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**RETROACTIVE AND RETROSPECTIVE LEGISLATION  
AND THE RULE OF LAW**

by

Robert J. Newton

Thesis submitted to the School of  
Graduate Studies and Research in partial fulfilment of  
the requirements for the degree of Master of Laws

University of Ottawa



Robert J. Newton, Ottawa, Canada, 1990



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## Chapter I

### INTRODUCTION

This thesis is concerned with a particular problem in the field of law known generally as the law of statutory interpretation.

Of predominant importance in this field are the rules of interpretation recognized and applied by the courts in carrying out their constitutional function of interpreting the law.<sup>1</sup> These rules of interpretation are simply guides<sup>2</sup> to assist the courts and the interested reader in determining the intent of the legislative body that made the legislation. Accordingly, rules of interpretation, although they are as binding on the courts as any other legal rules, are subject to built-in qualifications recognizing the supremacy of legislative intention.<sup>3</sup>

All of these rules reflect judicial policy of one sort or another. Some are justified on the basis of rules of grammar. Others are based on principles of logic. Still others are deeply rooted in the origins and fundamental nature of our legal system.

One rule of interpretation of the latter type is the rule against retrospective operation of legislation. This rule is addressed to the temporal operation (i.e., the operation in time) of legislation.<sup>4</sup> It consists of a presumption of legislative intention that applies so as to confine the time

period with respect to which legislation operates to a period after the date of its enactment. This is accomplished by restricting the application of legislation to events that occur after its enactment.

Problems of temporal operation and, more specifically, of retrospective operation may arise whenever legislation providing new rules for the governance of a particular form of human activity is brought into force. What must be determined in such a case is the proper temporal operation of both the new law and the old law that it supersedes.

Frequently, legislation will contain no provisions that expressly resolve the question of which law -- the old or the new -- should govern events or fact-situations that arose prior to its enactment.<sup>5</sup> The courts are then faced with the often-difficult task of clarifying the transition from the old state of the law to the new by determining whether the intent of the new legislation is that it should govern the legal effects of previous events or that the old law should continue to do so undisturbed.<sup>6</sup> In carrying out this task, the courts are obliged to consider and apply the rule against retrospective legislation. The practical significance of this rule of interpretation is therefore undeniable.<sup>7</sup>

Unfortunately, though, the exact meaning of the rule against retrospective legislation and the proper procedure to be followed in applying it are surrounded by a considerable amount of uncertainty and confusion. A complex,<sup>8</sup> inconsistent and frequently perplexing body of case law and academic

commentary has grown up around the topic of retrospective legislation. The difficulties in this area originate with the definition of the concept of retrospectivity itself. They are manifested in conflicting interpretations of the meaning and application of the rule of interpretation (including the operation of the presumption contained in the rule) and in incomplete and generally unsatisfactory explanations of the exceptions to the rule.

My thesis is that the rule of interpretation against retrospective legislation is best understood and applied in light of its historical underlying purpose, which is to preserve and promote the rule of law in our legal system. I maintain that this rule of interpretation is a prominent example of judicial recognition of the rule of law as a fundamental constitutional principle.

Furthermore, it is my submission that the primary cause of the complexity and confusion surrounding this area of statutory interpretation is the failure of some courts and commentators to keep this purpose and this principle firmly in mind. I believe that rational and consistent solutions to retrospectivity problems are possible if the philosophical principle underlying the rule of interpretation is recognized and followed as a guide both in defining and in applying the rule.

The political and legal ideal of the rule of law requires that the law provide an effective guide for social conduct. Laws must consist of a reliable set of rules on the basis of

which individuals can govern their conduct, make plans and develop expectations. Retrospective legislation is anathema to the rule of law because it generally fails to satisfy this requirement. Instead, it operates to change legal rules after individuals have acted in reliance upon them. Thus, not only does retrospective legislation provide no useful guide for conduct, it frustrates plans and disrupts expectations by undermining the social effectiveness of the previously existing law that it supplants.

The rule of interpretation against retrospective legislation was developed by the courts as one important element of the general judicial policy holding that the legislature must be presumed to intend to respect the constitutional values of the legal system in which and for which it is legislating.<sup>9</sup> By virtue of this rule, new legislation is presumed to have been intended to operate in accordance with one of the requirements of the constitutional principle of the rule of law -- the general requirement that laws be purely prospective in their operation.

There are two modes of retrospective operation that should be distinguished in the interests of precise analysis. These are retroactive operation and retrospective operation. Retroactive operation occurs when legislation has effective operation prior to the date of its enactment, while retrospective operation occurs when legislation operates after the date of its enactment so as to govern (and usually alter) the legal consequences of events that took place prior to that

date.<sup>10</sup> Both of these modes of operation allow legislation to govern the legal consequences of events that took place prior to its enactment, but only retroactive operation involves the concept of legislation having a fictitious pre-existence.

Generally speaking, both of these modes of legislative operation are offensive to the rule of law principle. Together they cover the entire range of ex post facto legislation,<sup>11</sup> describing those enactments which fall short of the rule of law requirement that laws operate in a purely prospective fashion. They also infuse the rule of interpretation against retrospective legislation with its essential meaning, thereby determining the scope of its application.

It is important to keep in mind, however, that this rule of interpretation is only a general rule. It is subject to a number of exceptions that can be justified by reference to its underlying purpose. Thus, enactments which operate retrospectively, but which do so in a manner that is consistent with the rule of law, are legitimate exceptions to the general rule of interpretation.

The presumption against retrospective legislation is a prima facie one, which is only fitting when one considers the important constitutional principle that it is designed to uphold. As such, it imposes an implicit qualification upon all enactments except those that can be justified as exceptions to it. Furthermore, the presumption is rebuttable only

by evidence of a contrary intention sufficient to remove all doubt or ambiguity.

The application of this prima facie presumption involves various stages of analysis. A three-step process of interpretation should be followed in every case where potentially retrospective legislation is being dealt with. These steps focus, in turn, upon (a) whether retrospectivity is an issue at all in the case; (b) if it is, whether the legislation falls within an exception to the general rule; and (c) if retrospectivity is an issue and the legislation does not qualify as an exception to the rule, whether the legislature has provided evidence of a contrary intention sufficient to rebut the presumption against retrospective operation. Where the legislature fails to rebut the presumption, there are certain conditions that must be satisfied in order to ensure that retrospective operation has been successfully avoided.

The application of the presumption is subject to social values other than the rule of law that may from time to time conflict with and even outweigh that fundamental constitutional principle. In addition, there are various factors to be taken into account that may help to identify some potentially retrospective enactments as less offensive to the principle of the rule of law than others. These competing values and factors are relevant to the question of legislative intention because they have a direct bearing on the reasonableness and likelihood of the legislature having intended its legislation to operate retrospectively.

In an attempt to demonstrate the validity of my thesis about the rule of law and retrospective legislation, I have proceeded in this paper as follows. In chapter II, I examine the concept of the rule of law, argue that it is the philosophical basis of the rule of interpretation against retrospective legislation, and advance the proposition that it should be the guiding principle for the courts when they are faced with the task of interpreting and applying that rule of interpretation.

In chapter III, I undertake a critical analysis of the existing approaches to retrospective legislation, using the rule of law principle as my standard of judgement. This exposes the inconsistencies and confusion that currently exist in certain quarters and suggests some solutions to these problems.

After outlining the problems that now exist in this area of the law, I offer my own principled and comprehensive analysis based upon the philosophy of the rule of law. In chapter IV, I provide definitions of the basic concepts that are relevant to proper analysis, most notably the concepts of retroactive and retrospective operation. In addition, I present an explanation of the nature and operation of the basic rule of interpretation against retrospective legislation as well as definitions and explanations of various special types of legislation, some of which are legitimate exceptions to the general rule of interpretation.

In chapter V, I put forward some practical guidelines for applying the rule of interpretation against retrospective legislation. These guidelines explain the three-step process that should be followed in cases involving potentially retrospective legislation. Here I discuss the crucial factors to be considered in determining (a) whether an enactment has the potential to operate retrospectively; (b) whether it qualifies as an exception to the general rule; and (c) whether the legislature has demonstrated an intention sufficient to rebut the presumption against retrospective operation. Chapter V concludes with a discussion of how the rule of interpretation is applied to avoid retrospective operation in the various contexts in which the issue of retrospectivity may arise.

In presenting this thesis, my ultimate goal is to provide a principled and comprehensive analysis that will be of practical assistance in resolving problems associated with the interpretation of potentially retrospective legislation.

## Chapter II

### PHILOSOPHICAL BASIS OF THE OPPOSITION TO RETROSPECTIVE LAWS: THE RULE OF LAW

#### Part A. The Concept of the Rule of Law

The concept of the rule of law has been an important principle of political and legal theory since the days of the Greek and Roman Empires.<sup>12</sup> The doctrine associated with this concept has long been regarded as fundamental to the political cultures of Western liberal democracies.<sup>13</sup>

In spite of this, the true meaning and full implications of the rule of law have proven elusive. There is no consensus about what the concept means and there is perhaps even less agreement about the extent to which any given political system conforms to its requirements. Nevertheless, there is a well-articulated and powerful theory of the concept that has received a substantial amount of support from modern writers on the subject.<sup>14</sup> This modern theory, which I will outline in the next few pages, explains the rule of law in meaningful terms and avoids both the insignificant and the extravagant claims that have been made in its name.

The rule of law has often been described by contrasting it with what it is not. There is general agreement that it is incompatible with anarchy, disorder or the exercise of unrestrained force. Indeed, proponents of the concept have traditionally recited the virtues of a "government of laws and not of men."<sup>15</sup> The classic statement of the concept in

the British context was made by Professor A.V. Dicey.<sup>16</sup> Dicey closely associated the rule of law with constitutional government. He set out several characteristics of the concept, emphasizing that the rule of law requires the subjection of all members of society to the law and that it is incompatible with the exercise of wide discretionary powers by government officials. In short, no person is above the law and no person is allowed to act arbitrarily in a society where the rule of law prevails.

But Dicey's description, while it affords valuable insight into the essential meaning of the concept, does not give a complete picture. A number of important features of the rule of law are missing from his analysis.<sup>17</sup> All the same, it seems fair to say that Dicey's work provides a useful starting point for a full understanding of the theory of the rule of law.

Perhaps the most commonly understood facet of the concept is reflected by the alternative phrase that is sometimes used to refer to it -- "the supremacy of law."<sup>18</sup> This term clearly conveys the idea that law must be the supreme force in society. All members of society, including government officials of the highest rank, must be subject to its dictates and sanctions. The rule of law is thus something quite different from simple law and order. The latter may be achieved without subjecting a society's rulers to the law: an all-powerful ruler may preside over an orderly society by effectively subjecting those ruled, but not himself, to the

law.<sup>19</sup> In contrast, the rule of law requires not only that government be by law, but also that it be under law.<sup>20</sup>

However, the concept of the rule of law goes far beyond the idea that all governmental actions must be authorized by law. The bare fact that a government is subject to legal rules, that its powers are derived from them, and that it is allowed to act only in accordance with them, is compatible with the widest discretionary authority and with virtually untrammelled exercises of power. The powers of the most autocratic ruler may be derived from law<sup>21</sup> and rule by unrestrained will can all too easily be masked by legal formality. Consequently, it is important to firmly distinguish the concept of the rule of law from that of mere legality: laws authorizing governmental action of the most wide-ranging variety may be recognized as valid within the framework of a particular legal system and yet be entirely incompatible with the rule of law.<sup>22</sup>

By the same token, the rule of law theory does not deny the legitimacy of governmental power per se. Rather, it requires that governmental power be exercised in a particular manner -- that is, in accordance with reasonably precise rules that have been laid down in advance.<sup>23</sup> It is founded on the philosophy that individuals should not be exposed to the unrestrained and unpredictable will of those who govern them. The idea is that only if people have the opportunity of knowing, prior to committing themselves to a course of conduct, the rules by which that conduct will be judged can

they in any sense be said to be fairly subjected to the power and authority of their government.<sup>24</sup> Locke expressed the idea this way:

For all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws, that both the people may know their duty, and be safe and secure within the limits of the law, and<sup>25</sup> the rulers, too, kept within their due bounds . . . .

From this it can be seen that the rule of law affords a measure of security to the individual. It protects him from raw exercises of political will by requiring that political will be exercised in conformity with certain standards. In so doing, it offers a tolerable middle ground "between the disorder of anarchy and the oppression and caprice of tyranny."<sup>26</sup> Professor F.A. Hayek has formulated a definition that captures the essence of the theory of the rule of law:

Stripped of all technicalities, this [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand -- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and<sup>27</sup> to plan one's affairs on the basis of this knowledge.

As Professor Joseph Raz has explained, "in the final analysis the doctrine rests on its basic idea that the law should be capable of providing effective guidance."<sup>28</sup>

From this definition, it is apparent that the rule of law theory insists upon a certain amount of predictability in society. To the extent that individual liberty depends upon security and predictability in one's environment, the rule of law also guarantees a basic level of liberty -- the liberty

associated with being able to predict the consequences of one's actions. It does this by enabling individuals who are subject to the law to plan their lives and develop firm expectations in light of their knowledge of its requirements.<sup>29</sup> Western liberal democracies, in adopting the rule of law as a political ideal, have recognized it as the foundation of individual liberties<sup>30</sup> and the sine qua non of respect for the dignity of the individual.<sup>31</sup>

As I have outlined it, the political ideal of the rule of law is essentially a prescription of the way in which government should exercise its lawmaking and enforcement powers. It is concerned both with "how legal rules are formulated, organized and promulgated"<sup>32</sup> and with how they are interpreted and enforced. The rule of law is thus a legal as well as a political ideal.<sup>33</sup> It establishes a standard for the proper function and purest purpose of law, which is to promote and shape "a voluntary social order"<sup>34</sup> by providing effective and reliable guidelines for human conduct.<sup>35</sup> The rule of law ideal may accordingly be looked upon as establishing a standard of excellence for the structure and operation of a legal system:<sup>36</sup>

[C]onformity to the rule of law is an inherent value of laws, indeed it is their most important inherent value. It is of the essence of law to guide behaviour through rules and courts in charge of their application. Therefore<sup>37</sup> the rule of law is the specific excellence of the law.

Of course, different legal systems will exhibit varying degrees of compliance when measured against this standard.<sup>38</sup>

It follows from this that the rule of law ideal addresses itself to all laws, and not just to those that define governmental powers. In extending beyond the Diceyan notion of constitutional government, it sets a standard for laws that govern relationships among individuals as well as for laws that govern the relationship between the individual and the state.<sup>39</sup>

In order to fulfil its role as an instrument for ordering social life, law must possess certain fundamental characteristics, all of which can be identified as elements of fundamental justice. Speaking generally, the law must be made known in clear and specific language and on a timely basis to those whose actions it hopes to influence. In particular, laws must be well-publicized, they must operate prospectively, they must be set down in distinct terms and they must be capable of being obeyed. Furthermore, they must be fully and consistently enforced by governmental or other authorities and impartially and consistently interpreted and applied by an independent judiciary.<sup>40</sup> It follows that unknown laws, ex post facto laws, obscure laws, laws conferring broad discretionary powers, laws requiring the impossible and laws that are inconsistent with the requirements of natural justice all fall short of the rule of law standard. Similarly, uneven enforcement of the law and failure to follow legal precedent are also incompatible with its requirements.

The concept of the rule of law that I have described is primarily concerned with the form of laws and with the procedure by which they are made, interpreted and enforced. Being essentially a formal and procedural ideal, it has nothing to say about the substantive content of law beyond requiring that the law possess those attributes necessary to enable it to serve as an effective guide for human conduct (i.e., it must be prospective in its operation, clear in its meaning, specific in its directions and capable of being complied with). This is a point worth emphasizing in the interests of preserving the integrity of the ideal itself.

On occasion, the rule of law has been misrepresented as a prescription for the existence of certain fundamental rights, including democratic rights.<sup>41</sup> But the rule of law is not and need not be a complete social philosophy; it is simply a prescription for the effectiveness of law as an instrument of social ordering. Beyond its formal and procedural requirements, the rule of law is neutral about the ends to which this instrument should be put.<sup>42</sup> In theory at least, the rule of law may pervade a society whose laws are both undemocratically made and highly repressive of individual liberty.<sup>43</sup> One must rely on other political ideals to justify the substantive individual rights, such as freedom of speech and freedom of association, that are so highly valued in many societies.<sup>44</sup>

It is also important to recognize that the rule of law is just that -- an ideal. No legal system can be expected to

fully comply with its requirements. There are two main reasons why this is so: (a) the significant practical obstacles that stand in the way; and (b) the existence of competing values that sometimes outweigh the value of the rule of law.

As a practical matter, the requirement that the law be spelled out in terms which provide a clear guide for conduct is subject to the reality of the indeterminacies of language. Attempts to reduce the scope of linguistic uncertainty will always be constrained by the fact that overzealousness in this regard can lead to reduced comprehensibility.<sup>45</sup> There are, therefore, limits to the law's capacity to communicate its requirements to those whose behaviour it seeks to regulate.

Compounding this problem, especially in today's complex legal environment, is the limited capacity of many individuals to inform themselves about and to understand the law. The ordinary person may have neither the time nor the ability to seek out and understand the law, and the costs of obtaining legal advice are often prohibitive.<sup>46</sup> Consequently, individuals may frequently act without consulting or understanding the law and without relying upon the consequences that it prescribes for a particular course of conduct.<sup>47</sup> One can argue that these practical considerations undermine the importance of the ideal by weakening its principal argument that, in enabling individuals to predict the legal consequences of given courses of conduct, the rule of law endows

them with a basic level of security and the freedom that goes with it.

Furthermore, even if it were humanly possible to fully comply with all of its requirements, one must keep in mind that the rule of law is not an absolute social or political value. Complete specificity or certainty in the law would hamstring governments in their efforts to serve the public interest. Few would dispute, for instance, that a certain amount of administrative discretion is a necessary feature of modern government.<sup>48</sup> Discretionary powers provide government officials with the flexibility necessary to enable them to effectively administer programmes designed to enhance social welfare. Yet strictly speaking, the existence of discretionary power detracts from the rule of law.<sup>49</sup> Emergencies, threats to political stability, threats to public health and safety, and various other social problems may also justify infringement of the principle.

Despite these limitations, the rule of law remains a vitally important ideal to which legal systems should in general aspire. Though its prescriptions can never be completely satisfied, efforts to satisfy them increase predictability in the legal system by increasing the opportunities for individuals to be guided by the law and to develop expectations in reliance on it. The net result is an enhanced level of security and liberty for the members of society. The fact that the ideal can never be fully realized is not a convincing reason for abandoning it.<sup>50</sup>

Moreover, the fact that the demands of the rule of law ideal may occasionally be outweighed by other interests and values is not a telling argument against it. All this means is that departures from what is generally good may sometimes be justified in the interests of a greater good. The generally salutary effects of compliance with the requirements of the ideal remain undeniable. The claim of the rule of law's proponents is simply that, other things being equal, the closer a legal system adheres to the ideal, the better that legal system will be.<sup>51</sup> As a practical matter, one can legitimately conclude that "the true requirements of the ideal are for attention to its prescriptions and for justification of deviations from it."<sup>52</sup>

It is not surprising that the powerful political and legal ideal that I have been discussing has been incorporated into the political cultures and legal systems of Western liberal democracies. In many if not all of these countries, the rule of law has attained the status of a constitutional principle.<sup>53</sup> It is reflected both in specific constitutional rules and in the traditional practices of the various organs of government.

To determine the extent to which the rule of law prevails in a given society, one must examine the constitutional structure and practices of its government. Certain constitutional rules and conventional practices must exist in order for the rule of law to flourish in a legal system. These may be summarized as follows:<sup>54</sup>

1. The judicial branch of government must be independent of the other branches of government and generally unfettered in its ability to carry out its duty of interpreting and applying the law. This duty must be carried out in an impartial and consistent manner.<sup>55</sup>

2. The executive branch of government must be allowed to act only as authorized by law and must enforce the law, as it is interpreted and applied by the judiciary, to its fullest extent and in an evenhanded manner.

3. The legislative branch of government must exercise its lawmaking powers in accordance with the procedure prescribed by law. In addition, the legislation produced by this branch of government must meet the requirements of the rule of law that were discussed earlier: it must be accessible, prospective, clear, specific and capable of being complied with.<sup>56</sup>

Obviously, these requirements will never be fully satisfied in any legal system. There will inevitably be shortcomings. In particular, the legislature may enact legislation that either falls short of the rule of law ideal in some respect or leaves itself open to such an interpretation. It is with respect to this type of legislation that the attitude taken by the judiciary towards interpretation is important. The rules of statutory interpretation and the manner in which they are applied by the courts can have a significant bearing on the extent to which the legislation of

a particular legal system complies with the rule of law ideal.

The judicial function of interpreting and applying the law may be exercised in a manner that both respects and promotes the constitutional principle of the rule of law. This occurs when the courts employ rules of interpretation that are consonant with the various prescriptions inherent in the rule of law principle.<sup>57</sup> These rules can be justified simply on the basis that they reflect various requirements of the constitutional principle of the rule of law.

There are a number of such rules of interpretation that have been adopted by English and Canadian courts. One of these is the rule against retrospective operation of legislation.<sup>58</sup> Another is the rule requiring that the meaning of a legislative enactment be ascertained from the words actually used by the legislature, and not from speculation about what the legislature should have said or actually meant to say.<sup>59</sup> In addition, there is the rule that legislation granting discretionary powers is to be construed so that the limits of discretion are consistent with the purposes of the legislation,<sup>60</sup> the rule requiring a strict construction of provisions purporting to oust or limit the jurisdiction of the courts,<sup>61</sup> and the rule in favour of an interpretation that accords with the requirements of natural justice.<sup>62</sup> All of these judicially created rules of interpretation serve to promote adherence to the rule of law in a legal system whose public actors may occasionally stray from its precepts.

Part B. The Rule of Law as a Canadian Constitutional Principle

Professor Dicey referred to the rule of law as one of the two fundamental principles of the British constitution, the other being the sovereignty of Parliament.<sup>63</sup> Leading authorities on British constitutional law, while recognizing that these two principles may sometimes come into conflict, have tended to confirm Dicey's views on this point.<sup>64</sup>

There is, however, a major distinction between these two constitutional principles. Unlike the principle of the sovereignty of Parliament, the rule of law does not completely manifest itself in the form of hard and fast constitutional rules. Rather, it is a fundamental principle that permeates the British legal system. It is reflected in the constitutional structure, rules and practices extant in Great Britain.

The rule of law pervades the British constitution at two levels: firstly in the form of enforceable constitutional rules and secondly in the form of constitutional practices. Both the distribution and exercise of governmental powers are in general conformity with the prerequisites of the rule of law discussed in the previous part. In particular, Parliament, though its lawmaking power is unlimited, has traditionally demonstrated a high degree of compliance with rule of law requirements in formulating its legislation. In turn, the judiciary has concerned itself with interpreting and applying Parliament's legislation in a manner that respects the constitutional principle of the rule of law.<sup>65</sup>

This approach to statutory interpretation is not surprising. The judicial branch of government, being constitutionally bound to apply the law, is by implication obliged to respect the constitutional principle of the rule of law. Judicial recognition of the rule of law as a fundamental principle of government has been manifested in various rules of statutory interpretation, which have been described as forming a "constitutional code of communication"<sup>66</sup> between Parliament and the courts.

Canada has inherited this British constitutional tradition. One of the principles of government introduced into this country when it was colonized by the British was the rule of law. Upon attaining dominion status in 1867, Canada incorporated the rule of law principle into its new constitution. The Constitution Act, 1867<sup>67</sup> refers in its preamble to the desire of the confederating colonies to unite under "a Constitution similar in principle to that of the United Kingdom." It then goes on to establish a system of government along the lines of the British system (with the notable exception of the federal distribution of powers). Thus, there can be no doubt that the rule of law has been enshrined as "a fundamental postulate of our constitutional structure."<sup>68</sup> Recently, it received express recognition as a founding principle of our nation in the preamble to the Canadian Charter of Rights and Freedoms.<sup>69</sup>

Similarly to the case in Great Britain, the rule of law is evidenced in Canada by specific and enforceable

constitutional rules, such as the requirement for judicial independence and the prohibition of retrospective penal legislation,<sup>70</sup> and by the traditional practices of its organs of government, such as the reluctance of its legislatures to enact retrospective legislation, bar access to the courts or grant broad discretionary powers.<sup>71</sup> In addition, Canadian courts have continued to apply long-standing rules of statutory interpretation that reflect the rule of law principle underlying our constitution.<sup>72</sup> These rules take the form of presumptions of legislative intent, by virtue of which Parliament and the provincial legislatures are presumed to have intended to respect the rule of law in formulating their enactments.

#### Part C. The Rule of Law and Retrospective Legislation

One of the essential demands of the rule of law is that laws be set out in advance so that individuals may be guided by them and plan their conduct accordingly. This means that legislation should address itself to the future.

In this part, I propose to explain in some detail why retrospective legislation is generally incompatible with this requirement of the rule of law. In addition, I will demonstrate the connection between the rule of law and the rule of interpretation against retrospective legislation and then go on to argue that, because of this connection, the rule of interpretation should be understood and applied in light of the constitutional principle of the rule of law. However, in

order to build a foundation for my arguments concerning the rule against retrospectivity, it is necessary to expose the vices of retrospective legislation from a rule of law perspective. This requires a preliminary definition of retrospective legislation.

Section 1. What Is Retrospective Legislation? The terms "retrospective" and "retroactive" have been used interchangeably in both the English and Canadian case law and legal literature.<sup>73</sup> For convenience of exposition in this part of my paper, I will use the former term to refer to the type of legislation with which I am concerned.

The meaning of the concept of retrospectivity has not always been made clear, and this has resulted in a significant amount of confusion in the law.<sup>74</sup> There seems to be a consensus, however, that retrospective legislation is legislation that operates so as to apply to a set of facts or circumstances that arose in the past.<sup>75</sup> An enactment is retrospective when it relates back to a time prior to its own existence<sup>76</sup> by affecting acts or operating on matters that took place prior to its enactment.<sup>77</sup> So an act that purported to penalize conduct which was lawful when it took place would be retrospective,<sup>78</sup> as would an act that purported to make its rules governing the liability of tortfeasors apply in respect of an accident involving tortious conduct that occurred prior to its enactment.<sup>79</sup>

In operating on cases or facts that arose prior to its own enactment, a retrospective statute addresses itself to the legal character and consequences of prior conduct. In doing so, it almost invariably alters those consequences.<sup>80</sup> This reaching back to govern and alter the legal effects of past events can be contrasted to the normal, prospective, operation of legislation. Legislation that operates prospectively addresses itself only to the legal consequences of events that take place subsequent to its enactment. To return to the examples given in the previous paragraph, the acts referred to would operate purely prospectively if they confined their operation to conduct and events that occurred after their enactment.

It is quite common to see retrospective operation referred to or described in terms of interference with "vested," "acquired" or "accrued" rights.<sup>81</sup> These are rights that have arisen under a particular state of law as a result of conduct that was undertaken or events that occurred while that law was in force.<sup>82</sup> Obviously, retrospective operation and interference with vested, acquired or accrued rights involve the same principle: it is only by determining the legal consequences of previous events that legislation can have any effect on the rights arising therefrom.<sup>83</sup>

Having established a preliminary definition of retrospective legislation, I will now examine the shortcomings of this type of legislation that are revealed when it is measured against the standard of the rule of law.

Section 2. The Shortcomings of Retrospective Legislation in Light of the Principle of the Rule of Law. In order for the rule of law to exist in a legal system, the laws of that legal system must be clearly laid down in advance. Individuals must be able to find out what the legal consequences of a given course of conduct will be before undertaking it. Retrospective legislation, in establishing the rules that govern events after those events have occurred, fails to meet this basic requirement. Because it judges acts or events that took place when one set of rules prevailed in accordance with a new and different set of rules,<sup>84</sup> it operates in a manner that is incompatible with the rule of law.<sup>85</sup>

Retrospective legislation represents an abnormal and unnatural deployment of law because it is wholly incapable of providing an effective guide for human conduct. The normal mode of operation for law is forward in time. When the law operates normally, it provides a set of rules upon which individuals can rely in planning future behaviour and developing expectations. This is the type of law envisioned and promoted by the rule of law philosophy.<sup>86</sup> But retrospective legislation lacks this virtue.<sup>87</sup> One cannot make plans and develop expectations on the strength of legal rules that are unknown:<sup>88</sup>

The essential idea of a legal system is that current law should govern current activities. . . . If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law.<sup>89</sup>

Moreover, in a legal system that is characterized by laws that are generally prospective in their operation, retrospective legislation not only fails to provide a guide for conduct, it actually disrupts expectations that have developed in reliance on the former law by overriding the effects of that law. Retrospective legislation subverts the guiding force of the former law, rendering it illusory. It is not surprising, then, that this type of legislation has been described as "a betrayal of what law stands for"<sup>90</sup> and as being contrary to the principles of fundamental justice.<sup>91</sup>

Retrospective legislation has the effect of denying to the individual the elemental procedural fairness insisted upon by the rule of law ideal. It violates human dignity at a fundamental level by robbing the individual of the freedom to plan his life with a reasonable degree of certainty<sup>92</sup> and by dashing any expectations that he may have developed in reliance upon the previously existing law.<sup>93</sup> The unpredictability that retrospective legislation introduces into the legal system can lead to insecurity as people become reluctant to rely upon normal (i.e., prospective) laws as behavioural guides. It is precisely this type of unpredictability and insecurity, which in large doses is characteristic of both anarchy and tyranny, that the political and legal ideal of the rule of law is intended to overcome.

Because retrospective legislation is cloaked in a mantle of legality and because it is quite capable of laying down specific rules applicable to various types of conduct, it may

appear at first glance to be less offensive to the rule of law than unrestrained exercises of political will or state power. Nonetheless, the principle involved, that of making rules to govern events after the events have occurred,<sup>94</sup> is really no different from that entailed by government in accordance with the unrestrained whims of men. The effects of retrospective legislation and of after-the-fact policy decisions are similar.<sup>95</sup> In short, retrospective lawmaking can amount to nothing less than government by will in the guise of government by law.

At this stage, it is perhaps important to note that I have been talking in general terms about retrospective legislation. As I will demonstrate later,<sup>96</sup> not all retrospective legislation is incompatible with the rule of law. It is also useful to keep in mind what I said earlier about the rule of law not being an absolute social value.<sup>97</sup> Retrospective legislation may sometimes be an appropriate means by which to pursue social values that are considered to outweigh the value of the rule of law.

The evils of retrospective legislation are most starkly manifested when an enactment imposes punishment retrospectively. Not only do the high stakes involved in such cases brand the punishment as clearly unfair, but the criminal law, which is so strongly identified with shaping human conduct, is put to work in a perverse manner. The absurdity of trying to guide human conduct by means of commands issued ex post facto becomes patent in this context.<sup>98</sup>

But it is not only in the area of penal law that retrospective legislation may undermine the rule of law. The disruption of expectations founded on existing law may have serious consequences in civil cases as well. For instance, a tort victim who has not yet pursued his remedy in the courts could find himself deprived of a right of action as a result of new legislation shortening the limitation period within which such actions must be brought. Admittedly, the tortfeasor would receive a corresponding (and quite undeserved) benefit. But my point is that the guiding force of the former law would be rendered nugatory by such legislation, which would itself be devoid of any guiding force with respect to the parties involved. As a consequence, expectations developed in reliance on the previous law would be destroyed.

Despite the fact that it is largely incompatible with the constitutional principle of the rule of law, there is no general constitutional prohibition of retrospective legislation in Canada.<sup>99</sup> In the field of penal law, however, the powers of the Parliament of Canada and of the provincial legislatures to enact retrospective legislation have been constitutionally limited. Paragraphs 11(g), (h) and (i) of the Canadian Charter of Rights and Freedoms<sup>100</sup> state:

11. Any person charged with an offence has the right

. . . . .

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international

law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

These provisions preclude, subject to the qualification contained in s. 1 of the Charter,<sup>101</sup> the enactment of legislation that:

1. Declares conduct previously engaged in to be an offence where that conduct was not, at the time it was engaged in, either an offence under Canadian or international law or criminal according to the general principles of law recognized by the community of nations (para. 11(g));<sup>102</sup>
2. Provides for the retrial of an accused for an offence after he has either been finally acquitted of the offence or finally found guilty of the offence and punished for it (para. 11(h));
3. Provides that a person who has been punished for an offence is to be punished for it again (para. 11(h)); or
4. Provides that a person who is found guilty of an offence is to be subjected to the punishment provided by the law in force at the time of sentencing, where the punishment for such an offence has been increased between the time the offence was committed and the time of sentencing (para. 11(i)).<sup>103</sup>

They are designed to prevent the abhorrent consequences associated with retrospective penal legislation by ensuring that the legal consequences of certain events (i.e., an innocent act, an acquittal, the imposition of punishment and the commission of an offence) are not altered by new legislation after those events have occurred.<sup>104</sup>

Our courts have not to this point indicated whether the Charter imposes any implicit limitations on the competence of Parliament and the provincial legislatures to enact retrospective legislation. One can speculate, though, that the rights guaranteed by s. 7, of which paras. 11(g), (h) and (i) seem to be but specific examples,<sup>105</sup> might preclude the enactment of certain types of non-penal retrospective laws. Section 7 provides as follows:

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

As I have already pointed out,<sup>106</sup> the rule of law guarantees that minimal level of security and freedom which is the necessary consequence of being able to predict the future with a reasonable degree of certainty. In addition, the rule of law may be seen to represent a principle of fundamental justice,<sup>107</sup> particularly when s. 7 is read in light of the Charter's preambulatory reference to the rule of law as a founding principle of our nation. Accordingly, it is well within the realm of reason to suggest that some types of non-penal retrospective legislation might offend s. 7.<sup>108</sup>

Even though there is no constitutional prohibition of retrospective legislation apart from the prohibitions that I have just discussed, Parliament and the provincial legislatures recognize the constitutional principle of the rule of law and, generally speaking, try to conform as closely as possible to its prescriptions for fundamental procedural fairness. This involves, among other things, an aversion towards retrospective legislation. There is a general assumption in our legal system that actions and events should be judged in accordance with the law that is in force when they take place.

There are, nevertheless, exceptions to this legislative behaviour, as well as many cases that involve considerable uncertainty about whether a particular legislature intended its legislation to operate retrospectively. These exceptions and cases of uncertainty are the central concern of my thesis. In particular, I will be focussing on the approach that the courts have taken and should be taking in dealing with legislation of this nature.

Section 3. The Purpose and Effect of the Rule of Interpretation Against Retrospective Legislation. The common law, with its catalogue of rules of statutory interpretation, has always displayed a strong aversion towards retrospective legislation. This antipathy has its roots in the earliest civilizations. The ancient Greeks adhered to the principle that laws should operate prospectively. The Roman Civil Code

declared that laws were ordinarily intended to apply only to transactions which occurred after their enactment and that they should not be taken to apply to past transactions without a clear statement of such an intention.<sup>109</sup>

This principle of Roman law was introduced into the common law of England through the writings of Bracton, who maintained that every new law ought to impose its form upon future matters only, and not on things past.<sup>110</sup> His view subsequently gained wide acceptance in the common law, primarily due to the influence of Sir Edward Coke. It was Coke who wrote: "It is a rule and law of Parliament that Regularly Nova constitutio futuris formam imponere debet non praeteritis,"<sup>111</sup> thereby reducing Bracton's principle into a legal maxim. The common law courts never went so far as to deny Parliament's power to enact retrospective legislation,<sup>112</sup> but they made it clear that in order to have its legislation interpreted so as to operate retrospectively, Parliament had to leave no doubt about its intention to bring about such a result.<sup>113</sup>

This attitude towards retrospective laws was justified on the basis of the unfairness involved in subjecting an individual to rules of which he could not possibly have been aware at the time he engaged in a particular course of conduct. It was recognized that laws which operated in this manner would often have a negative impact on morally innocent individuals. The prevailing view was that the natural movement of law was forward in time, so that it applied only

to events which took place after it came into existence. To subject the citizen to laws that were unknowable to him when he most needed to know them was considered incongruent with the true nature of law.<sup>114</sup> The bias against retrospectivity was viewed as being one important safeguard of the elementary procedural fairness that was the hallmark of the common law concept of justice.<sup>115</sup> My submission is that the traditional common law aversion to retrospective legislation was firmly based upon a policy of upholding the constitutional principle of the rule of law. The elementary procedural fairness that characterized the common law concept of justice had its roots in the rule of law ideal.<sup>116</sup>

The rationale for the rule of interpretation against retrospective legislation has often been expressed in terms of a desire to avoid unfairness or injustice.<sup>117</sup> On other occasions, the courts have observed that it is only logical and rational for laws to govern the conduct and events that take place while they are in force.<sup>118</sup> Some courts have emphasized that the interests of those who have relied upon the law must be protected,<sup>119</sup> while others have adverted to the need for predictability in the legal system.<sup>120</sup> It has also been noted that retrospective legislation may detract from the public's respect for the law.<sup>121</sup>

I suggest that these statements about the unacceptability of retrospective laws underscore the connection with the rule of law and demonstrate why it is such an important and valued

principle. The interests that the rule against retrospectivity protects and the evils that it seeks to avoid are exactly coincident with many of the interests served and evils avoided by the rule of law.<sup>122</sup> Lord Diplock expressed the connection this way:

The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance <sup>123</sup> what are the legal consequences that will flow from it.

The courts, in establishing and applying the rule against retrospective legislation, have acknowledged the importance of and have sought to uphold the constitutional principle of the rule of law. They have accomplished this by presuming that the Parliament of Canada and the provincial legislatures intend to respect the rule of law and that, accordingly, their legislation is intended to operate in a purely prospective manner. Only clear evidence of a retrospective intention will be sufficient to rebut this presumption.<sup>124</sup> The classic statement of Willes J. in Phillips v. Eyre<sup>125</sup> neatly summarizes the approach that the courts have taken in dealing with retrospective or potentially retrospective legislation:

Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. . . . Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature.<sup>126</sup>

In applying the presumption against retrospective legislation, the courts are simply taking account of the constitutional context in which all legislation is enacted.<sup>127</sup> They quite properly assume that the legislature intends to respect long-standing principles like the rule of law and are therefore not lightly disposed to see them displaced by an enactment.<sup>128</sup> Professor Cross has called this type of presumption, grounded as it is in a fundamental principle of the legal system, a "presumption of general application."<sup>129</sup> It has also been described as an element of the "constitutional code of communication"<sup>130</sup> between the legislature and the courts.

The effect of such a presumption is to impose a limitation of form upon the legislature. Because the intention to legislate retrospectively must be expressed in unmistakable language if the effects of the presumption are to be overcome, one can say that this particular aspect of the rule of law has been given a limited form of entrenchment as a constitutional restriction upon legislative power.<sup>131</sup> In this limited sense, Coke's "rule and law of Parliament"<sup>132</sup> is of binding constitutional effect.

In practical terms, the strength of this fundamental rule of interpretation is evidenced by the fact that it allows the courts to read into legislation an implicit qualification to the effect that its operation is intended to be prospective only. General legislative language, though it may be semantically capable of accommodating both retrospective and

prospective operation, is thereby frequently limited in its meaning so that it governs only those events or transactions that take place subsequent to its enactment.<sup>133</sup>

Section 4. The Rule of Law as a Guide for Defining and Applying the Rule Against Retrospective Legislation.

Notwithstanding the erosion of the rule of law that is the unavoidable consequence of the administrative discretion required to enable modern governments to respond effectively to social demands,<sup>134</sup> the virtue of the rule of law as a fundamental constitutional principle remains intact. This is especially true of particular aspects of the rule of law, including its general disapprobation of retrospective legislation.

My thesis is founded on the idea that problems of interpretation involving potentially retrospective legislation are most satisfactorily resolved when they are dealt with using the rule of law as the evaluating standard. This conclusion follows naturally from my argument that the rule of law is the underlying philosophical and constitutional basis of the rule against retrospective legislation. If the rule against retrospectivity is understood and applied as a device designed to preserve and promote the rule of law in our legal system, many of the difficulties that have traditionally surrounded it can be avoided. An analysis based upon the rule of law principle allows one to define and apply the rule in a rational and systematic fashion, thereby avoiding the

uncertainty and confusion that are the inevitable consequences of unprincipled interpretations and applications of the rule.

I submit that the essential concern of the courts in interpreting and applying the rule against retrospective legislation should be to ensure that, whenever possible, legislation is interpreted in a way that renders it effective as a guide for human conduct. Legislation must be presumed to have been intended to guide those whom it governs and not to disrupt the legal effects of activities that took place under a prior state of law. Aside from the question of fairness in individual cases, the courts must bear in mind that if retrospective legislation were to become too common, it might call into question the reliability of laws in general.

For purposes of worthwhile analysis, the effects of retrospective legislation must be measured in the context of the Canadian legal system, a system that is characterized by prospective laws. In this context, retrospective legislation not only fails to provide a meaningful guide for conduct, it also disrupts expectations that were fixed in reliance upon the law as it previously stood. For all practical purposes, then, social ineffectiveness (in the sense of being unable to guide conduct) and disruptiveness are the twin hallmarks of retrospective legislation.<sup>135</sup>

The disruptive effects of retrospective legislation are an obvious key to its identification. The fact that an

enactment disrupts legal expectations means that it undermines the operation of the previous law instead of providing the behavioural guide that it should. Accordingly, the concern to ensure that legislation is interpreted in a way that renders it socially effective translates directly into a concern that it be interpreted so as not to interfere with legitimate expectations born of the previously existing law. In fact, interference with expectations can be singled out as the most readily discernable feature of almost all retrospective legislation.

It follows that one of the things which the courts must focus on is expectations. But how are they to judge when expectations are legitimate and when they are unworthy of protection? My conclusion is that expectations are only legitimate when they are founded on the law itself -- that is, when they are based on the legal consequences of events as determined by the law that was in force when they took place. This conclusion lays the groundwork for a more precise definition of retrospective legislation. It can be defined as legislation that purports to govern the legal consequences of events which occurred under previously existing law and whose consequences have already been determined by that law. Moreover, in so operating, retrospective legislation usually disrupts legal expectations by changing the consequences of events as determined by the law that was in force when they occurred.

Another thing that the courts must focus upon is legislative intention. The legislature may, for various reasons, intend its legislation to operate retrospectively. Therefore, even where a court has correctly identified a piece of legislation as potentially retrospective, it must carefully examine any evidence of an intention on the part of the legislature to rebut the presumption that its legislation was intended to operate prospectively only. This entails not only a consideration of the language and purpose of the enactment, but also a number of other factors, such as the relative seriousness of the infringement of the rule of law that would result from a retrospective interpretation and the merits of other societal values that may be in conflict with the rule of law principle.

Therefore, in dealing with cases involving potentially retrospective legislation, the courts must recognize and resolve two basic issues. First of all, they must determine whether the legislation in question has the potential to operate retrospectively in a way that would be inconsistent with the rule of law. Secondly, they must weigh the evidence of legislative intention to lay down new rules that would operate in such a manner.<sup>136</sup>

Unfortunately, however, the courts have not always followed this approach. Sometimes they appear to have lost sight of the fundamental principle at stake and in many cases they have failed to articulate their reasoning in clear terms. The same can be said about some of the commentators

on the subject. This has had a detrimental effect on our general understanding both of the concept of retrospectivity and of the rule of interpretation against retrospective legislation.

### Chapter III

#### CRITICAL ANALYSIS OF EXISTING APPROACHES TO RETROSPECTIVE LEGISLATION

In the course of delivering his judgement in the case of Nadeau v. Cook,<sup>137</sup> Ford J. remarked:

The rule [against retrospective operation] seems clear enough, but it is the application in respect of the particular statute that is often difficult.<sup>138</sup>

Despite such thinking, much of the difficulty that currently surrounds the application of the rule against retrospective legislation is attributable to uncertainty about the exact meaning of the rule.

To a large extent, this uncertainty can in turn be traced to apparent disagreements about what constitutes retrospective operation. Because the character of the rule against retrospectivity depends upon the definition of retrospectivity that is incorporated within it, the obscurity of the definition of the basic concept of retrospectivity has caused difficulties for those seeking to apply the rule. As Lord Maugham observed in Gardner and Co. v. Cone:<sup>139</sup> "It seems to me that the word 'retrospective' is used in several different senses, and that this leads to a good deal of confusion."<sup>140</sup> Some of the uncertainty about the meaning of the rule can also be traced to disagreements about the operation of the presumption contained in the rule<sup>141</sup> and about the exceptions to the rule.<sup>142</sup> On a more general note, imprecision of expression and inconsistency of thought have

conspired to render the law relating to retrospective legislation somewhat obscure and incoherent.<sup>143</sup>

The practical result of all of this has been an uneven application of the rule of statutory interpretation by the courts. Cases have been analyzed and resolved according to different interpretations of the rule, and this has led to some inconsistent results. Specifically, I believe that there has been a tendency to make unwarranted distinctions between cases involving essentially the same principle. Different approaches to interpretation have been taken where a common approach would have been preferable.<sup>144</sup> The effect has been to conceal the important issues that are at stake in retrospectivity cases.

These shortcomings in the law can be blamed largely on the failure of the courts to take a principled and systematic approach in resolving retrospectivity issues. My submission is that by applying the rule of law theory set out in chapter II, this deficiency can be remedied and the way paved to a clearer understanding of the rule of interpretation against retrospective legislation. In this chapter, I will analyze the competing points of view on the subject of retrospective legislation, using the rule of law as my standard of reference. This should both highlight the difficulties that currently exist in the area and lay the groundwork for a coherent and defensible analysis of retrospective legislation.

Part A. Definitions of Retrospectivity

In chapter II,<sup>145</sup> I put forward a preliminary definition of the concept of retrospectivity. In reality, however, the authorities have not been of one voice on this question. Obviously, it is crucial to proper analysis to be able to identify this concept with precision and accuracy, given that it describes the type of operation that the rule of interpretation is intended to work against.

How does one know when the application of a statute to a particular fact-situation would involve retrospective operation? Several definitions of retrospectivity have been put forward, covering the spectrum from a very narrow to a relatively wide conception of what it involves. These can be summarized and illustrated using the following example.

Suppose that two parties have entered into a contract for the lease of residential premises. The term of the lease is five years. According to its terms, the landlord has assumed responsibility for maintaining the leased premises in a state fit for habitation. Midway through the term of the lease, a statute is enacted that would, if applicable, alter the rights of the contracting parties by requiring that the tenant bear all responsibility for maintaining the leased premises. After the enactment of the statute, a dispute arises over who should bear responsibility for damages that were incurred as a result of the landlord's failure to properly maintain the premises during a six-week period prior to the enactment date.<sup>146</sup>

The proponents of the narrowest definition of retrospectivity would limit the concept to mean nothing more than the effective operation of legislation prior to its enactment (a relatively rare phenomenon). This type of operation occurs only where legislative provisions are deemed to have been in effect during a period in which they in fact were not. Those who advocate this definition would not consider the application of the new legislation to the existing lease a retrospective one, even if the effect were to shift the responsibility for damage that had already been incurred. In their view, the legislation would be retrospectively applied only if it altered the legal responsibilities of the contracting parties as of a date prior to its enactment. Changing those responsibilities from the date of enactment onward would not suffice, despite the fact that the new responsibilities would relate to events that occurred during a period prior to the enactment of the legislation.

A more moderate view would consider the application of the legislation in respect of pre-enactment responsibilities to be retrospective because it would alter legal consequences that were completed prior to the enactment of the legislation. The fact that this alteration would be effective only as of the date of enactment of the legislation, and not as of a prior date, would not be decisive. On the other hand, it would not be a retrospective application to apply the new statutory responsibilities in respect of the remainder of the leasehold term, because to do so would

affect only the uncompleted and future legal consequences of the lease agreement.

An even wider view of retrospective operation encompasses the two conceptions of retrospectivity that I have just outlined, but would also consider the statute retrospective if it were applied so as to alter the legal obligations of the parties for the remainder of the term of the lease -- that is, in respect of time yet to run. The rationale underlying this broad conception of retrospectivity is that any legislative change in the legal consequences flowing from the pre-enactment event of making the lease -- whether those consequences were complete at the date of enactment of the statute or were capable of being fully realized only sometime after that date -- would be retrospective in nature.<sup>147</sup> The important thing is that the legal consequences of an event that took place prior to the enactment of the statute would be altered by that statute.

These are the three main concepts of retrospectivity that appear in the case law and in the academic literature.<sup>148</sup> Speaking from the perspective of the rule of law theory outlined in chapter II, I believe the third and broadest definition to be preferable. What follows is a more detailed discussion of these three alternative definitions, in which I present my reasons for concluding that the broadest definition is superior. I will commence with the narrowest and conclude with the broadest definition.

Section 1. Retrospectivity Defined as Operation Prior to Enactment. Some authorities have taken a very narrow view of the concept of retrospectivity by equating it with the effective operation of legislation as of a date prior to its enactment. This definition confines the concept to legislation that lays down legal rules which are deemed to have come into force prior to the existence of the legislation itself -- in other words, it describes legislation that contains legal rules which are deemed to have come into force prior to their enactment.<sup>149</sup> An example of this type of thinking can be found in West v. Gwynne,<sup>150</sup> where Buckley L.J. stated:

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 understand to be retrospective.<sup>151</sup>

Professor Elmer Driedger appeared to accept this restricted definition in his earlier writings.<sup>152</sup> In the first edition of his textbook on statutory interpretation, published in 1974, he had this to say on the subject:

A statute or a provision thereof may be made retrospective in one of two ways: either it is stated that it shall be deemed to have come into force at a time prior to its enactment; or it is expressed to be operative with respect to past transactions as of a past time. . . . Unless, therefore, a statute alters a right as of a prior time it cannot correctly be called retrospective within the normal meaning of that word.<sup>153</sup>

This definition also seems to have been accepted by the Supreme Court of Canada in Gustavson Drilling (1964) Ltd. v. Canada (M.N.R.).<sup>154</sup> In that case, the majority of the court, speaking through Dickson J. (as he then was), defined a

retrospective enactment as one that is "deemed to have come into force on a date prior to its enactment."<sup>155</sup>

At first glance, it might seem that Professor Pierre-André Côté adopts a similar narrow view in his textbook on legislative interpretation,<sup>156</sup> where he asserts that "a statute has a retroactive effect when it is deemed to operate in the past (retro agere)."<sup>157</sup> Further support for this impression could be drawn from his description of a retrospective statute as a creature having a fictitious pre-existence and as legislation whose operation is antedated to a time prior to its commencement.<sup>158</sup> In addition, he cites with approval the statements from the West v. Gwynne and Gustavson Drilling (1964) Ltd. v. Canada (M.N.R.) cases that I have just referred to.<sup>159</sup>

Upon closer inspection, however, I find that Professor Côté actually treats as retrospective statutes that apply to and govern the legal consequences of events which have occurred prior to their enactment, whether or not they do so as of a time prior to their enactment.<sup>160</sup> For example, he considers legislation that alters the obligations of contracting parties in respect of the previous operation of their contract<sup>161</sup> to be retrospective.<sup>162</sup> Similarly, legislation that alters, after an accident has occurred, the tortious liability of the parties involved is viewed as being retrospective.<sup>163</sup>

This is clearly a much broader notion of retrospectivity than the one expounded by Buckley L.J. in West v. Gwynne and

by Professor Driedger in his earlier writings. Accordingly, it seems to me that Professor Côté's conception of retrospectivity is more properly described as being addressed to legislative operation with respect to the past, rather than being limited to operation in the past. At the end of the day, he appears to lay down no requirement that a statute, in order to be classified as retrospective, be one that is deemed to have operated during a period in which it actually did not.<sup>164</sup> The overall tenor of his analysis identifies him as a proponent of a much broader notion of retrospectivity than the one being discussed in this section.<sup>165</sup>

To the proponents of the narrow view of retrospectivity, any operation of legislation after its enactment is classified as prospective, no matter how serious the implications may be for rights that have arisen under the previously existing law. This is because post-enactment operation affects previously acquired rights only as of the date of enactment, and not as of a past time.<sup>166</sup>

Having established what the narrowest view of retrospectivity is, it is important to realize that none of the authorities on the subject dispute that the narrow definition accurately describes a form of retrospective operation. The contentious issue is whether it describes the only form. As the following paragraphs reveal, there are both persuasive arguments and weighty authority indicating that it does not.

I maintain that the narrow definition of retrospectivity now under discussion is patently unacceptable. To begin

with, it is inconsistent with the traditional use of the term in the case law, where many, if not all, types of ex post facto legislative changes in the legal consequences governing events are considered to be retrospective.<sup>167</sup> But just as importantly, it is clearly insufficient to protect the expectations that arise out of reliance upon the law as it exists from time to time.

As I argued in chapter II, one of the features of a society under the rule of law is that its citizens are able to plan their affairs and to predict how their conduct will be judged by the legal authorities. Individuals who are aware of the law quite naturally expect that the legal consequences of events will be determined by the law that was in force when they occurred. Conduct is usually undertaken on that basis. Legislation that foils people's plans and disrupts their expectations by altering the legal consequences on which those plans and expectations were based does not effectively guide conduct. Rather, it does nothing more than lay down rules to govern conduct that has already taken place. The fact that such legislation does this only as of the date of its enactment and not as of a time prior to that date certainly does not render it inoffensive when measured against the standard of the rule of law.

To allow the narrow definition of retrospectivity to prevail would be to enable lawmakers to readily accomplish by comparatively subtle means the very thing that the rule of interpretation would discourage them from doing blatantly.

In cases where legislation would, if applicable, alter the legal consequences of prior events only as of the date of its enactment, the legislators would be considered to have effectively taken themselves outside the scope of the rule against retrospective operation. But the mischief that the rule is designed to combat (i.e., making rules to govern the legal consequences of events after the events have occurred) is as much a threat in this type of case as it is in cases involving legislation that meets the narrow definition of retrospectivity.

It would be most unwise to suffer the erosion of the rule of law in our legal system more willingly because a particular mode of legislative operation is involved, where that mode is itself clearly incompatible with the requirements of the rule of law.<sup>168</sup> Fortunately, the majority of English and Canadian courts have rejected such a restricted and unprincipled approach to retrospective legislation.<sup>169</sup> The conventional and much sounder approach has been to acknowledge the wisdom of the American jurist Story J., who made the following comments about the concept of retrospectivity in the course of interpreting an article in the New Hampshire Constitution that prohibited "retrospective laws:"

What is a retrospective law, within the true intent and meaning of this article? Is it confined to statutes, which are enacted to take effect from a time anterior to their passage, or does it embrace all statutes, which, though operating only from their passage, affect vested rights and past transactions? It would be a construction utterly subversive of all the objects of the provision to adhere to the former definition. It would enable the legislature to accomplish that indirectly, which it could not do directly.<sup>170</sup>

The general unwillingness of the courts to allow the form of legislation to be determinative must be applauded because it has encouraged them to concentrate on the substantive issues of reliance and expectations that are at stake in retrospectivity cases.

Having criticized the narrow definition of retrospectivity, I am obliged to acknowledge that most of its adherents do recognize a related, but separate, phenomenon which is also to be avoided. This they refer to as prospective interference with rights that were acquired under previously existing law.<sup>171</sup> However, although the proponents of the narrow definition acknowledge the existence of a separate presumption against interference with acquired rights, they assign it much less weight than they do the presumption against retrospectivity. While the presumption against retrospective operation is said to be a prima facie one, the presumption against interference with acquired rights is viewed as applying only when a statute is ambiguous.<sup>172</sup> This point of view is often accompanied by the argument that interference with acquired rights is commonplace.<sup>173</sup>

The argument that interference with acquired rights is commonplace is a misleading one. It has, I think, been the source of some of the difficulty that has plagued the law governing the interpretation of retrospective legislation. The problem here is that the phenomenon of interference with acquired rights has from time to time been confused with changes in the law that apply only to future events.<sup>174</sup> Only

the latter type of change can properly be described as commonplace.

It is obvious that one of the primary purposes of most legislative enactments is to make changes in the law, which changes are to be applicable in respect of future events. Generally speaking, there is no reason for having an interpretive presumption against such changes.<sup>175</sup> On the other hand, there is every good reason to guard against legislative interference with acquired rights. Interference with acquired rights involves alteration of the legal consequences of conduct and events that occurred under a previous state of law and, as a result, a frustration of the expectations of those who have acted in reliance upon that law. The difference between changes in the law that apply only to future events and changes that interfere with acquired rights is analogous to the difference between changing the rules of the game before the game begins and changing them during the game or after it has been played.<sup>176</sup>

The decision in R. v. Levine<sup>177</sup> can be used to illustrate this point. It involved legislation that did nothing more than create new rules for the governance of future conduct. In that case, the Manitoba Court of Appeal held that an amendment to provincial liquor control legislation<sup>178</sup> that had the effect of outlawing the possession of liquor in certain places where it previously could lawfully have been kept was applicable to the accused in respect of a quantity of liquor that she had kept in one of those places while the

old law was still in force. There could be no objection to the new rules applying to the accused in this case because the act of possession that was the subject of the charge occurred after those rules had come into force. Note that while the amendment was construed as governing such future conduct, it had nothing to say about the legal effects of acts of possession that had occurred prior to its enactment. The statute would have interfered with acquired rights had it been interpreted as declaring unlawful acts of possession that had lawfully occurred under the previous law. New rules would then have been applied in respect of previous events.<sup>179</sup>

The confusion about which I have been speaking must be avoided lest it result in a failure to properly distinguish the unusual from the commonplace and, as a consequence, inhibit recognition of ex post facto changes in the law for what they are -- infringements of the rule of law.<sup>180</sup>

Having made the distinction between legislation that interferes with acquired rights and legislation that merely sets out new rules to govern future conduct, it is undeniable that the former occurs more frequently than does legislation which meets the narrow definition of retrospectivity now under discussion. This is not surprising considering the extraordinary and fictitious character of legislation that is given force as of a date prior to its own enactment. But acknowledgement of this fact is far from an admission that legislative interference with acquired rights is a regular

occurrence. In fact, as I will point out in my discussion of the wider definitions of the concept of retrospectivity,<sup>181</sup> the overwhelming weight of judicial authority indicates that it occurs only when legislation unequivocally expresses an intention to operate on the past and disturb rights that were acquired under previously existing law.

When viewed in the light of a proper understanding of the concept of legislative interference with acquired rights, the narrow definition of retrospectivity is obviously unsatisfactory. Under that definition, the degree of protection for acquired rights would vary dramatically depending on the form of the legislation in question, owing to the differing strengths of the presumption against retrospective operation and the presumption against interference with acquired rights. As a consequence, there would be insufficient protection for acquired rights in cases involving legislation having the potential to change the legal consequences of pre-enactment events as of the date of its enactment.

Speaking from the perspective of the rule of law philosophy, there is no rational basis for treating the rights at stake in cases involving legislation that meets the narrow definition of retrospectivity any differently from those at stake in cases involving legislation that operates so as to alter the consequences of pre-enactment events from the date of its enactment onward. Both types of legislative operation pose a similar threat to the rule of law. It therefore

stands to reason that both should be subject to the same resistance in the interpretive process.

Section 2. Retrospectivity Defined to Include Operation After Enactment that Alters the Completed Legal Consequences of Pre-enactment Events.

A more moderate view of retrospectivity incorporates the previous definition, but goes further and applies the label "retrospective" to any legislation that interferes with the completed legal effects of events that took place prior to its enactment. This is the position adopted by Professor Côté. He starts with the unobjectionable premise that a statute should be construed "so as to leave unaffected that which has already occurred,"<sup>182</sup> and then goes on to say:

. . . unless it is retroactive a statute should affect neither the creation nor the extinction of legal situations validly created or extinguished in the past, nor should it govern the effects of these legal situations if such effects occurred completely in the past.<sup>183</sup>

According to Professor Côté, a statute that changes, even if only from the date of its enactment, the completed legal consequences of an event that occurred prior to its enactment operates retrospectively.<sup>184</sup> By contrast, a statute that alters only the future or uncompleted consequences of a pre-enactment event does not qualify as being retrospective.<sup>185</sup>

For an illustration of this distinction, recall the lease contract example that I gave in the introduction to this part.<sup>186</sup> If the new statute governing landlord and tenant responsibilities were applied so as to change the character

of leasehold obligations that had already been fulfilled, it would operate retrospectively. On the other hand, if it were applied so as to alter leasehold obligations that had yet to arise for performance, it would not.<sup>187</sup> A similar distinction can be drawn between fully realized property rights and those which can be enjoyed only at some future date.<sup>188</sup> This concept of retrospectivity has been adopted and applied by the courts in a number of cases.<sup>189</sup>

Professor Driedger appeared to accept this more moderate definition upon revising his views in 1976.<sup>190</sup> It was then that he first made a distinction between retroactive operation and retrospective operation, using the former term to denote what he had previously called retrospective operation and describing retrospective operation as follows:

A retrospective statute, on the other hand, changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction. . . . A retrospective statute operates as of a past time in the sense that it opens up a closed transaction and changes its consequences,<sup>191</sup> although the change is effective only for the future.

Unfortunately, however, Professor Driedger's peculiar interpretation and application of his revised definition of retrospectivity have seriously clouded the picture, making it doubtful whether he can be unequivocally classified as a supporter of the definition now under discussion. His test for retrospectivity<sup>192</sup> is most unsatisfactory and has probably contributed to the unprincipled and confused analyses of retrospectivity that have appeared in some of the cases. As

I will argue in chapter V,<sup>193</sup> Driedger's test for retrospective operation, which turns upon whether the fact-situation under consideration was described by the legislation at some time after the legislation actually came into force, is more properly a test for his pre-1976 conception of retrospectivity (after 1976 called "retroactivity").<sup>194</sup>

Professor Côté and the other adherents of this more moderate view of retrospectivity also recognize a separate phenomenon of prospective interference with acquired or vested rights. Côté defines this phenomenon as legislative interference with the future or unrealized legal effects of pre-enactment events.<sup>195</sup> This occurs when new legislative rules are applied so as to govern the future operation of existing contracts or the future exercise of existing property rights. Although those who hold this view agree that such interference should be presumed not to have been intended by the legislature, they consider it to be quite common<sup>196</sup> and view the presumption against it as arising only in cases of ambiguity.<sup>197</sup> There is thus a significantly lower degree of protection for legal consequences that have yet to be fully realized than there is for those that have already crystallized.

It is submitted that even this more moderate definition of retrospectivity can be challenged on the ground that it is inadequate to fully preserve and promote the rule of law in our legal system. This is true in spite of the fact that it

covers many of the situations in which the unfairness associated with ex post facto changes in the law may arise.

Before proceeding further with this point, however, it is necessary to appreciate the complexity of this definition. Most notably, it requires that a distinction be made between legal rights and liabilities that have been fully realized prior to new legislation being enacted and those that are fully realizable only at some date in the future. The difference here will sometimes be subtle. How does one tell when legislation would, if applicable, affect only "the future exercise of rights acquired in the past"<sup>198</sup> and when it would affect the fully realized rights arising out of a pre-enactment event?

Difficulties will be encountered unless care is taken to differentiate between the enforcement of rights that were fully realized prior to the enactment of new legislation, such as the right of a tort victim to recover compensation from the tortfeasor, and the future realization or future exercise of rights that were acquired in the past. The potential for confusion can be illustrated by observing that even the fully realized legal consequences of prior events are continuing consequences, in the sense that they are rights and liabilities subject to enforcement after they have crystallized. This is especially evident where they are the subject of a protracted lawsuit. Accordingly, one could argue that legislation enacted in the interim between the occurrence of a tort and the resolution of a lawsuit

concerning that tort would, if applied so as to alter the rights of the victim and the tortfeasor inter se, affect only the future realization of rights that had previously been acquired.<sup>199</sup> And so, the argument might go, it would not operate retrospectively if it were applied in that fashion.<sup>200</sup>

Such an argument would, however, be based on a serious misunderstanding of what Professor Côté and the other adherents of the definition of retrospectivity now being discussed mean when they talk about legislation altering the future consequences of pre-enactment events or altering the future exercise of previously acquired rights. They are not referring to remedial rights.<sup>201</sup> What they mean is this: legislation may alter contractual and proprietary rights having a future component (i.e., rights capable of being realized or exercised only in futuro) without operating retrospectively. Accordingly, legislation that alters the terms governing the future performance of a contract<sup>202</sup> or modifies the conditions under which property rights may be enjoyed in the future<sup>203</sup> cannot, by virtue of such operation, be classified as retrospective.

Having clarified this point, it is at the same time important to realize that some crystallized or remedial rights and liabilities contain future elements that may make them difficult to identify. This can complicate retrospectivity analysis in cases involving legislation that has the potential to interfere with such rights and liabilities.

Liability to punishment is a prime example. While liability to punishment arises (at the very latest) when an individual is convicted of having committed an offence, the punishment imposed may be a term of probation or of imprisonment, public remedies that by their nature are only realizable and exercisable over time.<sup>204</sup> Other examples can be drawn from the fields of family law, insurance law and pension law. Liability to make family support payments may arise upon the occurrence of a specific event, such as separation, divorce or the birth of a child, but the liability has a future component and is thus of a continuing nature.<sup>205</sup> Similarly, while the right to collect unemployment insurance or pension benefits arises upon the happening of the event that qualifies a person to receive benefits, those benefits have a future component in that they are payable only at specified intervals in the future.<sup>206</sup>

Despite the difficulties that may occasionally be encountered in making a distinction between the realized and the yet-to-be realized consequences of pre-enactment events, I believe the distinction to be an important one for analytical purposes.<sup>207</sup> I do not, however, think there is sufficient justification for making it the basis on which the definition of retrospectivity and the application of the presumption against retrospective legislation turn. Cases falling on both sides of the distinction may involve disappointed expectations -- expectations formed in reliance upon the law that was in force when specific transactions and events took

place.<sup>208</sup> It follows that the rule of law is at risk, albeit to varying degrees, in both types of case.

To pursue this point, it is instructive to refer to a case that is often relied upon by the proponents of the definition of retrospectivity now under discussion as authority for the existence of a separate and weaker presumption against legislative interference with acquired or vested rights. I am referring to the Supreme Court of Canada decision in Spooner Oils Ltd. v. Turner Valley Gas Conservation Board,<sup>209</sup> where the issue was whether provincial regulations relating to oil and gas leases applied to govern the future operation of leases that had been made prior to their enactment. While the court did not expressly refer to the concept of retrospectivity in its judgement, it nevertheless grounded its decision on Coke's "rule and law of Parliament"<sup>210</sup> to the effect that a new law ought to impose its form upon future matters only, and not on things past.<sup>211</sup> This, of course, is exactly the thinking that underlies the presumption against retrospective operation.<sup>212</sup>

Attempts to make a marked distinction between the concept of retrospectivity and the concept of interference with acquired or vested rights have, I think, succeeded only in obscuring the common principle that they involve.<sup>213</sup> It is submitted that because of this common principle, legislative alteration of legal consequences that have yet to be fully realized should be subsumed, along with legislative

alteration of legal consequences that have already crystallized,<sup>214</sup> under the definition of retrospectivity.

It is undoubtedly true that expectations will tend to be more settled in cases where legal consequences have crystallized prior to the date of enactment of new legislation than they will be in cases where legal consequences have not been fully realized by that date. My argument for a broad definition of retrospectivity is in no way intended to deny this fact. On the contrary, as I maintain later on, this is one factor that may legitimately be taken into account by the courts in determining whether a given enactment was intended to operate retrospectively.<sup>215</sup>

Section 3. Retrospectivity Defined to Include Operation After Enactment that Alters the Legal Consequences of Pre-enactment Events. There also exists, then, an even broader view of the concept of retrospectivity than the one examined in the previous section, a view that I prefer because it is more comprehensive in its promotion of the rule of law. This comprehensive definition includes the types of operation covered by the previous definition, but it goes further, extending to any case in which legislation operates to change the legal consequences of events that took place prior to its enactment.

Professor Theodore Sedgwick laid down a broad definition of the concept of retrospectivity that has received a

significant amount of approval. He described a retrospective statute in these words:

A statute, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already<sup>216</sup> past is to be deemed retrospective or retro-active.

This definition emphasizes that a retrospective statute is one which prejudicially interferes with legal rights (in the broad sense of that term) that have arisen out of previous transactions. This it may do either by taking away from rights (in a narrower sense of the term) that have been acquired under previously existing law or by adding to liabilities that have been incurred thereunder.<sup>217</sup>

Although Professor Sedgwick has been accused of fusing the definitions of retrospective operation and prospective interference with vested rights into one definition,<sup>218</sup> I believe that he has simply provided a description of the alternative ways in which the prejudicial effects of retrospective legislation may be brought about. In reality, his definition deals with a single principle. The message it conveys is that any legislation which operates so as to prejudicially interfere with rights (in the broad sense of the term) acquired in respect of events that occurred under previously existing law must be termed retrospective.

Sedgwick's definition brings all types of interference with acquired rights under the retrospectivity umbrella. In my opinion, it quite rightly makes no distinction between rights that have crystallized prior to enactment and those

that can only be fully realized at some later date. Interference with acquired rights is inconsistent with the rule of law principle, regardless of whether those rights have been fully realized. Both types of interference should therefore be included within the definition of retrospectivity and made subject to the presumption of interpretation against such operation.

Because of the directly proportional relationship between rights and liabilities,<sup>219</sup> retrospectivity necessarily involves a beneficial as well as a prejudicial alteration of acquired rights.<sup>220</sup> While some individuals will be negatively affected by a change in the law governing previous events, others will reap corresponding benefits. To convey this idea, it is preferable to think of retrospective legislation in a more general sense as legislation that changes the legal consequences of pre-enactment events. The following definitions reflect this thinking:

A retroactive statute is one which gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute.<sup>221</sup>

A law is retroactive if it alters the legal status of acts that were performed before it came into existence.<sup>222</sup>

Both of these statements convey the essential idea of retrospective operation in simpler and more comprehensive language than Sedgwick's definition.<sup>223</sup> They also make it more obvious that retrospectivity involves an infringement of the rule of law requirement that the law provide a framework

of certainty in the form of reliable guidelines for individual conduct. When legislation assigns new and different legal consequences to conduct by changing the rules governing that conduct after it has occurred, it frustrates expectations instead of fulfilling its proper guiding role.

It seems fitting that the definition of retrospectivity, upon which the scope of operation of the presumption against retrospective legislation depends, should encompass all forms of ex post facto rule making. In fact, the broad definition of retrospectivity now under discussion has received a significant amount of support in English and Canadian case law.<sup>224</sup> As for the academic writings on the subject, American commentators in particular have tended to embrace a comprehensive definition of the concept of retrospectivity.<sup>225</sup>

A prime example of Canadian support for the comprehensive definition is R. v. Walker,<sup>226</sup> a case in which the Supreme Court of Canada held that legislation restricting the power of the Crown to renew leases would be given retrospective effect if it were applied so as to modify the terms of leases made prior to its enactment. The terms of the leases in question called for perpetual renewal at the option of the lessee for additional 42-year terms. In the court's view, those renewal rights were created when the parties entered into the lease contracts. Therefore, they could only be interfered with if the legislation were interpreted as operating retrospectively. This was so despite the fact that the

renewal rights in question were not fully realizable or exercisable until after the date of enactment of the legislation in question.

A word of clarification about this definition is perhaps in order here. One should be careful to note that the mere fact that a new statute contemplates or requires the consideration of events that occurred prior to its enactment<sup>227</sup> does not make it retrospective. To qualify as being retrospective, the statute must in some way affect the legal consequences of a pre-enactment event.<sup>228</sup>

My conclusion is that the comprehensive definition of retrospectivity, a definition which encompasses legislation that operates as of a date prior to its enactment as well as legislation that operates after its enactment in a manner that alters the legal consequences of pre-enactment events, is the most soundly based of the competing definitions of the concept. Within its scope are included all of the types of after-the-fact legislation that are unacceptable when measured against the standard of the rule of law. For this reason, it is the best basis on which to build a rational and comprehensive analysis of retrospective legislation.<sup>229</sup>

Part B. The Meaning, Operation and Effect of the Rule  
Against Retrospective Legislation

A variety of statements of the rule against retrospective legislation can be cited, all of which have been generally accepted by the courts. Many of them represent long-standing authority. A notable example is the following extract from Maxwell's textbook on statutory interpretation:

It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.<sup>230</sup>

This rule amounts to a rebuttable presumption against retrospective operation. The courts presume that the legislature intends its legislation to operate prospectively only, and this presumption is rebuttable only by clear evidence of a contrary intention, whether expressed or implied.<sup>231</sup>

In addition, a corollary or subordinate rule against retrospective operation was articulated in Lauri v. Renad:<sup>232</sup>

It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective effect than its language renders necessary.<sup>233</sup>

Another subrule relates to delegated authority and, in particular, the authority to make subordinate legislation. This rule states that no legislation shall be construed as authorizing the making of retrospective subordinate legislation<sup>234</sup> or retrospective orders<sup>235</sup> unless it is unmistakably intended to do so.<sup>236</sup>

There are three major difficulties that one faces when attempting to apply these rules, two of which can be directly linked to the differing conceptions of retrospectivity that I have just discussed. For convenience, I will outline these problems by referring to the basic rule only. The first problem concerns the types of legislative operation that fall within the rule's description. Obviously, the rule derives its meaning and vitality from the definition of retrospectivity that is incorporated within it: the meaning and effect of the rule depend upon what the court applying it understands retrospectivity to be. And on this score, as I demonstrated in the previous part of this chapter, there are competing viewpoints. It follows that the essential meaning of the rule against retrospective legislation, in terms of the types of legislative operation that fall within its description, may vary from case to case.

Secondly, there is some inconsistency in the judicial statements that have been made about the nature of the presumption itself. This has led to doubts about the proper interpretive procedure to be followed when the issue of retrospectivity is raised. The way in which the presumption operates has important consequences for the significance of the rule as an agent for preserving and promoting the rule of law.

Finally, the rule against retrospective legislation is simply a general rule. The courts have recognized exceptions

to it. There are certain circumstances in which the presumption against retrospectivity does not apply, even though the legislation under consideration would operate retrospectively if it were interpreted as applying to the case at hand. These circumstances arise whenever the legislation being interpreted would have unobjectionable effects if it were applied retrospectively. But whether a given piece of legislation qualifies as a true exception to the rule or falls outside the meaning of the rule altogether depends upon the meaning of the rule to begin with, which in turn depends upon the definition of retrospectivity that has been adopted. It is not surprising, then, when one considers the lack of consensus about the meaning of the concept of retrospectivity, to learn that there has been some disagreement about the exceptions to the general rule. What seems to be lacking, in fact, is any sort of comprehensive and principled analysis of the types of legislation that warrant being classified as exceptions to the general rule.

I now propose to discuss each of these areas of difficulty in more detail by offering a critical analysis of the various approaches that have been taken in dealing with the important issues involved.

Section 1. Types of Legislative Operation Covered by the Rule. As I have already pointed out, the rule against retrospective legislation takes its meaning from the concept of retrospectivity that is incorporated within it. The

definition of retrospectivity sets the limits of the rule's application in the sense that it determines the types of legislation and legislative operation that fall within the meaning of the rule. Therefore, no court can rationally apply the rule of interpretation until it has established a definition of the concept of retrospectivity. As one would expect, the different meanings that have been assigned to the concept of retrospectivity have been reflected in differing views on the question of which types of legislative operation are covered by the rule.

Everyone seems to agree that legislation which is deemed to have come into operation prior to its enactment meets the definition of retrospectivity and, as a consequence, falls within the meaning of the rule. Absent clear indication of a contrary legislative intention, no statute is to be construed as having operated during a period prior to its very existence. The supporters of the narrowest definition of retrospectivity, however, limit the application of the rule to this kind of operation. They advocate another, much weaker, presumption to address what they consider to be a fairly common occurrence: post-enactment interference with acquired or vested rights.<sup>237</sup>

Such a narrow scope of meaning for the rule against retrospectivity is unacceptable for the same reasons that I put forward in criticizing the narrowest definition of retrospectivity. It provides insufficient protection for the rule of law. To accept this meaning would be to interpret

the classic statements of the rule against retrospectivity in an unjustifiably narrow fashion, paying scant heed to the rule's philosophical underpinnings. It would allow form to triumph over substance. Moreover, the modest protection that would be afforded by the presumption against interference with vested rights to those acquired rights falling outside the scope of the rule would not compensate for the shortcomings of such an interpretation.<sup>238</sup>

Apart from this major objection to such a narrow interpretation of the rule, there is an objection of a more practical nature. Simply put, the rule would be almost useless if its scope were so confined.<sup>239</sup> The unusual type of legislative operation that would be covered by the rule is so highly artificial that it cannot be brought about except by the clearest and most distinctive language, presumption or no presumption.

The wider definition propounded by Professor Côté endows the rule with a broader and much more acceptable meaning.<sup>240</sup> This interpretation of the rule is much less easily dismissed; it is not nearly so bound up in distinctions of form that are unjustified in principle and it encompasses many of the more serious threats to the rule of law.

But even this more moderate interpretation of the rule is open to the criticism that it fails to address itself to all types of ex post facto changes in the law. While the rule, if based on this definition, would apply to legislation that

threatened to disrupt the completed or crystallized consequences of pre-enactment events, it would offer no resistance to legislation having the potential to alter the future consequences of pre-enactment events. As a result, it would not serve the interests of the rule of law in every situation where expectations developed in reliance on the law were in danger of being disappointed.

Professor Côté's recognition of a separate and weaker presumption against interference with the future consequences of pre-enactment events goes some way towards remedying this problem, but it offers a distinctly inferior degree of protection for those acquired rights to which the rule against retrospective operation would not apply. Furthermore, it unnecessarily complicates retrospectivity analysis by subjecting cases involving a common principle to tests that are markedly different.

In contrast, the widest definition of retrospectivity provides the basis for a rule that encompasses all of the types of temporal operation that are capable of disrupting expectations and undermining the certainty that the law should provide.<sup>241</sup> All ex post facto legislative changes in the consequences of pre-enactment events, regardless of whether the consequences have been fully realized or not, would be brought within the purview of the rule. Accordingly, any change in acquired rights<sup>242</sup> that would result from the application of new legislation would be made subject to the rule and to the resistive force of the presumption

that is incorporated within it. It follows that the rule against retrospective legislation is best suited to fulfilling its mandate of promoting the rule of law when it is interpreted in this manner. Because I believe this interpretation to be truest to the philosophical rationale that underlies the rule, I have adopted a similarly broad conception of the rule<sup>243</sup> as the basis for my approach throughout this paper.

Section 2. The Operation of the Presumption Embedded in the Rule. Apart from the fundamental question of the proper scope of meaning to be attributed to the rule against retrospective operation (the answer to which determines the types of statutory operation that the rule militates against), there is the important question of how the presumption embedded in the rule operates. In this section, I will examine the nature and operation of the presumption against retrospective legislation.

One thing that seems clear from the authorities is that the presumption against retrospective operation can only be displaced or prevented from arising by evidence of retrospective intention that removes all doubt about the matter. Any ambiguity or uncertainty of meaning in an enactment is to be resolved in favour of a purely prospective operation. Thus, more than simple proof on the balance of probabilities is required:

Perhaps no rule of construction is more firmly established than this -- that a retrospective operation is not

to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.<sup>244</sup>

Another uncontroversial point is that the evidence of legislative intention required to rebut the presumption or prevent it from arising need not be in the form of express language, but may follow by necessary implication from the terms of an enactment:

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>245</sup>

A retrospective intention may be deduced from specific terms contained in a statute, from its purpose or subject matter, or from the circumstances in which it was enacted.<sup>246</sup>

Doubts may exist in some quarters, however, about whether the presumption operates in a prima facie manner or comes into play only when some ambiguity is found in an enactment.<sup>247</sup> The resolution of this issue has important consequences for the strength of the presumption.

As a prima facie presumption, the presumption against retrospectivity would apply from the outset of the interpretive process and would prevail unless clearly rebutted by the legislation under consideration.<sup>248</sup> In effect, the courts would take it for granted that the legislature intended to legislate prospectively. When legislation is subject to a prima facie presumption, it must be read in light of that presumption. Furthermore, only unequivocal

indications of a contrary legislative intention are sufficient to displace such a presumption.<sup>249</sup> Presumptions of this type usually represent fundamental principles of the legal system. The practical effect of treating the presumption against retrospectivity as a prima facie one would be that legislation containing general words capable of bringing about retrospective operation would be interpreted in a restricted fashion from the outset. The assumption would be that it was intended to operate prospectively only.

By contrast, if the presumption against retrospective operation were to come into play only in cases where legislation was reasonably susceptible of two meanings,<sup>250</sup> it would only apply where the court, after having attempted to discover legislative intention by the usual means, was left in some doubt about it.<sup>251</sup> Only then could the court presume that the legislature intended its legislation to operate in a purely prospective fashion. Presumptions of this type are obviously much weaker than prima facie presumptions and are usually based on judicial policies that are less closely identified with the fundamental principles of the legal system. Many of them are founded on practical rules of language or logic.<sup>252</sup>

Although detailed judicial commentary on the operation of the presumption against retrospective legislation is scarce, the prevailing view is that the presumption is of a prima facie character.<sup>253</sup> This is clearly the preferable view because it recognizes the fundamental constitutional

principle upon which the rule against retrospectivity is based. The rule of law is of such vital importance in our legal system that the courts are fully justified in assuming that the legislature intends to respect it in all of its implications. In treating prospectivity as an implicit or understood characteristic of legislation, the courts are simply recognizing the constitutional context in which legislation is enacted.<sup>254</sup>

Unfortunately, however, the disagreements about the definition of retrospectivity and the resultant uncertainty about the true scope of meaning of the rule of interpretation against retrospectivity have conspired to raise doubts about the scope of application of the prima facie presumption. Those who define retrospectivity in a way that does not include all types of interference with acquired rights have generally insisted on a separate rule of interpretation against interference with vested rights. This rule is said to contain a presumption that is much weaker in nature than the presumption against retrospective operation. According to the authorities who support this view, the presumption against interference with acquired or vested rights applies only in cases of ambiguity. It is therefore of less weight and authority than a fundamental presumption:

. . . what is known as a presumption against interference with rights is not a prima facie presumption, but only a presumption that may be invoked when the statute is reasonably susceptible of two meanings.<sup>255</sup>

. . . the rule against retrospective operation of statutes is far stronger than the presumption of non-interference with vested rights, which only applies where

the legislation is in some way ambiguous and reasonably susceptible of two constructions.<sup>256</sup>

The upshot of this approach is that some legislation which threatens to change the legal effects of pre-enactment events escapes being read subject to a fundamental presumption that points to a contrary conclusion. As I observed in the previous discussion of definitions and the scope of the rule, the same principle is at stake in all cases where legislation has the potential to change the legal consequences of events after they have occurred. It does not seem warranted to invoke a strong presumption based on a fundamental constitutional principle in some cases and a much weaker presumption in others. Why should acquired rights that are threatened with alteration as of the date of enactment of legislation be accorded significantly less protection than those that stand to be altered as of a date prior to enactment? And why should the future or unrealized legal consequences of pre-enactment events be marked off for a level of protection that is so distinctively inferior to that accorded completed consequences?

A change in the legal consequences of an event after it has taken place can only be brought about by legislative operation that is inconsistent with the requirements of the rule of law. Expectations that have developed in reliance upon the law stand to be disrupted or destroyed. Therefore, it seems to me that all cases involving a potential ex post facto change in legal rules should be judged in the light of a presumption that bears a degree of weight and authority

commensurate with the fundamental constitutional principle that is at stake. Such cases can then be subjected to a more systematic and less complicated analysis. When the presumption against retrospective operation is viewed as a prima facie presumption applicable to all ex post facto changes in the law, it is a most effective device for promoting the rule of law within our legal system. Only then does it fully reflect the constitutional principle upon which it is founded.

This is not to say that the nature of the legal consequences that would be affected by ex post facto legislation should not be taken into account in the process of interpretation. As I will argue in chapter V,<sup>257</sup> this is a legitimate factor to consider in assessing the intention of the legislature. Legislators are more likely to intend to disrupt expectations based on future legal consequences than those based on fully realized consequences, given that the former tend to be less hardened or fixed than the latter. The detraction from law's guiding role is generally less severe and less objectionable when unrealized consequences are affected. The point remains, however, that all cases involving ex post facto changes in the law should be subjected to the same basic analysis from the outset.<sup>258</sup>

Section 3. Exceptions to the Rule. Although the rule against retrospective legislation is grounded in a fundamental principle of our legal system, it is not an absolute

rule. Certain types of legislation that fall within the meaning and description of the rule are nevertheless excepted from its application for policy reasons.<sup>259</sup> Essentially, my position is that only legislation which can be said to be inoffensive to the rule of law principle should be treated as an exception to the general rule against retrospectivity.<sup>260</sup>

Consider the case of procedural legislation. Legislation that deals solely with matters of procedure<sup>261</sup> is often said to be exempt from the general presumption against retrospectivity. In fact, the accepted view is that purely procedural enactments are presumed to operate retrospectively.<sup>262</sup> This position is said to be justified because the purpose of a procedural enactment is not to establish substantive rights, but merely to set out the method or procedure by which substantive rights may be enforced. However, the divergent views concerning the definition of retrospectivity and the meaning of the rule of interpretation which incorporates that definition have given rise to problems of classification. To understand these problems, it is necessary to refer back to the previous discussion of these matters in this chapter.

The proponents of the narrowest definition of retrospectivity, a group that prior to 1976 included Professor Driedger, regard statutes that affect only procedure as being outside the description of the rule altogether. Because procedural acts do not make changes in procedural rules as of a date prior to their enactment, they do not fall within the scope of meaning of the rule to begin with.<sup>263</sup> Therefore, it

would be a misnomer to describe them as exceptions to the rule. Moreover, these authorities are of the opinion that purely procedural enactments are outside the purview of the much weaker rule against interference with vested rights, a conclusion based on the idea that no person has a vested right to any course of procedure.<sup>264</sup> Rights must be substantive rights in order to be capable of vesting, so the argument goes. This classification cannot be faulted as a matter of logic, given the assumptions on which it rests. But as I have already argued, it seems to me that these assumptions are based on a seriously flawed understanding of the concept of retrospectivity.

As for those who adhere to Professor Côté's broader definition of retrospectivity, they also claim that procedural enactments are outside the scope of both the rule against retrospectivity and the rule against interference with vested rights.<sup>265</sup> This view hinges on the argument that purely procedural acts have no effect upon the completed consequences of pre-enactment events (to which the rule against retrospectivity is addressed), nor upon the future consequences of pre-enactment events (to which the rule against interference with vested rights is addressed). The assumption is that both of these rules are concerned solely with substantive consequences.

It is, however, possible to argue that procedural enactments operate retrospectively in the sense that they alter the procedural consequences of pre-enactment events. Because

procedural acts may affect, albeit to a minor extent, the rights arising out of pre-enactment transactions or events (in the sense that they alter the procedure that must be followed to enforce the substantive rights arising therefrom), it can legitimately be said that they meet the definition of retrospectivity when they do so. One can quite properly view such enactments as altering the procedural consequences associated with events that occurred prior to their enactment. This seems to me to be a conceptually superior way to describe the effects of a change in procedure. Viewed in this light, procedural statutes can legitimately be classified as exceptions to the general rule against retrospective legislation, even though it is true, for the reasons given by Driedger and Côté, that they can never be properly classified as exceptions to the rule against interference with vested rights.<sup>266</sup>

The argument for treating procedural enactments as retrospective in their operation also applies with respect to the broad definition of retrospectivity and the comprehensive rule of interpretation based upon that definition. But it has wider repercussions in this context because all ex post facto changes in the law are relevant. With the comprehensive interpretation of the rule against retrospectivity, there is no separate presumption against interference with vested rights to consider: changes in the procedure by which unrealized rights and liabilities may be enforced can also logically be classified as retrospective. It follows that

procedural enactments can quite properly be described as exceptions to the rule against retrospective operation when that rule is given a comprehensive scope.

This view of procedural enactments accords with the view that has traditionally been taken by the courts. Acts that deal with purely procedural matters are often described in the case law as being retrospective in their application to pre-enactment events. The tendency has been to classify procedural enactments as exceptions to the rule against retrospective legislation.<sup>267</sup> But even if one proceeds on the basis that procedural enactments can logically be described as exceptions to the general rule against retrospectivity, should they be exempted from the operation of that rule as a matter of principle?

The answer may be found by referring back to the principle underlying the rule against retrospective legislation. The rule of law demands that the law provide a framework of rules upon which individuals may rely in conducting themselves and organizing their affairs. The presumption against retrospectivity, which is designed to preserve and promote this function, should only apply to enactments that threaten to undermine it. Purely procedural enactments can be treated as exceptions to the rule because, although they do, technically speaking, alter the consequences of prior events by changing the rules governing the mode of enforcement of the substantive rights arising therefrom, they have no effect on the substantive rights themselves. The latter are the only

rights upon which individuals are likely to have relied. Thus, even when procedural legislation is applied retrospectively, the expectations of individuals and the guiding function of the law are left unimpaired.

Another type of legislation that has been treated as an exception to the rule against retrospectivity is legislation that merely consolidates or otherwise re-enacts existing law. It too has been treated as being subject to a reverse presumption in favour of retrospectivity.<sup>268</sup> But consolidations and re-enactments are enactments that simply restate existing law without changing it. So the statement that this type of legislation is an exception to the rule cannot possibly be true with respect to any of the definitions of retrospectivity that I have discussed. Re-enacting legislation cannot be an exception to the rule of interpretation as narrowly construed because it does not operate as of a date prior to its enactment. Furthermore, because it would not change the legal consequences of pre-enactment events if it were applied to them (since, by definition, it merely restates previously existing law), it cannot logically qualify as an exception under the broader interpretations of the rule either.

Nonetheless, under the slightly modified comprehensive definition of retrospectivity that I adopt in chapter IV,<sup>269</sup> a definition that focusses upon legislation governing (as opposed to altering) the legal consequences of pre-enactment events, re-enactments do fall within the scope of meaning of

the rule of interpretation. Although they cannot alter the consequences of pre-enactment events, they do have the capacity to govern them. They can therefore be classified as exceptions to the rule as a strict matter of logic. What is more, they are legitimate exceptions to the rule because when they are allowed to govern the legal consequences of pre-enactment events, they bring about no change in those consequences. By simply restating the law that existed prior to their enactment, they cannot possibly disturb expectations that have developed in reliance on the law that they replace. Consequently, they do not offend the principle of the rule of law when they are interpreted retrospectively.

There is a third type of legislation that many authorities consider to be an exception to the rule against retrospectivity.<sup>270</sup> I am referring here to declaratory legislation. Declaratory legislation, by which the legislature purports to interpret, clarify or explain the meaning of existing law, may be effective as of a date prior to its enactment or as of the date of its enactment.<sup>271</sup> In the former case, it would fall within the narrow definition of retrospectivity, in that its interpretation of existing law is effective as of a date prior to its enactment: it declares what the law must be deemed to have always meant. Thus, it could conceivably be viewed as an exception to the rule against retrospectivity even when that rule is given its narrowest interpretation. In the latter case, it would not fall within the meaning of the rule as narrowly interpreted;

however, it would fall within one or both of the broader definitions of retrospectivity, and thus within the scope of the rule based on one or both of those definitions, if it changed the meaning of the existing law and operated so as to alter the consequences of pre-enactment events.<sup>272</sup>

Because the courts and not the legislatures are constitutionally responsible for interpreting legislation, there is every possibility that a legislature will actually change the meaning of the existing law in enacting declaratory legislation. Therefore, one could say that declaratory enactments might often, as a strictly conceptual matter, be eligible to qualify as exceptions to the rule against retrospectivity when that rule is given one of its broader interpretations.<sup>273</sup> Moreover, under the slightly modified comprehensive definition of retrospectivity that I adopt in chapter IV, declaratory legislation would operate retrospectively, and thus fall within the scope of meaning of the rule, simply by governing the legal consequences of pre-enactment events, regardless of whether it brought about any change in those consequences.<sup>274</sup> Under my definition, any declaratory enactment addressed to pre-enactment events could, as a matter of logic, be classified as an exception to the rule.

As a matter of principle, however, declaratory legislation should not generally be classified as an exception to the rule against retrospective legislation. Despite the legislative pretence of merely clarifying or explaining existing law, declaratory acts often bring about changes in

the meaning of that law. As a result, they have the potential to alter the legal consequences of events that occurred prior to their enactment when they are applied in respect of such events. This means that they have the potential to disrupt expectations founded on those consequences. Admittedly, these changes will not usually be of a radical nature. Nonetheless, to the extent that declaratory enactments make changes in the law and apply so as to alter the consequences of pre-enactment events, they are inconsistent with the rule of law principle.<sup>275</sup> They also offend the rule of law principle on the ground that they represent legislative encroachment on the judicial function of interpreting the law.<sup>276</sup>

The truth of the matter is that declaratory legislation is usually nothing more than a special example of the very type of legislation that the general rule of interpretation is intended to work against. The better approach is to say that most declaratory enactments will operate retrospectively only if they succeed in overcoming the presumption against that mode of temporal operation. As Professor Driedger points out,<sup>277</sup> it makes more sense to say that declaratory legislation rebuts the presumption against retrospectivity by displaying a sufficient contrary intention than it does to say that it is an exception to the general rule and that, as a consequence, the presumption does not apply to it at all.<sup>278</sup>

This concludes my critical review of the existing approaches to retrospective legislation. In the next two chapters, I will expand upon my ideas by offering a detailed and systematic theory of retrospective legislation built upon the reasoning put forward in this chapter. My submissions will continue to be based on the notion that retrospective legislation is generally to be avoided because it is incompatible with the fundamental Canadian constitutional principle of the rule of law. The next chapter focusses on defining the concept of retrospectivity, explaining the meaning and operation of the rule of interpretation incorporating that concept and discussing the exceptions to the rule and other special types of legislation. In chapter V, I will set out some practical guidelines for applying the general rule against retrospectivity as it is explained in chapter IV.

## Chapter IV

### DEFINITIONS OF THE CONCEPT OF RETROSPECTIVITY AND AN EXPLANATION OF THE MEANING, OPERATION AND EFFECT OF THE RULE AGAINST RETROSPECTIVE LEGISLATION

In the previous chapter, I outlined the major disagreements and inconsistencies that currently exist in the law governing the interpretation of potentially retrospective legislation. To a large extent, these problems are attributable to a failure to keep firmly in mind the philosophical basis of our deep-seated aversion to retrospective laws. The failure to look to the rule of law principle as a standard of evaluation is evidenced by the incomplete and occasionally erroneous explanations of the meaning and operation of the rule against retrospective legislation that appear in the jurisprudence. Because of this failure, the rule of interpretation has not been consistently applied, and this, in turn, has resulted in uneven protection for the rule of law in our legal system. In addition, the failure to adhere to principle has created a considerable amount of uncertainty and confusion for those seeking the guidance of judicial precedent and authoritative analysis.<sup>279</sup>

In chapter II, I discussed the principle of the rule of law, describing it as a political ideal that has been adopted as a fundamental principle of our constitution. It is essentially a formal and procedural ideal, prescribing the manner in which the powers of government ought to be exercised. The

standard of fundamental procedural fairness inherent in the rule of law principle requires that laws be capable of effectively guiding human behaviour. If laws are to conform to the requirements of this principle, they must ensure a basic level of predictability in social life. In short, they must consist of rules upon which individuals can rely in conducting themselves.

Generally speaking, the rule of law principle requires that laws should govern only the legal consequences of conduct that is undertaken and events that occur during the period of their existence. A law which operates so as to govern the legal consequences of events that occurred prior to its existence and which, in so operating, alters the legal consequences of events as determined under the previously existing law is clearly incompatible with the rule of law.

My basic submission is that the rule of interpretation against retrospective legislation was developed by the courts in recognition of the fundamental importance of the constitutional principle of the rule of law. The courts have quite naturally taken the view that legislatures should be presumed to intend to lay down rules which are consistent with this basic principle. It is with this purpose in mind that the rule against retrospectivity should be understood and applied. Therefore, the central concern of the courts in interpreting and applying the rule should be to preserve, insofar as it is compatible with the sovereign lawmaking

powers of the legislature in question, the reliability of the law as a guide for human conduct.

The key to upholding this aspect of the rule of law is to confine the operation of every legislative enactment to an appropriate period of time, and the challenge of doing so arises whenever there is a transition from one state of law to another. The rule against retrospective legislation is a rule of interpretation that promotes the attainment of this objective: it leans strongly in favour of a delineation of the temporal bounds of legislation<sup>280</sup> that is consistent with the requirements of the rule of law.

It may be helpful to think of transitional problems as problems involving a conflict of laws in time, or a temporal conflict of laws.<sup>281</sup> A number of authors have made the analogy to territorial conflicts of laws and choice-of-law problems.<sup>282</sup> But although this analogy may help to illuminate the issues at stake in cases involving transitional problems, it does not provide the clear and comprehensive foundation for analysis that the rule of law does. A conflict of laws analysis may, for instance, quite properly stress the importance of the nature and degree of the connection between events and the law that was in force when they occurred,<sup>283</sup> but the rule of law philosophy goes beyond that and offers a compelling explanation of why the connection is so important and why it should be preserved.

The definitions and explanations that I will put forward in this chapter are for the most part compatible with the

mainstream of common law thought on the subject of retrospectivity. The courts have traditionally been concerned to ensure that legislation is interpreted in a manner that reflects the procedural fairness demanded by the rule of law. Aside from its comprehensiveness, what is perhaps most noteworthy about my analysis is that it constantly emphasizes the connection between the constitutional principle of the rule of law and the aversion to retrospective legislation that has always characterized our legal system. I attempt to present a rational, systematic and comprehensive theory of retrospective legislation, using the principle of the rule of law as an unwavering guide. It seems to me that following such a principled approach would lead to a more rational, coherent and understandable body of law in this area, with the ultimate payoff being a suitably consistent level of protection in our legal system for an essential feature of the rule of law.

It almost goes without saying that simply accepting and adhering to my theory of retrospectivity will not automatically solve all transitional problems. As is the case with all legal theories and rules, the theory advanced in this thesis can only be put into practice through the medium of human judgement. What I hope my exposition will do, however, is identify more clearly the issues that are at stake in retrospectivity cases, the factors that should be taken into account in such cases and the proper procedure to be followed in resolving them.

Part A. Definitions of the Basic Concepts of Retroactivity,  
Retrospectivity and Prospectivity

The importance of properly defining the concept of retrospectivity can hardly be overemphasized. As I have indicated, the rule of interpretation leaning against retrospective operation takes its meaning from the definition of retrospectivity that is incorporated within it. In order to fulfil its purpose of preserving and promoting the rule of law, the rule against retrospective legislation must incorporate a definition of retrospectivity that is broad enough to encompass every type of legislation that has the potential to disrupt reasonable human expectations about the legal consequences of events. On the other hand, the definition must not be so broad as to extend beyond the mischief that the rule of interpretation is intended to combat, and thus lose its distinctive character.

The narrower definitions of retrospectivity that I examined in chapter III are not adequate to allow the rule against retrospective operation to completely fulfil its purpose. Many legitimate expectations formed in reliance upon the law as it may exist from time to time would be left insufficiently protected by a rule of interpretation that was limited by the scope of either of those definitions.<sup>284</sup>

In contrast, the broad definition is well-suited to the purpose for which the rule against retrospectivity was designed. By addressing itself to all types of legislative changes in the legal consequences of prior events, it brings within its scope all enactments that have the potential to

operate "after the fact" and thereby infringe the rule of law principle. When infused with this meaning, the rule against retrospective operation treats any after-the-fact change in the legal consequences of events as a potential source of interference with legitimate expectations. In doing so, the rule postulates a fundamental connection between legitimate expectations and legal consequences that seems entirely justified when one remembers its essential function, which is to help vindicate reliance upon the guiding force of the law.<sup>285</sup>

Given that after-the-fact alterations in the legal consequences of acts or events constitute the mischief that the rule against retrospective legislation must discourage, I submit that retrospectivity analysis can proceed more profitably if one recognizes that this mischief can be brought about by two distinct modes of temporal operation. The first involves the artificial and fictional type of operation that occurs when legislation alters the consequences of pre-enactment events as of a date prior to its enactment.<sup>286</sup> This type of legislation is deemed to have commenced operation prior to its enactment and to have operated for a period prior to its period of actual operation.<sup>287</sup> The second mode of operation is less blatant. It involves legislation that alters the legal consequences of pre-enactment events as of the date of its enactment.<sup>288</sup> A number of judicial and academic authorities have recognized these as distinct modes of retrospective operation.<sup>289</sup>

Furthermore, it is possible to differentiate these two modes of retrospective operation by using distinct labels when referring to them. As Professor Driedger has perceptively observed,<sup>290</sup> there is a subtle difference in meaning between the words "retroactive" and "retrospective," notwithstanding the fact that they have often been used interchangeably in the case law and legal literature. This difference can be traced to the Latin root words from which they are derived. "Retroactive," meaning "acting or operating in the past,"<sup>291</sup> accurately describes legislation that is deemed to operate prior to its own enactment, and thus govern events that occurred prior to its enactment as of a date prior to its enactment. "Retrospective," meaning "looking to the past,"<sup>292</sup> describes legislation that looks to the past and governs, from the date of its enactment onward, the legal consequences of events that occurred prior to its enactment.<sup>293</sup> I turn now to a more detailed examination of the distinctive features of retroactive and retrospective legislation.

Section 1. Retroactive Operation. The simplest way to define retroactive legislation is to say that it is legislation which operates as of a date prior to its enactment.<sup>294</sup> Professor Driedger describes a retroactive statute as one that "makes the law different from what it was during a period prior to its enactment."<sup>295</sup> He then goes on to state:

A retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a

time prior to its enactment.<sup>296</sup>

Needless to say, the phenomenon of operation prior to enactment (or operation in the past) is highly artificial and can occur only when legislative provisions are treated as though they have had a fictitious pre-existence. In order for legislation to operate retroactively, the date on which its provisions effectively come into force must precede the date of its enactment.

There are three main types of retroactive legislation. Perhaps the most common type contains a commencement provision expressly stating that the legislation shall be deemed to have come into force on some specified date prior to its enactment.<sup>297</sup> This requires that the provisions in the main body of the legislation be read as though they had come into effect on the date specified, rather than on the date of their enactment. An example of this type of retroactive legislation was considered in R. v. Canada Sugar Refining Co.<sup>298</sup> The legislation in question was an act amending The Customs Tariff, 1894.<sup>299</sup> The amending act had received royal assent on July 22, 1895, but s. 4 thereof provided that it was to be "held to have come into force" on May 3, 1895, some two and one-half months earlier. Accordingly, it was read as though it had commenced operation on that earlier date.

A second type of retroactive legislation contains substantive provisions that by their own terms apply to prior transactions or events as of a past time. Legislation may specify that it applies to pre-enactment events as of a time

prior to its enactment.<sup>300</sup> In doing so, it deems certain legal consequences to have existed prior to its enactment, thereby determining the content of pre-existing law. This technique is most likely to be used with acts of validation, ratification or indemnity. In Gold Seal Ltd. v. Alberta (A.-G.),<sup>301</sup> the Supreme Court of Canada was confronted with a statute of this type. An amendment to the Canada Temperance Act<sup>302</sup> had been enacted in 1921. Section 21 of the amendment provided that certain existing proclamations and orders-in-council "shall be or shall be deemed to have been valid," thereby effectively validating those instruments as of the date they were made.

A third type of retroactive legislation is legislation that contains a direct statement of what the previous law was. Enactments of this type declare "what the law must be deemed always to have been."<sup>303</sup> In doing so, they revise the form and, in many cases, the meaning of the law as of a time prior to their enactment. An example of this type of legislation was considered in Western Minerals Ltd. v. Gaumont,<sup>304</sup> where the Supreme Court of Canada interpreted a statute called The Sand and Gravel Act.<sup>305</sup> The statute had been enacted on April 7, 1951. Sections 2 and 3 of the act provided that, with respect to all land in Alberta, "the owner of the surface of the land is and shall be deemed at all times to have been the owner of and entitled to all sand and gravel." These provisions had the effect of determining the content of pre-existing law.

It is interesting to note that while all of these types of retroactive legislation have a similar effect, the date upon which they effectively come into force cannot be ascertained in exactly the same way. With respect to the first type noted above, the date of effective commencement can be determined by simply reading the commencement provision, which specifies the pre-enactment date on which the legislation is to be taken to have come into force. The date specified is the date upon which the legislation effectively commences operation. With respect to the other types of retroactive legislation, the matter is not quite so simple. Due to the special wording of their substantive provisions, their effective date is not the same as the date upon which (in a technical sense) they come into force. Technically speaking, they come into force upon being enacted.<sup>306</sup> As a practical matter, however, their effective date is the pre-enactment date from which their provisions must be taken to have represented the law. This feature is attributable to the fact that their substantive provisions are themselves directed to the past -- they operate in the past by virtue of their very wording.<sup>307</sup> Their effective commencement date is either the date of the previous transaction to which they apply (in the case of the second type) or the commencement date of the previously existing law that they purport to expound (in the case of the third type).<sup>308</sup>

In spite of these differences, by focussing on the actual effects of these types of retroactive legislation, it is

possible to explain their operation in language that applies to all of them. The common characteristic of these types of retroactive legislation is this: all of them are treated as though they operated during a period prior to the period in which they operated as a matter of fact. By virtue of a legal fiction, their effective commencement date precedes their actual commencement date.<sup>309</sup> Therefore, for purposes of analysis, it is helpful to think of retroactive legislation as legislation whose effective operation spans two distinct periods of time: it has a fictional operation for a period prior to its actual commencement date and a factual operation for a period from that date onward.<sup>310</sup>

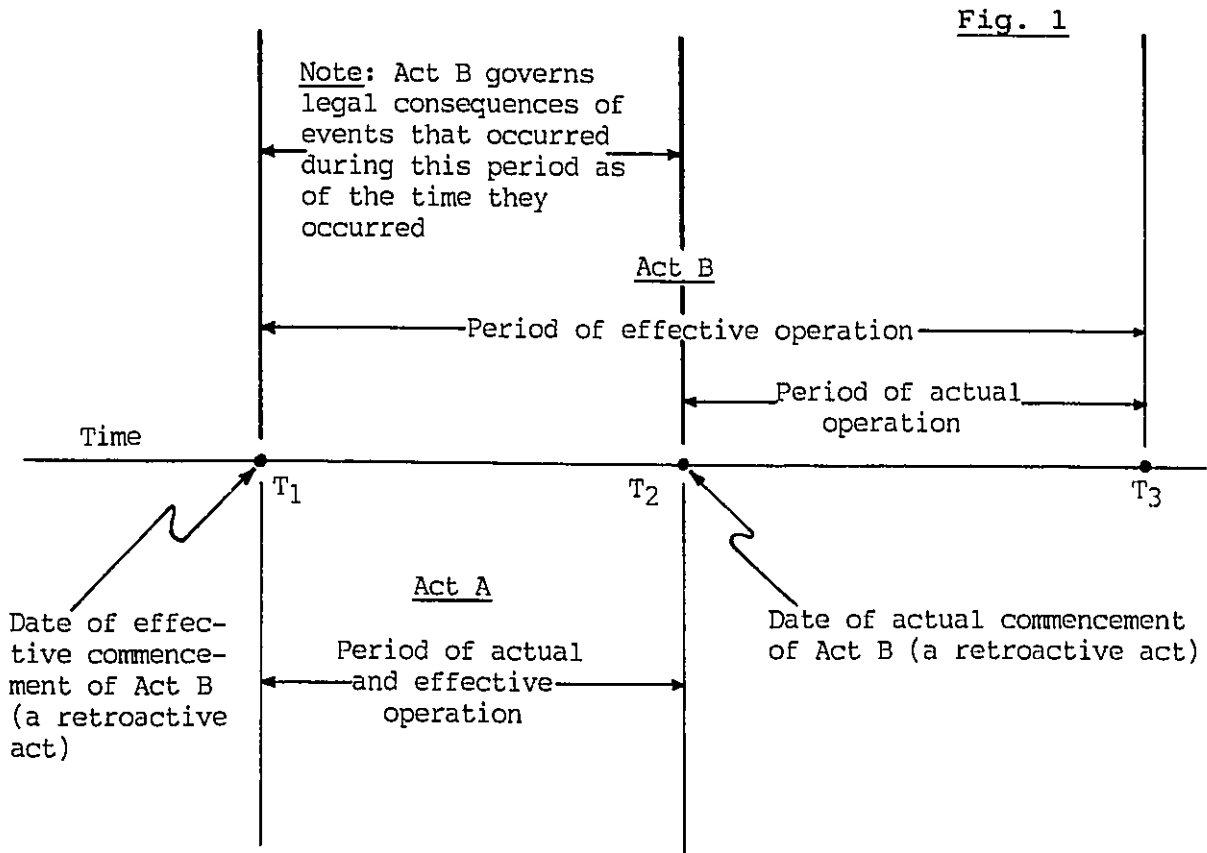
By its very nature, legislation that operates retroactively is highly prejudicial to rights and liabilities that have accrued under the previously existing law. Because such legislation is deemed to have operated prior to the date on which it actually commenced operation, conduct and events that took place prior to its actual commencement must be judged as though it were actually in force when they occurred,<sup>311</sup> despite the fact that it clearly was not.

Such a highly unnatural and fictitious operation is a patent violation of the rule of law principle.<sup>312</sup> The natural way for laws to operate -- the only way in which they can possibly serve as guides for human conduct -- is to govern the period during which they are actually in force and nothing more. Retroactive legislation does not do this. Instead, it operates so as to obliterate the effects of the

law that was actually in force during a previous period by substituting itself for that law. As a result, the legal consequences established by the replaced law are treated as though they never existed. The expectations based upon those consequences are not only dashed, their original validity is denied.<sup>313</sup> These are the fruits of deeming the law to have been something that it in fact was not.

Retroactive legislation demonstrates two things. First of all, it demonstrates how two different laws addressed to the same events can operate at different times to govern the legal effects of those events.<sup>314</sup> Both the law that was actually in force when the events occurred and the subsequently enacted retroactive legislation determine the legal effects of the events, but they do so at different times.<sup>315</sup> The distinctive feature of retroactive legislation, however, is that it does something more than this: it demonstrates how two different laws addressed to the same period of time can operate at different times to govern that period.<sup>316</sup> Both the law that was actually in force during that period and the subsequently enacted retroactive law operate to govern the period, but they do so at different times.<sup>317</sup>

The diagram on the following page depicts the effects of a retroactive statute. Notice how both Act A and Act B (a retroactive act) operate to govern the same period of time (i.e., the period between  $T_1$  and  $T_2$ ). But each act can only govern that period during the period in which it actually



operates. Act A does so during the period between  $T_1$  and  $T_2$ , and Act B, operating in an artificial manner, does so during the period between  $T_2$  and  $T_3$ . The retroactive operation of Act B enables it to govern the legal consequences of events that occurred during the period between  $T_1$  and  $T_2$  as though it were actually in force when those events occurred. This means that Act B governs those consequences as of the time the events occurred.

Of course, retroactive legislation can occur in a number of contexts. A retroactive statute may replace another statute (as depicted in the previous diagram) or it may replace

existing common law rules. Furthermore, when a retroactive statute replaces another statute, it may do so in several different ways.<sup>318</sup> I will discuss the application of the rule against retroactive operation in these various contexts in chapter V.<sup>319</sup>

Section 2. Retrospective Operation. Legislation operates retrospectively when it operates after the date of its actual coming into force so as to govern the legal consequences of events that occurred before that date.<sup>320</sup> In contrast to retroactive legislation, there is no fictitious pre-existence involved here -- there is nothing unusual about the time period during which retrospective legislation operates.<sup>321</sup> Although retrospective legislation governs the legal effects of events that took place prior to its actual commencement, it does so only as of the date of its actual commencement, not as of a prior date.<sup>322</sup> It is not deemed to have operated during a period prior to the period in which it operated as a matter of fact; thus, its effective commencement date and its actual commencement date are one and the same.

In R. v. Budic (No. 2),<sup>323</sup> the Alberta Court of Appeal dealt with a retrospective statute. The accused in that case had been charged with non-capital murder. After the alleged offence took place, but before he could be retried on the charge pursuant to court order, an amendment to the Criminal Code<sup>324</sup> came into force. By virtue of this amendment, the offences of first and second degree murder were created and

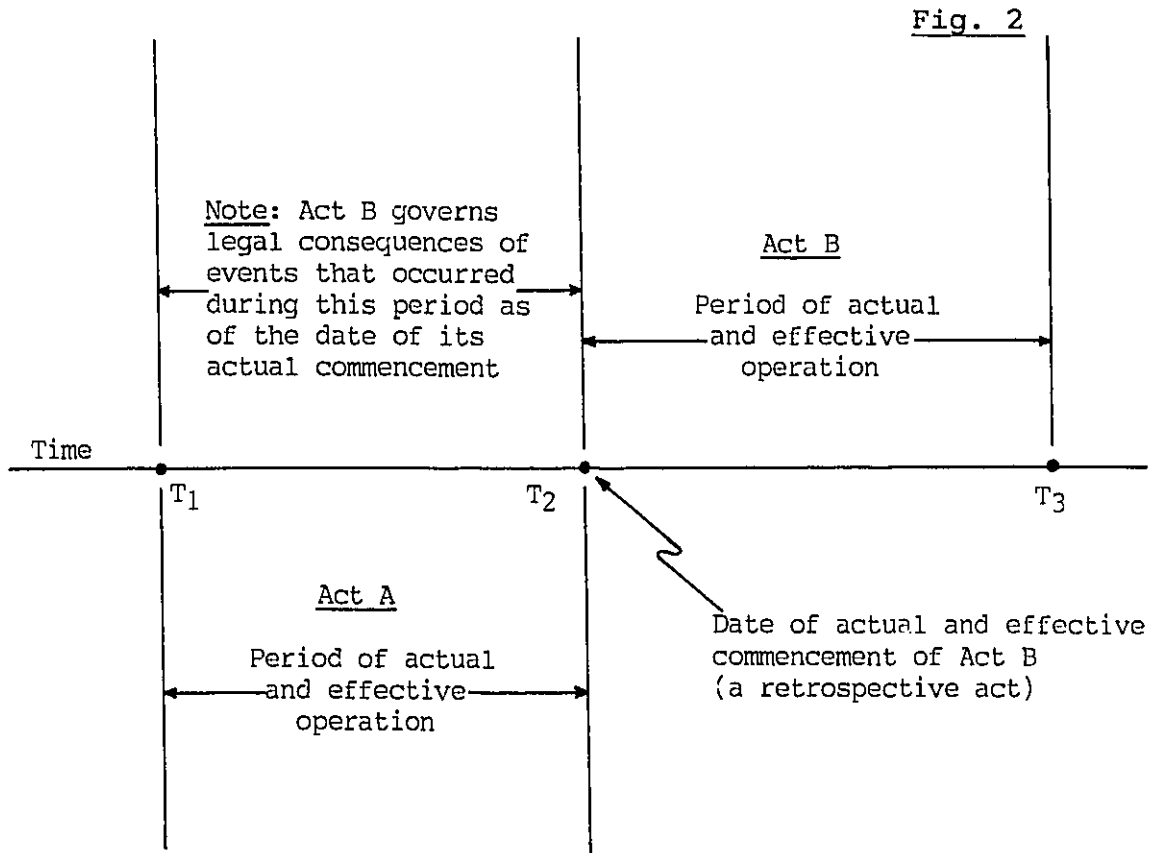
corresponding punishments established. The amendment was held to apply to the accused even though it provided for a first degree murder charge and for heavier punishment than he would have been liable to under the law as it existed prior to amendment. The amending legislation was retrospective because it governed the legal consequences (i.e., punishment) of an event (i.e., the commission of an offence) that had taken place prior to its actual coming into force and because it did so from the date of its actual coming into force onward.<sup>325</sup>

Compared to retroactive operation, retrospective operation might seem normal. But in fact it has serious effects. The natural way for laws to operate is to govern the legal effects of those events that occur during the period in which they are actually in force. This is the only way in which they can effectively guide conduct. But retrospective legislation, in governing the legal consequences of previous events, almost always changes those consequences.<sup>326</sup> By changing the legal consequences of events that occurred in the past, albeit only from the date of its actual commencement onward, retrospective legislation disrupts expectations that have developed in reliance on the previously existing law. Conduct undertaken while one set of rules was in effect is later judged by another set of rules. So even though the effect of the previously existing law is not obliterated,<sup>327</sup> the function of that law as a reliable guide for conduct is undermined. Clearly, legislation that operates in this

manner violates the principle of the rule of law,<sup>328</sup> albeit in a less blatant and artificial manner than retroactive legislation does.

Retrospective legislation provides an illustration of how two different laws addressed to the same events can operate at different times to govern the legal consequences of those events.<sup>329</sup> Both the law actually in force when the events occurred and the subsequently enacted retrospective law determine the legal effects of those events, but they do so at different times.<sup>330</sup>

The diagram on the following page depicts the effects of a retrospective statute. Both Act A and Act B (a retrospective act) operate to govern the legal effects of the same events (i.e., the events that occurred during the period between  $T_1$  and  $T_2$ ). Each act governs the events in question during the period in which it actually operates: Act A does so during the period between  $T_1$  and  $T_2$  and Act B does so during the period between  $T_2$  and  $T_3$ . But in contrast to the case with retroactive legislation, they do not govern the same period; rather, they govern the same events at different times. The retrospective operation of Act B enables it to govern the legal consequences of events that occurred during the period between  $T_1$  and  $T_2$  after it actually commences operation, but only from that date onward. In other words, Act B governs the consequences of those events as of the date of its actual commencement.



Retrospective legislation, like retroactive legislation, can occur in a number of contexts.<sup>331</sup> In chapter V,<sup>332</sup> I will discuss the application of the general rule of interpretation in these contexts.

Section 3. Prospective Operation. Now that I have defined and explained the crucial concepts of retroactive and retrospective operation, I will complete the picture with a discussion of the third major type of temporal operation -- prospective operation.

Prospective operation can perhaps best be explained by contrasting it to retrospective operation. Legislation operates prospectively when it operates after the date of its actual coming into force so as to govern the legal effects of events that occur after that date.<sup>333</sup> When it operates prospectively, legislation does not in any way govern or alter the legal effects of events that occurred prior to its actual commencement. It does not look backward, but only ahead to the future.<sup>334</sup>

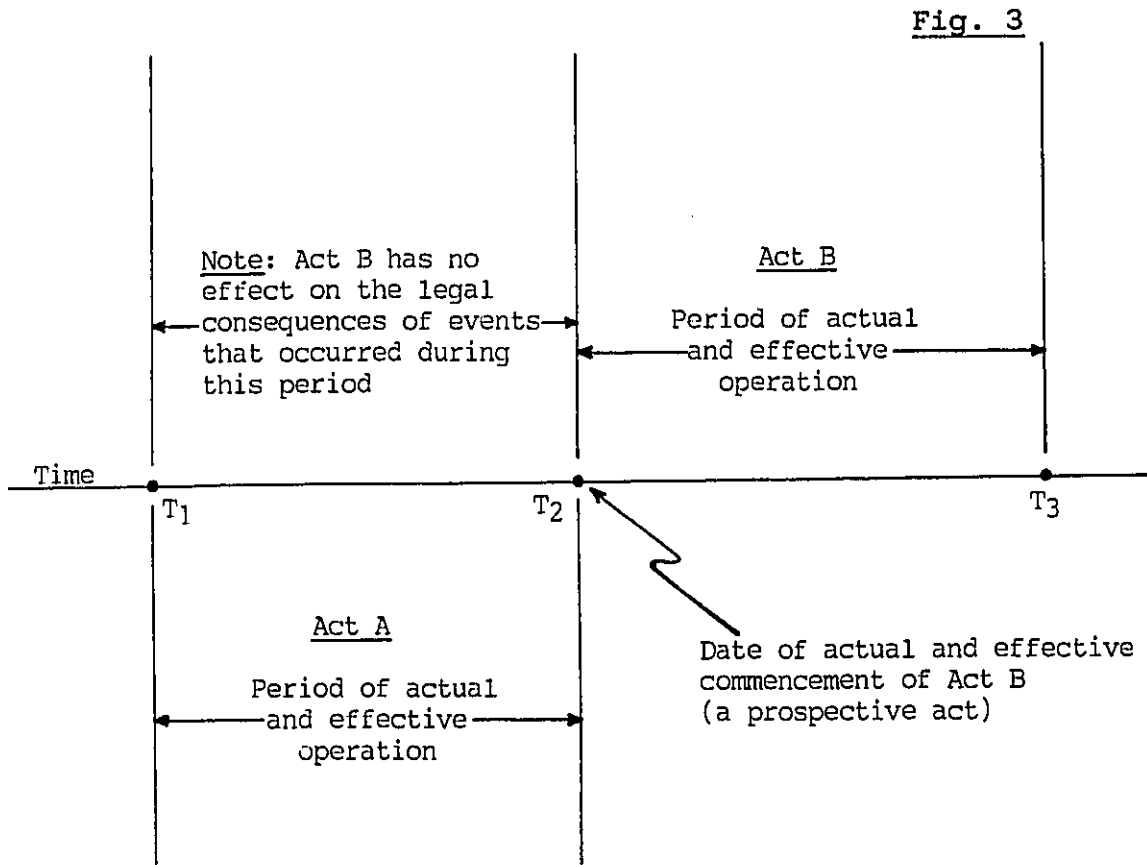
Of course, almost every statute operates prospectively to some extent. The great majority of retroactive and retrospective statutes operate prospectively as well.<sup>335</sup> But in order to be called prospective, a statute must operate in a prospective fashion only. If it does not operate purely prospectively, it will be labelled "retroactive" or "retrospective," as the case may be.

The British Columbia Court of Appeal dealt with a purely prospective statute in Meurer v. McKenzie.<sup>336</sup> That case involved a plaintiff who had been injured in an industrial accident on August 24, 1973. At the time of the accident, he was entitled under the common law to maintain an action against fellow employees for damages suffered as a result of their negligence in the workplace. On July 1, 1974, an amendment to the Workmen's Compensation Act, 1968<sup>337</sup> came into force. The amendment removed this right and substituted a right to claim compensation from the Workmen's Compensation Board. The court concluded that this amendment did not apply

to govern the consequences of industrial accidents that had occurred prior to its coming into force. Because it applied only in respect of accidents that occurred after its date of commencement, it was purely prospective in its operation.

Prospective operation is entirely compatible with the rule of law. Because prospective legislation operates only during the period in which it is actually in force (unlike retroactive legislation) and because it governs only the legal consequences of events that occur during the period in which it is actually in force (unlike retrospective legislation), it does not disrupt any expectations founded on the previous state of the law. Thus, the legal rules contained in prospective legislation function as effective guides for conduct. From a rule of law perspective, prospective operation is the natural mode of operation for legislation; legislation that operates prospectively operates both during and with respect to an appropriate period of time.

The effects of a prospective statute are depicted in the diagram on the following page. Act A and Act B (a prospective act) operate to govern only the legal effects of those events that occur during their respective periods of operation. Act A governs events that occur during the period between  $T_1$  and  $T_2$ , while Act B governs events that occur during the period between  $T_2$  and  $T_3$ . The purely prospective operation of Act B prevents it from having any effect on the legal consequences of events that occurred prior to its actual coming into force.



In chapter V,<sup>338</sup> I will discuss the application of the presumption favouring prospective operation in the various contexts in which issues of temporal operation may arise.<sup>339</sup>

Part B. The Meaning, Operation and Effect of the Rule Against Retroactive and Retrospective Legislation

Section 1. Statement of the Rule and an Explanation of Its Essential Meaning. The concepts of retroactivity and retrospectivity that I have just explained are the central components of the rule of interpretation against retroactive and retrospective operation. The definitions of these concepts are incorporated into the rule, thereby endowing it with its

essential meaning and delimiting the potential scope of its application.

It is apparent from the previous discussion of retroactive and retrospective operation that law is an extraordinarily flexible instrument. In assigning legal consequences to human activity, it is not bound by any inherent constraints preventing it from changing the legal effects of events after they have taken place. The legal consequences of events, unlike the natural consequences of events, can be altered after the fact at the will of the legislature. Retroactive legislation, in governing events that took place prior to its actual coming into force as though it were in force when they took place, demonstrates this in a particularly dramatic way. But retrospective legislation, in determining the consequences of pre-enactment events as of the date of its actual commencement, also provides convincing evidence of law's flexibility.

In some circumstances this flexibility can be beneficial, but viewed from another perspective, it is not one of law's appealing features. This is because it enables the making of laws that are clearly incompatible with the rule of law. However, the rule against retroactive and retrospective legislation is a bridle with which abuses of the flexibility that is inherent in law may be curbed and controlled. Every time there is a transition from one set of legal rules to another, this rule of interpretation comes into play to promote conformity with the rule of law principle. It does

this by weighing heavily in favour of an interpretation that will confine the operation of the legislation in question to its proper temporal bounds. The favoured (i.e., prospective) interpretation protects those expectations that can reasonably be said to have arisen out of reliance on the law.

The rule against retroactive and retrospective legislation is not, of course, a conclusive rule. As a rule of interpretation, it is nothing more than a statement of presumed legislative intent that is rebuttable by convincing evidence to the contrary. The rule has been expressed in many ways, but it can be boiled down to the following statement, which combines references to the distinct concepts of retroactivity and retrospectivity while remaining faithful to the traditional common law conception of the rule:

Legislation shall not be interpreted so as to operate either retroactively or retrospectively unless there is evidence, putting the matter beyond reasonable doubt, that it is intended to do so.<sup>340</sup>

This statement indicates that the rule consists of a presumption against retroactive and retrospective operation that requires any doubt or ambiguity in an enactment to be resolved in favour of a prospective interpretation.<sup>341</sup>

The corollaries of this basic rule can be stated as follows:

Legislation shall not be interpreted so as to have a greater retroactive or retrospective operation than it is, beyond a reasonable doubt, intended to have.<sup>342</sup>

Legislation shall not be interpreted so as to authorize the making of retroactive or retrospective subordinate legislation or orders unless there is evidence, putting the matter beyond reasonable doubt, that it is intended to do so.<sup>343</sup>

These corollary rules make it clear that every type and degree of retroactive and retrospective operation must be justified by clear and unambiguous evidence of legislative intention. Even legislation that is clearly intended to operate retroactively or retrospectively will be strictly construed with respect to the extent of its retroactive or retrospective operation.<sup>344</sup>

My submission is that these rules against retroactive and retrospective operation are designed to work against the mischief inherent in ex post facto lawmaking. When they are infused with the meaning of the concepts of retroactive and retrospective operation that I have suggested, they become effective barriers to the negative consequences that usually accompany ex post facto legislation. They then encompass both legislation that is deemed to operate prior to its actual commencement and legislation that operates after its actual commencement so as to govern the legal consequences of pre-commencement events. As a result, the need to resort to a separate rule against legislative interference with vested rights disappears. In short, all cases involving the same issue are subjected to the same analysis, an analysis that focusses on the protection of expectations that have arisen as a result of reliance on the law and, ultimately, on the preservation and promotion of the rule of law in our legal system.

Given that the rule of interpretation against retroactive and retrospective legislation is really a presumption of

legislative intent, the challenge in applying it is to determine the meaning of legislation in light of that presumption. Except in those areas where the traditional aversion to retroactive and retrospective laws has been transformed into constitutional restrictions on legislative power,<sup>345</sup> the policy of the rule must give way to the clearly expressed commands of the legislature. Therefore, it is of crucial importance to understand the nature and operation of the presumption contained in the rule.

Section 2. The Nature and Operation of the Presumption

Embedded in the Rule. As I indicated in my statement of the rule against retroactive and retrospective legislation, the presumption embedded in the rule is rebuttable only by proof beyond reasonable doubt of a contrary intention. Mere proof on the balance of probabilities is not sufficient. This conclusion follows from the fact that any doubt or ambiguity in an enactment must be resolved in favour of a purely prospective operation:

If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.<sup>346</sup>

Unless there is some declared intention of the legislature -- clear and unequivocal -- or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an act is prospective, and not retrospective.<sup>347</sup>

But beyond this, the presumption has a prima facie operation. It is a presumption of general application in the sense that it applies from the outset of the interpretive

process.<sup>348</sup> In Cross's words, the presumption applies "although there is no question of linguistic ambiguity in the statutory wording under construction."<sup>349</sup> The policy of the presumption is thus considered to be an understood element of legislation: it is "an implicit component of the legislative message."<sup>350</sup> This presumption against retroactive and retrospective operation is simply one form of judicial recognition of the constitutional context in which legislation is enacted. Therefore, while the courts acknowledge the sovereignty of the legislature as lawmaker,<sup>351</sup> they will interpret its legislation in accordance with the fundamental constitutional principle of the rule of law, absent an unmistakable expression of intention to the contrary. The strength of the presumption against retroactive and retrospective operation corresponds to the importance of the principle underlying the rule of interpretation in which it is contained.

The constitutional principle that the rule promotes is not easily displaced. As a rule, general language will not, without more, be sufficient to rebut the presumption against retrospectivity.<sup>352</sup> By general language, I mean words that, if read literally, would encompass both retrospective and prospective operation. For example, in Bingeman v. McLaughlin (Bingeman),<sup>353</sup> the Supreme Court of Canada refused to apply legislation abolishing the presumption of advancement<sup>354</sup> to an interspousal transfer of property that had taken place prior to its coming into force, even though a literal reading of the legislation would have permitted such

an application. In delivering the judgement of the court, Spence J. reiterated the general rule that legislation should be ignored when considering circumstances that arose prior to its effective date, unless it contains express terms or gives rise to a necessary implication to the contrary.

To further illustrate the point, in Steeves v. Dufferin (Rural Municipality),<sup>355</sup> the Manitoba Court of Appeal subjected legislation that shortened a limitation period to a "strict and rigorous construction."<sup>356</sup> In that case, the court read an amendment to The Municipal Act<sup>357</sup> in a restricted fashion so that it did not apply to those existing causes of action that would have been immediately barred if it were so applied. This interpretation was adopted in spite of the fact that the amending provision was worded broadly enough to apply to all causes of action, regardless of when they had arisen.<sup>358</sup>

As strong as the presumption is, however, express language is not a prerequisite for rebutting it.<sup>359</sup> I have already indicated that the presumption may be rebutted by implications drawn from the terms, subject matter or purpose of the enactment being interpreted or from the circumstances in which it was enacted.<sup>360</sup>

It has been suggested in some of the cases and academic writings that the presumption against retroactive and retrospective operation is of a different nature than the presumption against interference with vested or acquired rights. According to this view, the presumption against interference

with vested rights arises only where there is some ambiguity in the legislation being considered. It does not apply from the beginning of the interpretation process the way that the presumption against retroactivity and retrospectivity does. Therefore, it cannot be taken into account in determining whether an ambiguity exists in the first place.<sup>361</sup> Such thinking is founded on less comprehensive views of the concept of retrospectivity than the one that I have been arguing for: it is based on one of the two narrower definitions of retrospectivity that I explained in chapter III.<sup>362</sup>

There are several disadvantages to this approach. For one thing, it complicates retrospectivity analysis by insisting upon two different presumptions. More significantly, though, it makes a distinction between cases involving legislative interference with the legal consequences of events that is difficult to justify in principle.<sup>363</sup> If it is correct to say that "every statute is presumed to apply only to future acts,"<sup>364</sup> it is difficult to understand why certain rights and liabilities that have been acquired under previously existing law should receive a significantly lesser degree of protection than others. This is especially true considering that the varying nature of the rights at stake in particular cases can quite adequately be taken into account when assessing legislative intention to rebut the presumption, a point that I will develop in chapter V.<sup>365</sup>

My position is essentially this. Because all cases that fall within the definitions of retroactivity and

retrospectivity involve the same principle of after-the-fact lawmaking, they should be subjected to the same basic analysis. Whenever acquired rights are threatened by an enactment, a common, prima facie, presumption should apply. The nature of the rights affected should be nothing more than a circumstantial factor bearing upon the clarity of expression or the irresistibility of the implication required to rebut the presumption and interfere with those rights.<sup>366</sup>

In all cases except those in which there is a constitutional limitation on legislative power to be considered, the application of the presumption involves a three-step process of interpretation.<sup>367</sup> The first thing that must be determined is whether retroactive or retrospective operation is an issue in the case. This requires the court to decide whether a particular application of legislation would involve retroactive or retrospective operation. If it would, then the court must determine whether the legislation in question is of a special type that qualifies as an exception to the general rule. If it is, then the presumption against retroactivity and retrospectivity is not applicable and the legislation must be interpreted without recourse to that presumption. If it is not, then the intent of the legislation must be ascertained in light of the presumption. In chapter V,<sup>368</sup> I present a detailed explanation of this process as part of my discussion on applying the rule against retroactivity and retrospectivity. In the meantime, I will examine those types of enactment that qualify as exceptions

to the general rule, as well as certain other special types of legislation.

Section 3. Exceptions to the Rule and Other Special Types of

Legislation. In chapter III, I observed that the rule against retrospective legislation is not an absolute one.<sup>369</sup> The courts and the legislatures have recognized exceptions to it. As I have indicated, even the constitution provides for an exception.<sup>370</sup> These exceptions are cases where the rule of interpretation is not applicable despite the fact that the legislation under consideration would, if applied to the situation at hand, fall within the meaning and description of the rule.<sup>371</sup>

Some of these exceptions are founded on sound policy. Certain types of legislation are justifiably excepted from the rule because they do not offend the rule of law principle when applied retroactively or retrospectively. These exceptions will be examined in detail in this section. In addition, I will examine certain other types of legislation that have occasionally been described as exceptions to the rule, with a view to clarifying their true status under a rule of law analysis. Before doing this, however, it is interesting to note some special exceptions to the rule, both historical and existing, that cannot be justified by reference to the rule of law principle.

Prior to 1793, the common law doctrine of relation applied to give statutes a retroactive effect. According to

this doctrine, statutes were deemed to have come into force on the first day of the legislative session in which they were enacted, unless they provided otherwise.<sup>372</sup> Accordingly, statutes were treated as though they had come into force prior to the date on which they actually came into force -- their effective commencement date preceded their actual commencement date. As a result, the legal consequences of events that occurred in the interim between the opening of a legislative session and the actual commencement date of a statute enacted in that session were determined as though the statute were in force when those events took place. Almost invariably, this meant that the consequences of such events were changed after the events had taken place. Furthermore, they were changed as of the date that the events took place.

Needless to say, the doctrine of relation was blatantly inconsistent with the rule of law. Because of it, statutes were considered to have operated during periods when they could not possibly have served as guides for conduct. Fortunately, this common law rule of interpretation was abolished by statute many years ago,<sup>373</sup> but not before it had worked some harsh results.<sup>374</sup>

Another common law exception to the rule against retroactive and retrospective legislation was the rule of interpretation that called for the ab initio revival of repealed statutes in certain circumstances. Prior to 1850, where an act was repealed and the repealing act itself was later

repealed by a third act, the third act was said to revive the first act ab initio (instead of from the date of commencement of the third act), unless the third act provided otherwise.<sup>375</sup> The prior existence of the second act was thus denied and the first act was deemed to have operated as though it had never been repealed. The net effect of this unusual rule was that the third act was given a retroactive effect: it was deemed to have repealed the second act as of a date prior to its (i.e., the third act's) actual coming into force. Indeed, it was deemed to have come into effect so as to repeal the first repealing act immediately after the latter came into force.

Although the courts mitigated the obvious harshness of this rule by interpreting it in a way that protected some of the rights that arose during the period of operation of repealed repealing enactments,<sup>376</sup> it was patently inconsistent with the rule of law because it presumed the law to have been something other than it actually was. This anomalous rule was abolished by statute in 1889.<sup>377</sup>

Both of these old exceptions to the rule against retroactive and retrospective operation were unjustified in principle. By promoting a socially ineffective and disruptive role for law, they flew in the face of the constitutional principle upon which the rule is based. As such, they can best be described as historical anomalies.

As for the present-day exceptions that cannot be justified on a strict rule of law analysis, they are inoffensive

by comparison. First of all, there is the constitutional rule, contained in para. 11(i) of the Charter, requiring that legislation which reduces the punishment for an offence be interpreted retrospectively.<sup>378</sup> This constitutional rule is supported by a statutory rule of interpretation, contained in para. 44(e) of the federal Interpretation Act,<sup>379</sup> which provides that enactments which reduce the punishment for an offence are presumed to operate retrospectively. Both of these rules favour legislative changes in the consequences of punishable acts after they have been committed, and so can hardly be justified by recourse to the rule of law principle.<sup>380</sup> Rather, they appear to be based on another value -- the value of human liberty -- that is considered to outweigh the value of the rule of law in this context.<sup>381</sup>

Secondly, there is the statutory rule of interpretation contained in para. 6(2)(a) of the federal Interpretation Act, which provides that an enactment containing no commencement provision is deemed to have come into force upon the commencement of the day on which it was enacted.<sup>382</sup> It is self-evident that an act cannot possibly commence actual operation until it has been enacted. Therefore, unless legislation of this type is enacted at the stroke of midnight, it is given a retroactive effect (albeit a miniscule one) by being construed as though it had come into force prior to the moment of its actual coming into force. It is apparent, however, that this statutory exception to the rule has a negligible impact.

So much for these special exceptions to the general rule. As I indicated at the outset, my main purpose in this section is twofold. My first objective is to examine those types of legislation that can be justified as exceptions to the rule on the basis of the rule of law principle.<sup>383</sup> The second is to clarify the status of certain other types of legislation that have sometimes been classified as exceptions to the rule. I will now move on to discuss these different types of legislation.

Subsection 1. Procedural enactments. The courts have stated on numerous occasions that procedural enactments are exceptions to the general rule against retrospective legislation.<sup>384</sup> In fact, procedural acts are presumed to operate retrospectively. Lord Blackburn, speaking for the House of Lords, explained the common law position in these terms:

[I]t is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.<sup>385</sup>

This exception, as it relates to the repeal of one enactment and the substitution of another, is codified in paras.

44(c) and (d) of the federal Interpretation Act:

44. 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 in 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 (i) in the recovery or enforcement of fines, penalties and forfeitures imposed under the former enactment, (ii) in the enforcement of rights, existing or accruing under the former enactment, and (iii) in a proceeding in relation to matters that have happened before the repeal;

. . . . .

Both paragraphs provide for the retrospective operation of procedural enactments: para. 44(c) deals with the continuation of pending proceedings under substituted procedural rules, while para. 44(d) deals with the conduct of other proceedings undertaken in relation to events that occurred prior to the substitution of new procedural rules. As far as possible, both pending and future proceedings are to be conducted in accordance with substituted procedural rules.<sup>386</sup> The effect is that there is a reverse presumption in favour of retrospectivity in such cases.<sup>387</sup>

What is the justification for classifying procedural enactments as exceptions to the general rule of interpretation? Before answering this question, it is necessary to understand what a procedural act is and what effects a procedural act usually has. By definition, a procedural enactment is one that does nothing more than establish the rules by which certain substantive rights may be enforced. It is not intended to create or alter substantive rights and

liabilities; rather, "it defines the procedure and the proof by which the substantive law is applied in practice."<sup>388</sup> As LaForest J. puts it:

Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use.<sup>389</sup>

In a sense, however, procedural legislation governs (and alters) the legal consequences of prior events when it applies in respect of the enforcement of substantive rights that arose prior to the date of its actual coming into force. This is true because one component of the legal rights connected with an event is the procedural rules governing the enforcement of the substantive rights which arise from that event. To illustrate, a change in the procedure that must be followed in order to secure the trial by jury of a libel suit would, when applied to a pending action, alter the procedural consequences of the conduct alleged to have constituted libel. It would, however, have no effect on the substantive consequences of that conduct. The substantive right of the plaintiff to a remedy for being libelled and the corresponding liability of the defendant would remain unimpaired.<sup>390</sup> Thus, all substantive rights and liabilities can be understood as being subject to procedural rules that determine how they may be enforced. These procedural consequences arise upon the happening of a particular event or the occurrence of certain conduct, such as conduct that is alleged to constitute the commission of an offence, a tort or

a breach of contract. In most cases, they can be said to arise when a cause of action is born.

Alterations in the procedural consequences of events do not usually produce the same negative results that are produced when substantive consequences are altered. They do not, as a rule, offend the rule of law principle. This is because, as a practical matter, people do not usually rely upon procedural rules when planning or engaging in conduct. Generally speaking, individuals are concerned with substantive rights, rather than with the procedure that must be followed in order to enforce them. And this is as it should be. Reliance upon rules that simply regulate the mode of enforcement of rights should not be encouraged where it would tend to diminish the effectiveness and authority of substantive legal rules. An individual should not, for instance, be encouraged to engage in unlawful conduct by virtue of his knowledge that the existing rules of evidence will make it difficult for him to be held legally accountable for that conduct.<sup>391</sup>

My conclusion is that legislative changes in the procedural consequences of events pose no threat to legitimate expectations. Instead, they provide a new set of rules that are capable of serving as effective guides for those seeking to enforce their rights through the judicial system. Accordingly, the authorities are completely consistent with the principle underlying the rule of interpretation against retrospective legislation in stating that no person has a

vested right to any particular course of procedure.<sup>392</sup>

Nobody has procedural rights to the extent that previously existing procedural rules should be applied to govern the enforcement of his existing substantive rights.<sup>393</sup>

In order for an enactment to qualify as an exception to the general rule of interpretation against retrospective operation, however, its effects must be of a purely procedural nature (i.e., it must deal with matters of procedure without in any way impinging upon substantive rights).<sup>394</sup> It must not affect an individual's right or liability to a particular remedy. Often, legislation that is procedural in form would, if applied to fact-situations that have previously arisen, alter substantive rights.<sup>395</sup> This is true of legislation dealing with things like limitation periods,<sup>396</sup> rules of evidence<sup>397</sup> and rights of appeal.<sup>398</sup>

To illustrate, a statutory provision setting out a new and longer limitation period for medical malpractice suits would be procedural in form -- it would simply establish a revised time limit within which claims of this type could be enforced in the courts. But to apply it in respect of a cause of action that had already become statute-barred under the previously existing limitation rules would clearly affect substantive rights. A physician's reliance on the former law as establishing his immunity from a malpractice claim once the shorter limitation period prescribed by that law had expired would then be undermined.<sup>399</sup> In cases like this, the general rule of interpretation should apply because the

legislation goes beyond simply governing the means of enforcing substantive rights and actually affects substantive rights per se.<sup>400</sup>

I should emphasize at this point that the remedies by which rights are enforced cannot be classified as mere matters of procedure. Sometimes the argument is made that legislation which alters the remedies available for the enforcement of rights is merely procedural, based on the reasoning that remedies only have to do with the means by which a right may be enforced.<sup>401</sup> Such an argument is both unconvincing and unacceptable. It is premised upon what is, in this context, an artificial and impractical distinction between a legal right and a legal remedy.<sup>402</sup> In reality, an integral component of a legal right is the remedy that is available to protect and enforce it. The remedy available to enforce a right is an element of the definition of that right.

Accordingly, when I say that I have a right to enjoy my property or a right to be free of the tortious conduct of others, it is implied that I will have recourse to some sort of judicial or administrative remedy should someone deny or interfere with either of these rights of conduct. It is this recourse that gives the rights force and meaning. Moreover, once one of these rights is interfered with, a right to a remedy against the perpetrator crystallizes. At that point, my right has been transformed from a general right of conduct into a specific remedial right.<sup>403</sup> My right is then nothing

more nor less than a right to a remedy. Any ex post facto legislative alteration of this remedial right would clearly have substantive effects. It therefore could not be classified as purely procedural so as to fall within the exception to the general rule against retrospective legislation.<sup>404</sup>

There is also another important point to be made. What I have said in this subsection about procedural enactments is in no way intended to suggest that an individual is not entitled to rely on existing rules of procedure when enforcing his rights or defending a claim in the courts. Although procedural rules generally are not and should not be relied upon when considering the legal consequences of engaging in a given type of substantive conduct, actually following existing procedural rules invariably gives rise to legitimate expectations. Relying upon the continued existence of current procedural rules when undertaking substantive conduct and relying upon the procedural rules that are in effect when procedural conduct is undertaken are two very different things. Procedural steps, once taken, produce substantive legal consequences that will inevitably be relied upon, and individuals are as justified in doing so as they are in relying upon the legal consequences that attach to substantive conduct at the time it is undertaken.

To illustrate, a plaintiff who files a writ of action in accordance with the existing rules of civil procedure justifiably develops expectations based on those rules. He relies upon those procedural rules in conducting himself. He

expects that his conduct, being in accordance with existing rules, will be recognized as having brought about the effects prescribed by those rules. This expectation would be frustrated if a subsequently enacted statute were interpreted so as to render such a writ ineffective to accomplish its purpose.<sup>405</sup> If procedural statutes were applied in such a manner, they would alter the substantive effects of conduct previously engaged in. As a result, legitimate expectations developed in reliance on previously existing procedural law would be foiled and the rule of law principle would be violated.

In summary, purely procedural enactments are legitimate exceptions to the rule against retrospective legislation because they do not, even when applied retrospectively, disrupt expectations that have developed out of reliance on the law. Those expectations should be and generally are based solely on the substantive consequences of events. Because purely procedural retrospective enactments have no effect on such consequences, they do not subvert the guiding force of the law that existed prior to their coming into force.

It is interesting to note that the rationale for the exclusion of procedural enactments from the general rule of interpretation is sometimes said to be that retrospective procedural laws cause no prejudice or injustice.<sup>406</sup> This is indeed true. But the reason it is true is that purely procedural retrospective legislation, in leaving legitimate

expectations undisturbed, is entirely compatible with the principle of the rule of law.

Subsection 2. Consolidating enactments and other enactments that simply re-enact previously existing law. In his 1983 textbook on the construction of statutes, Professor Driedger states:

There is one exception to the presumption against retrospective operation. Where an enactment is repealed and replaced, the new enactment is retrospective<sup>407</sup> so far as it is a repetition of the former enactment.

In fact, this type of enactment is more than an exception to the rule. It is subject to a reverse presumption in favour of retrospective operation by virtue of para. 44(f) of the federal Interpretation Act:<sup>408</sup>

44. 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;

. . . . .

As a result of this rule,<sup>409</sup> new enactments of this type are accorded special treatment. They are viewed as doing nothing more than continuing the operation of the law contained in the enactments that they replace. Because they merely restate the law as contained in those repealed

enactments, they are treated for purposes of interpretation as consolidations of the previously existing law.<sup>410</sup>

While the repeal and re-enactment of legislation may take place in the context of a consolidation of previously existing statute law, it may also take place where there is really no process of consolidation involved. I think it might be worthwhile to take a moment to distinguish these two contexts.

Consolidating enactments bring together from various sources some or all of the previously existing statute law and present it in a unified and often reclassified format. Although consolidating acts change the form in which the law is presented, they are not intended to bring about any change in its meaning:

Consolidating Acts are Acts which comprehend in one statute the provisions on a certain subject contained in a number of statutes, those former statutes being

repealed. The object is to improve the form of the law without altering its substance.<sup>411</sup>

A consolidation may involve as broad an undertaking as bringing together in a comprehensive and integrated format all or almost all of the existing statutes in a given jurisdiction.<sup>412</sup> On a smaller scale, it may involve collecting and re-enacting as a unified whole all of the statute law governing a particular subject, bringing together in one enactment two or more related enactments, or re-enacting in a single statute a previously existing statute with all of its amendments.<sup>413</sup> In every case, however, the consolidating enactment or enactments repeal the various enactments that

they are consolidating and substitute themselves in their place:

Consolidation can be looked on as a form of processing. It takes the texts of various Acts of Parliament and, without altering the essential wording, combines them into a coherent whole. . . . The consolidation Act is itself a legislative text. It has gone through the procedures which bestow validation as law. <sup>414</sup> It replaces, in the corpus juris, the texts it embodies.

Existing law may also be repealed and reproduced in a new format without any process of consolidation being involved. This occurs whenever legislation simply re-enacts or restates the legal rules that were contained in a previously existing enactment. As in the case of a consolidation, the new legislation repeals certain provisions and then re-enacts them, but here there is no collection from various sources involved.<sup>415</sup> To the extent that the new legislation makes no change in the meaning of the law, it may be termed simply a re-enactment or a restatement of previously existing law.<sup>416</sup>

Consolidating enactments and other enactments that simply re-enact previously existing law are recognized by the courts for what they are. Instead of being interpreted as new law, they are viewed as being mere reformulations of previously existing law.<sup>417</sup> The repeal of the replaced statutes is treated as a formality only -- it does not have the consequences of an ordinary repeal. The new legislation is considered to be a new form or a new expression of the law contained in the repealed legislation, and that law is construed as having been in continuous force (i.e., its operation is not considered to have been interrupted by the

repeal and substitution). The legal rules contained in the repealed legislation are thus preserved in unbroken continuity from the date they first came into effect,<sup>418</sup> and for purposes of interpretation the new legislation is not considered to be new law.<sup>419</sup>

As a result of this treatment, the replacement legislation is construed as operating retrospectively.<sup>420</sup> It is allowed to apply so as to govern the legal consequences of events and transactions that took place before it came into force. Of course, those prior events and transactions took place under the same legal rules as are contained in the replacement legislation. Therefore, the retrospectively operating replacement legislation does nothing more than preserve the legal consequences that were originally assigned to prior events and transactions by the repealed legislation.<sup>421</sup> °

Consolidating enactments and other enactments that do nothing more than re-enact previously existing statute law are justifiable exceptions to the general rule of interpretation against retrospective legislation. Because they simply restate the previously existing law without in any way changing its meaning, they cannot possibly disrupt expectations founded on that law. In giving new expression to the previously existing law, they reproduce the very legal rules upon which those expectations were based. The guiding force of the previous law is thus perfectly preserved. Accordingly, it is entirely consistent with the constitutional

principle of the rule of law to presume that enactments of this type apply to govern the legal consequences of events that occurred prior to their coming into force.<sup>422</sup>

Of course, it is a matter of interpretation whether an enactment does nothing more than consolidate or re-enact previously existing law. Sometimes a change in language results in a change in meaning,<sup>423</sup> while at other times it does not.<sup>424</sup> If the new legislation changes the meaning of the law, it does not fall within the exception to the general rule. In that case, it must be presumed to apply only in respect of events that occur after the date of its coming into force.<sup>425</sup> In chapter V,<sup>426</sup> I will outline some of the practical difficulties faced by the courts in determining whether legislation falls within this exception to the general rule of interpretation.

Subsection 3. Codifying enactments. The term "codifying enactment" has been used in two different senses, which should be explained at the outset to avoid confusion. In one sense, "a codifying statute is one which purports to state exhaustively the whole of the law on a particular subject."<sup>427</sup> It provides a comprehensive collection of the rules that govern a particular area of the law.<sup>428</sup> While such enactments draw primarily upon previously existing common law and statute law rules,<sup>429</sup> they often introduce changes to the law.<sup>430</sup>

In contrast, sometimes the terms "codifying enactment" and "codification" are used in a more restricted sense to refer to legislation that does nothing more than "codify the existing law."<sup>431</sup> This is legislation that presents a comprehensive code of the previously existing common law and statute law rules on a particular subject, without in any way changing that law.<sup>432</sup> Legislation of this type has been referred to as a "straight codification"<sup>433</sup> in recognition of the fact that no change is made to the substance of the law as a result of the codification. It is in this narrower sense of the term that Professor Côté has observed that "statutes may contain some provisions that codify the law and others that change it."<sup>434</sup> Of course, whether an enactment changes the previous law or simply codifies it is a matter of interpretation for the courts.

One cannot make the blanket statement that codifications (in the broader sense of that term) are legitimate exceptions to the general rule against retrospective legislation. This is because they may modify the law that has previously been relied upon. Consequently, codifications in the broader sense are only exceptions to the general rule against retrospective legislation insofar as they do not change the meaning of the previously existing law. Codifications that introduce changes to the law cannot be allowed to operate so as to alter the legal consequences of previous events unless they display an intention to do so in terms clear enough to rebut the presumption against retrospectivity.

The story is different for codifying enactments that meet the more restricted definition discussed above. Straight codifications can be justified as legitimate exceptions to the general rule of interpretation on the same basis as consolidations and other re-enactments of existing statute law are.<sup>435</sup> To the extent that an enactment does nothing more than restate existing legal rules, it cannot possibly disrupt expectations that were developed in reliance upon those rules. Although the point has not been expressly decided by a Canadian court, it has been suggested on a couple of occasions that codifying enactments of this nature should be interpreted just like other enactments that bring about no change in the meaning of the law.<sup>436</sup>

Subsection 4. Declaratory enactments. Declaratory legislation is legislation enacted to explain, clarify or interpret either the common law or existing legislation, usually for the purpose of removing doubts about the meaning of the explained law.<sup>437</sup> It is a binding declaration of the meaning of the law governing a particular subject. In effect, declaratory legislation is a vehicle by which the legislature may interpret either its own legislation or the common law.<sup>438</sup>

Declaratory legislation represents a departure from normal constitutional practice. Traditionally, the legislature has confined itself to enacting legislation, leaving the task of interpretation to the courts.<sup>439</sup> The

effects of declaratory legislation have been compared to those of a judicial decision. As Professor Côté has observed, "by enacting declaratory legislation, Parliament fills the shoes of the judge."<sup>440</sup> Its interpretation of existing law (whether statute or common law) is binding on the courts. Declaratory legislation may be passed to clarify the meaning of an existing common law or statutory rule,<sup>441</sup> to rectify an obvious omission in an existing statute,<sup>442</sup> or to overcome the effects of a judicial interpretation that the legislature considers confusing or erroneous.<sup>443</sup>

There is no special format for declaratory legislation. A declaratory enactment may contain a preamble explaining the circumstances that necessitate legislative intervention in the interpretation process. It may also contain the word "declared." Neither, however, is a prerequisite for or a sure-fire indicator of a declaratory enactment.<sup>444</sup>

Declaratory enactments are legislative pronouncements on how an existing law is to be construed. A declaratory act may do nothing more than state that a particular legal rule is to be interpreted in a certain manner.<sup>445</sup> Perhaps the most reliable indicator of a declaratory enactment, however, is a provision that states what the law means and has always meant.<sup>446</sup> A provision of this type was considered by the Supreme Court of Canada in Stackhouse v. R.<sup>447</sup> In that case, the court had to interpret an amendment which purported to declare the meaning of the term "senior judge" as it appeared in the Courts of Justice Act.<sup>448</sup> Prior to the enactment of

the amendment, there had been some uncertainty about who qualified as a senior judge. The amendment purported to remove all doubt as follows:

1. Section 92 of the Courts of Justice Act (Revised Statutes, 1925, chapter 145) is amended by adding thereto the following paragraph:

"The senior judge, within the meaning of this section, means and has always meant the Circuit Court judge who, by his commission, has received the title of senior judge of such court."

As a general rule, specific and unmistakable language must be used in order to make a legislative interpretation binding on the courts.<sup>449</sup> It is not sufficient that the legislature, in enacting legislation, has proceeded upon some assumption about the meaning of the existing law. The legislature's revealed opinion, although entitled to some weight as persuasive authority, is not binding on the courts unless it is expressed in declaratory form:

[T]he province of the Legislature is not to construe, but to enact; and their opinion, not expressed in the form of law as a declaratory provision would be, is not binding on Courts, whose duty is to expound the statutes they [the Legislature] have enacted.<sup>450</sup>

Professor Côté has observed that legislation may be implicitly declaratory -- that is, the courts may deduce from its contents and from the circumstances surrounding its enactment that it was intended to declare the meaning of existing law.<sup>451</sup> This is undoubtedly true. But it is important to realize that he is speaking about statutes that are declaratory in a special sense of the term. He is talking about statutes that, according to the court's interpretation, clarify or explain existing law without changing

it.<sup>452</sup> This type of declaratory enactment has the same effect as a simple re-enactment of existing law -- it is a re-enactment in clarified form -- and should be understood as simply one type of declaratory legislation.<sup>453</sup> Declaratory legislation, it must be remembered, encompasses all legislative interpretations of existing law, many of which have the effect of changing the meaning of that law.

While it is true that declaratory enactments often serve to remove ambiguities in the existing law, thereby clarifying its meaning and effect, it is also true that on many occasions they bring about changes in the law. As I have indicated, the task of interpreting the law rests with the courts. Only the courts can give an independent and impartial interpretation of existing law. Consequently, when the legislature steps in and offers its own interpretation, the effect may well be to alter the true meaning of that law. By enacting declaratory legislation, the legislature may, in the guise of interpretive language, actually change the meaning of existing law.

Such changes occur in their most blatant form when the legislature takes it upon itself to "correct" a judicial interpretation of the law. For example, in Holmes Foundry Ltd. v. Point Edward (Village),<sup>454</sup> the Ontario Legislature had passed an amendment to s. 64 of the Ontario Municipal Board Act,<sup>455</sup> stating what "the approval of the Board mentioned in subsection (1) means and, notwithstanding the decision of any court, shall be deemed always to have meant."

The effect of this declaratory amendment was to change the meaning of the legislation as previously determined by the courts. As a result, a previously invalid municipal taxing bylaw was rendered valid ab initio.

It is not unusual for declaratory enactments to be construed as operating retroactively.<sup>456</sup> They are often treated as declarations of what the law means and has always meant. In such cases, they are deemed to have commenced effective operation prior to the date of their actual coming into force. In Professor Driedger's words:

Acts in the nature of declaratory Acts are declarations by Parliament of what the law must be deemed always to have been. They are therefore retroactive and accordingly apply to past transactions, pending litigation and in derogation of acquired rights.<sup>457</sup>

More specifically, they are treated as being effective as of the date that the clarified or explained law came into existence.<sup>458</sup> As Bennion puts it:

All this means is that the law as so declared is taken always to have been law (in the case of a common law rule) or to have been law since the commencement of the relevant enactment (in the case of statutory provisions).<sup>459</sup>

Several prominent authorities have suggested that declaratory enactments are free from the general presumption against retroactive and retrospective operation.<sup>460</sup> I submit, however, that such a position not well-founded. As I have noted, in many cases the effect of a declaratory enactment is to change the meaning of existing law.<sup>461</sup> Frequently, "declaratory legislation is retroactive in the same way that a change in the case law has a retroactive

effect."<sup>462</sup> The result in such cases is that the expectations of individuals who have relied upon the law as it previously stood are put in jeopardy. Such effects are incompatible with the rule of law principle.

It follows that the retroactive or retrospective operation of declaratory enactments should not be viewed sympathetically by courts anxious to uphold the rule of law. Individuals should be entitled to rely on the law as interpreted by an independent and impartial judiciary. In making decisions and undertaking conduct, people can only rely on the meaning of the words that the legislature has actually used in its legislation. It is on this basis that the judiciary undertakes its constitutional role of interpretation. As Lord Reid put it:

We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.<sup>463</sup>

The fact that the legislature failed to say what it meant to say or should have said is no reason to condone the ready sacrifice of expectations that were formed in reliance on what it actually did say. What is more, after-the-fact policy decisions can all too readily be camouflaged by "explanatory" legislation.<sup>464</sup> My argument can be summed up as follows:

[I]n a society living under the rule of law citizens are entitled to regulate their conduct according to what a statute has said, rather than by what it was meant to say or by what it would otherwise have said, if a newly considered situation had been envisaged.<sup>465</sup>

There is another important reason why retroactive and retrospective declaratory enactments offend the rule of law principle. In purporting to interpret its own legislation, the legislature usurps the traditional constitutional role of the judiciary. While our constitution does not prohibit this, it is not in keeping with fundamental constitutional principles. The doctrine of separation of powers, which is an important aspect of the rule of law, requires that the law be interpreted by an independent and impartial judiciary.<sup>466</sup>

Declaratory legislation that operates retroactively or retrospectively amounts to a judicial-style interpretation of the law. Its effects are comparable to those of a decision by a court of last resort:<sup>467</sup>

. . . a declaratory act is not truly legislation, but rather part of the case law; in trying to define the meaning of existing legislation, the legislator places

himself in judicial territory, and plays a role analogous to that of a judge.<sup>468</sup>

As a result of this type of declaratory legislation, individuals who relied on the law as it previously stood are deprived of the opportunity of having it independently and impartially interpreted. Of course, legislative encroachment on the judicial function is particularly obvious and egregious where the legislature purports to correct an "erroneous" judicial interpretation of the law by overturning the final result of the very case in which it was made.<sup>469</sup>

Admittedly, certain types of retroactive or retrospective declaratory legislation may be less offensive than others, either because of the degree of uncertainty surrounding the

law in a particular area or because of the nature of the rights affected by it. For example, it is not reasonable for individuals to have relied heavily on a law whose meaning is uncertain.<sup>470</sup> Also, some interpretive legislation, such as tax legislation designed to fill technical oversights in the existing law, may be more readily acceptable because of the lack of equity associated with the rights of those who claim to have relied on such shortcomings.<sup>471</sup> Nevertheless, such considerations do not warrant classifying these types of declaratory legislation as exceptions to the general rule of interpretation; rather, they are simply factors that may properly be taken into account in determining whether the legislature intended to rebut the presumption against retroactive and retrospective operation.<sup>472</sup>

It is true, as I have already pointed out,<sup>473</sup> that there will be cases where courts will determine that the interpretation offered by the legislature simply clarifies or explains the existing law without changing its meaning. In these cases, the rule of law is not threatened: no person would be in a position to argue that he was prejudiced by the legislature's interpretation of the previously existing law if the latter is in accord with the judicial interpretation of that law. Therefore, one can make a good argument that there is room for a limited exception to the rule in such cases.<sup>474</sup>

Nevertheless, my conclusion is that, generally speaking, declaratory enactments are not properly classified as

exceptions to the rule of interpretation against retroactive and retrospective operation. Rather, they should be read subject to the prima facie presumption against those types of operation, which they must successfully rebut before being allowed to operate in either fashion. Absent clear evidence of intention to the contrary, a legislature's interpretation of existing law should be given effect only from the date of actual coming into force of the interpreting statute, and then only with respect to cases that arise or events that occur after that date.<sup>475</sup> In short, as a general rule, declaratory enactments should be presumed to operate prospectively only.

Subsection 5. Curative enactments. As the name suggests, curative enactments are enactments that are intended to cure certain undesirable legal effects resulting from the past operation of the law. Errors, omissions and other defects or irregularities in conduct may produce unwanted legal consequences that can be remedied after the fact by appropriate legislation.<sup>476</sup>

Curative enactments may be employed for a variety of purposes, many of which are clearly incompatible with the rule of law.<sup>477</sup> In our society, however, their use tends to be restricted to rectifying administrative oversights. They may be designed to validate actions undertaken by government or other administrative officials without legal authority<sup>478</sup> or to indemnify those officials against the consequences of

having acted illegally.<sup>479</sup> Generally, they are used to correct inadvertent defects in administrative procedure and to validate actions that have been undertaken in good faith and in apparent compliance with the law.<sup>480</sup> For example, curative legislation may validate tax sales that were not carried out in strict compliance with prescribed procedure,<sup>481</sup> it may rectify the failure of government officials to follow prescribed procedure in enacting regulations,<sup>482</sup> it may validate bylaws and ordinances that were passed without legal authority,<sup>483</sup> or it may validate marriages that were performed in good faith but not in accordance with the technical requirements of the law.<sup>484</sup>

These types of curative legislation are usually justified as being in the public interest. The public interest in the smooth functioning of government and in the efficient administration of justice is considered to outweigh the interests of those who would seek to rely on rights acquired under the cured law. Often the individual rights affected by curative legislation may be seen as lacking in equitable merit, making the argument in favour of such legislation even stronger.<sup>485</sup> The benefits accruing to an individual as a result of a technical shortcoming in the administration of the law may be viewed as a windfall,<sup>486</sup> with the result that there is little reluctance to interfere with them.<sup>487</sup> In this sense, curative enactments may be classified as generally beneficial in nature.<sup>488</sup>

By definition, curative enactments operate either retroactively or retrospectively.<sup>489</sup> They invariably change the legal consequences of conduct that occurred prior to their actual coming into force, and they do so either as of a date prior to their actual commencement or as of the date of their actual commencement. For example, they may make previously invalid subordinate legislation valid ab initio<sup>490</sup> or from the date of validation onward.<sup>491</sup>

The question that must be addressed in this subsection is whether curative legislation should be classified as an exception to the general rule of interpretation against retroactive and retrospective legislation. Putting it more accurately, must legislation that would have a curative effect if applied retroactively or retrospectively be read subject to the prima facie presumption against such an interpretation?<sup>492</sup>

In my view, one cannot make the blanket statement that curative legislation constitutes an exception to the general rule of interpretation. However important and beneficial curative legislation may be, it should not be so classified. This is because, strictly speaking, most curative enactments operate inconsistently with the rule of law principle. Given that they operate to change the legal consequences of previous events, all curative enactments have the potential to disrupt expectations founded on the previously existing law.

Having said this, I hasten to add that, generally speaking, curative legislation does not pose a particularly

serious threat to the rule of law. This follows from the fact that the primary purpose of curative legislation is to overcome the negative effects of inadvertent errors or technical shortcomings that have caused no substantive prejudice to individual expectations. Both the strong public interest associated with curative legislation and the insubstantial nature of the private rights involved are mitigating factors to be taken into account in determining the degree of offensiveness of such legislation in light of the rule of law principle.<sup>493</sup>

In fact, there is one type of curative legislation that can legitimately be classified as an exception to the general rule.<sup>494</sup> I am referring to curative legislation that simply brings the previously existing law (and the effects of its operation) into line with what it was commonly perceived to be all along. This type of curative legislation may be used to overcome the disruptive effects of an unexpected judicial decision.<sup>495</sup> For example, a court may declare ultra vires legislation that up until the date of the declaration was generally viewed by the community as being valid. Alternatively, it may declare invalid actions that had been undertaken in good faith and in apparent compliance with the existing law. Individuals may have acted in reliance upon the apparent law for many years. Curative legislation can be put into place to uphold the reliance interests of those individuals by retroactively or retrospectively validating

actions taken in reliance on the law as it was generally perceived to be.<sup>496</sup>

Similarly, curative legislation may be used to remedy misconceptions about the law that have arisen as a result of the failure of the legislature or the government to comply with some other requirement of the rule of law principle. Suppose, for instance, that legislation governing the effects of certain business transactions were not adequately publicized and were therefore unknown to the persons affected by it. Or suppose that such legislation were for other reasons incapable of being complied with. Clearly, legislation cannot be complied with if it is unknown or if it requires the impossible, yet the legal consequences of non-compliance may be serious. Curative legislation allows the legislature "to stop and turn about to pick up the pieces."<sup>497</sup> It can compensate for previous failures to meet the rule of law standard by protecting expectations that were based upon the known and observable law.

Although the type of curative legislation that I have been discussing is as retroactive or as retrospective as any other type, it is not inconsistent with the rule of law principle. This is because it does not disrupt expectations. While it does alter the legal consequences of prior events, it alters only their actual consequences -- it has no effect on perceived consequences. Of necessity, expectations are based upon the latter.<sup>498</sup> Consequently, this type of curative legislation simply alters legal positions that were

unknowingly acquired and brings them into line with what they were perceived to be all along. There is nothing objectionable about this:

. . . there is little injustice in retroactively depriving a person of a right, however valuable, which was created contrary to his bona fide expectations at the time he<sub>499</sub> entered the transaction from which the right arose.

In fact, one can make a convincing argument that curative laws which operate in this manner actually promote the rule of law by upholding expectations formed in reliance upon a commonly held perception of what the law was.<sup>500</sup>

Admittedly, it is tempting to broaden the scope of the limited exception to the rule that I have just staked out. One can point to the general benefits that accrue when curative legislation remedies technical and inadvertent shortcomings in the administration of the law, such as might occur in the conduct of tax sale proceedings,<sup>501</sup> the issuance of a detention order<sup>502</sup> or the registration of a chattel mortgage.<sup>503</sup> I have already acknowledged that the equitable merits of reliance claims may be slim in such cases. But all of these cases involve legislative changes in the perceived consequences of events. They involve changes in the law on which individuals may have relied in conducting themselves. On balance, therefore, I think it is more appropriate to treat this common type of curative legislation, not as an exception to the general presumption against retroactive and retrospective legislation, but as legislation whose relatively benign effects should be taken into account as a

mitigating factor in assessing the evidence of intention to rebut that presumption.<sup>504</sup>

Subsection 6. Beneficial enactments. Professor Driedger has suggested that the presumption against retrospective operation does not apply to statutes which "attach benevolent consequences to a prior event,"<sup>505</sup> nor to those which attach new prejudicial consequences to a prior event, where those consequences "are intended as protection for the public rather than as punishment for a prior event."<sup>506</sup>

With respect to statutes of the second type, it is no doubt true, as Craies suggests,<sup>507</sup> that the courts may be more willing to attribute a retrospective intention to the legislature where the object of the legislation is to protect public health, safety or morals<sup>508</sup> or to protect the public from unscrupulous or evasive practices.<sup>509</sup> I suggest, however, that this has more to do with the courts taking the public interest into account when interpreting legislation than with an outright exception to the general rule against retrospective operation.<sup>510</sup>

It is important to remember that this type of legislation, despite its generally beneficial nature, will always have some prejudicial effects when it is applied retrospectively. Specifically, it will bring about changes in the legal consequences of pre-enactment events that are prejudicial to some people who have relied upon the previously existing law.<sup>511</sup> While the public interest is an important

factor to be taken into account in interpreting legislation, it must not be allowed to completely overshadow the rule of law requirement for predictability in the law. Consequently, this type of legislation should not be read as an exception to the rule: it should not be left entirely free from the presumption against retrospective operation.<sup>512</sup> In chapter v,<sup>513</sup> I put this whole matter into perspective by suggesting that the public interest is simply one important factor bearing upon the clarity with which the legislature must speak in order to rebut the general presumption against retrospectivity.

The first type of statute referred to by Professor Driedger presents somewhat more difficulty. It is, of course, relatively rare for legislation to have purely benevolent effects. Almost every enactment benefits some people at the expense of others. This follows from the directly proportional relationship between rights and liabilities that I have already adverted to.<sup>514</sup> However, there are some situations where one can make the argument that legislation has purely beneficial consequences. Is there any justification for classifying this type of legislation, which would not adversely alter the legal consequences of pre-enactment events and thus would not adversely affect individual expectations developed in reliance on the previously existing law if it were applied retrospectively, as an exception to the general rule?

The Canadian Bill of Rights<sup>515</sup> and the Canadian Charter of Rights and Freedoms<sup>516</sup> have been cited as examples of purely beneficial legislation.<sup>517</sup> Perhaps legislation that authorizes an increase in social welfare benefits or reduces the punishment for an offence could also be placed under this rubric.<sup>518</sup> Nevertheless, even these types of enactment would, if applied in a retrospective fashion, carry certain consequences that are inconsistent with the rule of law principle, albeit only to a minor extent.

The recent decision of the Supreme Court of Canada in Stevens v. R.<sup>519</sup> demonstrates the limitations of arguments in favour of an exception to the general rule of interpretation for purely beneficial legislation. In the Stevens case, the majority of the court refused to give retrospective effect to s. 15 of the Charter, where the result of doing so would have been to absolve a person from punishment for having contravened a provision of the Criminal Code<sup>520</sup> prior to that provision being rendered inoperative by the coming into force of s. 15. This finding is consistent with the general approach of the courts, which has been to refuse to allow the Charter to operate retrospectively.<sup>521</sup>

The approach of the majority of the court in the Stevens case is, I suggest, the correct one.<sup>522</sup> In the interests of fairness, equality and predictability in the administration of justice, the consequences of actions should be determined in accordance with the law that was in effect at the time they occurred.<sup>523</sup> Otherwise, individuals will be treated

more or less favourably on a whimsical basis -- that is, depending on how expeditiously their case is disposed of by the judicial system.<sup>524</sup> "Even-handed justice"<sup>525</sup> -- the notion that similar cases should be treated similarly -- is one facet of the rule of law.<sup>526</sup> Inequality of treatment based on the sheer happenstance of a change in the law involves prejudice to those individuals whose cases fall on the wrong side of the time line. My point is simply that persons who acted in contravention of the law, but who were fortunate enough not to have had their cases finally disposed of by the judicial system prior to the enactment of a new, beneficial, law, would be given an unwarranted preference if the new law were applied retrospectively to them. Those unlucky individuals whose cases had been dealt with prior to the enactment of the new law would be correspondingly prejudiced.<sup>527</sup>

I should emphasize that this analysis does not even take cognizance of the argument that the collective interests of society (as represented by the state) would be prejudiced by the retrospective application of such beneficial enactments. Admittedly, however, it is questionable whether the state can invoke the rule of law principle on its behalf.<sup>528</sup> That being the case, I am content to conclude my discussion of beneficial enactments without pursuing this argument.

My conclusion is that while certain enactments can legitimately be described as beneficial, they may still carry prejudicial and undesirable consequences if applied in a

retrospective manner. From a rule of law standpoint, there is no compelling reason to classify such enactments as wholesale exceptions to the general rule of interpretation against retrospectivity. In fact, the rule of law theory tends to point in the other direction. Nonetheless, I acknowledge that, given the marginally prejudicial consequences which would flow from a retrospective application of most beneficial enactments and considering the strong public and individual interests that are often involved, beneficial legislation is by and large not particularly offensive when it operates retrospectively. Accordingly, in chapter V<sup>529</sup> I argue that the beneficial nature of legislation is a legitimate factor to be taken into account by the courts in assessing the evidence of an intention to rebut the presumption against retrospective operation.

## Chapter V

### GUIDELINES FOR APPLYING THE RULE AGAINST RETROACTIVE AND RETROSPECTIVE LEGISLATION

In chapters II and III, I argued that the purpose of the rule against retroactive and retrospective legislation is to help promote the rule of law in the legal system by protecting expectations that have arisen as a result of reliance on the law. My concern in chapter IV was to explain the meaning, operation and effect of the rule in light of this underlying purpose. In this chapter, I carry my thinking one step further, arguing that the rule of interpretation should also be applied in light of this underlying purpose and setting out the issues that must be resolved and the procedure that should be followed in doing so.

There are two broad issues that must be dealt with in every case involving potentially retroactive or retrospective legislation. First of all, the court must determine whether, if the legislation were applied to the case at hand, it would operate contrary to the rule of law by interfering with legitimate expectations (i.e., expectations that have arisen out of reliance upon the previously existing law). Secondly, assuming that legitimate expectations are at risk, the court must ascertain the legislature's intention with respect to those expectations. This intention must be determined subject to the presumption that the legislature does not intend its legislation to interfere with them.

In all cases except those involving constitutional limitations upon legislative power, legislative intention must prevail.<sup>530</sup> The whole purpose of the rule of statutory interpretation is to assist the courts in carrying out their constitutional duty of determining, from the words used by the legislature, the intent or meaning of its legislation.

The practical effect of ascertaining the intended temporal operation of legislation is to delineate the ambit or scope of its operation. Although the courts are concerned in such cases with the timing of an enactment's application, this can be translated into a basic question: To which individuals in respect of which fact-situations does the enactment apply? Thus, while the factors to be taken into account in determining the temporal operation of legislation are specialized, the resolution of a case involving potentially retroactive or retrospective legislation has familiar practical consequences.

In the next four parts of this chapter, I will discuss the three-step process of interpretation that should be followed in interpreting legislation that has the potential to operate either retroactively or retrospectively. Where necessary, I will deal separately with retroactive operation and retrospective operation. In the fifth part of the chapter, I will explain the conditions that must be met in order to ensure that legislation is given neither a retroactive nor a retrospective interpretation. The essential purpose of this chapter is to set out guidelines for the

proper application of the rule against retroactive and retrospective legislation. My comments are intended to address all of the issues that a court must face when questions of retroactive or retrospective operation arise.

Part A. Outline of the Three-Step Process of Interpretation

The procedure that should be followed in dealing with potentially retroactive or retrospective legislation involves a three-step process of interpretation. The first question that must be asked varies depending upon whether it is retroactive operation or retrospective operation that is in issue. In the former case, the question to be asked is:

1. In order for this legislation to apply to this person in respect of this fact-situation, would it have to be interpreted as having effectively come into force prior to the date on which it actually came into force?

In the latter case, the appropriate question is:

1. Would the application of this legislation to this person in respect of this fact-situation allow the legislation to govern, as of the date of its actual coming into force, the legal consequences of an event which occurred prior to that date?

The first question asks whether retroactive or retrospective operation is even an issue in the case.<sup>531</sup> If the legislation could apply to the fact-situation under consideration without operating either retroactively or

retrospectively, then the presumption against those modes of temporal operation is irrelevant and can be disregarded.

If the answer to the first question is positive, one must move on to consider a second question, which is as follows:

2. Is this legislation of a kind that, because it poses no threat to legitimate expectations and the rule of law, can be classified as an exception to the general rule of interpretation against retroactive or retrospective legislation?

This second question is designed to determine whether, given that either retroactivity or retrospectivity is in issue, the general presumption against such operation should not apply because the legislation is of a special type that falls outside the mischief to which the presumption is addressed.<sup>532</sup> If the legislation is of such a type, it should be read without recourse to the presumption.

Assuming, however, that the answer to the second question is negative, there is a third and final question to be dealt with. In cases where retroactive operation is in issue, the question is as follows:

3. Does the legislation, when read subject to the presumption against such an interpretation, indicate beyond a reasonable doubt an intention that it should be interpreted as having effectively come into force prior to the date on which it actually came into force?<sup>533</sup>

In cases involving potential retrospectivity, the appropriate question is:

3. Does the legislation, when read subject to the presumption against such an interpretation, indicate beyond a reasonable doubt an intention that it should be interpreted as governing, from the date of its actual coming into force onward, the legal consequences of the prior event in question?<sup>534</sup>

The third question focusses on legislative intention, asking whether the legislation manifests an unambiguous intention to operate retroactively or retrospectively. The answer to this question can only be arrived at after the court has undertaken an assessment of legislative intention in light of the presumption against those modes of temporal operation.<sup>535</sup>

Part B. Determining Whether Retroactive or Retrospective Operation Is in Issue

Section 1. Retroactive Operation. As a general rule, it is not difficult to tell whether a particular application of an enactment would require that it be given retroactive effect. This is attributable to the artificiality of retroactive operation, involving as it does the fiction of deeming legislative rules to have existed at a time when they did not in fact exist. In ascertaining whether retroactivity is in issue, one must simply decide whether the statutory provisions in question could only apply to the fact-situation under consideration if they were deemed to have come into

force as of a date prior to the date on which they actually came into force.

Nevertheless, there are situations in which one must carefully examine the language used in an enactment to determine whether a particular application of that enactment would involve retroactive operation. These situations call for an analysis, from a temporal perspective, of the applicability of the enactment to the fact-situation under consideration. The manner in which a legal rule is formulated can have a crucial bearing on the temporal operation that would be involved in applying it to a given fact-situation.

Professor Driedger has pointed out this connection. In his earlier writings, he suggested a useful test for determining whether a particular application of legislation would involve retroactive operation.<sup>536</sup> As I will demonstrate, this test focusses on the fact-situation that attracts the application of legislative rules and is simply an application of the well-known rule of interpretation which requires that legislation be construed as always speaking.

Sometimes a statute describes the persons who are subject to it by reference to their status. For instance, an enactment might set out rules for the division of marital property between "spouses"<sup>537</sup> or impose restrictions on the activities of "convicted persons."<sup>538</sup> Alternatively, an enactment might describe its subjects by reference to the occurrence of an event. For example, it might prohibit persons from engaging in the sale or distribution of securities without prior

approval<sup>539</sup> or prohibit them from discriminating against other persons on certain grounds.<sup>540</sup> Similarly, an enactment may, in describing the cases to which it applies, refer both to status and to the occurrence of a specific event, as in the following example:

60. (1) Where a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, . . . children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for<sup>541</sup> the purpose in a court of competent jurisdiction.

Unless legislation operates retroactively, it can only apply to those individuals who hold the status upon which it operates at some time after its date of actual commencement. By the same token, where its application hinges on the occurrence of an event and where that event is described in the present tense, non-retroactive legislation can only apply in respect of events of that nature which occur after its date of actual commencement. Therefore, to test for retroactivity in such cases, one must ascertain whether the fact-situation under consideration existed or occurred only at some date prior to the date of actual commencement of the legislation. If it did, the legislation could not possibly apply to it without operating retroactively (i.e., without having effective operation prior to the date of its actual commencement).

Looking at this test from the opposite perspective, one can ask this question: Was the fact-situation under consideration (whether the holding of a particular status, the occurrence of a particular event, or both) covered by or described by the legislation at some time after the legislation's actual coming into force? If the fact-situation answered to the description contained in the legislation at some time after that date -- that is, if the legislation covered that fact-situation when it existed or occurred -- the legislation would not have to operate retroactively in order to apply to it. There would be no need to treat the legislation as having had a fictitious pre-existence in order to encompass that fact-situation. On the other hand, if the fact-situation under consideration only matched the fact-situation to which the legislation is addressed at some date prior to its actual coming into force, the legislation could only apply to that fact-situation if it were interpreted as operating retroactively.

This test is based on the rule that a statute is to be construed as always speaking, a rule which appears in s. 10 of the federal Interpretation Act:<sup>542</sup>

Law Always Speaking

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

The effect of this rule is that legislation will operate upon all fact-situations answering to its description that exist

or arise during its period of operation. As George Coode explained it in his treatise on legislative drafting:

If the law be regarded while it remains in force as constantly speaking, we get a clear and simple rule of expression, which will, whenever a case occurs for its application, accurately correspond with the then state of facts. The law will express in the present tense facts and conditions required to be concurrent with the operation of the legal action; in the perfect past [sic] tense, facts and conditions required as precedents to the legal action . . . .<sup>543</sup>

The courts have identified retroactive applications of legislation in accordance with this test on a number of occasions.<sup>544</sup> The English Court of Appeal decision in Re Pulborough (Parish) School Board Election<sup>545</sup> provides a striking example of this test in action. In that case, the court had to interpret a subsection of the Bankruptcy Act, 1883<sup>546</sup> which provided that "where a debtor is adjudged bankrupt he shall, subject to the provisions of this Act, be disqualified for," among other things, "being elected to or holding or exercising the office of member of a school board." At issue was whether the provision applied to a person who had been adjudged bankrupt prior to its enactment.

The majority judgements underline the importance of ensuring that the fact-situation under consideration corresponds to the wording of the legislation being interpreted at some point during the legislation's period of actual operation. They make it clear that the provision in question could not have applied to persons who were adjudged bankrupt before its enactment unless it operated retroactively. Lopes L.J., in responding to one of the arguments made in the case,

focussed on the wording of the subsection:

It has been contended that the words "is adjudged bankrupt" are to be read, "has been adjudged bankrupt either before or after the passing of this Act."

I cannot so read those words. Independently of other considerations, with which I will presently deal, and regarding them only from a grammatical standpoint, I should read them, "is adjudged bankrupt under this Act." The sentence would then be, where a debtor "is adjudged bankrupt under this Act he shall, subject to the provisions of this Act, be disqualified." This reading seems more consonant with sense than "where a debtor has been adjudged bankrupt under this Act, or any previous Act, he shall, subject to the provisions of this Act, be disqualified." The former reading gives to "is" its ordinary and natural meaning; the latter distorts it.<sup>547</sup>

In the course of rejecting an alternative argument, Davey C.J. also paid careful attention to the language in which the subsection was cast:

The question therefore seems to me to turn on the proper construction to be put on the words "where a man is adjudged bankrupt" at the commencement of s. 32 of the Bankruptcy Act, 1883. Now, reading those words alone, and apart from considerations arising out of the subject-matter of the section in which they occur, I should certainly understand them (according to the ordinary use of the English language) to mean, if any man shall or may hereafter be adjudged bankrupt; and unless there be some controlling context in the Act or in the section, I hold that to be the meaning of the words. It has been suggested that the words may be read as meaning "where a man is an adjudicated bankrupt." The answer seems to me to be that those are not the words before us, and that the words we have to construe are grammatically different. I think the words "is adjudged" are the verb, whereas in the paraphrase suggested the word "adjudicated" would be an adjective. The one form of sentence points to an event to happen, whereas the form suggested predicates a certain quality of the subject which may just as well attach to him by a previous adjudication as by a subsequent one.<sup>548</sup>

Maxwell v. Callbeck<sup>549</sup> is a Canadian case in which the test was applicable. It involved a motor vehicle negligence action. At the time of occurrence of the accident that gave rise to the proceedings, Alberta law did not recognize the

defence of contributory negligence. Some eight months after the accident, The Contributory Negligence Act<sup>550</sup> came into force. Section 2 of that statute provided for a new defence of contributory negligence "where by the fault of two or more persons damage or loss is caused to one or more of them." The plaintiff in the action maintained that the new statute was applicable to the case.

When confronted with this argument, the Supreme Court of Canada concluded that the statute could not be so applied without giving it retroactive effect. This was unquestionably the correct approach. Because the damage or loss had occurred prior to the actual coming into force of the new act, it did not fall within the terms of or meet the description contained in that act at any time during the act's period of actual operation: the damage or loss was not incurred during the actual life of the enactment. As a consequence of its wording, the new enactment could only apply to govern the legal effects of accidents that occurred while it was in force. Therefore, it could only have applied to the case in question if it were artificially deemed to have come into force prior to the date of its actual commencement.<sup>551</sup> The situation might have been different had the legislation instead been addressed to accidents "where by the fault of two or more persons damage or loss has been caused . . . ."

Similarly, legislation applicable to "spouses" has been held to apply only to persons who were spouses at some time

after the legislation came into force.<sup>552</sup> Also, legislation imposing sanctions upon those who commit a newly defined sexual offence<sup>553</sup> or upon those who discriminate against individuals on newly proscribed grounds<sup>554</sup> has been held to be incapable of applying to conduct undertaken prior to its actual commencement without operating retroactively. Only by operating retroactively could such legislation apply to persons who, while meeting its description prior to its actual coming into force, did not meet it thereafter. (Of course, if the legislation did operate retroactively, those persons could be said to have met the description contained in the legislation at some time during the legislation's period of effective operation, even though they did not meet it during its period of actual operation.)

The test that I have been discussing is essentially one of timing. It requires that legislative provisions be read as applying only for the period of time during which they are actually in force. Fact-situations alleged to come within the purview of the legislation must be carefully analyzed to see whether they answered to the description contained in the legislation at some point during this period or, putting it another way, during the period in which it was actually speaking. The idea is to identify those cases in which the legislation could not possibly apply to the fact-situation under consideration unless it were deemed to have come into force at some date prior to its actual coming into force.<sup>555</sup>

Because of the ambiguity inherent in some grammatical constructions, it may be open to question in certain cases whether an enactment can be applied to a particular fact-situation without operating retroactively.<sup>556</sup> A prime illustration of this occurred in R. v. Vine.<sup>557</sup> The legislative provision before the court in that case disqualified "every person convicted of a felony" from selling spirits. At issue was whether this provision could apply to a person who had been convicted of a felony before it was enacted. An important question was whether the word "convicted" was to be read as an adjective or as a verb. If the statute were read as applying to "every convicted person," it could apply to the person in question without operating retroactively. On the other hand, if it were read as applying to "every person who is convicted," it could not. The court, by a two-to-one margin, opted for the former interpretation. While this interpretation meant that retroactivity was not an issue in the case, the court then had to go on to deal with the issue of retrospective operation.

Despite the fact that such grammatical ambiguities may have to be resolved from time to time, the test that I have outlined in this section remains a valuable one for ascertaining when the application of legislation to a particular fact-situation would involve retroactive operation.

Section 2. Retrospective Operation. On the whole, it is more difficult to identify cases in which a given application of legislation would be retrospective than it is to identify retroactive applications of legislation. This is due to the fact that retrospectivity analysis is inherently more complex. While it is true that both retroactive and retrospective operation are modes of temporal operation, the former involves the comparatively simple question of whether a given application of legislation would result in its being accorded an artificial or fictional pre-existence. The answer to this question can be determined solely by reference to the timing of an enactment's application and, more particularly, to measurements of actual and effective periods of operation.

With retrospective operation, the temporal phenomenon involved is not so obvious. What is at issue is the application of legislation that operates solely in the present and future to events that occurred in the past, as opposed to a question of whether legislation is to be construed as having operated in the past. In dealing with retrospective operation, the courts are confronted with the task of determining whether a given application of legislation would result in the legislation governing the legal consequences of an event that occurred prior to its actual coming into force. Because retrospective legislation almost always operates so as to alter the legal consequences of the prior events that it governs, this task usually translates into one of determining

whether the legislation under consideration, if it were applied to a particular fact-situation, would have the effect of changing the legal consequences of a prior event. What are the criteria for dealing with this crucial question?

Professor Hochman has suggested that the legal consequences of an event are changed whenever a statute "gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute."<sup>558</sup> Professor Munzer, speaking along similar lines, offered this explanation:

The legal status of an act has been "altered" by a law if the set of true descriptions of its character or consequences after the creation of the law differs from the set of such descriptions antedating its creation,<sup>559</sup> and if this difference would not exist but for that law.

It seems to me that these statements accurately describe the effects of the great majority of retrospective statutes.

One thing that becomes clear at this point is that Professor Driedger's test, which was discussed in the previous section, can be of no assistance in identifying retrospective operation. This is true in spite of the fact that Driedger came to consider his test as a test for retrospectivity after revising his views in 1976.<sup>560</sup> Whether legislation would have the effect of altering the legal consequences of a pre-commencement event cannot logically depend, as Driedger argues, upon the way in which its rules are formulated.<sup>561</sup> Retrospectivity can occur where the fact-situation that attracts the application of an enactment is the existence of a given status (in which case Driedger

claims that the enactment would not operate retrospectively if that status existed after its coming into force) and it can also occur where the fact-situation that attracts the application of an enactment is the occurrence of a particular event (in which case Driedger implies that the enactment would not operate retrospectively if the event took place after its coming into force).

Driedger's test is inappropriate because it is concerned with the time period for which or during which legislation operates. It does not directly address itself, as it should, to the effect of legislation on the consequences of events that occurred prior to its commencement. The unsuitability of his test can be illustrated by focussing upon one of its claims -- the claim that legislation whose application is triggered by the existence of a given status will not be given a retrospective effect as long as it is applied only to persons or things holding that status after its coming into force. A moment's reflection exposes the weakness of this argument. Since status can only be acquired as the result of some event, legislation may, by regulating the consequences of holding a particular status, indirectly alter the legal consequences of the event which gave rise to that status. Furthermore, it may do this to the same extent as if it addressed itself directly to the legal consequences of that event.

The British Columbia Court of Appeal recognized this in McLean v. Leth,<sup>562</sup> where the effect of an amendment to the

British Columbia Mechanics' Lien Act<sup>563</sup> was at issue. The case involved a lien claimant who had filed his claim prior to the coming into force of the amendment. At the time of filing, the lien claim was inadequate for the purpose of preserving the lien under s. 19 of the act because the affidavit supporting it was sworn before the claimant's solicitor. This rendered it ineffective, under the then-existing rules of court, to support a lien claim. Subsequently, the period for filing a proper claim expired and the claimant's lien ceased to exist. Shortly thereafter, however, an amendment to s. 19 came into force. This amendment added a new subsection to s. 19 which provided that "no affidavit required to be filed under this section shall be held to be defective or void solely on the ground that it was made before the claimant's solicitor."

The amending provision was thus addressed to affidavits required to be filed under s. 19 of the statute. Arguably, it operated with respect to all affidavits holding that status. According to Driedger's test, the application of the amendment to the affidavit in question would not have been retrospective, given that its status as an affidavit required to be filed under s. 19 existed after the coming into force of the amendment. But such a conclusion would clearly have been wrong. If the amendment had been applied to the affidavit in question (or to any other defective affidavits filed prior to its coming into force), it would have had the effect of transforming an invalid lien claim into a valid

lien claim and of reviving an expired lien. In other words, it would have altered the consequences flowing from the previous failure to file a lien claim in accordance with the then-existing rules. The court realized that such an application would be retrospective and concluded that the amendment was intended to operate prospectively only. Therefore, it was held to apply only in respect of affidavits filed after it had come into force.<sup>564</sup>

Moving beyond this point, it seems only logical to conclude that one cannot decide whether legislation would operate so as to alter the legal consequences of an event until one knows what the original consequences of that event were. Only after the nature and extent of the consequences of an event have been ascertained is a court in a position to state whether or not new legislation, if applied in respect of that event, would have the effect of altering its consequences. It is with regard to this question that retrospectivity analysis can be especially troublesome. Owing to the variety and complexity of human activity, it is often difficult to exhaustively define the legal consequences of an event.<sup>565</sup>

In defining retrospective operation, I argued that it was appropriate to use the criterion of legislative governance of legal consequences.<sup>566</sup> I based this argument on my assertion that, from a legal point of view, legitimate expectations are logically identifiable with legal consequences: only a change in legal consequences will be likely to disappoint legitimate expectations. Having made this point, it is nevertheless

important to recognize that expectations can be used not only in an abstract sense as the touchstone for a workable definition of retrospectivity, but also to help infuse that definition with practical meaning. Actual expectations and the reasonableness of those expectations may provide helpful clues as to what the legal consequences of an event really are and, it follows, as to whether a given change in the law has the potential to bring about a change in those consequences.

In most cases, the basic or core legal consequences of an event are obvious. These consequences give rise to expectations that are unquestionably legitimate. Thus, certain consequences arising from a tort, a breach of contract, a criminal offence or some other failure to comply with a legal standard of conduct will be beyond dispute.<sup>567</sup> Conversely, compliance with the multifaceted rules of our legal system produces obvious legal consequences. Doubts may arise, however, about the more peripheral legal consequences associated with events.

To take an example, one might ask what the legal consequences of a criminal conviction are. Some of them -- the ensuing criminal record and the liability to suffer the accompanying punishment -- are obvious. But what about other detrimental effects that might ensue, such as disqualification from engaging in certain types of business<sup>568</sup> or from pursuing certain careers,<sup>569</sup> increased insurance premiums<sup>570</sup> or heavier punishments for subsequent convictions?<sup>571</sup> Would

legislation that dealt with any of these matters operate retrospectively if it were applied in respect of pre-enactment convictions?

For another example, consider the case of a motor vehicle accident that has been caused by the tortious conduct of one of the parties involved. It is beyond question that the legal consequences of such an event would include the right of the victim to receive compensation from the tortfeasor in accordance with the law that was in force at the time of the accident.<sup>572</sup> But what if the tortfeasor is impecunious, forcing the victim to seek compensation from an unsatisfied judgement fund? Is the victim's right to claim against the fund, like his right of action against the tortfeasor for compensatory damages, acquired once the accident occurs (and thus determined by the law then in existence) or is it acquired only at some later date, such as the date of entering judgement or the date of applying for compensation? This question becomes crucial where new legislation governing payments from the fund is brought into effect. Would its application in respect of an accident that occurred prior to its enactment involve retrospective operation? Different courts have given different answers to this question.<sup>573</sup>

One method of dealing with difficult cases of this sort is to judge them in accordance with a familiar common law standard -- the standard of reasonableness. It may be appropriate to determine whether a particular outcome should be classified as a legal consequence of an event by weighing the

reasonableness of relying upon such an outcome as a legal consequence of that event. In troublesome cases, I suggest that the courts would be quite justified in taking into account the reasonableness of the expectations that are alleged to have developed in reliance upon existing legal rules.

In assessing the reasonableness of expectations, the key factors that the courts should bear in mind are the proximity and directness of the connection between the past event in question and the consequences that are alleged to flow from it. The less remote and more direct the alleged consequences are, the stronger will be the case for recognizing them as bona fide legal consequences.

Accordingly, in the example involving the claim against the unsatisfied judgement fund, the court should consider the nature of the connection between the accident and the rules governing claims against the unsatisfied judgement fund. Using this criterion, a conclusion must be reached about whether the legal consequences of the accident include rights and liabilities vis à vis the fund. This will in turn be determinative of whether the application of new unsatisfied judgement fund legislation in respect of that accident would involve retrospective operation.

Unfortunately, the courts have sometimes skipped over this important step in the interpretive process. Instead, they have either (a) attempted to define away the difficult question of legal consequences by classifying the rights

involved as something inferior, such as "privileges"<sup>574</sup> or "mere potential rights;"<sup>575</sup> or (b) jumped ahead to the question of whether the legislature has indicated with sufficient clarity an intention that the legislation should be applied to the case at hand.<sup>576</sup> While this tendency is understandable given the difficulties inherent in ascertaining whether a given application of legislation would involve retrospective operation, our retrospectivity jurisprudence has been impoverished as a result. The preferable mode of analysis is to deal in a substantive way with the question of retrospectivity before going on to assess legislative intention.

#### Part C. Considering the Exceptions to the Rule

Once it has been determined that a particular application of legislation would involve retroactive or retrospective operation, the court must decide whether the legislation is of a special type that qualifies as an exception to the general rule of interpretation, and is thus exempt from the application of the presumption against retroactive and retrospective operation. As I demonstrated in chapter IV, nearly all of the exceptions to the rule are justifiable on the basis that they represent legislation which, despite its potentially retroactive or retrospective operation, is consistent with the principle underlying the general rule of interpretation against those types of operation.<sup>577</sup>

It is only in extremely rare cases that potentially retroactive legislation should be excepted from the application of the rule. The highly fictional nature of retroactive operation is such that it almost invariably disrupts legal expectations. Notable exceptions would be where the legislation being considered is (a) curative legislation that has the effect of bringing previously existing law into line with what that law was commonly perceived to be; or (b) declaratory legislation that makes no change in the meaning of the previously existing law.<sup>578</sup> In any event, the unusual effects of retroactive legislation require such distinct and unmistakable language to bring them about that the inapplicability of the presumption makes little practical difference.<sup>579</sup>

For all intents and purposes, then, my concern in this part is with the exceptions to the rule against retrospective legislation. These I will discuss under the four headings that follow.

Section 1. Procedural Enactments. The courts are quite frequently called upon to determine whether an enactment is procedural in nature. In order to be exempted from the application of the rule on the grounds that it is procedural, legislation must have purely procedural effects when applied to the case at hand: it must leave substantive rights and expectations intact.<sup>580</sup>

One cannot conclude that legislation has no effect on substantive rights simply because it deals with procedural matter. Legislation that lays down rules of evidence,<sup>581</sup> establishes rights of appeal,<sup>582</sup> sets out limitation periods<sup>583</sup> or prescribes general rules of procedure<sup>584</sup> may, despite its essentially procedural nature, affect substantive rights when applied in respect of certain fact-situations. Therefore, each enactment must be considered in the context of the case at hand. As Bennion observes,<sup>585</sup> an enactment may have purely procedural effects in light of some facts and substantive effects in light of others. Clearly, legislation is not purely procedural if it would, when applied in respect of a given set of facts, go beyond regulating the method of enforcing a remedy and actually alter or remove the remedy itself.<sup>586</sup>

It seems to me that the basic question to be asked by the courts is this: Could the new procedural requirements be complied with without in any way affecting substantive rights?<sup>587</sup> Acts of a procedural nature that would alter substantive rights if applied retrospectively must be read subject to the general presumption against retrospective operation. However, statutes that would have purely procedural effects if so applied are not only exempt from the application of the general presumption, but subject to a reverse presumption in favour of retrospective operation.<sup>588</sup> This reverse presumption is recognized in paras. 44(c) and (d) of the federal Interpretation Act<sup>589</sup> as it applies to

repeals and substitutions. Essentially, these provisions require that new procedural rules be followed insofar as they can be adapted to the substantive rights and liabilities in question without altering them.<sup>590</sup> Of course, the presumption in favour of a retrospective operation for purely procedural enactments may, like the general presumption against retrospective operation, be rebutted.<sup>591</sup>

Section 2. Consolidations and Other Re-enactments. If legislation does nothing more than re-enact the provisions of the previously existing statute law on a particular subject, it is exempt from the application of the general rule and subject to a reverse presumption in favour of retrospective operation.<sup>592</sup>

The test for this type of legislation does not require a word-for-word re-enactment. What it does require is a reproduction of the previously existing law in a new form that does not bring about any alteration in its meaning.<sup>593</sup> Any change in meaning will attract the application of the general presumption against retrospective legislation.<sup>594</sup> There will, of course, be difficult cases in which opinions will differ as to whether substituted legislation brings about a change in the meaning of the law.<sup>595</sup>

Although it may be true to say that a change in the language of an enactment usually brings about a change in its meaning,<sup>596</sup> there is no presumption to that effect.<sup>597</sup> In fact, changes in wording may simply have the effect of

removing surplusage<sup>598</sup> or of more clearly expressing the meaning of a previously existing enactment.<sup>599</sup> This is especially true where linguistic changes are made in the course of a revision or a consolidation.<sup>600</sup>

Where legislation is repealed and new legislation is substituted therefor in the course of a revision or a consolidation, the new legislation must be a "pure"<sup>601</sup> or "straight"<sup>602</sup> consolidation in order to qualify as an exception to the rule. It must be a "reproduction [of the repealed legislation] in identical, or substantially identical, terms."<sup>603</sup> Legislative provisions that have been modified in the course of a consolidation so that their meaning has been altered<sup>604</sup> cannot be presumed to operate retrospectively and must be read subject to the ordinary presumption against such operation.<sup>605</sup>

It would appear that there is a presumption to the effect that consolidating enactments (in the broad sense of that term) are not intended to change the meaning of the existing law. Professor Driedger maintains that such a presumption does not exist in Canada,<sup>606</sup> but it is difficult to understand why this should be so when one examines the authorities on the subject.<sup>607</sup> It would seem to be quite reasonable and proper to resort to such a presumption when interpreting consolidating legislation, the main purpose of which is not to make changes in the law, but simply to update and reorganize the statute book.<sup>608</sup> Of course, the presumption can

only arise where there is some ambiguity in the legislation being interpreted.<sup>609</sup>

Once it has been determined that an enactment does nothing more than consolidate or re-enact previously existing legislation, the enactment should be interpreted as though the rules which it contains have been in continuous operation since the date of enactment of the original legislation.<sup>610</sup> This means that it should be presumed to govern events that took place prior to its enactment -- in other words, it should be presumed to operate retrospectively. Similarly, appointments<sup>611</sup> and subordinate legislation<sup>612</sup> made under the repealed original legislation should be presumed to continue in force under the new enactment.<sup>613</sup>

Section 3. Codifying Enactments. Legislation that codifies existing law without changing it is a legitimate exception to the general rule against retrospective legislation and should be read without recourse to the presumption against retrospectivity. In order to qualify as an exception, legislation must be what Bennion calls a "straight codification,"<sup>614</sup> as opposed to a codification with amendments or a codification that is part of law reform.

As is the case with consolidations and other types of re-enactments, enactments embodying a straight codification of existing law are to be interpreted as though the legal rules that they contain have been in continuous operation since the date of their origin in the legal system.<sup>615</sup>

Straight codifications, like straight consolidations, should be presumed to operate retrospectively, and thus to apply in respect of events that took place prior to their coming into force.<sup>616</sup>

Despite the similarities between codifying and consolidating enactments, most of the authorities suggest that there is no presumption that codifying enactments (in the broad sense of the term) are not intended to change the previously existing law.<sup>617</sup> This distinction is perhaps justifiable when one considers that codifications, being closely identified with law reform, are much more likely than consolidations to go beyond merely restating previously existing law.<sup>618</sup>

Section 4. Other Exceptional Enactments. There are, as I noted in chapter IV, other types of legislation that may be classified as exceptions to the general rule of interpretation. A prominent example is declaratory legislation that does not alter the meaning of the existing law.<sup>619</sup> A rarer example is curative legislation that does not disrupt legitimate expectations.<sup>620</sup> One can make a strong argument that both of these types of legislation should be exempted from the application of the presumption against retrospective operation.

It is important to remember, however, that there is no justification for a blanket exception to the rule for either declaratory or curative legislation. Many legislative

attempts to "clarify," "expound" or "explain" the meaning of existing law actually bring about a change in the meaning of that law.<sup>621</sup> Meanwhile, the whole purpose of curative legislation is to alter the legal consequences of pre-enactment events, and this will usually affect expectations that have developed in reliance upon those consequences.

Part D. Assessing the Evidence of Intention to Rebut the Presumption Against Retroactive and Retrospective Operation

Section 1. Retroactive Operation. Once it has been determined that retroactive operation is in issue and that the legislation in question is not of a type to qualify as an exception to the general rule of interpretation, the court must assess the evidence of intention to rebut the presumption against retroactive operation. Given that this presumption is prima facie in nature, the legislation must be read subject to it from the outset. Furthermore, the presumption can only be rebutted by evidence removing all reasonable doubt about the legislature's intention to legislate retroactively.

Because retroactive operation is so unusual and artificial, involving as it does the fictional deeming of legal rules to have existed at a time when they did not in fact exist, it can only be brought about by the clearest, most unequivocal and distinctive language. As Professor Driedger puts it, "a retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a

time prior to its enactment."<sup>622</sup> The most common indicators of retroactive intention are:

1. A statement that the provisions of an enactment are to be read as having come into force as of a date prior to their actual coming into force;<sup>623</sup>
2. A statement that the provisions of an enactment are to be applied to past transactions as of a date prior to their actual coming into force;<sup>624</sup>
3. A statement of what the law meant or of how it should be read as of a date prior to the actual coming into force of the interpreting or directing provision;<sup>625</sup> and
4. A statement that certain facts are deemed to have occurred or to have existed as of a date prior to the actual coming into force of the deeming provision.<sup>626</sup>

All of these may be classified as explicit indicators of legislative intention. Owing to its highly artificial nature, retroactive legislation cannot generally be brought about by implication.<sup>627</sup>

Because of the special language required to bring about retroactive operation, the legislature's intention to have its legislation operate retroactively will almost always be obvious. Therefore, unlike the case with potentially retrospective legislation, there is little room for weighing policy factors in determining whether a particular piece of legislation displays a sufficient intention to rebut the presumption and operate retroactively.<sup>628</sup> Nevertheless, there are three basic factors that may help the courts to

identify some retroactive enactments as less offensive to the rule of law than others. These are (a) the nature of the rights affected by the legislation; (b) the degree to which those rights are affected by the legislation; and (c) the public interest served by the legislation.<sup>629</sup> While these factors are discussed in greater detail in the following section on retrospective operation, a context in which they have much greater practical application, it might be useful to briefly discuss a couple of them as they relate to retroactive operation.

As an illustration of the relevance of the first factor, one can observe that retroactive changes in the law which have been foreshadowed by public notice may cause little or no disruption when they take effect. Advance notification of such changes allows individuals to conduct their affairs and develop expectations on the basis of legislation that is not yet in force. Perhaps the best example of this is tax legislation, which is routinely made retroactive to the date of the budget speech in which the changes that it makes were originally announced.<sup>630</sup> The prejudice to the individual as a result of such legislation is minimal because of the prior announcement of this fact and, as a consequence, the rule of law is not significantly impaired.<sup>631</sup>

Furthermore, the disruption of expectations based on existing law will be less serious where those expectations are not rationally based. This may occur in situations where there has been a long-standing divergence between the law as

written and the law as applied or enforced, yet individuals have failed to adjust their expectations accordingly. Retroactive legislation that closes the gap between the written law and the law as it is applied in practice may be less objectionable than many other types of retroactive legislation.<sup>632</sup>

Interference with rights and expectations may be considered less serious where the latter are lacking in equitable merit. It has been suggested, for instance, that tax legislation designed to counter artificial tax-avoidance schemes by plugging loopholes in the law may be freer from the presumption against retroactive and retrospective legislation than other types of legislation.<sup>633</sup> Retroactive legislation of this nature may be justified in part by the insubstantial equity associated with taxpayers who claim to have acquired a right to enjoy the advantages of such loopholes.<sup>634</sup>

On the other hand, retroactive legislation is distinctly unpalatable when it interferes with the most hardened and legitimate expectations by intervening in the judicial process.<sup>635</sup> Consequently, the courts are reluctant to allow retroactive legislation to have any bearing upon pending judicial proceedings,<sup>636</sup> and even less willing to allow it to affect final judgements.<sup>637</sup> They will rely on the corollary rule against retroactive operation<sup>638</sup> to exclude such proceedings from the ambit of the legislation, absent the most precise and unequivocal wording to the contrary.

Along with the extent to which rights are affected by retroactive legislation, another factor that should be considered is the public interest served by the legislation. Referring again to my tax legislation example, retroactive legislation designed to plug tax loopholes may be justified on this ground.<sup>639</sup> In some cases, the public interest in protecting the treasury and fairly distributing the burden of taxation will outweigh the interests of individuals who seek to rely on the strict terms of the law as it was previously written.<sup>640</sup> In fact, legislation of the type referred to has been viewed by some as a species of curative legislation.<sup>641</sup>

As a general rule, I suggest that the more seriously retroactive legislation infringes the rule of law principle, the less acceptable it is and the more clearly the legislature must indicate its retroactive intention in order to dispel all doubt and overcome the general presumption against retroactivity.

Section 2. Retrospective Operation. Retrospective legislation does not share the artificiality or the fictional quality that characterizes retroactive legislation. Unlike the case with retroactive operation, distinctive language is not a prerequisite for retrospective operation. Retrospective operation can be brought about by general words<sup>642</sup> and may be implied from the terms of an enactment, from its purpose or object, or from the circumstances surrounding its making.<sup>643</sup> Consequently, an intention to legislate retrospectively is

much less readily identifiable than an intention to legislate retroactively. Be that as it may, once it has been determined that retrospectivity is in issue and that the legislation under consideration does not qualify as an exception to the general rule against retrospective operation, the court is faced with the task of determining whether the legislature has demonstrated sufficient evidence of an intention to rebut the prima facie presumption against retrospective operation.

In order for an enactment to rebut this presumption, there must be in it a clear indication of an intention to alter, as of the date of its actual commencement, the consequences of events that occurred prior to that date.<sup>644</sup> As Professor Driedger explains it:

For retrospectivity the question is: Is there anything in the statute to indicate that the consequences of a prior event are changed, not for a time before its enactment, but henceforth from the time of enactment, or from the time of its commencement if that should be later?<sup>645</sup>

Because retrospective operation is so often brought about by implication, it presents a much greater analytical challenge than retroactive operation does.<sup>646</sup>

In meeting this challenge, it is certainly not enough for a court to simply look at the general wording of an enactment and conclude that, because such wording, when literally construed, could apply to events that occurred prior to its enactment as well as events that occurred thereafter, the enactment must have been intended to apply to both. To illustrate, the fact that a statute refers to "affidavits"<sup>647</sup>

or "causes of action"<sup>648</sup> and attributes certain legal effects to them does not in itself indicate an intention that it should apply to all affidavits or causes of action, regardless of whether they were made or arose after its coming into force. Because of the prima facie nature of the presumption against retrospective operation, general language must be read as implicitly intended to bring about prospective operation only, even though it may be semantically capable of encompassing both retrospective and prospective operation. There has to be strong evidence of a contrary intention in order to overcome the presumption and require a broader reading of the statute.<sup>649</sup>

The most common indicators of retrospective intention are:

1. Transitional provisions which expressly provide that the general terms of an enactment are intended to apply in respect of events that occurred prior to the enactment's coming into force;<sup>650</sup>
2. Provisions in the main body of an enactment that expressly tie its application to events which took place prior to its actual coming into force;<sup>651</sup>
3. Specific provisions that necessarily imply a retrospective intention on the part of the legislature;<sup>652</sup> and
4. Necessary implication from the object or purpose of an enactment<sup>653</sup> or from the circumstances surrounding its making.<sup>654</sup>

With respect to the purpose of an enactment, it is sometimes argued that because the aim of legislation is to achieve uniformity or standardization in a certain area of activity, all events, whether they took place prior to or after its coming into force, should be made subject to its rules.<sup>655</sup> This argument is especially common in cases involving a question of the applicability of new legislative rules to existing contracts.<sup>656</sup> It must be remembered, however, that the uniformity argument cuts both ways. There is always a strong case to be made that the legal effects of events should be determined in accordance with the legal rules that were in effect when the events occurred. This argument for consistency in the application of the law calls for uniformity of a different sort, and it strikes me as being, on balance, more compelling than the alternative argument just noted.<sup>657</sup>

It is also sometimes argued that legislation having a remedial character is usually intended to operate retrospectively.<sup>658</sup> However, such an argument is indicative of a shallow and unsatisfactory approach to interpretation. By virtue of s. 12 of the federal Interpretation Act,<sup>659</sup> every enactment is presumed to be remedial in nature:

Enactments Remedial

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

If the reasoning outlined above were followed to its logical conclusion, all enactments would be presumed to operate

retrospectively.<sup>660</sup> Obviously, then, it is not enough to conclude that legislation is intended to operate retrospectively just because it has a remedial character.<sup>661</sup> Most enactments will have a remedial effect whether or not they operate retrospectively.<sup>662</sup> The remedial nature of an enactment should only come into play as a relevant factor where the enactment is remedial in the more specialized sense of rectifying obviously unreasonable or unjust provisions in the existing law.<sup>663</sup>

While the language of an enactment must point in favour of retrospective operation in order to render the enactment capable of rebutting the presumption against retrospectivity, it is often difficult to determine whether a particular enactment necessarily implies a retrospective operation. In particular, the purpose of legislation is often so broad or general that relating it to the specific issue of retrospective operation is problematic. In recognition of this fact, I submit that there are three basic criteria which can be singled out as factors to be taken into account in ascertaining whether legislation clearly calls for a retrospective interpretation. These are:

1. The nature of the rights that would be affected by a retrospective interpretation of the legislation;
2. The extent to which those rights would be affected by such an interpretation; and
3. The public interest that would be served by such an interpretation.<sup>664</sup>

It only stands to reason that the courts should be concerned about the consequences of construing an enactment retrospectively.<sup>665</sup> The three factors listed in the previous paragraph can be used to gauge the seriousness of the infringement of the rule of law principle that would result from construing an enactment retrospectively. They also take into account any competing public values that would be served by such an infringement. Because they enable the courts to identify some types of retrospective operation as less offensive than others, these factors can be used to estimate the probability that the legislature intended its legislation to operate retrospectively.

The relevance of these factors can be summarized by saying that the more serious the infringement of the rule of law that would result from a retrospective interpretation of legislation and the less significant the public interest that would be served thereby, the less likely it is that such an interpretation was intended and the more clearly and specifically the legislature must express its retrospective intention in order to rebut the presumption against retrospectivity. These factors can be weighed in individual cases to help ascertain whether the legislature has rebutted the general presumption against retrospectivity by dispelling all reasonable doubt about its retrospective intentions.

In the interests of clarity, however, I must stress that this does not mean that the strength of the presumption against retrospective operation varies from case to case.<sup>666</sup>

In every case where it applies, the presumption can only be rebutted by evidence removing all reasonable doubt that the legislation under consideration was intended to operate retrospectively. What it does mean is that in some cases, depending upon the factors just cited, the legislature will have to go to greater lengths to dispel all reasonable doubt (and thus rebut the presumption) than it will in others. This is due to the fact that the courts will more readily attribute a retrospective intention to the legislature in some circumstances than in others.

Subsection 1. The nature of the rights liable to be affected. The nature of the rights that would be affected by a retrospective interpretation of legislation has an important bearing on the seriousness of the infringement of the rule of law that would result from such an interpretation. Therefore, it is an important indicator of the likelihood or probability that the legislature intended its legislation to operate retrospectively. Generally speaking, the greater the likelihood that rights have been relied upon and the greater the degree of reliance upon them, the more clearly the legislature must speak in order to adversely affect them. Depending upon the circumstances, some rights may be seen as more deserving of protection than others.

Changes in the law that are foreshadowed as the result of a delayed legislative commencement date<sup>667</sup> may be more likely to receive a retrospective interpretation.<sup>668</sup> Such changes

will be relatively inoffensive to the rule of law if they afford individuals an adequate opportunity to adjust their expectations and protect their interests. This is particularly true of procedural changes, such as might be brought about by an amendment modifying the limitation period within which certain causes of action may be prosecuted.<sup>669</sup> For example, new legislation that has the effect of requiring a plaintiff to file suit within the 60 days following its date of enactment instead of within 90 days of that date may be given a retrospective interpretation more readily than other legislation.<sup>670</sup>

A foreshadowing argument may also have merit when made in respect of activities that occur in the interim between the enactment and the coming into force of new legislation. Arguably, individuals who enter into contracts or who acquire property, statutory or other rights during such a period have an opportunity to consider the pending legislation when doing so, and thus can adjust their expectations accordingly.<sup>671</sup> It must be emphasized, however, that arguments based on the fact that the commencement of new legislation has been foreshadowed should carry no weight at all except in a limited number of cases. These are cases in which the parties involved have had a meaningful chance, in the interim between the enactment and the commencement of new legislation, either to protect their rights as acquired prior to its commencement or to adjust their expectations in accordance with its terms.<sup>672</sup>

Rights that have arisen as a result of technical deficiencies in the administration of the law or as a result of evasive practices often have very little equity associated with them. Consequently, the courts may be more willing to see these rights altered retrospectively than other rights possessing greater equitable merit.<sup>673</sup> There are a number of situations in which the merits of reliance claims may be slim. For example, legislation correcting administrative oversights committed in the course of conducting tax sales or the like may be relatively unobjectionable in cases where those oversights are unlikely to have affected the behaviour or the reliance interests of the parties involved.<sup>674</sup> Similar reasoning can be used with respect to taxation legislation. Plugging tax loopholes after the fact is considered to be a standard part of the game played between the taxpayer and the tax collector.<sup>675</sup> In general, then, grasping at technicalities in order to found a claim of disrupted expectations may not be looked upon with much favour by the courts.<sup>676</sup>

Where individual liberty is at stake, the courts may be more willing to allow legislation to operate retrospectively. The fact that legislation is seen as being beneficial from an individualistic point of view may encourage a retrospective interpretation.<sup>677</sup> Both para. 44(e) of the federal Interpretation Act<sup>678</sup> and para. 11(i) of the Charter<sup>679</sup> reflect this philosophy.<sup>680</sup> One can sense the influence here of the rule of interpretation requiring that ambiguous penal

enactments be strictly construed in favour of accused persons.<sup>681</sup> It would seem that, generally speaking, the courts tend to be sympathetic to arguments in favour of individual liberty.<sup>682</sup>

There is also a broader argument to the effect that purely beneficial legislation<sup>683</sup> may be more readily accorded a retrospective interpretation. Once again, the focus here is on the rights of the individual as opposed to the collective rights of society, the implication being that legislation which confers benefits upon individuals should be given the widest possible scope.<sup>684</sup> The fact that legislation has a generally beneficial character is a legitimate factor to be taken into account in assessing retrospective intention. Its importance should not be overemphasized, however.<sup>685</sup>

On a related note, legislation that is intended to overcome unreasonableness, hardship or injustice in the law may also be more readily interpreted as operating retrospectively.<sup>686</sup> Occasionally, the courts have simply described such legislation as "remedial,"<sup>687</sup> but this is too general a label. All enactments are deemed to be remedial.<sup>688</sup> A more precise way of expressing the idea is to say that legislation which corrects obvious hardships or injustices in the law may more readily be construed as operating retrospectively than other types of legislation.<sup>689</sup>

The courts also tend to be more willing to permit legislative interference with acquired rights that will be fully realizable only at some future date<sup>690</sup> than with rights that

have already crystallized.<sup>691</sup> Because they include a future component, rights of the former type can be affected by changes in the rules by which future conduct is to be judged, while rights of the latter type can only be affected by a more drastic change in the rules governing conduct that has already been completed. The decision in R. v. Hayward, Ex parte Cyr<sup>692</sup> can be used to illustrate this point. The issue in that case was whether the New Brunswick Landlord and Tenant Act,<sup>693</sup> which came into force on January 12, 1939, applied to leases that were entered into prior to that date. Section 12 of the act deemed all leases containing a covenant that prohibited assignment without the landlord's consent to be subject to a proviso that such consent was not to be unreasonably withheld. It also authorized application to a County Court judge in cases of dispute about what was reasonable. One of the leases in question had been assigned without consent on March 8, 1938 (prior to the coming into force of the new statute), while the other had been so assigned on February 4, 1939 (after the commencement of the new statute).

The New Brunswick Court of Appeal held that the new legislation applied only in respect of the assignment that was made after its coming into force, citing in support of their decision the corollary rule that a statute is not to be accorded a greater retrospective operation than its language renders necessary.<sup>694</sup> Although the court was willing to construe the legislation as governing the future operation of

leases that had already been made, it was unwilling to go so far as to allow it to transform an act that constituted a breach of contract at the time it was committed into a lawful act ex post facto. This reasoning can be justified on the grounds that expectations respecting future legal consequences tend to be less fixed than those respecting consequences that have been fully realized. Future consequences are less directly connected with and less proximate to corresponding events than consequences that have already crystallized.<sup>695</sup>

It is also true that some rules of law, because of the nature of the conduct to which they relate, may be less relevant or conducive to planning than others, and thus less likely to give rise to reliance interests. In conducting himself, a person may rely less heavily or specifically on the rules governing liability for negligent conduct (which is unplanned) than on the rules governing transfers of property or the formation of contracts (which are planned).<sup>696</sup> It is, however, difficult to generalize, and any distinctions that are made will tend to be very fine ones.

Furthermore, one is more likely to expect changes (including retrospective changes) in some areas of the law than others. Legislative reform of the law governing family rights and obligations or revisions to the rules governing the occupation and use of real property, for instance, are more readily anticipated than some other types of legislative changes. Indeed, it may be almost understood that certain

areas of law will be reformed from time to time to keep abreast of social change and meet community needs. An argument can be made that the reliance interests in such cases are weaker, and thus more susceptible to retrospective interference.<sup>697</sup>

At the other end of the spectrum, the courts will not readily conclude that a legislature intended its legislation to interfere with pending litigation or with final judgments, even where the legislation is expressly stated to be applicable to pre-enactment events or to existing causes of action.<sup>698</sup> In such cases, expectations have become especially hardened and very specific language will be required to interfere with them.<sup>699</sup> Absent such language, the courts will rely on the corollary rule against retrospective operation<sup>700</sup> to exclude pending litigation and final judgments from the ambit of the legislation.

Subsection 2. The extent to which the rights involved would be affected. The extent to which the legislation under consideration would, if applied retrospectively, interfere with rights that were acquired under previously existing law is another factor to be considered in determining legislative intent.<sup>701</sup> The more significant and far-reaching the abrogation of such rights would be, the less likely it is that the legislature intended to bring about such a result, and the more convincing the evidence of intention to rebut

the presumption against retrospectivity must be in order to justify a retrospective interpretation of the legislation.

Consequently, legislation that has the effect of modifying a contractual term<sup>702</sup> or altering a tort remedy<sup>703</sup> is less objectionable than legislation that renders a contract unenforceable<sup>704</sup> or abolishes a tort remedy altogether.<sup>705</sup> Similarly, legislation that alters proprietary rights to a relatively minor extent is less offensive than legislation that significantly interferes with or removes such rights.<sup>706</sup>

Subsection 3. The public interest that would be served.

From time to time, situations will arise in which there will be a strong public interest in having legislation operate retrospectively. As I observed in chapter II,<sup>707</sup> the rule of law is not an absolute value. Emergency circumstances such as war,<sup>708</sup> insurrection, threats to public health and safety, and economic crises may require that the rule of law be temporarily sacrificed for the greater good.<sup>709</sup> To a lesser extent, legislation that is intended to protect the public from unsafe or unscrupulous activities or from certain consequences of social or economic inequality may be more readily interpreted as having a retrospective operation than other types of legislation.<sup>710</sup>

There is also a public interest in the financing and effective administration of government that may outweigh the rights of individuals to take advantage of tax loopholes or technical shortcomings in official behaviour. Accordingly,

legislation that is intended to cure legislative and administrative oversights may in many cases be viewed as quite legitimate.<sup>711</sup> The relevance of the public interest factor was adverted to over a century ago in the case of Phillips v. Eyre:<sup>712</sup>

[A]llowing the general inexpediency of retrospective legislation it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the state, or even the conduct of individuals, the justice of which prospective laws made for ordinary occasions and the usual exigencies of society for want of prevision fails to meet, and in which the execution of the law as it stood<sup>713</sup> at the time may involve public inconvenience and wrong.

Part E. Explanation of What Is Involved in Ensuring that Legislation Does Not Operate Retroactively or Retrospectively

Once a court has decided that a particular piece of legislation is intended to operate purely prospectively, there are certain conditions that must be met if this result is to be accomplished and the intention of the legislature respected. The purpose of this part is to outline in some detail what a court must do in order to ensure that an enactment operates neither retroactively or retrospectively.

Before entering into a detailed discussion of the conditions that must obtain if an enactment is to be given a purely prospective interpretation, it is important to recognize that questions of retroactivity and retrospectivity can arise in two broad contexts. One context occurs where the enactment being interpreted replaces common law rules governing a particular subject, the other where the enactment

under consideration replaces other legislation governing the same subject. In the former case, the issue relates to the proper transition from common law rules to the statutory rules that supersede them. In the latter case, the focus is on the transition from one set of statutory rules to another.

The first context is largely self-explanatory, but the second may involve any of the following:

1. The simple repeal of an existing enactment;<sup>714</sup>
2. The amendment of an existing enactment by adding or deleting words; or
3. The amendment of an existing enactment by way of repeal and substitution (i.e., an existing enactment is repealed and a revised enactment is substituted for it).<sup>715</sup>

Using the rule of law principle as the standard of judgment, amending and repealing enactments should be subject to the same rule of interpretation as enactments that supersede the common law. All of these contexts involve the same essential phenomenon, in that one set of rules is enacted to take the place of another. In the transition from the old law to the new, rights that were acquired under the old law may be put in jeopardy. Therefore, in all of the situations noted, the transition from the old state of the law to the new should be determined, and the temporal bounds of both the old and the new law delineated, in accordance with the general presumption against retroactive and retrospective operation.<sup>716</sup>

With these introductory comments in mind, I now move to a detailed examination of the conditions that must be met if legislation is to be prevented from operating retroactively or retrospectively. I will deal first with the requirements for avoiding retroactive operation and then go on to discuss the requirements for avoiding retrospective operation.

Section 1. Avoiding Retroactive Operation. As I explained in chapter IV,<sup>717</sup> retroactive operation involves the effective operation of legislation for a period prior to the date of its actual commencement. In order to avoid this type of statutory operation, two conditions must obtain:

1. The operation of the new legislation being interpreted must be confined to a period after its actual coming into force; and
2. The law that was in force during the period prior to the actual coming into force of the new legislation, whether it took the form of common law or statutory rules, must be treated as governing that period.<sup>718</sup>

In cases where new legislation supersedes the common law on a given subject, the general common law rule of interpretation against retroactive legislation applies. The result is that the new legislation is presumed to have commenced operation on the date of its actual commencement and the superseded common law rules are presumed to have operated prior to that date. In the case of new legislation that repeals or amends existing legislation, there is a statutory

rule of interpretation that applies in favour of a similar result. Paragraph 43(b) of the federal Interpretation Act reads as follows:<sup>719</sup>

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

. . . . .

(b) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder,

. . . . .

By way of historical background, it is interesting to note that the common law rule on the effect of repeal appears to have been much different from the statutory rule that eventually replaced it. In fact, the common law rule was expressed in terms that seemed incompatible with the general common law presumption against retroactive legislation. One leading case stated that, subject to a relatively limited exception, the effect of repealing a statute was to obliterate it as completely from the records of Parliament as if it had never been passed.<sup>720</sup> Repealed legislation was to be "considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."<sup>721</sup> Another case was slightly less draconian in its assessment, declaring 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."<sup>722</sup>

On an initial reading, the message to be taken from these cases would appear to be that repealing enactments were

construed as operating retroactively, except as regards concluded actions or closed transactions. It seems as though the two essential conditions for avoiding retroactive operation were being ignored in that, aside from the exceptions noted, (a) repealing enactments were treated as though they had come into force prior to their actual coming into force so as to snuff out the life of the enactments they repealed from the very moment at which the latter had commenced operation; and (b) as a consequence of this fiction, repealed enactments were not treated as though they governed the period prior to their repeal.<sup>723</sup>

One could be excused for wondering why the common law thought it necessary or appropriate to pretend that, with the exception of concluded actions or closed transactions, repealed legislation had never existed. The highly fictional nature of such a presumption seems patently unjust and sharply at odds with the general common law presumption against the retroactive operation of legislation.<sup>724</sup> Would it not have been more reasonable and practical to conclude that repealed law should be interpreted as having ceased operation as of the date of its repeal?

Upon closer examination of the case law, however, it appears that these radical judicial pronouncements did not accurately reflect the way in which the courts actually interpreted repealing enactments. As a rule, acts that had been undertaken while repealed legislation was in force were in fact treated as though they had occurred under the

previous state of the law. Their legal effects were not judged as though the repealing legislation were in force when they occurred, and this was so whether or not they happened to be part of a concluded action or a completed transaction. In effect, the courts recognized that repealed legislation governed the period during which it actually operated, and they treated it as though it simply expired or ceased to have effect upon being repealed. In turn, repealing legislation was interpreted as though it applied to repeal the repealed legislation as of the date of the former's actual commencement.<sup>725</sup>

The rather strange upshot of all of this is that some authorities have claimed that the statutory rule of interpretation that replaced the common law rule<sup>726</sup> was simply a codification of the latter!<sup>727</sup> Whatever the case, the statutory rule makes it much clearer than the common law rule did that repealing enactments are to be presumed not to have a retroactive effect. It leaves no doubt that repealed statutory provisions are to be treated exactly the same as superseded common law rules when it comes to the question of retroactive operation.<sup>728</sup> Both are presumed to govern the period during which they were in actual operation. Correspondingly, repealing or superseding legislation is presumed not to have been intended to operate prior to the date of its actual commencement.<sup>729</sup>

In summary, the operation of the statutory presumption against retroactive repealing legislation is entirely in

harmony with the operation of the common law presumption against the retroactive operation of legislation that supersedes the common law. Both apply in favour of ensuring that the two essential conditions for avoiding retroactive operation are met.

Section 2. Avoiding Retrospective Operation. I indicated in chapter IV<sup>730</sup> that legislation operates retrospectively when it governs, as of the date of its actual commencement, the legal consequences of events which occurred prior to that date. As is the case with retroactive operation, there are two requirements that must be met if legislation is to be prevented from operating retrospectively. These are as follows:

1. The new legislation being interpreted must be read so that it does not apply to govern the legal consequences of events that occurred prior to its actual coming into force;<sup>731</sup> and
2. The law that was in force during the period prior to the actual coming into force of the new legislation, whether it was in the form of common law or statutory rules, must be treated as governing the legal consequences of events that occurred during that period.

When legislation supersedes the common law rules on a particular subject, the general common law presumption against retrospectivity applies in favour of seeing that both of the above conditions are fulfilled. However, where a

change in the law is brought about by the repeal or amendment of previously existing legislation, there are several statutory rules of interpretation that apply. These rules, which are contained in paras. 43(c), (d) and (e) of the federal Interpretation Act, work in a fashion similar to the general common law rule:<sup>732</sup>

43. 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 the enactment so repealed,

(d) affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or

(e) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment, penalty or forfeiture referred to in paragraph (d),

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

It is interesting to contrast the operation of these statutory rules of interpretation with the common law rule that they replaced. In the previous section, I referred to the draconian language that was used to describe the effects of repeal at common law.<sup>733</sup> Remarkably, however, the common law rule was interpreted liberally enough to preserve many rights that were acquired under repealed enactments, notwithstanding the fact that they had not been enforced in the courts prior to the date of repeal. In order for rights to

survive the repeal of the enactment under which they were acquired, they had to be based upon a completed transaction -- that is, a transaction past and closed.<sup>734</sup>

There seems to be some disagreement in the case law about whether the predecessor of para. 43(c) of the Interpretation Act<sup>735</sup> codified or broadened the common law rule on repeal.<sup>736</sup> In some respects, it would appear to have broadened the rule.<sup>737</sup> What is undeniable, however, is that the statutory rule expresses the proper approach to interpreting repealing legislation in much clearer language than the common law rule did. Instead of defining itself in terms of prosecuted actions or closed transactions, it puts the focus on preserving rights that have been acquired under repealed law.

In stating that acquired rights are not to be interfered with, Parliament is saying that the legal consequences of events should not be altered after those events have occurred. This follows from the fact that rights are acquired under legislation upon the happening of events: events give rise to specific legal consequences. The effect of the statutory presumption is thus to ensure that the legal consequences of events which occurred under a particular state of statutory law are not affected by the repeal of that law. Though the law itself may be repealed, the rights and liabilities created as a result of its previous operation are not. Accordingly, the repealed law is presumed to continue to govern the legal consequences of events that occurred

while it was in force, and this presumption will prevail barring a clear expression of legislative intention to the contrary.<sup>738</sup>

Moving beyond this point, there were some situations in which the common law rule on repeal was clearly inadequate to fully protect acquired rights, and this is where para. 43(c), in concert with paras. 43(d) and (e), unquestionably goes beyond the common law rule in the protection that it offers.<sup>739</sup> Where rights that had been acquired under repealed legislation required the continued existence of a specific text of law in order to enable their enforcement or realization, the common law rule could be of no assistance. In the eyes of the common law, once legislation had been repealed, its provisions could not be relied upon to authorize the taking of any enforcement action after the date of repeal.

The best illustration of this is the common law treatment of repealed penal enactments. Enforcement proceedings that had not been completed at the date of repeal of penal legislation could not be continued after that date, nor could new proceedings be commenced in respect of offences that were alleged to have been committed prior to the repeal date.<sup>740</sup> A similar rule applied with respect to other rights that required statutory authority for their enforcement, such as a statutory right of action, a right of appeal, a right to rely on a limitation defence or a right whose realization depended upon the performance of an official act.<sup>741</sup> In this regard,

the common law rule on the effect of repeal failed to allow for the legislative survival necessary to ensure fulfilment of the second essential condition for avoiding retrospective operation.

At this point, it is interesting to observe an important difference between the common law's treatment of superseded common law rules and its treatment of repealed statutory rules when it came to the question of survival. As I have indicated, common law rules are not repealed -- they are superseded or overridden.<sup>742</sup> Furthermore, they are only superseded to the extent that a new statute applies to the situations that they formerly governed. Therefore, at common law, if a new statute were construed so as not to operate retrospectively, the common law rules that it superseded would continue to exist for the limited purpose of enabling previously acquired rights to be enforced.<sup>743</sup> In contrast, statutory rules, once repealed, were treated by the common law as though they had been abrogated in toto. They no longer operated for any purpose whatsoever, and thus could not be relied upon in enforcing rights that had been acquired prior to their repeal.

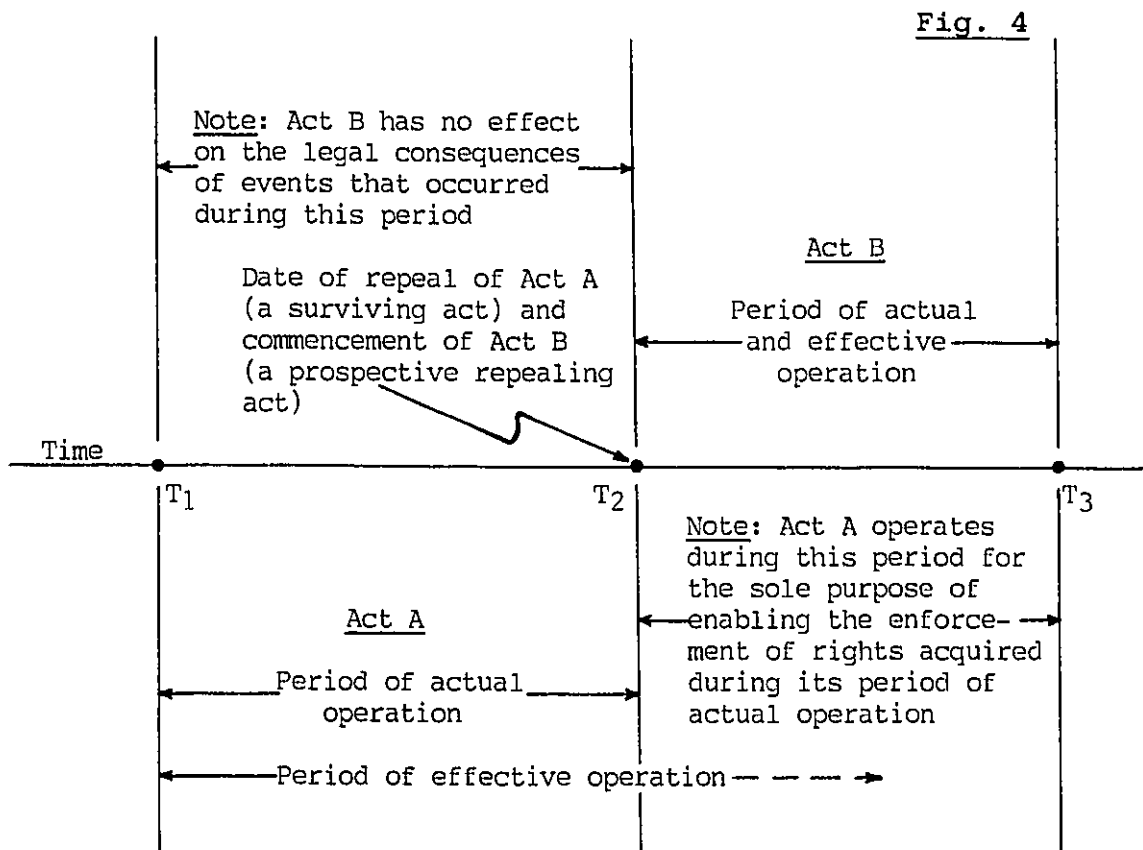
The combined effect of the predecessors of paras. 43(c), (d) and (e) of the Interpretation Act<sup>744</sup> was to overcome this shortcoming in the common law rule. By virtue of these statutory rules of interpretation, rights acquired under repealed statute law were put on the same footing as rights acquired under superseded common law rules.<sup>745</sup> Consequently,

the enforcement of any right or liability, including penal liability, is now presumed not to be affected by the repeal of the legislation under which it was acquired or incurred. Legal proceedings to enforce such rights and liabilities may be commenced and continued as though the repeal had never taken place.<sup>746</sup>

These statutory rules enable legislation to survive its repeal for the limited purpose of allowing acquired rights to be enforced. They operate to help ensure that right holders have the benefit of the legislative text necessary to support their claims. In this way, they help to ensure that the second condition for avoiding retrospective operation is satisfied. The combined effect of these rules is therefore entirely consistent with the operation of the general common law rule against retrospective operation.

While the survival of repealed legislation is a common phenomenon,<sup>747</sup> only rarely has it been expressly acknowledged in the case law.<sup>748</sup> Survival occurs whenever legislation is interpreted as having effective operation after its actual operation in order to enable the preservation of rights that were acquired thereunder. In effect, the operation of legislation is artificially extended beyond its natural life solely for this purpose.<sup>749</sup> The phenomenon of survival is depicted in the diagram on the following page.

Legislative survival is of special importance for rights that have a future component.<sup>750</sup> The survival necessary to allow for the realization or enforcement of such rights may



be substantial. It may be necessary to treat repealed legislation as having survived for a long time in order to enable it to determine the consequences of actions that take place over a period of time within the context of a contractual or a proprietary relationship.<sup>751</sup>

Continuing with the question of survival, it is important to recognize that in cases where the repeal of an enactment is accompanied by the substitution of another enactment, the provisions of paras. 43(c), (d) and (e) of the federal Interpretation Act must be read in conjunction with those of s. 44.<sup>752</sup> Sections 43 and 44 are complementary provisions, they

are not mutually exclusive. Paragraphs 44(c) and (d) provide that substituted provisions are presumed to apply insofar as possible with respect to the procedure to be followed in enforcing rights that have been acquired under repealed legislation. They qualify the presumption, established in para. 43(e), that rights which have been acquired under a repealed enactment may be enforced as though the enactment had not been repealed. This qualification, however, is entirely in keeping with the exception to the general rule against retrospectivity for purely procedural enactments.<sup>753</sup>

In conclusion, it might be helpful to review what a court must do in order to avoid giving a retrospective effect to legislation that repeals previously existing legislation. Unless the presumption against retrospective operation is inapplicable<sup>754</sup> or has been rebutted by clear evidence of a contrary legislative intention, a court must:

1. Interpret the new legislation in a restricted fashion so as to prevent it from altering the legal consequences of events that occurred prior to its actual coming into force.<sup>755</sup> This means that the new legislation must be read so as not to apply to persons in respect of given fact-situations where to do so would alter the legal consequences of pre-commencement events; and
2. Determine the legal consequences of events that occurred while the repealed legislation was in force in accordance with that legislation. Meeting this condition may require that the repealed legislation be treated as

surviving its repeal for the limited purpose of enabling the realization or enforcement of acquired rights and liabilities.

By following these requirements, a court which has determined that retrospective operation was not intended by the legislature ensures that the legislature's intention is respected. The result is that successive legislative enactments are kept within their proper temporal bounds as determined by the constitutional principle of the rule of law.

## Chapter VI

## CONCLUSION

Throughout the previous chapters, I have attempted to provide a principled, systematic and comprehensive analysis of retroactive and retrospective legislation, including a detailed explanation of how the courts should go about the task of interpreting potentially retroactive or retrospective enactments. My major concern has been to dispel much of the uncertainty and confusion that currently surrounds this topic.

At the root of the difficulties in this area of statutory interpretation are the inconsistent and unclear definitions of the concepts of retroactivity and retrospectivity that have been put forward from time to time by courts and commentators alike. In chapter III, I demonstrated how disagreement and uncertainty about the proper definition of these concepts has produced differing views about the scope of the rule of interpretation against retroactive and retrospective legislation. They have also led to questions about the exceptions to this fundamental rule of interpretation. The exceptions to the rule have not always been satisfactorily accounted for and rarely, if ever, have been precisely and systematically articulated. Even the nature of the presumption embedded in the rule of interpretation has been a subject of some uncertainty.

As indicated, these shortcomings are to some extent attributable to the imprecise language that has been employed in this area of law, an area in which precise expression is a prerequisite to coherence. Nonetheless, the most striking feature of the jurisprudence on retroactive and retrospective legislation is the lack of principled and systematic analysis. While there is no shortage of technical arguments based on fine distinctions, arguments based upon a comprehensive philosophical overview of the issues involved are quite rare.<sup>756</sup> This goes a long way towards explaining why problems of retroactivity and retrospectivity are commonly viewed as being inherently complex. There is, indeed, a temptation to throw up one's hands in dismay at the discordant pronouncements that have been made on the subject.<sup>757</sup>

The solution to many of these difficulties lies in developing an understanding of why retroactive and retrospective legislation is generally considered to be objectionable in our society and in our legal system. By digging down to first principles, it is possible to establish a firm foundation for rational analysis. With this in mind, I argued in chapter II that the philosophical basis for our general aversion to retroactive and retrospective legislation is the rule of law, a long-standing and powerful political and legal ideal.

The rule of law prescribes a standard that the law must meet in order to serve both as an effective instrument of social ordering and as a guarantor of justice and liberty of

the most fundamental sort. The requirements of the rule of law principle are essentially formal and procedural: they are requirements that must be met if the law is to be capable of guiding human conduct and providing individuals with a basic level of security. Simply put, the rule of law requires predictability in the legal system. Laws must be such that individuals are able to make plans and develop expectations in reliance upon them. At the same time, the rule of law must be viewed, not as establishing absolute requirements, but as representing very important social values that may be outweighed by other values in certain circumstances. This concept is an important part of our Canadian political and legal heritage and is enshrined as a fundamental principle of our constitution.

Generally speaking, both retroactive and retrospective legislation fly in the face of the rule of law principle. Consequently, the courts have traditionally employed a presumption of interpretation to the effect that all legislatures must be taken to intend to respect the rule of law by legislating prospectively. Only if legislation clearly manifests an intention to contravene this important principle will the courts interpret legislation to operate retroactively or retrospectively. Moreover, in the area of penal law, Canadian legislatures are constitutionally restricted in their power to enact such legislation.

My submission is that this general presumption should be understood and applied in light of its underlying purpose,

which is to preserve and promote the rule of law in our legal system. Attention to the underlying purpose of the rule provides the key to a soundly based critical analysis of the existing approaches to retroactive and retrospective legislation. It also lays the groundwork for a principled and comprehensive theory of such legislation.

In the course of critically analyzing the existing approaches to interpretation in chapter III, I argued for a broad definition of ex post facto legislation, a definition that takes into account all of the ways in which the undesirable effects of after-the-fact changes in the law may be brought about. In chapter IV, I defined and described in detail the two distinct modes of temporal operation by which such effects may be realized. These were appropriately labelled as retroactive operation, which involves the effective operation of legislation prior to the date of its actual commencement, and retrospective operation, which involves the operation of legislation after its actual commencement date so as to govern (and usually alter) the legal consequences of events that occurred prior to that date.

The definitions of retroactive and retrospective operation are of central importance to proper analysis in this area of the law because they establish the scope of meaning of the basic and corollary rules of interpretation against retroactive and retrospective legislation. These rules operate as prima facie presumptions that can only be rebutted by unequivocal evidence of a contrary intention, thereby

reflecting the importance of the constitutional principle that they are intended to promote.

In chapter IV, I also discussed the several exceptions to the general rule against retroactive and retrospective legislation. I explained that, for the most part, the exceptions to the rule can be justified on the basis that they describe enactments which, even when construed retroactively or retrospectively, do not operate contrary to the rule of law principle. I also examined a number of other special types of legislation with a view to explaining the circumstances, if any, in which they may legitimately be treated as exceptions to the general rule.

In chapter V, I offered some practical guidelines for applying the general rule against retroactive and retrospective legislation. These guidelines set out the basic three-step process of analysis that should be undertaken in every case in which retroactivity or retrospectivity issues are raised. The first step is to determine whether retroactivity or retrospectivity is in issue, the second is to determine whether the legislation in question qualifies as an exception to the general rule, and the third step involves assessing the evidence of legislative intention to rebut the general presumption against retroactive and retrospective operation.

Retroactive operation is relatively easy to identify because of its peculiar nature. Its fictional qualities tend to make it quite obvious when retroactivity is in issue and

when it is intended by the legislature. Retrospective operation tends to be more difficult to identify because, although it too is a distinctive mode of temporal operation, its effects are usually brought about in a less clear-cut fashion. The distinguishing feature of retrospective legislation is its effect on the consequences of pre-commencement events, something that is often difficult to determine. It follows that cases involving a question of retrospectivity generally present a greater analytical challenge to the courts than those involving potentially retroactive legislation.

There are several factors that should be taken into account in assessing potentially retroactive or retrospective legislation and, more specifically, in determining whether the legislature has expressed with sufficient clarity an intention to rebut the general presumption against retroactivity and retrospectivity. These have to do with the reasonableness and likelihood, viewed from the perspective of the rule of law principle, of the legislature having intended its legislation to operate in such a fashion. Broadly speaking, the factors to be considered are (a) the nature of the rights that would be affected by the legislation if it were allowed to operate retroactively or retrospectively; (b) the degree to which those rights would be affected by such an interpretation; and (c) the public interest that would be served by such an interpretation. These factors take into account not only the relative seriousness of the

potential infringement of the rule of law principle, but also competing values that may in some circumstances outweigh the value of the rule of law.

In chapter V, I also discussed the essential conditions that must be met if a retroactive or retrospective operation of legislation is to be avoided. I prefaced this discussion with an outline of the various contexts in which issues of retroactivity and retrospectivity may arise, and then focussed on the statutory rules of interpretation relating to repealing and amending enactments. My conclusion was that these rules operate consistently with the general common law rule against retroactive and retrospective legislation. Consequently, they work towards ensuring that the essential conditions for avoiding retroactive and retrospective operation are met.

I will conclude by reiterating the fundamental and unifying theme of this thesis. Essentially all of the arguments presented derive from a single philosophical position, a position that emphasizes the importance of the rule of law principle and the desirability of preserving and promoting it in our legal system. It is my belief that this is the surest foundation upon which to build a satisfactory theory of retroactive and retrospective legislation.

## ENDNOTES

1. On the constitutional function of the courts, see W.F. Craies, Craies on Statute Law, 7th ed. by S.G.G. Edgar (London: Sweet & Maxwell, 1971) at 13-15.
2. R. v. Ali (1979), [1980] 1 S.C.R. 221 at 235, Pratte J.
3. According to Sir P.B. Maxwell, Maxwell on the Interpretation of Statutes, 11th ed. by P. St. J. Langan (London: Sweet & Maxwell, 1962) at 1-2 (quoting Coke, Institutes, vol. 4 at 330):

A statute is the will of the legislature, and the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded "according to the intent of them that made it."

See also Pierre-André Côté, The Interpretation of Legislation in Canada, trans. Katherine Lippel, John Philpot and Bill Schabas (Cowansville, Que.: Yvon Blais, 1984) at 3-6; and Craies, n. 1 at 10-11.
4. The temporal dimension of legislation can usefully be contrasted to its operation in space. Both involve the question of which events an enactment is intended to or should properly govern. In the case of temporal operation, the question of applicability relates to when events have taken place, while in the case of spatial operation, the question relates to where they have occurred. Ascertaining the territory with respect to which legislation is intended to apply is one example of determining its operation in space: see the discussion of territorial operation in Côté, n. 3 at 146-154.

John K. McNulty, in "Corporations and the Intertemporal Conflict of Laws" (1967) 55 Cal. L. Rev. 12 at 16-18, points out the analogy between cases where the proper temporal operation of legislation is in question and those involving a territorial conflict of laws. There is, nevertheless, a distinction to be made between these two types of problem. While both can be analyzed by examining the connection between legal events and some other factor (either the time when the events occurred or the physical location where they occurred), problems of temporal operation must ultimately be resolved on the basis of legislative intent. In this respect, territorial choice-of-law problems offer no parallel for analysis.
5. Such provisions, where they do exist, are called transitional provisions in recognition of the fact that they govern the transition from one state of the law to another. The value

of transitional provisions was adverted to by Lord Simon P. in Williams v. Williams, [1971] 2 All E.R. 764 at 772 (P.):  
. . . it is desirable that wherever possible a statute should indicate in express and unmistakable terms whether (and, if so, how far) or not it is intended to be retrospective. The expenditure of much time and money would be thereby avoided.

6. As Morden J.A. observed in Re McDonald and R. (1985), 21 C.C.C. (3d) 330 at 351 (Ont. C.A.), leave to appeal to S.C.C. refused [1985] 2 S.C.R. ix: "Transition and cut-off rules relating to changes in the law frequently give rise to difficult problems of policy and interpretation."
7. The issues associated with the retrospective operation of legislation must be distinguished from those associated with the retrospective effects of judicial decisions. Unlike legislation, judicial decisions are by nature retrospective in the sense that they pass judgement upon events that have already occurred. They usually do so, however, in accordance with the law that was in force at the time those events occurred. As such, one of the main purposes of a judicial decision is to interpret previously existing law: see Smith v. London (City) (1909), 20 O.L.R. 133 (Div. Ct.), and Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission of Ontario, [1937] O.R. 796 (C.A.). In contrast, the main purpose of legislation is to lay down new rules to govern future cases.  
This is not to deny, however, that judges sometimes make new law in the course of rendering their decisions or that when they do, the issues raised are similar to those raised by retrospective legislation: see M.L. Friedland, "Prospective and Retrospective Judicial Lawmaking" (1974) 24 U.T.L.J. 170. Nevertheless, in this thesis I am concerned exclusively with the issues raised by retrospective legislation.
8. "The subject of retroactivity and retrospectivity is a complex one, yet one about which little has been written:" Bera v. Marr, [1986] 3 W.W.R. 442 at 450 (B.C.C.A.), Craig J.A. (dissenting).
9. Côté, n. 3 at 351.
10. These definitions, though essentially correct, have been streamlined in order to more readily convey the basic distinction that I wish to make. A detailed discussion of these two modes of operation, including definitions that are technically more precise, can be found infra in chapter IV at 93 ff.
11. Throughout this paper, I use the term "ex post facto" in a broad sense to describe any legislation that lays down rules "after the fact" -- that is, after the conduct or events that they purport to govern have occurred: see Henry Campbell

- Black, Black's Law Dictionary, 5th ed. (St. Paul, Minn.: West, 1979) at 520. I do not use it in the restricted sense that has been assigned to it in American constitutional jurisprudence: see Craies, n. 1 at 388-389, quoting Calder v. Bull, 3 Dallas (U.S.) 386 at 391 (1798), Chase J.
12. Aristotle wrote approvingly of the concept, asserting that "the rule of law is preferable to that of any individual:" Politics III, ed. Davis, trans. Jowett, p. 16, quoted in T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 Cambridge L.J. 111 at 112-113, fn. 5. Like some other rule of law theorists who subscribed to a version of natural law thinking, he probably had in mind the rule of a higher law. See also Arthur L. Goodhart, "The Rule of Law and Absolute Sovereignty" (1958) 106 U. Pa. L. Rev. 943 at 947-949, and O. Hood Phillips & Paul Jackson, O. Hood Phillips' Constitutional and Administrative Law, 7th ed. (London: Sweet & Maxwell, 1987) at 33.
  13. Eric Colvin, "Criminal Law and the Rule of Law," in Patrick Fitzgerald, ed., Crime, Justice and Codification: Essays in Commemoration of Jacques Fortin (Toronto: Carswell, 1986) 125 at 127.
  14. In particular, see Lon L. Fuller, The Morality of Law, rev. ed. (New Haven: Yale University Press, 1969); Joseph Raz, "The Rule of Law and Its Virtue" (1977) 93 L.Q. Rev. 195; John Rawls, A Theory of Justice (1971; rpt. Cambridge, Mass.: Harvard Belknap Press, 1973) at 235-243; and Colvin, n. 13 at 128. Colvin, at p. 128, fn. 8, calls it "the modern theory of the rule of law."
  15. This oft-quoted phrase can be traced to the Massachusetts Constitution of 1780: see R. MacGregor Dawson, The Government of Canada, rev. 5th ed. by Norman Ward (Toronto: University of Toronto Press, 1970) at 73.
  16. A.V. Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. by E.C.S. Wade (1959; rpt. London: Macmillan, 1961) at 188-195.
  17. Colvin, n. 13 at 129, remarks that the modern theory of the rule of law "involves a broadening of Dicey's perspective rather than a break with the tradition which he embodied. . . . The modern theory . . . views constitutional government as an aspect of the rule of law rather than the whole phenomenon." Allan, n. 12 at 114-115, points out that Dicey failed to present his theory in "clear juristic terms."
  18. Dicey used this phrase interchangeably with the phrase "the rule of law:" see, for example, n. 16 at 184.

19. Sir Ivor Jennings, The Law and the Constitution, 5th ed. (1959; rpt. London: University of London Press, 1964) at 45-46, and Goodhart, n. 12 at 946-947.
20. Goodhart, n. 12 at 946-947. By way of illustration, one of the significant features of Magna Carta lies in the acknowledgement by King John that he was subject to the common law of the land: see Goodhart, supra at 948, and J. Harvey & L. Bather, The British Constitution, 4th ed. (1977; rpt. London: Macmillan, 1978) at 424-425.
21. Jennings, n. 19 at 47-48, makes the point well:  
It is not enough to say . . . that the powers of the Crown and its servants are derived from the law; for that is true even of the most despotic state. The powers of Louis XIV, of Napoleon I, of Hitler, and of Mussolini were derived from the law, even if that law be only "The Leader may do and order what he pleases."
22. See R.F.V. Heuston, "The Rule of Law," in R.F.V. Heuston, Essays in Constitutional Law, 2d ed. (London: Stevens & Sons, 1964) 32 at 40-41; Allan, n. 12 at 113-114; and F.A. Hayek, The Road to Serfdom (1944; rpt. London: Routledge & Kegan Paul, 1962) at 81-84.
23. Jennings, n. 19 at 48, and Dawson, n. 15 at 73. As Colvin, n. 13 at 130, states:  
The ideal of the rule of law . . . requires that law be designed so that it is knowable. And, moreover, that it is knowable in advance of engaging in the conduct to which it will be applied.
24. Allan, n. 12 at 112-113 and 117.
25. John Locke, Two Treatises of Government, book II, para. 137, quoted in Allan, n. 12 at 117, fn. 22.
26. Harvey & Bather, n. 20 at 11.
27. Supra, n. 22 at 72. Hayek goes on to argue that the rule of law is incompatible with any significant government intervention in the economy, a conclusion that does not follow from his definition of the concept. His argument on this point is based instead on an extremely conservative economic philosophy: see Harry W. Jones, "The Rule of Law and the Welfare State" (1958) 58 Colum. L. Rev. 143. Nevertheless, his definition of the rule of law is well-stated. It was adopted by Professor Joseph Raz as the foundation of his penetrating analysis of the rule of law, contained in the article cited in n. 14.
28. Supra, n. 14 at 202.

29. Allan, n. 12 at 117. See also Raz, n. 14 at 203-204, who observes that predictability in one's environment increases one's power of action; Goodhart, n. 12 at 945-946, who points out that the rule of law guarantees a minimal degree of freedom; and Rawls, n. 14 at 235 and 239-240. At p. 235, Rawls expresses the idea in these words:

Now the rule of law is obviously closely related to liberty. . . . A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men's liberties.

It is also interesting to note Jeremy Bentham's views on this subject. Bentham thought that the principal function of law was to provide security to individuals. He pointed out that there can be no liberty in any meaningful sense of the word without the security provided by law. Human beings, being naturally disposed to make plans and develop expectations, need the security and predictability afforded by the law in order to enjoy liberty that is of any real value: see Jeremy Bentham, Principles of the Civil Code, in Jeremy Bentham, The Works of Jeremy Bentham, vol. 1, ed. by John Bowring (1838-1843; rpt. New York: Russell & Russell, 1962) 297 at 302-303 and 307-308. This security he referred to as "that Liberty that is produced by Law:" Jeremy Bentham, University College London manuscripts, box 69, p. 55, quoted in Douglas G. Long, Bentham on Liberty (Toronto: University of Toronto Press, 1977) at 78. See generally Long's discussion of Bentham's views at pp. 71-79.

30. Goodhart, n. 12 at 945-946, points out that the individual liberties which are so highly cherished in Western liberal democracies could not exist if those societies were not subject to the rule of law.
31. Raz, n. 14 at 204-205.
32. Colvin, n. 13 at 149-150.
33. Allan, n. 12, distinguishes the political ideal of the rule of law from the rule of law as a "juristic principle."
34. Colvin, n. 13 at 130.
35. As Fuller, n. 14 at 96, puts it: "[L]aw is the enterprise of subjecting human conduct to the governance of rules."
36. Fuller, n. 14 at 4, 42-43 and 96-97, refers to this standard as the "inner" or "internal" morality of law. Colvin, n. 13

at 129, describes the rule of law ideal as "a standard for the institutional design of law."

37. Raz, n. 14 at 207-208. And see generally pp. 205-208.
38. Allan, n. 12 at 114.
39. Laws governing relationships among individuals are also products of the exercise of governmental power, although that fact may be less obvious than it is in the case of laws that govern the relationship between the individual and the state: see Raz, n. 14 at 199.
40. Raz, n. 14 at 198-202; Fuller, n. 14 at 46-91; and Colvin, n. 13 at 130-134 and 141-151, list various requirements that the law must meet in order to conform to the rule of law ideal. With respect to clarity, see Merkur Island Shipping Corp. v. Laughton, [1983] 2 A.C. 570 at 612 (H.L.), Lord Diplock. With respect to accessibility, prospectivity, clarity and specificity, see Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G., [1975] A.C. 591 at 638 (H.L.), Lord Diplock (dissenting on other grounds). With respect to the requirements of natural justice, see Rawls, n. 14 at 238-239.
41. Raz, n. 14 at 196, decries such "promiscuous" uses of the term.
42. Ibid. at 208.
43. Ibid. at 196; Goodhart, n. 12 at 943-945; and Phillips & Jackson, n. 12 at 35. This is not to deny that there is a connection between the rule of law and democracy or between the rule of law and individual rights. One is much more likely to find democracy in a society where the rule of law prevails and individual liberties cannot exist in the absence of the rule of law. My point, though, is that the connections are not inevitable and that these distinct concepts should not be confused.
44. Not so the International Commission of Jurists, who in a declaration issued at the Congress of Delhi in 1959 purported to subsume under the rubric of the rule of law the requirement that governments "create and maintain the conditions which will uphold the dignity of man as an individual." According to the jurists, this requirement can only be fulfilled if each individual in a society is endowed with certain civil and political rights and able to enjoy "the social, economic, educational and cultural conditions which are essential to the full development of his personality:" see International Commission of Jurists, The Rule of Law and Human Rights: Principles and Definitions (Geneva: International Commission of Jurists, 1966) at 9, para. 1.

Statements like this stray far afield from the essentially formal and procedural ideal of the rule of law. They are a "perversion of the doctrine" (Raz, n. 14 at 195) in that they render the rule of law almost meaningless as a juristic term by making it synonymous with a complete social and political philosophy (Phillips & Jackson, n. 12 at 35-36). This type of abuse of the concept attempts to take advantage of its reputation as an objective standard by infusing it with a highly subjective set of criteria that invariably represent a particular view of what the substance of the law should be. It confounds the principle of the rule of law with the "rule of the good law."

45. Colvin, n. 13 at 135 and 145-148.
46. Accordingly, law that satisfies the requirements of the ideal from the point of view of the legal profession may be deficient in the eyes of the layman: Colvin, n. 13 at 135.
47. Bryant Smith, "Retroactive Laws and Vested Rights II" (1928) 6 Tex. L. Rev. 409 at 419-420, and Gene A. Maguire, "Retroactive Applications of Statutes: Protection of Reliance Interests" (1988) 40 Maine L. Rev. 183 at 188, fn. 26.
48. Colvin, n. 13 at 131; Goodhart, n. 12 at 949 and 956; Allan, n. 12 at 117; and Dawson, n. 15 at 73 and 264-275.
49. Allan, n. 12 at 117, and Dawson, n. 15 at 73-74 and 264-267. Dicey, n. 16 at 188-193, feared the arbitrariness that can accompany discretion and seemed to equate the two concepts.
50. As Colvin, n. 13 at 130-131, states: "All that can ever be demanded is 'reasonable' approximation to the ideal."
51. Ibid. at 129; Raz, n. 14 at 210; and Rawls, n. 14 at 236.
52. Colvin, n. 13 at 135.
53. Heuston, n. 22 at 40-41, and Dicey, n. 16 at v and 406.
54. This account borrows heavily from Frederic S. Burin, "The Theory of the Rule of Law and the Structure of the Constitutional State" (1966) 15 Am. U. L. Rev. 313. At p. 315, Burin acknowledges that there is no logical necessity for constitutional rules: it is possible for a ruler who enjoys absolute power to govern by observing the requirements of the rule of law. He points out, however, that the necessity of having at least some of the rule of law requirements reduced to constitutional rules has been historically demonstrated.  
The difficulty of altering constitutional rules is one factor to be taken into account in measuring the security of the rule of law in a legal system. Of course, there are no ironclad guarantees of the rule of law because (a) all legal systems, except perhaps those that are founded on some sort

of immutable natural law, have established procedures by which constitutional rules (including those that are indispensable for the rule of law) may be altered; and (b) even if existing constitutional rules conform to rule of law requirements, the government may not observe those rules in practice.

55. This entails the requirement that like cases be treated in a like manner and different cases differently (see Rawls, n. 14 at 237, and Colvin, n. 13 at 132) as well as the requirement that individuals have ready access to the courts for the resolution of disputes (see Newfoundland Association of Public Employees v. Newfoundland (A.G.), [1988] 2 S.C.R. 204 at 213, Dickson C.J.C.; British Columbia Government Employees' Union v. British Columbia (A.G.), [1988] 2 S.C.R. 214 at 229-230 (Dickson C.J.C.) and 251 (McIntyre J.); and Raz, n. 14 at 201). As Raz observes at p. 201, citizens can only be guided by the law if it is consistently and correctly applied by the courts in resolving disputes.
56. See supra at 14. It is not necessary for there to be constitutional rules requiring that legislation have all of these characteristics. Nevertheless, constitutional requirements of this type do serve to promote conformity to the rule of law by rendering offending legislation null and void. This is true, for example, of some of the limitations on legislative power contained in the United States Constitution, notably art. I, s. 9, no. 3, and art. I, s. 10, no. 1, prohibiting "ex post facto laws:" see Bryant Smith, "Retroactive Laws and Vested Rights" (1927) 5 Tex. L. Rev. 231 at 231, fn. 1. By contrast, in the United Kingdom, Parliament has full power to legislate contrary to the rule of law because it has the power to alter the constitution unilaterally.
57. Phillips & Jackson, n. 12 at 39, and Allan, n. 12 at 117-125.
58. Phillips & Jackson, n. 12 at 35 and 39, and Allan, n. 12 at 119-121.
59. See Sir Rupert Cross, Statutory Interpretation, 2d ed. by John Bell & George Engle (London: Butterworths, 1987) at 27; Allan, n. 12 at 117-118; Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G., n. 40 at 613 (Lord Reid), at 629-630 (Lord Wilberforce) and at 637-638 (Lord Diplock, dissenting on other grounds); Stock v. Frank Jones (Tipton) Ltd., [1978] 1 All E.R. 948 at 953 (H.L.), Lord Simon of Glaisdale; and the discussion infra in chapter IV at 140-141.
60. Allan, n. 12 at 118-119, and Roncarelli v. Duplessis, [1959] S.C.R. 121.

61. Cross, n. 59 at 173, and Côté, n. 3 at 407-408, especially fnn. 890 and 891. These are commonly known as privative clauses.
62. Ridge v. Baldwin (1963), [1964] A.C. 40 (H.L.), and Allan, n. 12 at 132-133.
63. Supra, n. 16 at v and 406.
64. Phillips & Jackson, n. 12 at 33-39 and c. 3; Harvey and Bather, n. 20 at c. 2; and E.C.S. Wade & G. Godfrey Phillips, Constitutional and Administrative Law, 10th ed. by A.W. Bradley (London: Longman, 1985) at cc. 5 and 6.  
Because Parliament could, in exercising its unlimited lawmaking powers, enact legislation that would seriously infringe upon or even destroy the rule of law in the British legal system, one would be justified in concluding that parliamentary supremacy is the fundamental principle of the British constitution: J.A. Corry & J.E. Hodgetts, Democratic Government and Politics, rev. 3d ed. (1959; rpt. Toronto: University of Toronto Press, 1968) at 96, and Phillips & Jackson, supra at 25 and 38-39.
65. Phillips & Jackson, n. 12 at 39; Allan, n. 12 at 117-125; and Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G., n. 40 at 638, Lord Diplock (dissenting on other grounds).
66. Allan, n. 12 at 124 and 142.
67. (U.K.), 30 & 31 Vict., c. 3 (formerly the British North America Act, 1867).
68. Roncarelli v. Duplessis, n. 60 at 142, Rand J. Dawson, n. 15 at 73, refers to the rule of law as "a cardinal principle of the Canadian constitution." See also Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721 at 747-752, and Newfoundland Association of Public Employees v. Newfoundland (A.G.), n. 55 at 213, Dickson J.
69. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (hereinafter sometimes referred to as "the Charter"). The preamble to the Charter reads as follows:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

In British Columbia Government Employees' Union v. British Columbia (A.G.), n. 55 at 229, Dickson C.J.C., the Supreme Court of Canada confirmed that "the rule of law is the very foundation of the Charter."

70. Constitutional prohibitions against retrospective penal legislation are found in paras. 11(g), (h) and (i) of the Canadian Charter of Rights and Freedoms: see the discussion infra at 29-31.
71. Admittedly, in today's complex social environment there is an increasing tendency to grant considerable discretionary powers to administrative officials and to bypass the courts by referring specialized matters to quasi-judicial tribunals. Nevertheless, Canadian legislatures remain concerned with keeping administrative discretion within the narrowest bounds compatible with achieving the social objectives of their legislation. In addition, there is still a strong concern to ensure that quasi-judicial tribunals are independent and impartial in their deliberations and that they are subject to the supervision and ultimate control of an independent judiciary: Allan, n. 12 at 131.
72. Most notably, for the purposes of this paper, the presumption against retrospective operation of legislation. For another example, in Roncarelli v. Duplessis, n. 60, the Supreme Court of Canada applied the presumption that discretionary powers which are unrestricted on their face are intended to be exercised only in good faith and consistently with the object or purpose of the legislation conferring them.
73. Halsbury's Laws of England, vol. 44, 4th ed. by Lord Hailsham of St. Marylebone (London: Butterworths, 1983) at 570, fn. 1; A Concise Dictionary of Law (Oxford: Oxford University Press, 1983) at 319; L.B. Curzon, A Dictionary of Law, 5th ed. (Plymouth, Eng.: MacDonald & Evans Ltd., 1979) at 298; Cusson v. Robidoux (1975), [1977] 1 S.C.R. 650; Sun Alliance Insurance Co. v. Angus, [1988] 2 S.C.R. 256; Re McDonald and R., n. 6; and Bera v. Marr, n. 8 at 450, Craig J.A. (dissenting).
74. Words and Phrases Legally Defined, 2d ed. (London: Butterworths, 1969) at 335. And see infra, chapter III.
75. F. Stroud, Stroud's Judicial Dictionary of Words and Phrases, vol. 4, 5th ed. by John S. James (London: Sweet & Maxwell, 1986) at 2285.
76. Earl Jowitt & Clifford Walsh, Jowitt's Dictionary of English Law, vol. 2, 2d ed. by John Burke (London: Sweet & Maxwell, 1977) at 1573. This is suggested by the Latin root word "retro," meaning back, backward or behind: Black's Law Dictionary, n. 11 at 1184.
77. Curzon, n. 73 at 298.
78. A Concise Dictionary of Law, n. 73 at 319.
79. Tomashavsky v. Nichols (1955), 16 W.W.R. 598 (Alta. S.C. A.D.).

80. Words and Phrases Legally Defined, n. 74 at 335.
81. See, for example, Taylor v. R. (1877), 1 S.C.R. 65; Williams v. Irvine (1893), 22 S.C.R. 108; Jones v. Gamache (1968), [1969] S.C.R. 119; R. v. Walker, [1970] S.C.R. 649; Dixie v. Royal Columbian Hospital, [1941] 1 W.W.R. 389 (B.C.C.A.); and Tomashavsky v. Nichols, n. 79.
82. A Concise Dictionary of Law, n. 73 at 384.
83. Cross, n. 59 at 184, acknowledges that retrospectivity and interference with vested rights could be dealt with together.
84. Admittedly, there are some special types of retrospective legislation that simply restate previously existing law. These types of enactment, while they govern the legal consequences of pre-enactment events, do not alter those consequences. Because of this feature, they are not offensive to the rule of law principle. For details, refer to the discussion of consolidating, re-enacting and codifying enactments, infra in chapter IV at 129-135.
85. One could argue that retrospective legislation which has purely beneficial consequences to the individual members of society does not offend the rule of law. But legislation that has no prejudicial consequences whatsoever will be exceedingly rare: see the discussion of beneficial enactments, infra in chapter IV at 149 ff. A more convincing argument is that legislation which has generally beneficial consequences for individuals will often be less offensive to the rule of law principle than some other types of legislation: see my remarks in the context of the discussion of the intention required to rebut the presumption against retrospectivity, infra in chapter V at 194-195.
86. F.A.R. Bennion, Statutory Interpretation (London: Butterworths, 1984) at 314, asserts that "the rule of law means nothing else."
87. Witness the words of an anonymous author in "Retrospective Legislation and Its Effect on Existing Rights" (1957) 2 Vict. U. Well. L. Rev. 213 at 213:

It is the function of the law to provide certainty in the legal relations into which people may enter, and it is considered with reason that retrospective statutes are apt to defeat this purpose, creating confusion and working injustice at the same time.
88. Fuller, n. 14 at 53, observes: "Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose."

89. Bennion, n. 86 at 444. By the same token, the law applicable to current activities should not be the law that was in force only at some prior date: see R. v. Kaye (1988), 67 Sask. R. 61 (Q.B.).
90. Bennion, n. 86 at 314.
91. Gamble v. R., [1988] 2 S.C.R. 595 at 647, Wilson J.
92. Raz, n. 14 at 205, and Harvey and Bather, n. 20 at 11.
93. Bennion, n. 86 at 444, states: "Retrospectivity is artificial, deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare."
94. Bennion, ibid. at 314, aptly likens this to switching the rules while an event is in progress.
95. Of course, the effects are most egregious when the retrospective law or policy is made to suit the personal interests of the ruler instead of some legitimate public purpose: see Raz, n. 14 at 202-203.

One can make the argument that in a system of generally prospective laws, retrospective legislation may operate more unfairly than a law that is meaninglessly vague to begin with. In the latter case, there is little or no room for reliance interests to arise and official actions taken in response to past conduct can hardly be said to disrupt expectations. In contrast, retrospective laws tend to disrupt expectations by virtue of the fact that they change legal rules after individuals have had an opportunity to rely on them.
96. Infra, chapter IV at 117 ff.
97. See the discussion supra at 15-18.
98. As Fuller, n. 14 at 59, remarks: "It is the retroactive criminal statute that calls most directly to mind the brutal absurdity of commanding a man today to do something yesterday." The Supreme Court of Canada recently confirmed that it is fundamental to a legal system recognizing the rule of law that an accused be tried and punished in accordance with the law which was in force at the time the offence was committed: Gamble v. R., n. 91.
99. Quinn v. Prairiedale No. 321 (Rural Municipality) (1958), 25 W.W.R. 241 (Sask. C.A.); Gagnon v. R. (1971), 14 C.R. (N.S.) 321 (Que. C.A.); Zong v. Commissioner of Penitentiaries (1975), [1976] 1 F.C. 657 (C.A.); Boulangier v. Fédération des producteurs d'oeufs de consommation du Québec (1982), 141 D.L.R. (3d) 72 (Que. C.A.), leave to appeal to S.C.C. refused (1982), 141 D.L.R. (3d) 72n (S.C.C.); Air Canada v. British

Columbia (1986), 4 B.C.L.R. (2d) 356 at 378 (C.A.), Lambert J.A., rev'd on other grounds [1989] 4 W.W.R. 97 (S.C.C.); and Ex parte Hum Bing You, [1926] 3 D.L.R. 462 (Que. K.B.).

100. Supra, n. 69.

101. Section 1 of the Charter provides as follows:

Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

102. See Gowan Guest, Q.C., "War Crimes" (1987) 45 Advocate 693.

103. This provision was applied in R. v. Logan (1986), 51 C.R. (3d) 326 (Ont. C.A.).

104. Oddly enough, para. 11(i) of the Charter also imposes a limitation on the power of Parliament and the provincial legislatures to enact a specific type of prospective penal legislation. It requires that legislation providing a reduced punishment for an offence apply retrospectively to a person who committed the offence before the legislation came into force in cases where the person is not sentenced until after the commencement date. Accordingly, statutory provisions that attempt to provide otherwise are unconstitutional.

Paragraph 11(i) constitutionalizes what was formerly a simple rule of interpretation contained in para. 36(e) of the Interpretation Act, R.S.C. 1970, c. I-23 (now R.S.C. 1985, c. I-21, para. 44(e)). The rule of interpretation continues to apply, but now Parliament and the provincial legislatures are constitutionally limited in their power to rebut it.

It is debatable whether this aspect of para. 11(i) of the Charter should be viewed as explicitly recognizing the fact that a value (in this case, individual liberty) may outweigh the value of the rule of law or simply as supporting "beneficial" provisions that are entirely consistent with the rule of law: see infra, chapter IV at 119-120, as well as the discussion of beneficial legislation, infra in chapter IV at 149 ff.

105. Gamble v. R., n. 91 (retrospective application of penal legislation said to infringe s. 7 Charter right to fundamental justice).

106. Supra at 12-13.

107. See Gamble v. R., n. 91 at 647, Wilson J., where the rule of law is described as an element of fundamental justice.

108. See, for instance, the arguments made in Minto Construction Ltd. v. Ontario (Regional Assessment Commissioner, Region No. 3) (1989), 68 O.R. (2d) 350 (H.C.). As noted by Douglas J. Sherbaniuk, Q.C., in "Retrospectivity in Canadian Tax Legislation," in Canadian Tax Foundation, Report of the Proceedings of the Thirty-fifth Tax Conference (1983) (Toronto: Canadian Tax Foundation, 1984) 727 at 739: "The scope of this provision [s. 7] is far from clear and must await judicial elaboration."
109. The relevant provisions of the Civil Code are cited in Herbert Broom, A Selection of Legal Maxims, 10th ed. (London: Sweet & Maxwell, 1939) at 352. The Roman approach to retrospective laws is discussed in Gerardo Broggin, "Retroactivity of Laws in the Roman Perspective" (1966) 1 Ir. Jurist (N.S.) 151.  
See also the discussion of the history of the bias against retrospective laws contained in Elmer E. Smead, "The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence" (1936) 20 Minn. L. Rev. 775. My historical sketch is drawn largely from Smead's account.
110. Of the Laws and Customs of England, vol. III, ed. by Sir Travers Twiss, p. 531, cited in Smead, n. 109 at 776. Smead notes that Bracton was responsible for introducing a number of Roman civil law concepts into the common law.
111. Institutes, vol. 2 at 292, quoted in Smead, n. 109 at 777. In Broom, n. 109 at 352-358, this maxim is discussed in detail and loosely translated as: "A new law ought to be prospective, not retrospective, in its operations."
112. There were some judicial dicta suggesting that Parliament did not have the power to enact unjust legislation, most notably Coke's remarks in Dr. Bonham's Case (1610), 8 Co. Rep. 113b, 77 E.R. 646 at 652. Smead, n. 109 at 780, suggests that Coke may have viewed the rule against retrospective legislation as part of a natural law limitation on the power of Parliament.
113. Sir William Blackstone, Commentaries, vol. 1 (1765; rpt. New York: Oceana, 1965) at 46.
114. Blackstone, ibid. at 45-46, submitted that retrospective laws, because they cannot be known by persons prior to undertaking conduct, fail to meet a fundamental requirement of laws -- the requirement that they consist of prescribed rules. To Blackstone, then, this requirement meant that legal rules had to operate in futuro.
115. For a fuller discussion, see Smead, n. 109 at 777-780.
116. The rules of natural justice are a good illustration of the common law's concern with procedural fairness.

117. Sir P.B. Maxwell, Maxwell on the Interpretation of Statutes, 12th ed. by P. St. J. Langan (London: Sweet & Maxwell, 1969) at 204; Moon v. Durden (1848), 2 Exch. 22, 154 E.R. 389 at 396, Platt B. (retrospective laws described as incompatible with natural justice); Midland Railway Co. v. Pye (1861), 10 C.B. (N.S.) 179, 142 E.R. 419 at 424, Erle C.J. (effects of retrospective law said to be shocking to one's sense of justice); Young v. Adams, [1898] A.C. 469 at 476 (P.C.), Lord Watson; Upper Canada College v. Smith (1920), 61 S.C.R. 413; Sidback v. Field (1907), 6 W.L.R. 309 (Y.T.S.C. en banc); Glynn v. Niagara Falls (City) (1914), 31 O.L.R. 1 (S.C.A.D.); Gay v. R. (1949), 8 C.R. 86 (N.B.S.C.A.D.); Meurer v. McKenzie (1977), [1978] 1 W.W.R. 114 (B.C.C.A.); Re Sanderson and Russell (1979), 24 O.R. (2d) 429 (C.A.); R. v. Lucas (1986), 27 C.C.C. (3d) 229 (Ont. C.A.); and Hornby Island Trust Committee v. Stormwell (1988), 53 D.L.R. (4th) 435 (B.C.C.A.).
118. Moon v. Durden, n. 117; Upper Canada College v. Smith, n. 117; Re McDonald and R., n. 6; and R. v. Lucas, n. 117.
119. Husted v. Husted (1979), 108 D.L.R. (3d) 328 (Alta. C.A.), and Saltcoats No. 213 (Rural Municipality) v. Nabozniak, [1987] 6 W.W.R. 665 (Sask. C.A.).
120. Sun Alliance Insurance Co. v. Angus, n. 73, and R. v. Lucas, n. 117.
121. R. v. James (1986), 55 O.R. (2d) 609 (C.A.), aff'd [1988] 1 S.C.R. 669.
122. Phillips & Jackson, n. 12 at 35; Fuller, n. 14 at 210-212; and S.M. Waddams, Introduction to the Study of Law, 2d ed. (Toronto: Carswell, 1983) at 10.
123. Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G., n. 40 at 638 (dissenting on other grounds). See also Lord Diplock's comments in Inland Revenue Commissioners v. Joiner, [1975] 3 All E.R. 1050 at 1062 (H.L.).
124. Phillips & Jackson, n. 12 at 39; Allan, n. 12 at 117-125; and Waddams, n. 122 at 10.
125. (1870), L.R. 6 Q.B. 1 (Ex. Ch.).
126. Ibid. at 23.
127. Côté, n. 3 at 351.
128. Cross, n. 59 at 166-167.

129. Ibid. at 167. Cross points out that such presumptions have a constitutional foundation in that they reflect the relationship between the legislature, the executive, the judiciary and the individual citizen. In the case of the presumption against retrospective legislation, the constitutional foundation involved is the principle of the rule of law. For discussions of the judicial function of interpretation in this context, see Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G., n. 40 at 629, Lord Wilberforce; and Stock v. Frank Jones (Tipton) Ltd., n. 59 at 953, Lord Simon of Glaisdale.
130. Supra, n. 66 and accompanying text.
131. This also holds true with respect to rules of interpretation designed to uphold other aspects of the rule of law, such as the presumption that widely phrased discretionary powers are intended to be exercised only for the purposes of the enactment in which they are contained and the presumption that administrative tribunals exercising a judicial function are obliged to observe the rules of natural justice: see supra at 20; Cross, n. 59 at 166-169; and Allan, n. 12 at 117-125.
132. Supra, n. 111 and accompanying text.
133. As Cross, n. 59 at 167, observes, "presumptions of general application apply although there is no question of linguistic ambiguity in the statutory wording under construction."
134. Raz, n. 14 at 197; Allan, n. 12 at 117; Goodhart, n. 12 at 956; and Harvey & Bather, n. 20 at 431-432. The best that can be hoped for is that discretion will be kept within reasonable bounds, thereby limiting the potential for arbitrariness.
135. If the laws of a legal system were not generally prospective in their operation, individuals would not be able to develop substantive expectations in reliance on them. Retrospective legislation would then have little or no disruptive effect. Unpredictability and insecurity would reign supreme. In this situation, social ineffectiveness would be the single distinguishing feature of retrospective legislation. But as Fuller, n. 14 at 53, observes: "If . . . we are to appraise retroactive laws intelligently, we must place them in the context of a system of rules that are generally prospective."
136. In the field of penal law and possibly in certain other areas, there is an additional issue to be considered -- the constitutional validity of the legislation: see supra at 29-31.

In chapter V, I set out the three-step process of analysis that should be followed by the courts in interpreting

potentially retrospective legislation. This process squarely addresses the two basic issues referred to here in the text.

137. [1948] 1 W.W.R. 284 (Alta. S.C.).
138. Ibid. at 287.
139. [1928] Ch. 955.
140. Ibid. at 966. See also Brosseau v. Alberta Securities Commission, [1989] 1 S.C.R. 301 at 317-318, L'Heureux-Dubé J.; Re Sanderson and Russell, n. 117 at 433, where the Ontario Court of Appeal, speaking through Morden J.A., noted the various definitions of "retrospective" extant in the case law; and Allen v. Gold Reefs of West Africa, Ltd., [1900] 1 Ch. 656 at 673 (C.A.), Lindley M.R., where the term "retrospective" was described as being "somewhat ambiguous."
141. Cross, n. 59 at 186, refers to the inconsistent judicial views on the nature of the presumption contained in the rule against retrospective operation.
142. The best example is that of declaratory legislation. A number of authorities have insisted that the rule is not applicable to such legislation, but a strong argument can be made that many declaratory enactments are not properly viewed as exceptions to the rule: see infra, chapter IV at 135 ff., especially at 139-143.

Of course, whether a given type of statute qualifies as an exception to the rule depends in the first place upon the scope of the definition of retrospective operation contained in the rule. Only if a statute has the potential to fall within the terms of the rule (i.e., only if it could indeed operate retrospectively) can any discussion be entertained about whether it should, for policy reasons, be excepted from the application of the rule: see my detailed discussion of the various exceptions to the rule and of other special types of legislation, infra in chapter IV at 117 ff.
143. The obscurity and incoherence of the law in this area is itself inconsistent with the rule of law requirement that the law be reasonably clear: see Cross, n. 59 at 3.
144. Given my preference for a broad conception of retrospectivity, I submit that many of the problems in this area of the law are attributable to courts and commentators making unwarranted distinctions between cases involving similar issues and principles, rather than to any tendency to unjustifiably lump together cases involving truly different issues. More specifically, as I will explain, they are the inevitable result of the application by some courts of unduly narrow definitions of the concept of retrospective operation.
145. Supra at 24-25 and 39.

146. This example was inspired by the case of Levin v. Active Builders Ltd. (1973), 40 D.L.R. (3d) 299 (Man. C.A.).
147. As is the case with the immediately previous definition, the alteration in legal consequences would be effective as of the date of enactment of the legislation in question.
148. The reader should be clear on the point that the two wider definitions of retrospectivity both encompass two distinct modes of operation: (a) the highly artificial operation of legislation prior to its enactment, to which the narrow definition limits itself; and (b) the operation of legislation after its enactment so as to alter the legal consequences of pre-enactment events. In chapter IV, I contend that retrospectivity issues can be better understood if these two modes of operation are clearly distinguished and labelled as "retroactive" and "retrospective" operation, respectively. It should also be noted that the mere fact that a statute contemplates or takes into account an event that occurred prior to its enactment, or assigns different legal consequences to events than the former law assigned to similar events that occurred during its period of operation, does not mean that it operates retrospectively. A statute does not operate retrospectively unless it affects the legal consequences of events that occurred prior to its enactment: see R. v. St. Mary, Whitechapel (Inhabitants) (1848), 12 Q.B. 120, 116 E.R. 811 at 814, Lord Denman C.J.; R. v. Levine (1926), 46 C.C.C. 342 (Man. C.A.); E.A. Driedger, "The Retrospective Operation of Statutes," in J.A. Corry, F.C. Cronkite & E.F. Whitmore, eds., Legal Essays in Honour of Arthur Moxon (Toronto: University of Toronto Press, 1953) 3 at 5 (specifically, the example of a change in roadway speed limits); and infra, nn. 227 and 228 and accompanying text.
149. For present purposes, this is a sufficient statement of the narrow definition. However, as I will explain in chapter IV, in order to be completely accurate and include all statutes that lay down legal rules which operate as of a past date, it is preferable to speak of legislation that has effective operation prior to its actual commencement date. While the date of actual commencement may be and usually is the date of enactment, in some cases it may be delayed until an appointed date after enactment: see Elmer A. Driedger, The Construction of Statutes (Toronto: Butterworths, 1974) at 171.
150. [1911] 2 Ch. 1 (C.A.).
151. Ibid. at 11-12.
152. (1953), n. 148, and (1974), n. 149 at 139-148. And see Elmer A. Driedger, The Composition of Legislation (Ottawa: Department of Justice, 1957) at c. XVI.

153. (1974), n. 149 at 140. Driedger adheres to this definition throughout most of the discussion in his text. However, his explanation of retrospective operation is obscured by some remarks suggesting that he may have had in mind a wider definition of the term, a definition that would encompass some types of legislation that operate from their date of enactment onward. For instance, later on at p. 140, he appears to accept the second part of Sedgwick's definition to the effect that a statute which "creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions already past" is considered to be retrospective. (This interpretation of Driedger's remarks seems clearly correct when one considers the views expressed in his 1953 essay, supra, n. 148, and in his 1957 textbook, supra, n. 152). At p. 144, he asserts that a statute "would be given retrospective effect if it is applied so as to impose a new duty or attach a new disability in respect of events that took place before the statute was enacted." Also, he gives as an example of a retrospective act the act of indemnity that was considered in Phillips v. Eyre, n. 125. That act did not in fact operate as of a past time: it was only effective as of the date of its enactment.

As for his 1953 essay, he seems to advocate the strict view of retrospectivity with particular strength at pp. 5-7. But there are points in his essay, most notably at pp. 4, 6, 8 and 11, where he wavers from it and appears to embrace a broader definition. A similar assessment can be made of his 1957 text.

As I point out infra at 57-58, Professor Driedger modified his thinking on the subject after writing his 1974 text, and the incongruous comments to which I have just referred are forerunners of his later views.

154. (1975), [1977] 1 S.C.R. 271.

155. Ibid. at 279. This definition is not in keeping with the broad view of retrospectivity traditionally taken by the Supreme Court of Canada (see, for example, Upper Canada College v. Smith, n. 117), nor with some of its more recent pronouncements on the subject (see Martin v. Perrie, [1986] 1 S.C.R. 41, and Sun Alliance Insurance Co. v. Angus, n. 73). However, the exact nature of the court's conception of retrospectivity in this case is not free from doubt. Although the definition quoted in the main text seems to have been generally relied upon throughout the court's discussion at pp. 279-280, Dickson J. also described as "retrospective" any enactment that is "operative with respect to transactions occurring prior to its enactment" (see p. 279). This, of course, is a much broader definition of retrospectivity than the one being discussed in this section.

156. Supra, n. 3.

157. Ibid. at 95. Professor Côté uses the term "retroactive" instead of the term "retrospective."
158. Ibid. See also pp. 97, 98, 99-100 and 101-102 for statements along the same lines.
159. See Côté, n. 3 at 95, 98 and 100.
160. Ibid. at 85, 95-96, 99-100, 103-106 and 108.
161. Refer to the lease example discussed supra at 44-46.
162. Supra, n. 3 at 103, fnn. 305-308.
163. Ibid. at 103, fnn. 309 and 310.
164. It is misleading to suggest that legislation which changes the legal consequences of pre-enactment events as of the date of its enactment involves operation as of a past time or operation in the past. Yet this claim has often been made: see Elmer A. Driedger, The Construction of Statutes, 2d ed. (Toronto: Butterworths, 1983) at 186; Ortved v. Bailey, [1983] I.L.R. 6212 at 6214 (Ont. H.C.), Rutherford J., aff'd (1984), [1983] I.L.R. 6212n (Ont. C.A.); and supra at 48. Such statements confuse operation in the past with operation in respect of the past.
165. See infra at 56 ff.
166. And so Professor Driedger claimed that the application of new legislation to pending actions, though it might run counter to the presumption against interference with vested rights, would not involve any question of retrospectivity: (1974), n. 149 at 147. Some cases in which the strict view of retrospectivity appears to have been adopted are Ontario (Regional Assessment Commissioner, Region No. 13) v. Downtown Oshawa Property Owners' Association, [1978] 2 S.C.R. 1030; Québec (Commission de protection du territoire agricole) v. Venne, [1989] 1 S.C.R. 880 at 913-915, Beetz J.; Moulton v. Moulton (1983), 46 N.B.R. (2d) 298 at 299-309 (C.A.), Hughes C.J.N.B.; Filteau v. Nesbitt, [1920] 2 W.W.R. 892 at 896-897 (Alta. S.C.A.D.), Beck J.; and Re Kanerva and Ontario Association of Architects (1986), 56 O.R. (2d) 518 (Div. Ct.).
167. Craies, n. 1 at 387-388; Maxwell, n. 117 at 215-220; Driedger (1974), n. 149 at 141, fn. 11; and Côté, n. 3 at 99, fn. 288, and at 412, fn. 906.
168. This is not to say that the mode of legislative operation, which determines the timing of a change in legal consequences, is unimportant. On the contrary, as I argue infra in chapter IV at 93 ff., drawing a clear distinction between

the two modes of retrospective operation is helpful for analytical purposes.

169. Driedger (1953), n. 148 at 4, acknowledged the heavy judicial support for a broader definition of retrospectivity than the one he was then advocating. This broader definition included the alteration or impairment of acquired rights. In (1974), n. 149 at 141, he admitted that there had been many occasions where a statute affecting acquired rights had been held to be retrospective on that account only. See also supra, n. 167.
170. Society for the Propagation of the Gospel in Foreign Parts v. Wheeler, 2 Gall. C.C. 105 at 139 (1814), quoted in Smead, n. 109 at 782. Although this statement was made in the context of a constitutional challenge, it applies with equal force to cases involving a pure question of statutory interpretation. Story J.'s words were quoted with approval in Re Sanderson and Russell, n. 117 at 433-434, Morden J.A.
171. For example, see Driedger (1974), n. 149 at 137-139, and Gustavson Drilling (1964) Ltd. v. Canada (M.N.R.), n. 154 at 282. This phenomenon is sometimes referred to as interference with vested, accrued or existing rights.
172. Driedger (1974), n. 149 at 139 and 143; Gustavson Drilling (1964) Ltd. v. Canada (M.N.R.), n. 154; and Board of Commissioners of Public Utilities v. Nova Scotia Power Corp. (1976), 75 D.L.R. (3d) 72 (N.S.S.C.A.D.). The proponents of one of the wider definitions of retrospectivity also believe that such a distinction exists between the operation of the two presumptions: see infra, n. 197. The practical implications of making this distinction are discussed infra at 75-79.
173. West v. Gwynne, n. 150. And see Canada (A.-G.) v. Hallet & Carey Ltd., [1952] A.C. 427 (P.C.); R. v. Beaton (1981), [1982] 1 F.C. 545 (C.A.); and Re Apple Meadows Ltd. and Manitoba (1985), 18 D.L.R. (4th) 58 (Man. C.A.).
174. In West v. Gwynne, n. 150, Cozens-Hardy L.J. betrayed this weakness in his analysis. In response to an argument that the statute under consideration (which deemed certain leases to be subject to a term regulating their assignment) would operate retrospectively if it were applied to leases entered into prior to its enactment, he stated, at p. 11: "Almost every statute affects rights which would have been in existence but for the statute." Another example of this type of confusion occurs in Acme Village School District No. 2296 v. Steele-Smith (1932), [1933] S.C.R. 47 at 60, where Crocket J. dismisses an argument in support of the preservation of existing contractual rights by terming the latter "mere potential rights." Finally, Driedger (1953), n. 148 at 5, confuses the impairment of acquired rights with making "unlawful what was hitherto lawful."

175. Few would dispute the validity of the following comment made by Dickson J. in Gustavson Drilling (1964) Ltd. v. Canada (M.N.R.), n. 154 at 282-283:  
No one has a vested right to continuance of the law as it stood in the past. The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued.
176. Bennion, n. 86 at 314. In both Hamilton Gell v. White, [1922] 2 K.B. 422 at 431-432 (C.A.), Atkin L.J.; and Nepean (Township) v. Leikin, [1971] 1 O.R. 567 at 573 (C.A.), Evans J.A., a distinction was drawn between the "abstract rights" conferred by a repealed act and the "specific rights" acquired by individuals upon the happening of an event to which the repealed act applied. Only the latter type of rights are the proper concern of retrospectivity analysis.
177. Supra, n. 148.
178. S.M. 1926, c. 28, s. 1, amending The Government Liquor Control Act, C.A.M. 1924, c. 117, s. 2.
179. To illustrate further, in my example of the lease contract (supra at 44-46), there would be no alteration of acquired rights if the legislation were applicable only to leases entered into after its enactment. Any application of the legislation to leases made prior to its enactment, however, would involve interference with acquired contractual rights and liabilities.
180. Even the terminology that is used can have a bearing on whether the distinction is kept clear. In at least one case, the term "vested rights" was reserved to describe rights that had been acquired under a given state of the law, while the term "existing rights" was used in a general sense to describe the rights prescribed by the law at any particular point in time: see Re Bedesky and Farm Products Marketing Board of Ontario (1975), 8 O.R. (2d) 516 (Div. Ct.), aff'd (1975), 10 O.R. (2d) 105 (C.A.), leave to appeal to S.C.C. refused (1975), 10 O.R. (2d) 106 (S.C.C.). It would seem wise to stick to this usage of "existing rights." The term does not convey the sense of interference with pre-enactment events with the same clarity as terms like "vested rights" or "accrued rights" do: see Craies, n. 1 at 398. Nonetheless, one must be alert to the fact that courts sometimes use it to denote acquired, vested or accrued rights.
181. Infra at 56-67.
182. Supra, n. 3 at 96. By this he means, of course, that a statute should have no effect on things that have occurred prior to its enactment.

183. Ibid. Recall that Professor Côté uses the term "retroactive" instead of the term "retrospective" to describe the type of operation in question: see supra, n. 157.

It seems to me that Côté has repeated himself in this passage. Both the creation and the extinction of legal situations, as he puts it, have distinctive legal effects. Those legal effects characterize or identify such situations from a legal point of view. For example, the making of a contract involves the creation of a legal situation, but the creation of that situation is defined in terms of its legal effects, which involve the bringing into existence of promises that are legally binding upon the contracting parties. These effects occur completely upon the making of the contract, even though the legal effects arising out of the future operation of the contract do not. Therefore, it would have been sufficient for him to have said that unless legislation operates retrospectively, it cannot govern the effects of legal situations where such effects have occurred completely in the past.

184. Ibid. at 95. As I pointed out supra in n. 164, it is misleading to say that such a change involves operation in the past. Only legislation that meets the narrow definition of retrospectivity, and thus has effective operation prior to its enactment, can truly be said to operate in the past. The legislation referred to in the text is more properly described as operating on or with respect to the past.

185. Ibid. at 96, 97, 111-112 and 132.

186. Supra at 44-46.

187. Côté, n. 3 at 85, 96 and 97-98. In Gallop v. Co-Operators Insurance Association (Guelph) (1977), 16 O.R. (2d) 49 at 52-53 (C.A.), Estey C.J.O., speaking for the majority of the court, made a distinction between crystallized obligations arising out of the past operation of a contract and contractual obligations yet to arise for performance.

188. Côté, n. 3 at 95-98 and 111 ff. The distinction may be illustrated by comparing Canadian Westinghouse Co. v. Grant, [1927] S.C.R. 625, where the court was concerned with the effect of legislation on the exercise of previously acquired patent rights, with Wright v. Brake Service Ltd., [1926] S.C.R. 434, where the issue was whether legislation enacted after the issue of a patent applied to affect the validity of the patent as issued. Even though the legislation in question was held not to be applicable in either case, only the future exercise of patent rights was at stake in the former case, while in the latter the court was concerned with legal effects that had been fully realized prior to the enactment of the new legislation. Consider also St. John (City) v. New Brunswick Power Co., [1925] S.C.R. 554, where the court drew a distinction between the effects of an order on fully

realized proprietary rights arising out of the construction and operation of electrical works and its effect on proprietary rights that could only be exercised in the future.

189. See, for example, Board of Commissioners of Public Utilities v. Nova Scotia Power Corp., n. 172 (new administrative power to regulate electrical rates not retrospective even though it applied to govern the future operation of existing electrical supply contracts); R. v. Beaton, n. 173 (new rules governing the designation of life insurance beneficiaries not retrospective if applied to existing policies); Saskatchewan Power Corp. v. TransCanada Pipelines Ltd. (1988), [1989] 2 W.W.R. 385 (Sask. C.A.) (regulations limiting prices payable for natural gas not retrospective even though they applied to govern existing supply contracts); Reynolds v. Nova Scotia (A.-G.), [1896] A.C. 240 (P.C.) (statute removing right to obtain renewal of mining licences not retrospective when applied to existing licence); Toronto (City) v. Roman Catholic Separate Schools of Toronto (1925), [1926] A.C. 81 (P.C.), and Canadian Petrofina Ltd. v. Martin, [1959] S.C.R. 453 (zoning bylaw restricting ownership rights not retrospective when applied in respect of property for which building permit application was pending at date of enactment); and Re Frank Johnston's Restaurants Ltd. and Prince Edward Island (A.-G.) (1980), 113 D.L.R. (3d) 481 (P.E.I.S.C. A.D.) (legislation restricting shopping centre development would not operate retrospectively if it were applied in respect of property for which a building permit application had been submitted prior to its enactment).

Note, however, that with the exception of the Frank Johnston's Restaurants case, the above-cited cases dealing with proprietary rights are somewhat unclear on this point in that the courts were not prepared to acknowledge that they involved any sort of acquired or vested rights.

190. Professor Driedger's revised views were first published in The Construction of Statutes, First Supplement (Toronto: Butterworths, 1976) at 13-21. They were carried forward and developed more fully in Elmer A. Driedger, "Statutes: Retrospective Reflections" (1978) 56 Can. Bar Rev. 264, and in (1983), n. 159 at 183-203.

It is interesting to note that Côté, n. 3 at 124, interprets Driedger as having adopted a broader definition similar to the comprehensive definition that I will discuss in the next section. However, in light of Driedger's continued insistence that a distinction be drawn between retrospective operation and interference with vested rights, Côté's interpretation seems doubtful.

191. (1983), n. 164 at 186. See also pp. 186 and 197-198. Note his clarification of the potentially misleading reference to operation "as of a past time."

192. His test for retrospectivity can be found in (1976), n. 190 at 16-17; (1978), n. 190 at 267; and (1983), n. 164 at 191-192 and 196.
193. Infra at 159-171.
194. Driedger's test is suitable only for determining whether legislation operates retrospectively in the narrow sense discussed in the previous section. It is of no assistance in identifying retrospective operation as defined in this section. In fact, his test was originally designed to detect retrospective operation as he had initially defined it (i.e., in the narrow sense discussed in the previous section): see (1953), n. 148 at 15, and (1974), n. 149 at 144. Inexplicably, while his definition of retrospectivity changed, his test for detecting it did not.
195. Supra, n. 3 at 97-100 and 111-112.
196. Côté, n. 3 at 100, and supra, n. 173.
197. Côté, n. 3 at 100-101. Notice that the distinction in the operation of the two presumptions is the same as that advocated by the proponents of the narrowest view of retrospectivity: see supra, n. 172 and accompanying text. However, the differing definitions of the concept of retrospectivity mean that the scope of operation of the respective presumptions is much different.
198. Côté, n. 3 at 97.
199. In this example, the victim's right to recover compensatory damages and the corresponding liability of the tortfeasor to pay them.
200. This argument has been made in cases concerning the operation of the Canadian Charter of Rights and Freedoms, n. 69, and has been quite rightly rejected: see, for example, Stevens v. R., [1988] 1 S.C.R. 1153, where the court ruled that s. 7 of the Charter would be given retrospective effect if it were applied in respect of criminal liability that arose prior to and continued after its coming into force.
- The cases on s. 15 of the Charter also offer a parallel for analysis. Claims that incidents involving unequal treatment which occurred prior to the coming into force of s. 15 gave rise to a continuing inequality that infringed s. 15 after it came into force have been largely rejected: Reference Re The Workers' Compensation Act, 1983 (Nfld.) (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.), aff'd [1989] 1 S.C.R. 922; R. v. Quesnel (1985), 53 O.R. (2d) 338 (C.A.); R. v. Lucas, n. 111; R. v. Graham (1985), 14 W.C.B. 257 (Ont. C.A.); R. v. Seo (1986), 54 O.R. (2d) 293 (C.A.); and Re Ontario and Ontario Public Service Employees Union (1986), 57

- O.R. (2d) 773 (Div. Ct.). But see R. v. Killen (1985), 70 N.S.R. (2d) 278 (S.C.A.D.).
201. For example, Côté, n. 3 at 103, states: "In the field of civil liability, the victim's rights are crystallized at the moment of the wrongdoing, and no subsequent statute can either diminish or extend them." See also p. 136.
202. See supra, nn. 187, 189 and 190. And see Moulton v. Moulton, n. 162 at 309 ff., Angers J.A. (dissenting in part).
203. See supra, nn. 188 to 190. See also Canada (A.-G.) v. Hallet & Carey Ltd., n. 173, and Santilli v. Montreal (City) (1975), [1977] 1 S.C.R. 334, but note that the point made in n. 189 about the cases dealing with proprietary rights applies to these two cases as well.
204. Difficulties with the concept of penal liability have recently arisen in the interpretation of the Canadian Charter of Rights and Freedoms. One question is whether s. 12 of the Charter, which confers upon every person the right not to be subjected to cruel and unusual punishment, operates retrospectively in being applied to persons whose punishment was imposed prior to the enactment of the Charter. A similar question relates to the s. 9 guarantee against arbitrary detention or imprisonment: see R. v. Konechny (1983), [1984] 2 W.W.R. 481 (B.C.C.A.), and R. v. Langevin (1984), 45 O.R. (2d) 705 (C.A.). Still another question is whether punishment that was imposed prior to the enactment of s. 7 became subject to its requirements for fundamental justice after its enactment: see Gamble v. R., n. 91.
205. Contrast Re Hunt and Lindensmith (1921), 67 D.L.R. 240 (Ont. S.C.A.D.) (statute enacted after the birth of a child would be retrospectively applied if allowed to govern the liability of his father to maintain him), and Anderton v. Seroka, [1925] 2 D.L.R. 488 (Alta. S.C.A.D.) (statute not applied retrospectively when it was construed as altering father's support obligations after the birth of his child).
206. Canada Employment and Immigration Commission v. Dallialian, [1980] 2 S.C.R. 582 (new legislation lowering age of eligibility did not alter accrued right to receive unemployment insurance benefits). Contrast this case with the decisions in Côté v. Canada Employment and Immigration Commission (1986), 69 N.R. 126 (F.C.A.), and Canada (A.G.) v. Bourdeau (1986), 86 N.R. 394 (F.C.A.), both of which held that entitlement to unemployment insurance benefits did not vest upon the establishment of a benefit period so as to be unaffected by a change in the definition of "earnings." Note, however, that in the Côté case at p. 131, Marceau J. suggested that some factors, such as the length of the benefit period and the rate at which benefits are to be paid, may constitute vested rights because they are more "strictly

dependent on past events." He then goes on to acknowledge: "It is not hard to understand the reactions of those who, like the applicant, have had their expectations disappointed and their hopes dashed . . . ."

With respect to pension benefits, see Canada (Minister of National Health and Welfare) v. Fielden (1988), [1989] C.C.L. 1871 (Pen. Apps. Bd.), and Winegarden v. Winegarden (1988), 15 R.F.L. (3d) 284 (Ont. Dist. Ct.) (new legislation allowing for division of pension benefits between spouses did not operate retrospectively so as to affect parties who had separated prior to its enactment).

207. Refer to my discussion of the evidence required to rebut the presumption against retrospective operation, infra in chapter V at 186 ff., especially at 195-197.
208. In Bera v. Marr, n. 8 at 461-462 and 466, the British Columbia Court of Appeal, speaking through Esson J.A., indicated that both retrospective operation and interference with vested rights involve the phenomenon of legislation attaching new consequences to events that occurred prior to its enactment.
209. [1933] S.C.R. 629. Both Driedger (1974), n. 149 at 137-138, and (1983), n. 164 at 183-184, and Côté, n. 3 at 112-113, rely on this case to support their positions.
210. See supra, n. 111 and accompanying text.
211. See p. 638 of the judgement, per Duff C.J.C.
212. The necessary connection between retrospective operation and interference with acquired rights is made manifest by Scrutton L.J.'s comments in Ward v. British Oak Insurance Co. (1931), [1932] 1 K.B. 392 at 397 (C.A.): "Prima facie an Act deals with future and not with past events. If this were not so the Act might annul rights already acquired, while the presumption is against that intention."
213. The confusion that can result from making definitional distinctions that are not founded on significant differences in principle is illustrated by the fact that some authorities classify retrospectivity as a special type of interference with vested rights (see Driedger (1953), n. 148 at 5-6, (1974), n. 149 at 140, and (1983), n. 164 at 185; Côté, n. 3 at 97; and Cross, n. 59 at 184), while others treat interference with vested rights as a particular type of retrospectivity (see Maxwell, n. 3 at 206 and 216-220, and n. 117 at 218 and 222-224; Craies, n. 1 at 398-401; and Sir Charles E. Odgers, Odgers' Construction of Deeds and Statutes, 5th ed. by Gerald Dworkin (London: Sweet & Maxwell, 1967) at 284 and 287-289). This inconsistent treatment is perhaps understandable, given that both types of operation (as these authorities have chosen to define them) involve the same

principle and can thus be explained under either heading. The fact that a common principle is involved is precisely why I favour an all-encompassing definition of retrospectivity.

214. Thus, the fact that rights may be "inchoate" or "contingent" when new legislation comes into force should not be decisive of the question of retrospectivity: see Canadian Imperial Bank of Commerce v. Noseworthy (1980), 117 D.L.R. (3d) 99 at 104 (Nfld. C.A.), Mifflin C.J.N.  
Note that although terms like "interference with acquired rights" and "interference with vested rights" are not inaccurate descriptions of the effects of ex post facto legislation, the term "retrospective operation" is preferable because it more clearly reflects the temporal issues that are involved.
215. I advocate this approach in my discussion on assessing the evidence of intention to rebut the presumption against retrospectivity: see infra, chapter V at 195-197.
216. A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law, 2d ed. (1874; rpt. Littleton, Colo.: Fred. B. Rothman, 1980) at 160, citing as authority Society for the Propagation of the Gospel in Foreign Parts v. Wheeler, n. 170 at 139, Story J. Sedgwick's definition was adopted by Craies, n. 1 at 387, fn. 31; Maxwell, n. 117 at 216; and Odgers, n. 213 at 280.
217. See Cross, n. 59 at 185.
218. By Driedger (1953), n. 148 at 4-6, (1974), n. 149 at 140, and (1983), n. 164 at 186-187. The evolution of Driedger's interpretation of Sedgwick's definition is troublesome. Originally, he appeared to interpret the definition as covering both (a) interference with vested rights as of the time of enactment; and (b) the attachment of new prejudicial consequences to past transactions as of a past time. Only the second aspect of the definition met with his approval: see (1953), n. 148 at 4-11, and (1974), n. 149 at 140-147. This was a highly doubtful interpretation.  
Later on, having modified his own definition of retrospectivity, Driedger interpreted Sedgwick's definition as covering both (a) interference with vested rights as of the time of enactment; and (b) the attachment of new prejudicial consequences to completed transactions as of the time of enactment: see (1978), n. 190 at 264-266, and (1983), n. 164 at 186-191. Again, only the second aspect of the definition met with his approval. Driedger's revised interpretation is much more plausible. However, he still failed to recognize the single principle at stake in cases involving retrospective operation and interference with acquired rights. This is illustrated by his comment in (1983), n. 164 at 187, that if Sedgwick's definition were adopted, "there would for all practical purposes be no difference between retrospective

and prospective statutes, because most statutes affect vested rights in some way." As I pointed out supra at 52-55, that is simply not the case.

219. In the words of George Coode, Coode on Legislative Expression; or, The Language of the Written Law, 2d ed. (1852), reprinted in Elmer A. Driedger, The Composition of Legislation and Legislative Forms and Precedents, rev. 2d ed. (Ottawa: Department of Justice, 1976) app. I at 323:

It is only possible to confer a Right, or Privilege, or Power, on one set of persons, by imposing corresponding Liabilities or Obligations on other persons, compelling these to afford the benefit conferred, or to abstain from invading it.

Even statutory rights to social welfare benefits are accompanied by corresponding government liabilities. Of course, where the benefits are purely discretionary, neither rights nor liabilities exist in any legal sense.

220. I use the term "acquired rights" here in the broad sense that has been employed throughout this paper -- i.e., in a sense that includes the notion of acquired liabilities. Note, however, that the definitions quoted with approval later in this paragraph and the definition that I put forward infra in chapter IV at 102 ff. obviate the need for clarification on this point. In referring to alteration of the legal effect, status or consequences of pre-enactment events, they clearly encompass both legal rights and legal liabilities.

The fact that retrospective operation may have positive consequences for some individuals was recognized by Wright J. in Re Athlumney, Ex parte Wilson, [1898] 2 Q.B. 547 at 551-552.

221. Charles B. Hochman, "The Supreme Court and the Constitutionality of Retroactive Legislation" (1960) 73 Harv. L. Rev. 692 at 692.
222. Stephen R. Munzer, "Retroactive Law" (1977) 6 J. Legal Stud. 373 at 373. And see R. v. MacGregor (1978), 39 C.C.C. (2d) 401 (Alta. S.C.A.D.) (rule against retrospectivity said to apply where legislation would change the legal consequences of pre-existing factual situations).
223. Aside from their simplicity and comprehensiveness, these definitions are to be preferred because they avoid stating the issue in terms of interference with vested rights. The concept of vested rights has resisted definition and has been accused of obscuring retrospectivity analysis: Côté, n. 3 at 112-114, and Re Falconbridge Nickel Mines Ltd. and Ontario (Minister of Revenue) (1981), 32 O.R. (2d) 240 at 251 (C.A.), Thorson J.A.

One of the main criticisms of vested rights analysis has been that it encourages courts to arrive at conclusions without adequately articulating the reasoning process that

was followed in getting there: see Elizabeth J. Armstrong, "Retroactive Application of North Carolina General Statute Section 39-13.6 Under a Vested Rights Analysis" (1987) 65 N.C. L. Rev. 1195 at 1201-1202. To my mind, however, a more significant advantage of these formulations of the definition of retrospectivity is that they more directly indicate the fundamental concern with the timing of the application of legislation, thereby tending to illuminate more clearly the rule of law issue that lies at the heart of retrospectivity analysis.

224. Both Driedger and Côté have acknowledged this: see supra, n. 169; Driedger (1983), n. 164 at 187; and Côté, n. 3 at 97. In English law, see Gardner and Co. v. Cone, n. 132 at 966, Maugham J.:

An Act may be called retrospective because it affects existing contracts as from the date of its coming into operation. . . . It may be more properly described as retrospective, because it applies to actual transactions which have been completed, or to rights and remedies which have already accrued; or it may apply again to such matters as procedure and evidence; and in each of those matters retrospective legislation has a different effect.

225. Aside from Hochman, n. 221, and Munzer, n. 222 and "A Theory of Retroactive Legislation" (1982) 61 Tex. L. Rev. 425, see Smith, n. 56 and "Retroactive Laws and Vested Rights II" (1928) 6 Tex. L. Rev. 409; Edward S. Stimson, "Retroactive Application of Law -- A Problem in Constitutional Law" (1939) 38 Mich. L. Rev. 30; Ray H. Greenblatt, "Judicial Limitations on Retroactive Civil Legislation" (1956) 51 Northw. U. L. Rev. 540; W. David Slawson, "Constitutional and Legislative Considerations in Retroactive Lawmaking" (1960) 48 Cal. L. Rev. 216; McNulty, n. 4; and Gregory J. DeMars, "Retrospectivity and Retroactivity of Civil Legislation Reconsidered" (1983) 10 Ohio N.U. L. Rev. 253.

In addition, as I observed supra in n. 216, the major English texts on statutory interpretation tend to support a broad conception of retrospectivity.

226. Supra, n. 81. For other examples involving contracts, see Upper Canada College v. Smith, n. 117 (statute barring actions for realty commissions based on oral sale contracts would operate retrospectively if applied to contracts made prior to its enactment); J.I. Case Threshing Machine Co. v. Whitney, [1922] 3 W.W.R. 643 (Sask. C.A.) (statute altering repossession procedure under conditional sale contracts would operate retrospectively if applied to contracts made prior to its enactment); Nepean (Township) v. Leikin, n. 176 (statute repealing exemption from planning approval would operate retrospectively if applied to sale agreements made prior to its enactment); and Canadian Imperial Bank of Commerce v. Noseworthy, n. 214 (statute altering repossession rights would operate retrospectively if applied to conditional sale

contracts made prior to its enactment -- the fact that the contractual rights in question were fully realizable only in the future, and were thus "inchoate" or "contingent" at the time the legislation was enacted, was irrelevant to the question of retrospectivity).

As for proprietary rights, see St. John (City) v. New Brunswick Power Co., n. 188 (order affecting the future exercise of property rights in respect of the location of electrical works would operate retrospectively); Toronto (City) v. Presswood Brothers (1943), [1944] O.R. 145 (C.A.) (zoning bylaw prohibiting the use of property for the purpose of operating a butcher shop was retrospective in its application to property which was being used for that purpose at the time of its passage); Re Teperman & Sons Ltd. and Toronto (City) (1975), 7 O.R. (2d) 533 (C.A.) (legislation restricting the availability of residential property demolition permits would operate retrospectively if it were applied in respect of property for which a demolition permit application had been submitted prior to its enactment); and Re George Sebok Real Estate Ltd. and Woodstock (City) (1978), 21 O.R. (2d) 761 (C.A.) (bylaw prescribing building maintenance and occupancy standards operated retrospectively in applying to buildings that had been constructed before its passage). See also Re Scott and Windsor (City) (1923), 53 O.L.R. 565 (S.C. A.D.).

227. This may be indicated in a statute by express reference to a prior event or it may follow by necessary implication.
228. There is a consensus on this point. Thus, in Anderton v. Seroka, n. 205, the issue was whether the liability of a father to maintain his child should be determined by legislation that was enacted after the birth of the child. Although the legislation could not be applied to the case without some consideration of the circumstances surrounding the child's birth, the court held that it would not, if so applied, alter the legal consequences of the birth merely by virtue of establishing the father's future liability for maintenance. And see supra, n. 148; Paton v. R., [1968] S.C.R. 341 at 359, Pigeon J.; Cross, n. 59 at 185; Craies, n. 1 at 386, fn. 32; Maxwell, n. 117 at 216-218; Driedger (1983), n. 164 at 193; and Côté, n. 3 at 101. As Cross puts it, at p. 185:

It is not enough that the circumstances on which the operation of the statute depends should have existed before it came into force. The statute must take away some vested right or impose a penalty for past acts which were not penalized when they were committed.
229. In chapter IV I present a fuller explanation of the concept of retrospective operation. My theory is based on the definition discussed in this section, but it is slightly more comprehensive in that it includes all legislation that operates so as to govern the legal consequences of pre-enactment

events. It thus includes not only those enactments that alter the legal consequences of pre-enactment events, but also those enactments (such as consolidating enactments) that govern the consequences of pre-enactment events without altering them.

230. Supra, n. 117 at 215. See also Young v. Adams, n. 117 at 476, Lord Watson.
231. Many rules of statutory interpretation are presumptions of legislative intention that will be sustained in the absence of convincing evidence to the contrary:  
It is possible to express almost any rule of statutory interpretation in the form of a presumption. The rules against retrospective operation and against extra-territorial operation are often expressed as presumptions. The reasons for rules of statutory interpretation being described as presumptions is that their operation is rebutted by an express provision to the contrary in the Act itself. They thus have the quality of evidentiary presumptions. (R.J. Walker, The English Legal System, 6th ed. (London: Butterworths, 1985) at 113.)
232. [1892] 3 Ch. 402 (C.A.).
233. Ibid. at 421, Lindley L.J. See also Reid v. Reid (1886), 31 Ch. D. 402 at 408-409 (C.A.), Bowen L.J.; Schmidt v. Ritz (1901), 31 S.C.R. 602; St. John (City) v. New Brunswick Power Co., n. 188; and R. v. Hayward, Ex parte Cyr, [1940] 3 D.L.R. 82 (N.B.S.C.A.D.).  
This rule follows as a necessary consequence of the general rule that legislation is not to be given a retrospective effect unless such an effect is clearly intended; the presumption is that no degree of retrospective operation is intended. So even where a statute is clearly retrospective to some extent, the presumption operates to inhibit any additional retrospective operation.
234. Canada (P.G.) v. Cie de publication La Presse (1966), [1967] S.C.R. 60, and Re Bedesky and Farm Products Marketing Board of Ontario, n. 180.
235. R. v. Board of Commissioners of Public Utilities (N.B.), Ex parte Moncton Utility Gas Ltd. (1966), 60 D.L.R. (2d) 703 (N.B.S.C.A.D.), and Re Western Decalta Petroleum Ltd. and Public Utilities Board of Alberta (1978), 86 D.L.R. (3d) 600 (Alta. S.C.A.D.).
236. As Côté, n. 3 at 104-105, points out, the application of this subrule involves a question of jurisdiction.
237. See the discussion supra at 47 ff. In West v. Gwynne, n. 150, however, the legitimacy of even a separate and weaker presumption against interference with acquired rights was

- called into question. Both Buckley L.J. and Cozens-Hardy L.J. claimed that most statutes interfere with "existing rights" (pp. 11-12), and Buckley L.J. went so far as to deny the very existence of a presumption against interference with existing rights (p. 12). In Acme Village School District No. 2296 v. Steele-Smith, n. 174 at 60, Crocket J. also questioned the legitimacy of such a presumption.
238. I have already indicated that this presumption against interference with vested rights is of a much weaker and more equivocal nature than the presumption against retrospective operation, in that it is said to apply only in cases of ambiguity. For an explanation of the significance of the distinction between the two presumptions, see the discussion in the next section on the operation of the presumption embedded in the rule.
239. One possible use: The corollary rule of interpretation confining the retrospective effect of retrospective legislation to the narrowest possible bounds might have some value in the context of preventing retrospective legislation from affecting pending litigation or final judgements.
240. See the discussion supra at 56 ff. This interpretation of the rule was adopted by Lamont and Crocket JJ. in Acme Village School District No. 2296 v. Steele-Smith, n. 174. In that case, the Supreme Court of Canada had to determine the effect on existing contracts of legislation prescribing new rules for the termination of teaching contracts. These two judges concluded in their majority judgements that legislative alteration of the future operation of existing contracts was not a matter of retrospectivity, although it might involve prospective interference with vested rights. See also Canada (A.-G.) v. Hallet & Carey Ltd., n. 173, and Board of Commissioners of Public Utilities v. Nova Scotia Power Corp., n. 172.
241. See the discussion supra at 63 ff. This interpretation has been adopted on many occasions: see supra, nn. 224 to 226; Sidback v. Field, n. 117 (existing contractual rights and obligations relating to the working of mining claims could only be affected by subsequent legislation if that legislation operated retrospectively); and Acme Village School District No. 2296 v. Steele-Smith, n. 174 at 61 ff., Rinfret J. (dissenting). This view of the rule may be accurately described as being founded on the notion that legislation should operate only on cases, facts or situations that come into existence after its enactment: see Maxwell, n. 117 at 215, and Walker, n. 231 at 99.
242. Recall that because of the direct relationship between rights and liabilities, a change in legal consequences is always prejudicial to one party or another: see supra at 65; Fowler v. Vail (1879), 4 O.A.R. 267 at 277, Patterson J.A.; and

Ishida v. Itterman (1974), [1975] 2 W.W.R. 142 at 146-147 (B.C.S.C.), Fulton J. If ex post facto changes in the law could be made without negatively affecting anyone, there would be little cause to lament the disruption of expectations and the loss of predictability that are the inevitable consequences of such violations of the rule of law principle.

An argument can be made, however, that changes in the law which are beneficial to individual citizens and prejudicial only to the rights of the state should be treated differently. I will pursue this point in my discussion of beneficial enactments, infra in chapter IV at 149 ff.

243. Infra, chapter IV at 108 ff.

244. Re Athlumney, Ex parte Wilson, n. 220 at 551-552, Wright J., cited in Maxwell, n. 117 at 216. This aspect of the presumption is similar to the presumption that doubtful or ambiguous provisions in penal statutes are to be interpreted in favour of the accused: see Côté, n. 3 at 353. It calls for a strict construction in that the least ambiguity in an enactment means that the court must resolve the issue of interpretation in favour of prospectivity.

Note, however, the contrary suggestion by Duff C.J. in Kent v. R., [1924] S.C.R. 388 at 397. In that case, the Chief Justice indicated that the presumption against retrospective operation would prevail only where two constructions were equally admissible. Thus, simple proof on the balance of probabilities would be sufficient to displace it or prevent it from arising.

245. Gustavson Drilling (1964) Ltd. v. Canada (M.N.R.), n. 154 at 279, Dickson J. See also Smith v. Callander, [1901] A.C. 297 at 305 (H.L.), Lord Ashbourne.

246. Pardo v. Bingham (1869), L.R. 4 Ch. App. 735 at 740, Lord Hatherley L.C.; and Upper Canada College v. Smith, n. 117 at 418-419, Duff J. And see Odgers, n. 213 at 289, and Côté, n. 3 at 93, 109 ff. and 125 ff.

247. See Cross, n. 59 at 186, and infra, n. 253.

248. Driedger (1983), n. 164 at 185 and 189. Driedger says that a prima facie presumption applies unless rebutted. Logically speaking, however, a prima facie presumption must apply in order to be rebutted. It would be more accurate to say that such a presumption governs unless it is rebutted.

249. Cross, n. 59 at 166-167, calls this type of presumption "a presumption of general application." Côté, n. 3 at 353, uses the term "reinforced presumption" and goes on to explain that such presumptions are quasi-constitutional in nature because they reflect basic principles of the legal system: "They reflect ideas which can be assumed to be present in the mind

of the legislator" (p. 351) and "are an implicit component of the legislative message" (p. 352). As he puts it, they can only be rebutted by legislative provisions of exceptional clarity (p. 353, fn. 622).

250. Driedger (1983), n. 164 at 185. Cross, n. 59 at 167, calls such presumptions "presumptions for use in doubtful cases," while Côté, n. 3 at 353, refers to them as "simple presumptions."
251. An example of this type of presumption is the presumption that penal statutes are to be strictly construed in favour of the subject: see Côté, n. 3 at 353, fn. 621; and Driedger (1983), n. 164 at 207-208. It arises only when there is some ambiguity in an enactment. Once brought into play, it requires that the interpretation which is least prejudicial to the accused be adopted: Tuck & Sons v. Priester (1887), 19 Q.B.D. 629 at 638 (C.A.), Lord Esher M.R.
252. Some of these simple presumptions, such as the ejusdem generis and the expressio unius exclusio alterius rules, appear to arise only when alternative interpretations are equally likely: Cross, n. 59 at 168; Driedger (1983), n. 164 at 111-125; and Côté, n. 3 at 242-249 and 261-266. Thus, they are not properly called rules of strict construction.
253. Ward v. British Oak Insurance Co., n. 212; Maxwell v. Callbeck, [1939] S.C.R. 440 at 444, Davis J.; Gustavson Drilling (1964) Ltd. v. Canada (M.N.R.), n. 154; Board of Commissioners of Public Utilities v. Nova Scotia Power Corp., n. 172; and Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission (1985), 39 Sask. R. 81 (C.A.). And see Driedger (1974), n. 149 at 143, and (1983), n. 164 at 189; Côté, n. 3 at 351, 353 (fn. 622), 100-101 and 124; and Cross, n. 59 at 186. See, however, Re Pulborough (Parish) School Board Election, [1894] 1 Q.B. 725 at 741 (C.A.), Davey L.J.; Chapin v. Matthews (1915), 24 D.L.R. 457 (Alta. S.C. en banc); Berling v. Alberta (Solicitor General) (1987), 1 M.V.R. (2d) 278 (Alta. C.A.); National Trust Co. v. Larsen, [1988] 3 W.W.R. 634 at 638-639 (Sask. Q.B.), Gerein J., leave to appeal to Sask. C.A. granted (1988), 68 Sask. R. 207 (C.A.); and Québec (Commission de protection du territoire agricole) v. Venne, n. 166 at 906-907, Beetz J., five cases that cast some doubt on the point. Cross also expresses some uncertainty, referring to Re Athlumney, Ex parte Wilson, n. 220 at 551-552, Wright J.; and Customs and Excise Commissioners v. Thorn Electrical Industries Ltd., [1975] 3 All E.R. 881 at 896 (H.L.), Lord Fraser of Tullybelton.

Oddly enough, Côté, while taking the position that the basic presumption against retrospectivity is a prima facie one, suggests at p. 412 that the presumption contained in the first corollary rule operates only where a thorough effort at "interpretation in accordance with the usual methods has failed to ascertain the legislator's intent." In effect, he

makes a distinction between legislation generally and legislation that rebuts the presumption to at least some extent, a distinction that does not seem to me to be logically justifiable. This view unnecessarily complicates retrospectivity analysis and should be rejected.

254. Interpretation in accordance with the fundamental principles of a legal system promotes coherence within that legal system: see Côté, n. 3 at 408, fn. 893. This in itself is an important element of the rule of law, in that it renders the law a more comprehensible guide for conduct.
255. Driedger (1974), n. 149 at 139. See also p. 143.
256. Côté, n. 3 at 100-101, citing Gustavson Drilling (1964) Ltd. v. Canada (M.N.R.), n. 154 at 282, Dickson J. See also ibid. at 124 and 353, fn. 622; Re Apple Meadows Ltd. and Manitoba, n. 173; Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission, n. 253; and Board of Commissioners of Public Utilities v. Nova Scotia Power Corp., n. 172.
- Proponents of the narrower definitions of retrospectivity seem to acknowledge that the presumption against interference with vested rights, like the presumption against retrospective operation, requires that any ambiguity in an enactment be resolved in favour of the construction that the presumption is designed to promote: see Driedger (1974), n. 149 at 137-139; Côté, n. 3 at 353; Cross, n. 59 at 178-180; Canada (A.-G.) v. Hallet & Carey Ltd., n. 173 at 450, Lord Radcliffe; Gustavson Drilling (1964) Ltd. v. Canada (M.N.R.), supra at 282, Dickson J.; and the cases referred to in Craies, n. 1 at 398, fn. 96-99. The difference lies in the timing of its application. Unlike the presumption against retrospectivity, the presumption against interference with vested rights does not apply from the outset of the interpretation process. Therefore, it cannot be taken into account in determining whether or not an ambiguity exists in the legislation being considered.
257. See infra at 192 ff., especially at 195-197.
258. Support for this view can be gleaned from Gardner and Co. v. Cone, n. 139; Western Counties Railway Co. v. Windsor and Annapolis Railway Co. (1882), 7 App. Cas. 178 (P.C.); Spooner Oils Ltd. v. Turner Valley Gas Conservation Board, n. 209; Upper Canada College v. Smith, n. 117; R. v. Walker, n. 81; Toronto (City) v. Presswood Brothers, n. 226; Re Teperman & Sons Ltd. and Toronto (City), n. 226; Re Frank Johnston's Restaurants Ltd. and Prince Edward Island (A.-G.), n. 189; Canadian Imperial Bank of Commerce v. Noseworthy, n. 214; and Re Oshawa (City) and 505191 Ontario Ltd. (1986), 54 O.R. (2d) 632 (C.A.). Refer also to my discussion of the nature and operation of the presumption, infra in chapter IV at 112 ff.

259. In order to qualify as an exception to the rule against retrospective legislation, legislation must fall within the potential scope of application of the rule to begin with. If legislation does not answer to the description contained in the rule, it is illogical to talk about whether it qualifies as an exception to the rule.
260. This statement must be qualified by a recognition of those constitutional rules and statutory rules of interpretation that provide otherwise: see infra, chapter IV at 119-120.
261. For example, legislation prescribing rules of evidence or the general procedure that must be followed in order to prosecute a claim in the courts: see the discussion infra in chapter IV at 121 ff.
262. In the words of Lord Blackburn, speaking for the House of Lords in Gardner v. Lucas (1878), 3 App. Cas. 582 at 603: "Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be." See also the federal Interpretation Act, R.S.C. 1985, c. I-21, paras. 44(c) and (d). (This is the first of many references in this thesis to the federal Interpretation Act. Although I have chosen to cite the provisions of this act as a matter of convenience, similar or equivalent provisions can usually be found in provincial interpretation statutes.)
263. Driedger (1953), n. 148 at 8, and (1974), n. 149 at 147.
264. Ibid. And see Maxwell, n. 117 at 222-224, on this point.
265. Côté, n. 3, makes this argument at pp. 133-139.
266. Because there are no vested rights in procedure, one could not logically conclude that procedural enactments are exceptions to the separate rule against interference with vested rights advocated by proponents of the narrower conceptions of the rule against retrospectivity.
267. Gardner v. Lucas, n. 262; Gardner and Co. v. Cone, n. 139; and Howard Smith Paper Mills Ltd. v. R., [1957] S.C.R. 403, are representative of the traditional common law classification of procedural enactments. See also Wright v. Hale (1860), 6 H. & N. 227, 158 E.R. 94 (Ex.); Re Athlumney, Ex parte Wilson, n. 220 at 551-552, Wright J.; Upper Canada College v. Smith, n. 117; A.-G. v. Vernazza, [1960] A.C. 965 (H.L.); Blyth v. Blyth, [1966] A.C. 643 (H.L.); Metropolitan Toronto (Municipality) v. Reinsilber, [1961] O.W.N. 330 (C.A.); Maxwell, n. 117 at 222-224; Craies, n. 1 at 401-402; and Côté, n. 3 at 133 ff.
268. Consolidations and re-enactments, because they make no change in the substance of the law, are construed not as new law,

but as new expressions of the previously existing law: see para. 44(f) of the Interpretation Act, R.S.C. 1985, c. I-21; Driedger (1974), n. 149 at 148, and (1983), n. 164 at 203; Côté, n. 3 at 29-35; and the discussion infra at 129 ff. The effect of a re-enactment is the same as if the old law continued in force uninterrupted by the repeal of the old enactment and the substitution of a new one.

269. In chapter IV at 102 ff., I give my definition of retrospectivity and a technical explanation of the concept.
270. Maxwell, n. 117 at 224-225; Craies, n. 1 at 395; Odgers, n. 213 at 291; and Côté, n. 3 at 422-423, all express the view that the presumption against retrospective operation does not apply to declaratory enactments.
271. Declaratory legislation has not always been clearly defined and the term has been used in several different senses. As I explain infra in chapter IV at 135 ff., declaratory legislation can be broadly defined as I have done here.
272. In order to be encompassed by the rule as interpreted by Professor Côté, it would have to alter the completed consequences of pre-enactment events. By contrast, any change in the consequences of pre-enactment events would bring it within the rule as comprehensively interpreted. Declaratory legislation that brings about no change in the meaning of existing law cannot qualify under either interpretation of the rule because it is incapable of bringing about any change in the legal consequences of pre-enactment events.
273. Côté, n. 3 at 414-423, speaks as though most, if not all, declaratory enactments operate retrospectively.
274. See infra, chapter IV at 135 ff.
275. Those declaratory acts that are interpreted by the courts as bringing about no change in the law are inoffensive to the rule of law principle when applied in respect of pre-enactment events on the same grounds that consolidations and other re-enactments are.
276. I elaborate on this point in my discussion of declaratory enactments, infra in chapter IV at 135 ff.
277. Supra (1974), n. 149 at 147, and (1983), n. 164 at 191.
278. With the exception of those declaratory enactments, mentioned supra in n. 275, that make no change in the previously existing law.
279. This uncertainty and confusion has been exacerbated by unduly technical theories such as Professor Driedger's test for retrospectivity, discussed infra in chapter V at 168-171.

280. McNulty, n. 4 at 13, explains that rules of interpretation for cases involving transitional problems (of which the rule against retrospective operation is the prime example) are designed to govern the reach of laws backward and forward through time.
281. As opposed to a conflict of laws in space, which is the central concern of the area of legal study known as conflict of laws: see J.-G. Castel, Canadian Conflict of Laws, vol. 1 (Toronto: Butterworths, 1975) at c. 6.
282. J.K. Grodecki, "Conflicts of Laws in Time" (1959) 35 Brit. Yb. Int'l L. 58; J.-G. Castel, "Conflict of Laws in Space and in Time" (1961) 39 Can. Bar Rev. 604; McNulty, n. 4 at 13; and Côté, n. 3 at 84-85.
283. McNulty, n. 4, advances a cogent argument that focusses on the nature and extent of the connection between events and the state of the law at various points in time. It is undeniable that these are important factors in cases involving transitional problems; they are relevant both to the identification of retrospective operation and to the question of legislative intention: see infra, chapter V at 171-174 and 186 ff. Recall, however, that territorial conflicts analysis, unlike transitional law analysis, is not fundamentally concerned with ascertaining legislative intention: see supra, n. 4.
284. This criticism applies with particular force to the narrowest definition of retrospectivity, discussed supra in chapter III at 47 ff. However, even under the broader definition espoused by Professor Côté (discussed supra in chapter III at 56 ff.), some legitimate expectations, such as those attendant upon certain contractual and proprietary rights and liabilities, would be excluded from the protective force of the rule of interpretation. The much weaker presumption against interference with vested rights would, I suggest, be inadequate to compensate for the shortcomings of the rule against retrospectivity if that rule were based upon either of these narrower definitions of retrospectivity.
285. The rule of law is not directly concerned with expectations based on other societal characteristics, such as common standards of morality or behaviour. It is only concerned with them insofar as they have been transformed into law.
- As I suggest infra in chapter V at 171-174, there is a symbiotic relationship between legal consequences and legitimate expectations. While my analysis proceeds on the footing that legitimate expectations depend upon the legal consequences of events, it is often helpful, when faced with the task of determining what the consequences of an event actually are, to consider the reasonableness of reliance upon the legal rules in question. In this sense, the legal consequences of an event may be said to depend upon the

expectations that it would be reasonable for people to hold in respect of that event.

286. With this type of operation, the change in the legal consequences of pre-enactment events is typically effective as of the date those events took place.
287. Note that it meets the narrow definition of retrospectivity discussed supra in chapter III at 47 ff.
288. This type of legislation falls within the comprehensive definition of retrospectivity discussed supra in chapter III at 63 ff. It would clearly not fall within the narrow definition discussed supra in chapter III at 47 ff.; rather, the proponents of that definition would describe it as legislation that prospectively interferes with acquired or vested rights. Depending upon the nature of the consequences (*i.e.*, whether they are identified with fully realized rights and liabilities or with rights and liabilities that have yet to crystallize), it would be included within Professor Côté's broader definition of retrospectivity or within his definition of prospective interference with vested rights: refer to the discussion supra in chapter III at 56 ff.
289. See Society for the Preservation of the Gospel in Foreign Parts v. Wheeler, n. 170 at 139, Story J.; Nova Corp. v. Amoco Canada Petroleum Co., [1981] 2 S.C.R. 437; Re Western Decalta Petroleum Ltd. and Public Utilities Board of Alberta, n. 235; Martelli v. Martelli (1981), [1982] 2 W.W.R. 638 (B.C.C.A.); Re Matejka (1984), 8 D.L.R. (4th) 481 (B.C.C.A.); and Hornby Island Trust Committee v. Stormwell, n. 117.  
As for academic authorities, see Driedger (1983), n. 164 at 185-186 and 197-198 (terming the former mode "retroactive operation" and the latter mode "retrospective operation"); Smead, n. 109 at 781-783; Hochman, n. 221 at 692; and McNulty, n. 4 at 58-59 (terming the former mode "retroactivity in the primary sense" and the latter mode "retroactivity in the secondary sense").
290. Driedger first made this point in (1976), n. 190 at 13-14, and reiterated the distinction in (1978), n. 190 at 268-269, and (1983), n. 164 at 185-186 and 197-198.
291. "Retro- (back) + agere (to drive, act): having relation or reference to or efficacy in a prior time . . . operative, binding and taking effect prior to enactment, promulgation or imposition . . ." -- Webster's Third New International Dictionary of the English Language (Springfield, Mass.: G. & C. Merriam, 1968) at 1940; "Retro- (backward) + agere (to drive): Influencing or applying to a period prior to enactment" -- The Heritage Illustrated Dictionary of the English Language, International Ed. by William Morris (Boston: American Heritage, 1973) at 1110; ". . . 1.b. Directed backwards in time. 2. Operating in a backward direction" --

- The Oxford English Dictionary, vol. VIII (1933; rpt. Oxford: Clarendon Press, 1970) at 583. And see Martelli v. Martelli, n. 289 at 642, where retroactive operation is described by Lambert J.A. as "an application which acts back."
292. "Retro- (back) + specere (look)" -- Funk and Wagnalls Comprehensive Standard International Dictionary (Chicago: J.G. Ferguson, 1973) at 1077; "1. Looking back on, contemplating, or directed to the past. 2. Looking or directed backward . . ." -- The Heritage Illustrated Dictionary of the English Language, n. 291 at 1111; and "Looking backward; contemplating what is past; having reference to a state of things existing before the act in question" -- Black's Law Dictionary, n. 11 at 1184. And see Martelli v. Martelli, n. 289 at 642, where retrospective operation is described by Lambert J.A. as "an application which looks back."
293. In Hornby Island Trust Committee v. Stormwell, n. 117 at 441, Lambert J.A. provides a lucid explanation of the distinction between these two types of legislative operation:  
A retroactive statute operates forward in time, starting from a point further back in time than the date of its enactment; so it changes the legal consequences of past events as if the law had been different than it really was at the time those events occurred. A retrospective statute operates forward in time, starting only from the date of its enactment; but from that time forward it changes the legal consequences of past events.
294. Retroactive operation is usually defined in these terms: see Driedger (1974), n. 149 at 140, and (1983), n. 164 at 186 and 197; Hochman, n. 221 at 692; McNulty, n. 4 at 58-59; and Smead, n. 109 at 781-783.
295. Supra (1983), n. 164 at 186.
296. Ibid.
297. See ibid. Driedger, in (1983), n. 164 at 223, observes that "a statute may be operative as of the day of its enactment or, if it so provides, as of an earlier or later day." Sub-section 5(2) of the federal Interpretation Act, R.S.C. 1985, c. I-21, provides that the date of commencement of an act is the date that it receives royal assent, unless it specifies otherwise. While an act may specify either a pre-enactment or a post-enactment commencement date, the former is a relatively rare occurrence.
298. (1897), 27 S.C.R. 395, aff'd [1898] A.C. 735 (P.C.).
299. S.C. 1895, c. 23, amending S.C. 1894, c. 33.
300. Driedger (1983), n. 164 at 186.

301. (1921), 62 S.C.R. 424.

302. S.C. 1921, c. 20, amending S.C. 1919 (2d Sess.), c. 8.

303. Driedger (1983), n. 164 at 198. Included within this category is one form of declaratory legislation (i.e., legislation that is enacted to explain or clarify existing law). For a discussion of declaratory enactments, see infra at 135 ff.

304. [1953] 1 S.C.R. 345.

305. S.A. 1951, c. 77.

306. Unless they specify some other date: see supra, n. 297, and infra, n. 309.

307. Retroactive enactments of the second and third type do not depend for their retroactivity on a commencement provision that expressly stipulates their coming into force as of a previous date. Therefore, although they commence operation upon enactment for the purposes of subs. 5(2) of the federal Interpretation Act, in a real and substantive sense they commence operation and operate prior to their enactment date.

308. Sometimes legislation of the third type will expressly state in its substantive provisions the prior date from which those provisions are to be taken to have been the law. For an example of this, see R. v. Richardson, [1948] S.C.R. 57.

309. It is possible, though highly unlikely, for the actual commencement date of a retroactive statute to be a date other than the date of its enactment. However, it is only possible with respect to the second and third types of retroactive legislation that I have just explained.

Consider this. In almost all cases, the actual operation of a retroactive statute begins at the time of its enactment. This is true because the great majority of retroactive statutes are brought into force simply by virtue of their enactment. By definition, all retroactive statutes of the first type come into force this way: the specific wording of their commencement provision precludes any other result. Upon receiving royal assent and coming into existence as enactments, their substantive provisions are given effect as of the pre-enactment date specified in the commencement provision.

With retroactive legislation of the second and third types, the case may be different. Because of the directly retroactive wording of their substantive provisions, they do not require the assistance of a "deeming" commencement provision in order to operate retroactively. Therefore, it is possible for these types of retroactive legislation to contain a commencement provision stipulating that they will not come into force until some date after their enactment.

To illustrate, a declaratory act or an act deeming certain legal rules to have been applicable in respect of previous events might contain a commencement provision stating that it is to come into force on some post-enactment date. This date may be specified in the enactment or left to be fixed by proclamation: see Driedger (1983), n. 164 at 223, and the federal Interpretation Act, subss. 5(3), 6(1) and 18(4). In such a case, the inherently retroactive rules contained in the act would not come into force until a date after their enactment. Of course, once they did come into force, they would effectively operate as of a date prior to their actual coming into force, thus having a practical effect comparable to those retroactive statutes that are brought into force by virtue of their enactment. The Education Statute Law Amendment Act, 1988, S.O. 1988, c. 27, comes close to providing an example of the kind of retrospective enactment that I have in mind. It would have been an appropriate example had the entire statute, and not just ss. 1 to 40, been enacted to come into force on December 1, 1988: see Re Association française des Conseils scolaires de l'Ontario and Ontario (1988), 66 O.R. (2d) 599 (C.A.).

310. This description provides a ready basis for comparing the phenomenon of retroactive operation with that of retrospective operation: see infra at 102 ff.
311. McNulty, n. 4 at 58-59, points out that the usual effect of retroactive legislation is to alter the legal consequences of events that occurred prior to its actual commencement as of the time those events occurred.
312. See Fuller, n. 14 at 51-62.
313. There are a few exceptions to this general description of the effects of retroactivity. These are elaborated upon in my examination of various special types of legislation later in this chapter. One exception is declaratory legislation that is found to have brought about no change in the meaning of the previous law that it purports to clarify or explain: see infra at 137-138 and 142. Another is the rare type of curative legislation that I discuss infra at 146-148.
314. Retrospective legislation, which is discussed in the next section, also demonstrates this phenomenon.
315. Because they are not both in force at the same time, there is no conflict over which law governs the legal effects of the events in question at any particular moment.
316. Munzer (1977), n. 222 at 385-387, describes the phenomenon of retroactive operation by saying that two laws can be valid for the same period of time during different periods of time. It is this feature that allows retroactive legislation to

govern the legal consequences of prior events as of the time those events occurred.

317. Because they are not both in force at the same time, there is no conflict over which law governs the period in question at any particular moment.
318. A retroactive statute may simply repeal existing statutory provisions, or it may amend them either by adding or deleting words or by repealing them and substituting new ones. Furthermore, it may do this expressly or by implication.
319. Infra at 200-206.
320. Retrospective operation is sometimes defined in terms of legislation that operates after its enactment so as to govern (or alter) the legal consequences of events that occurred prior to its enactment: see Driedger (1983), n. 164 at 197; Hochman, n. 221 at 692; Smead, n. 109 at 781-783; and McNulty, n. 4 at 58-59. However, as I indicated supra in nn. 297 and 309, the date on which a statute is enacted is not necessarily the date on which it comes into force. While statutes are often silent about their commencement date, in which case they are effective as of the date of their enactment (by virtue of subs. 5(2) of the federal Interpretation Act), they may provide for a specified post-enactment commencement date (Interpretation Act, subss. 5(3) and 6(1)) or for a post-enactment commencement date to be set by proclamation (Interpretation Act, subs. 18(4)). Therefore, in defining retrospective operation, it is more accurate to refer to the commencement date of legislation than to refer to its date of enactment.
- Unlike the case with retroactive statutes, the effective commencement date of a retrospective statute is the same as the date on which it actually commences operation. For purposes of analysis, I will continue to employ the terms "actual commencement date" and "actual operation" in order to be able to explain retrospective operation in the same terms that were used to explain retroactive operation. This should facilitate a clearer understanding of these two phenomena.
321. It is, of course, possible for a retroactive statute to operate so as to govern the legal consequences of events that took place prior to its effective commencement date. But one cannot describe this type of operation as simply retrospective. By definition, retrospective legislation operates as of the date of its actual commencement to govern the legal consequences of events that took place prior to that date. In contrast, retroactive legislation that operates so as to govern the consequences of events that took place prior to its effective commencement date must, by definition, do so as of a date prior to its actual commencement. One could, however, describe this latter type of legislation as having a retrospective retroactive operation.

Accordingly, notwithstanding Driedger's assertion in (1983), n. 164 at 186, that a statute may be both retroactive and retrospective in its operation, I suggest that this idea would be more accurately expressed by saying that legislation may have a retroactive operation that is of a retrospective nature. For an example of retroactive operation that was found not to be of a retrospective nature, see Grabbe v. Grabbe (1986), 10 B.C.L.R. (2d) 104 (C.A.).

322. McNulty, n. 4 at 59, notes that retrospective laws "bear importantly on prior events by affecting their future consequences as of the time the new law is adopted." Driedger (1983), n. 164 at 197, explains that "a retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted." It "changes the law from what it otherwise would be with respect to a prior event."
323. (1977), 35 C.C.C. (2d) 333.
324. Criminal Law Amendment Act (No. 2), 1976, S.C. 1974-75-76, c. 105, amending R.S.C. 1970, c. C-34.
325. This conclusion was confirmed by the Supreme Court of Canada in Gamble v. R., n. 91. See also Tomashavsky v. Nichols, n. 79 (amendment establishing new rules governing the liability of joint tortfeasors was retrospective because it applied in respect of an automobile accident that had occurred before it came into force).
326. See infra, n. 328.
327. The old law is still considered to have governed the period during which it was actually in force, and thus to have governed the effects of events that occurred in that period during that period.
328. There are some special types of legislation that do not offend the rule of law principle when they operate retrospectively. This is because, in operating so as to govern the legal consequences of prior events, they bring about no substantive change in the consequences of those events: see the discussion of procedural enactments, consolidating enactments and other exceptions to the rule, infra at 121 ff.
329. The same is true of retroactive legislation: see supra, n. 314 and accompanying text.
330. Because they are not both in force at the same time, there is no conflict about which law governs the legal consequences of the events in question at any particular moment.
331. See supra at 101-102.

332. Infra at 200-202 and 206 ff.

333. Recall from nn. 297, 309 and 320, supra, that the date of commencement of legislation is often, but not always, the date of its enactment.

With prospective legislation as with retrospective legislation, there is no fictitious pre-existence or deemed operation involved. Thus, the effective commencement date of a prospective enactment is the date on which it actually comes into force. However, in order to facilitate comparison of the phenomena of retroactive, retrospective and prospective operation, I will continue to use the same terminology that I employed in the two previous sections. Thus, I will refer in this section to the "date of actual commencement" and the "period of actual operation" of legislation.

334. "Pro- (forward) + specere (look): 2 Looking toward or concerned with the future; anticipatory" -- Funk & Wagnalls Comprehensive Standard International Dictionary, n. 292 at 1013; ". . . characterized by looking forward into the future" -- The Oxford English Dictionary, vol. VIII, n. 291 at 1493-1494; and "Looking forward; contemplating the future" -- Black's Law Dictionary, n. 11 at 1100.

335. For example, the retroactive Act B depicted in Fig. 1 on p. 101 would operate prospectively in governing the legal consequences of events that occurred during the period between  $T_2$  and  $T_3$ , and the retrospective Act B depicted in Fig. 2 on p. 105 would operate prospectively in governing the legal consequences of events that occurred during the period between  $T_2$  and  $T_3$ .

While it is possible for a single piece of legislation to operate both retroactively and prospectively or both retrospectively and prospectively, retroactive and retrospective operation are by definition not compatible. However, as I explained supra in n. 321, an enactment may combine prospective operation with retroactive operation that is of either a retrospective or a prospective nature.

336. Supra, n. 117.

337. S.B.C. 1974, c. 101, s. 11, amending S.B.C. 1968, c. 59, s. 10.

338. Infra at 200 ff.

339. Like retroactive and retrospective legislation, prospective legislation may occur in a number of contexts: see supra at 101-102 and 105.

340. See supra, chapter III at 68. Sometimes the rule is stated in the form of a presumption, as in "it is presumed that the legislature does not intend its legislation to operate either retroactively or retrospectively." However, in order to be

complete, this form of presentation of the rule must be accompanied by a statement explaining that the presumption may be rebutted and specifying how it may be rebutted.

The basic common law rule of interpretation that I have just recited is supplemented by a number of statutory rules of interpretation that are addressed to specific contexts in which questions of retroactivity and retrospectivity may arise. These statutory rules are discussed infra in chapter V at 202 ff.

341. Refer to my discussion of the nature and operation of the presumption in the following section.
342. See supra, n. 233.
343. See supra, nn. 234 to 236.
344. As Giles A.S.P. explained in Iscar Ltd. v. Karl Hertel GmbH (1987), 24 C.P.C. (2d) 293 at 296-297 (F.C.T.D.), aff'd on other grounds (1988), 19 C.P.R. (3d) 385 (F.C.T.D.):  
Retroactive and retrospective legislation which takes away vested rights has been strictly construed by the Courts on those occasions where the legislation has been silent or ambiguous on the extent to which it is to be retrospective or retroactive.  
In Hornby Island Trust Committee v. Stormwell, n. 117 at 442, Lambert J.A. suggested that the corollary rule providing that "no larger backdated construction should be given than is required in clear terms" would lead towards a retrospective construction and away from a retroactive construction in a case where there was some doubt on the point. A similar view was taken by a majority of judges of the Supreme Court of Canada in Schmidt v. Ritz, n. 233.
345. See the discussion of constitutional limitations on legislative power to enact retroactive or retrospective legislation, supra in chapter III at 29-31 and infra in n. 530.
346. Re Athlumney, Ex parte Wilson, n. 220 at 551-552, Wright J.
347. Gardner v. Lucas, n. 262 at 601, Lord O'Hagan.
348. Cross, n. 59 at 166-167. "The principle is too well established to require authority that a statute is prima facie prospective unless it contains express words or there is the plainest implication to the contrary:" Maxwell v. Callbeck, n. 253 at 444, Davis J. More accurately, a statute is prima facie prospective in all cases and actually prospective in the absence of express words or the plainest implication to the contrary.
349. Supra, n. 59 at 167.
350. Côté, n. 3 at 352.

351. Subject, of course, to any constitutional limitations on legislative power, such as those contained in paras. 11(g), (h) and (i) of the Charter: see supra, chapter III at 29-31.
- While the rule of interpretation against retroactive and retrospective legislation is compatible with the sovereignty of the legislature, it is only in this limited sense that one can make the claim that the principle of the rule of law and the principle of legislative sovereignty are not in conflict in this context. In fact, legislative sovereignty means that political power need not be exercised in accordance with rule of law requirements; the legislature could seriously impair or even destroy the rule of law if it so wished: see supra, n. 64. Therefore, only in the sense that legislative enactments are to be interpreted in light of the rule of law principle is it correct to say that no conflict exists between legislative sovereignty and the rule of law. This should be kept in mind when considering the following comments of Allan, n. 12 at 127, regarding the compatibility of these two principles:
- Each principle is accorded full respect within its proper limits. The latter principle authorizes, and requires, a manner of interpretation of parliamentary intent: it does not provide a means of confounding it.
352. On occasion, the courts have taken a literal approach to interpretation by noting that the wording of the enactment in question makes no distinction between legal situations arising prior to commencement and those arising thereafter, and concluding from that that the enactment must have been intended to apply to both: see Côté, n. 3 at 92 and 125; West v. Gwynne, n. 150 at 10 (Cozens-Hardy M.R.), 13-14 (Buckley L.J.) and 15-16 (Kennedy L.J.); Acme Village School District No. 2296 v. Steele-Smith, n. 174 at 50-52, Lamont J.; and Hackett v. Ginther, [1986] 3 W.W.R. 385 at 390-391 (Sask. C.A.), Tallis J.A. (dissenting). This approach is unacceptable because it fails to accord prima facie force to the presumption. Instead, it treats the presumption as though it applies only where legislation is ambiguous: see infra, chapter V at 187-188.
353. (1977), [1978] 1 S.C.R. 548.
354. The Family Law Reform Act, 1975, S.O. 1975, c. 41, para. 1(3)(d).
355. [1934] 3 W.W.R. 549.
356. Ibid. at 553, Prendergast C.J.M.
357. S.M. 1930, c. 50, s. 3, amending R.S.M. 1913, c. 133 (adding s. 472A).
358. See also Martin v. Perrie, n. 155, and Metropolitan Toronto (Municipality) v. Reinsilber, n. 267.

359. This comment, like the previous comment concerning general language, has practical application only with respect to retrospective operation. Retroactive operation is so unusual and unnatural that explicit language is almost inevitably required to bring it about: see the discussion infra in chapter V at 182-183.
360. Supra, chapter III at 75. And see infra, chapter V at 186 ff.
361. See supra, chapter III at 75-77, especially at nn. 255 and 256.
362. Supra at 44 ff.
363. Refer to the discussion supra in chapter III at 61-63, particularly to Spooner Oils Ltd. v. Turner Valley Gas Conservation Board, n. 209 at 638, Duff C.J., where the presumption against interference with vested rights was described in language that is indistinguishable from the language customarily used to describe the presumption against retroactive and retrospective operation.
364. Metropolitan Toronto (Municipality) v. Reinsilber, n. 267 at 331, McGillivray J.A.
365. Infra at 192 ff., especially at 195-197.
366. In recognizing that the rights liable to be affected by legislation have varying degrees of entrenchment, depending upon the nature of the expectations that can reasonably be expected to flow from them, I am in no way suggesting that the presumption against retroactive and retrospective legislation can be rebutted by anything other than proof beyond a reasonable doubt. Rather, I am simply acknowledging that the nature of the right liable to be affected can quite properly be taken into account in determining whether all reasonable doubt about legislative intention has been removed.
367. In cases involving a constitutional question, there is an additional consideration -- namely, whether the legal rules that have been laid down by the legislature are valid and enforceable: see infra, n. 530.
368. Infra at 156 ff.
369. Supra at 79 ff.
370. See supra, n. 104.
371. Exceptions to the rule should not be confused with situations where the presumption against retroactive and retrospective operation applies, but is ultimately rebutted by the enactment in question. Sometimes the courts have clouded their

- analysis by doing this: see, for example, McLaren v. McLaren (1979), 24 O.R. (2d) 481 at 489 (C.A.), where Wilson J.A. states that the presumption against interference with acquired rights is not applicable where legislation is expressly retroactive. Where legislation is expressly retroactive, it would be more accurate to say that the presumption has been rebutted.
372. Smead, n. 109 at 779; Maxwell, n. 117 at 15; and Craies, n. 1 at 383.
373. The common law rule of relation was abolished by the Acts of Parliament (Commencement) Act, 1793 (U.K.), 33 Geo. III, c. 13, and replaced by the much more sensible rule that an act takes effect upon the date it receives royal assent, unless it specifies some other date. Paragraph 5(2) of the federal Interpretation Act, R.S.C. 1985, c. I-21, contains a similar provision.
374. In R. v. Thurston (1662), 1 Lev. 91, 83 E.R. 312 (K.B.), as a result of the application of this rule of interpretation, previous conduct was judged to have more serious criminal consequences than it had when it took place. See also the cases cited by Craies, n. 1 at 383, fnn. 2 and 3; and Maxwell, n. 3 at 396, fnn. 10 and 11.
375. Case of Bishops (1606), 12 Co. Rep. 7, 77 E.R. 1290 (K.B.). And see Driedger (1983), n. 164 at 225, and Maxwell, n. 3 at 389-390.
376. Refer to my discussion of the effect of repeal at common law, infra in chapter V at 203-205 and 207-211.
377. It was abolished with respect to repealing acts passed after 1850 by the Interpretation Act, 1889 (U.K.), 52 & 53 Vict., c. 63, s. 11. The corresponding Canadian provision is the predecessor of para. 43(a) of the federal Interpretation Act. These provisions went beyond abolishing the rule by providing that repealed enactments were to be presumed not to be revived at all, whether ab initio or merely from the date of repeal of the original repealing enactment.
378. This rule was discussed supra in n. 104.
379. Paragraph 44(e) of the Interpretation Act provides as follows:
44. 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,

. . . . .

(e) when any punishment, penalty or forfeiture is reduced or mitigated by the new enactment, the punishment, penalty or forfeiture if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;

. . . . .

380. This point is debatable. Some might argue that these constitutional and interpretive rules favouring retrospective penal legislation are justifiable exceptions to the general rule because a retrospective reduction in the severity of penal consequences has a purely beneficial effect: see the discussion of beneficial enactments, infra at 149 ff.

381. See the discussion supra in chapter II at 15-18.

The better view is that these parallel constitutional and interpretive provisions do not go so far as to allow statutes that abolish offences to apply retrospectively. It seems reasonable that they should be applicable only when punishment has been reduced, and not where liability to punishment has been removed altogether. Nobody should be entitled to complete absolution for conduct that constituted an offence at the time it took place: Telep v. Superintendent of Insurance Brokers & Real Estate (1985), 67 B.C.L.R. 242 (C.A.) (interpreting the equivalent provision in the British Columbia Interpretation Act), and Côté, n. 3 at 130. This view is entirely in line with the traditional approach taken by the courts, which is exemplified by R. v. Fisher (1968), [1969] 1 All E.R. 100 (C.A. Crim. Div.) (accused prosecuted and punished in accordance with the law that was in force at the time the conduct in question occurred, despite the fact that the statutory provision prescribing the offence had subsequently been repealed). However, for a contrary opinion on the proper interpretation of para. 44(e), refer to Re Lyle and Canada (Minister of Employment and Immigration) (1982), 133 D.L.R. (3d) 64 (F.C.A.).

See also paras. 43(d) and (e) of the federal Interpretation Act and the discussion of retrospectivity in the context of repealing statutes, infra in chapter V at 206 ff.

382. Paragraph 6(2)(a) states:

(2) Every enactment that is not expressed to come into force on a particular day shall be construed as coming into force

(a) in the case of an Act, on the expiration of the day immediately before the day the Act was assented to in Her Majesty's name;

. . . . .

And see Driedger (1983), n. 164 at 223, and Côté, n. 3 at 71.

383. As I point out in the pages immediately following, some of these types of legislation go beyond being simple exceptions to the rule against retrospective legislation. Not only does the rule not apply to them, but they are to be read subject to a reverse presumption in favour of retrospective operation. The same is true, of course, of the existing exceptions to the rule that I have just discussed.
384. Craies, n. 1 at 401-402; Maxwell, n. 117 at 222-224; and supra, n. 267. Procedural enactments are not, however, exceptions to the rule against retroactive operation. They are not to be readily construed as having come into effect as of a date prior to their actual commencement. A misleading suggestion to this effect was made in Carpenter v. Baniuk (1987), 85 N.B.R. (2d) 385 at 394 (C.A.), Ayles J.A.
385. Gardner v. Lucas, n. 262 at 603. And see McGrath v. Scriven (1920), 52 D.L.R. 342 (N.S.S.C. en banc), aff'd (1920), 56 D.L.R. 117 (S.C.C.).
386. See infra, n. 400.
387. As is the case with the general presumption against retrospective legislation, this presumption may be rebutted: see R. v. Ali, n. 2; Re Owners of Lands Requiring Drainage and Mariposa (Township) (1980), 30 O.R. (2d) 633 (Div. Ct.); and subs. 3(1) of the federal Interpretation Act.
388. R. v. Inkster (1988), 69 Sask. R. 1 at 4 (Q.B.), Hrabinsky J. See also Upper Canada College v. Smith, n. 117 (procedural enactments regulate the method of enforcing a remedy, but do not affect the availability of the remedy itself); Haffner v. Weston (1927), [1928] 1 D.L.R. 711 (Sask. C.A.) (enactments that affect procedure only deal with the mode by which an existing right of action may be asserted -- they create no new right of action); and Hackett v. Ginther, n. 352 (a purely procedural enactment is concerned with how an issue shall proceed to judgement, and not with whether there shall be a judgement at all).
389. Sun Alliance Insurance Co. v. Angus, n. 73 at 265.
390. See Hackett v. Ginther, n. 352.
391. So a person cannot legitimately claim to have relied upon previously existing rules of evidence, under which it was more difficult for the Crown to secure a conviction: Howard Smith Paper Mills v. R., n. 267; R. v. Kumps, [1931] 1 W.W.R. 812 (Man. C.A.); R. v. Firkins (1977), 80 D.L.R. (3d) 63 (B.C.C.A.), leave to appeal to S.C.C. refused (1977), 80 D.L.R. (3d) 63n (S.C.C.); and R. v. Inkster, n. 388.
392. Costa Rica v. Erlanger (1876), 3 Ch. D. 62 at 69 (C.A.),

- Mellish L.J.; Maxwell, n. 117 at 222; Craies, n. 1 at 401; and Côté, n. 3 at 133-135.
393. This is true even where proceedings to enforce substantive rights are pending when new procedural rules come into force: Kimbray v. Draper (1868), L.R. 3 Q.B. 160 at 163, Blackburn J.; Re Joseph Suche & Co. (1875), 1 Ch. D. 48 at 50, Jessel M.R.; Re Wicks and Armstrong, [1928] 2 D.L.R. 210 (Ont. S.C. A.D.); Bell v. Montreal Trust Co. (1956), 20 W.W.R. 273 (B.C.S.C.), aff'd (1956), 20 W.W.R. 273 (B.C.C.A.); and Craies, n. 1 at 401-402.
394. "[I]t is apparent that the question to be considered is not simply whether the enactment is one affecting procedure but whether it affects procedure only and does not affect substantial rights of the parties:" Filteau v. Nesbitt, n. 166 at 894, Harvey J. And see Upper Canada College v. Smith, n. 117 at 424 (Duff J.) and 442-443 (Anglin J.), and Côté, n. 3 at 137-146.
395. As Bennion, n. 86 at 447, points out, an enactment may be merely procedural in light of some facts, but substantive in light of others.
396. Stephenson v. Parkdale Motors Ltd., [1924] 3 D.L.R. 663 (Ont. S.C.), aff'd [1924] 4 D.L.R. 1201 (Ont. S.C.A.D.); Dixie v. Royal Columbian Hospital, n. 81; and Elliot v. Saskatoon (City), [1985] 5 W.W.R. 22 (Sask. Q.B.), aff'd [1986] 3 W.W.R. 575 (Sask. C.A.).
397. R. v. LeSarge (1975), 26 C.C.C. (2d) 388 (Ont. C.A.) (new rules on the admissibility of wiretap evidence were so incompatible with prior enforcement practice that they would alter substantive rights if applied retrospectively), and Filteau v. Nesbitt, n. 166 (removal of bar to admissibility of evidence of oral contract for real estate commission would alter substantive rights of parties if applied to contract made prior to removal).
398. Hyde v. Lindsay (1898), 29 S.C.R. 99; Colonial Sugar Refining Co. v. Irving, [1905] A.C. 369 (P.C.); and Boyer v. R. (1948), [1949] S.C.R. 89, establish that appeal rights, which are a matter of jurisdiction, crystallize upon the commencement of proceedings to enforce substantive rights. Thus, alterations in appeal rights are presumed not to apply to pending proceedings.
399. See Martin v. Perrie, n. 155.
400. The federal Interpretation Act provisions respecting procedural enactments (quoted supra at 121-122) are compatible with the common law requirement that procedural changes should only be applied retrospectively where they would have a purely procedural effect. Paragraph 44(c) provides that

substituted procedural rules are to be applied only "in so far as it may be done consistently with the new enactment," while para. 44(d) states that any new procedure must be followed "as far as it can be adapted." I suggest that these qualifications can be read as acknowledgements of the common law rule that procedural legislation is only presumed to operate retrospectively where it would not alter the substantive legal consequences of events in doing so: see R. v. Vallières (No. 2) (1973), 47 D.L.R. (3d) 363 at 370 (Que. C.A.), Brossard J.A.

In this regard, however, see R. v. Ali, n. 2 at 240, where Pratte J. expresses the opinion that these qualifications modify the common law rule respecting procedural enactments. This seems to me to be a doubtful statement. The common law always worked against allowing substantive rights to be retrospectively altered by new enactments, regardless of whether those enactments dealt with procedural matter or not. In order to fall within the common law exception to the rule against retrospective operation, legislation had to have a purely procedural effect: Upper Canada College v. Smith, n. 117 at 424 (Duff J.) and 442-443 (Anglin J.). The qualifications in paras. 44(c) and (d) simply recognize this fact, saying in effect that procedural provisions are not to be applied unquestioningly. They must be compatible with enforcement of the substantive rights that are the subject of the proceedings.

I do, however, see room for argument on this point insofar as the common law rules on the effect of repeal might not have allowed for the survival of repealed procedural rules in appropriate cases, whereas paras. 44(c) and (d), in tandem with para. 43 of the Interpretation Act, clearly do: see the discussion on the survival of repealed enactments, infra in chapter V at 209-214.

401. See, for example, Maxwell, n. 3 at 216-220; Manning v. Howard (1975), 8 O.R. (2d) 728 at 738-739 (C.A.), Jessup J.A.; Foy v. Foy (1978), 20 O.R. (2d) 747 at 747-748 (C.A.), Jessup J.A.; and Angus v. Hart (1984), 45 O.R. (2d) 667 at 670-671 (H.C.), Galligan J., aff'd (1986), 53 O.R. (2d) 793 (C.A.), rev'd (sub nom. Sun Alliance Insurance Co. v. Angus), [1988] 2 S.C.R. 256.
402. Accord, Sun Alliance Insurance Co. v. Angus, n. 73 at 262-266, LaForest J.
403. Refer to Nepean (Township) v. Leikin, n. 176, where the Ontario Court of Appeal distinguished between "abstract" and "specific" rights.
404. Bell Canada v. Palmer, [1974] 1 F.C. 186 (C.A.); Meurer v. McKenzie, n. 117; and Elliot v. Saskatoon (City), n. 396.
405. Two cases that support this analysis are Kearley v. Wiley, [1931] 2 D.L.R. 433 (Ont. S.C.), aff'd [1931] O.R. 167

- (S.C.A.D.); and H.A. Roberts Ltd. v. Glassman (1960), 24 D.L.R. (2d) 341 (B.C.C.A.). See also Brown v. Black (1889), 21 N.S.R. 349 (S.C. en banc) (steps followed to obtain jury trial not rendered ineffective by subsequently enacted rules revising the procedure to be followed to obtain such a trial); McLean v. Leth, [1950] 1 W.W.R. 536 (B.C.C.A.) (improperly filed lien claim not cured by subsequently enacted amendment prescribing more relaxed requirements for the enforcement of liens); Farm Credit Corp. v. Lindberg (1988), 72 Sask. R. 43 (Q.B.) (new mediation procedure, though specifically made applicable to pending actions, was not applicable so as to return parties to their original positions by negating the effects of their having followed previously existing procedure); and Côté, n. 3 at 137, fn. 466. Contrast Haffner v. Weston, n. 388.
406. Côté, n. 3 at 135.
407. Supra (1983), n. 164 at 203. See also Côté, n. 3 at 80-81.
408. Driedger (1983), n. 164 at 243, in referring to the predecessor of para. 44(f), states:  
Paragraph (f) provides in effect that where provisions of the former enactment are re-enacted in the new enactment they are to be regarded as a consolidation and as declaratory of the law and not as new law. This provision, therefore, precludes argument that the new enactment is being given retrospective effect when applied to transactions that took place before the repeal and re-enactment.
409. Note that the term "declaratory" is used in this provision in the restricted sense of having the effect of restating, explaining or clarifying the previously existing law without changing its meaning: see the discussion of declaratory enactments, infra at 135 ff.
410. The ramifications of this treatment are discussed later in this subsection.
411. Odgers, n. 213 at 334. Craies, n. 1 at 361-362, states that "consolidation is the reduction into a systematic whole of the statute law relating to a given subject," adding that "the object . . . is to consolidate and reproduce the law as it stood before the passing of the act." And see Galloway v. Galloway (1955), [1956] A.C. 299 at 320 (H.L.), where Lord Radcliffe dealt with a consolidating act, "the function of which is to repeat, but not to amend, existing statute law;" and Peter Sparkes, "The 1925 Property Legislation: Curtaining Off the Antecedents" [1988] Stat. L. Rev. 146 at 150: "Consolidation involves drawing together the text of related statutory provisions that were formerly spread across the statute book. In its purest form, it involves simple

reiteration of the earlier text, with the minimum of changes apart from essential 'carpentry.'" (Quoting Bennion, n. 86 at 518.)

412. Henry Campbell Black, Black's Law Dictionary, rev. 4th ed. (St. Paul, Minn.: West, 1968) at 381. This type of consolidation occurs in Canada whenever the federal or a provincial government undertakes a general consolidation or revision of its statute law.

Although the terms "consolidation" and "revision" are sometimes used interchangeably (see, for example, Côté, n. 3 at 29; Craies, n. 1 at 362-364; Odgers, n. 213 at 334; and Cross, n. 59 at 5-6, 61 and 70), the latter term has a broader meaning. While it is true that "revision" encompasses the notion of "consolidation," revised statutes sometimes go beyond rearranging the previously existing law and make corrections and improvements that alter its meaning: see Black's Law Dictionary, n. 11 at 1187; Craies, n. 1 at 362-364; Re Jang Sue Yee (1968), 68 D.L.R. (2d) 137 (B.C.C.A.); and Norman Larsen, "Statute Revision and Consolidation: History, Process and Problems" (1987) 19 Ottawa L. Rev. 321 at 330-334. Accordingly, it is possible that a general revision will make some changes in the substantive meaning of the law, even though its essential purpose is to restate existing law in a more convenient format. In fact, Craies, n. 1 at 362, says that this is "almost inevitable," and Sparkes, n. 411 at 150, observes that even "changes in the carpentry affecting the form of the legislation may contain hidden changes in meaning." The statute authorizing and governing a general revision may expressly provide that any substantive change in the law brought about as a result of the revision is to apply only in respect of subsequent transactions and matters, thus confirming the operation of the general presumption against retrospective applications of new law: see, for example, An Act respecting the Revised Statutes of Canada, S.C. 1964-65, c. 48, subs. 9(2); and the Statute Revision Act, R.S.C. 1985, c. S-20, subs. 18(3).

Many of the authorities have recognized the distinction between consolidation and revision and have used such terms as "pure consolidation" (Craies, n. 1 at 362), "plain consolidation" (Maxwell, n. 3 at 24) and "straight consolidation" (Cross, n. 59 at 171, and Bennion, n. 86 at 71, 85, 88 and 517) to distinguish consolidations in the purest sense of the term from consolidations involving revisions or amendments. In this paper, unless otherwise indicated, I use the term "consolidation" in its purest or strictest sense.

413. Driedger (1983), n. 164 at 214, offers this definition: "A consolidation Act is one that re-enacts as one statute an earlier statute with its amendments."
414. F.A.R. Bennion, Statute Law (London: Oyez, 1980) at 70.

415. Consolidating legislation can thus be understood as a specific type of re-enacting legislation. It is interesting to note that Côté, n. 3 at 29, does not make this distinction. He uses the term "consolidation" to refer to all legislation that re-enacts previously existing law. However, at pp. 80-81, he hints at a distinction when he refers to substitutions that "amount to," are "tantamount to," or are "equivalent to" a consolidation.
416. Of course, where there is no consolidation involved, the substituted legislation is usually enacted for the purpose of changing the existing law in some way. Any provisions that have the effect of changing the law fall outside the scope of the exception to the rule and must be interpreted in light of the presumption against retrospective legislation.
417. In the case of a general consolidation or revision, this is usually provided by the authorizing and governing statute: see the Revised Statutes Act, 1960, S.B.C. 1960, c. 50, subs. 11(1); An Act respecting the Revised Statutes of Canada, S.C. 1964-65, c. 48, subs. 9(1); and the Revised Statutes of Canada, 1985 Act, S.C. 1987, c. 48, s. 4. In other cases, it is covered by para. 44(f) of the federal Interpretation Act.
418. Trans-Canada Insurance Co. v. Winter (1934), [1935] S.C.R. 184; Canada (M.N.R.) v. Molson, [1938] S.C.R. 213; Frontenac (Licence District) Licence Commissioners v. Frontenac (County) (1887), 14 O.R. 741 (H.C. Ch. D.); R. v. Quong Wong, [1930] 1 W.W.R. 299 (B.C.C.A.); Re Green and Jamael, [1936] 2 D.L.R. 153 (N.S.S.C. *en banc*); and R. v. Ross (1956), 115 C.C.C. 31 (B.C.C.A.). In Canada (M.N.R.) v. Molson, *supra* at 219, Duff C.J. noted that the effect of the repeal and re-enactment of a provision as part of a general revision was the same as if there had been no revision at all. Thus, the law contained in the re-enacted provision was treated as though it had been in force since the date of enactment of the provision that it replaced. In R. v. Quong Wong, *supra* at 301, the repeal in question was referred to by Martin J.A. as a "nominal repeal." See also Craies, n. 1 at 362 (effect of repeal described as "purely literary," being merely for the purpose of rearrangement), and Bennion, n. 86 at 517.
- In contrast to the case of repeal in the context of a re-enactment, the ordinary effect of repeal is to terminate the operation of the repealed law except to the extent that it may be required to enable the enforcement of rights that were acquired thereunder prior to the repeal: see my discussion of the effect of repeal, *infra* in chapter V at 202 ff. Where there is a repeal and re-enactment, however, the operation of the repealed law is continued to its fullest extent.
419. And so, after a consolidation, references in other legislation to legislative provisions that have been consolidated must be read as references to the equivalent provisions in the consolidating legislation: Bell v. Prince Edward Island

(A.G.) (1973), [1975] 1 S.C.R. 25. And a reference in a statute to legislation that has since been re-enacted otherwise than as part of a consolidation must be interpreted as a reference to the re-enacting legislation: Canada (A.G.) v. Public Service Staff Relations Board, [1977] 2 F.C. 663 (C.A.). References in other documents must also be read as references to the re-enacting legislation: R. v. Quong Wong, n. 418. See also Côté, n. 3 at 63.

In addition, regulations and appointments made under repealed legislation remain in force as if they had been made under the re-enacting legislation: R. ex rel. Davis v. James (1957), 7 D.L.R. (2d) 75 (Ont. C.A.), and R. v. Novis (1987), 50 M.V.R. 1 (Ont. C.A.). See also Côté, n. 3 at 81-82, and paras. 44(a) and (g) of the federal Interpretation Act, which provide for the survival of appointments and subordinate legislation to the extent that they are not inconsistent with the new legislation. The broader rules contained in the Interpretation Act permit survival as a matter of convenience. Survival under such circumstances can be justified by analogy to consolidating and re-enacting enactments: the repeal of the authorizing legislation and the substitution of new legislation with which existing appointments or subordinate legislation are compatible is deemed not to disrupt the flow of jurisdictional authority through time.

420. This has been expressly stated in at least two enactments governing general revisions: see S.O. 1877, c. 6, s. 10, which governed the effects of the Ontario general revision of 1877, and the Revised Statutes Act, 1960, S.B.C. 1960, c. 50, subs. 11(2), which governed the British Columbia revision of 1960. (Interestingly enough, both of these statutes indicated an intention for retroactive operation.) In Ex parte Todd: Re Ashcroft (1887), 19 Q.B.D. 186 (C.A.), a case dealing with a simple re-enactment, Lord Esher M.R., at p. 195, described any other legislative intention as "inconceivable" in the circumstances.
421. The effect is the same as applying the provisions of an act at a particular point in time so as to govern the consequences of a previous event that occurred while those same provisions were in force. The repeal of the old legislation is not allowed to disrupt the continuity of the legal rules that are contained in both the old and the new legislation.
422. Recognizing consolidations and re-enactments as exceptions to the general rule of interpretation has the positive effect of encouraging legislatures to reorganize and streamline their statute law as the need arises. It also encourages them to use the more convenient repeal and substitution method of amendment: see Côté, n. 3 at 80 (fn. 213), 337-338 and 422.
423. Canada (A.-G.) v. Giroux (1916), 53 S.C.R. 172 (substitution of the word "person" for the word "party" held to have changed the meaning of the law).

424. Ouellette v. Canadian Pacific Railway Co., [1925] A.C. 569 (P.C.) (new legislation interpreted as having simply removed surplusage from the legislation that it replaced). And see Travis P. Clardy, Case Comment (1987) 14 *Pepperdine L. Rev.* 751.

Arguably, there is a presumption that a general revision (or consolidation, in the broad sense of that term) does not change the meaning of the previously existing law: Côté, n. 3 at 33-34, 337 and 422; Craies, n. 1 at 59-60 and 363-364; Maxwell, n. 117 at 21-24; Odgers, n. 213 at 334; Cross, n. 59 at 61 and 170; Bennion, n. 86 at 517-519; and Sparkes, n. 411 at 149, fn. 23 (citing Beswick v. Beswick (1967), [1968] A.C. 58 at 73 (H.L.), Lord Reid). Driedger, however, in (1983), n. 164 at 214, maintains that while a presumption to this effect may exist in the United Kingdom, no such presumption exists in Canada. For further discussion on this point, see infra, chapter V at 179-180.

425. Any change in the meaning of the law brought about as a result of the revision applies only in respect of subsequent matters and transactions. In the case of a general revision, this is sometimes stated in the authorizing and governing legislation: see S.O. 1877, c. 6, s. 10, the effects of which were considered in Re Brock and Toronto (City) (1880), 45 U.C.Q.B. 53; the Revised Statutes Act, 1960, S.B.C. 1960, c. 50, subs. 11(3); and An Act respecting the Revised Statutes of Canada, S.C. 1964-65, c. 48, subs. 9(2).

With respect to enactments generally, para. 44(f) of the federal Interpretation Act makes it clear that the presumption in favour of retrospective operation applies "except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment."

426. Infra at 178-180.

427. Cross, n. 59 at 6.

428. Craies, n. 1 at 59; Maxwell, n. 117 at 25; and Côté, n. 3 at 27, fn. 8. An example is the Bills of Exchange Act, 1882 (U.K.), 45 & 46 Vict., c. 61, considered by the House of Lords in Bank of England v. Vagliano Brothers, [1891] A.C. 107. At p. 144 of his judgement in that case, Lord Herschell described this as an enactment "which was intended to be a code of the law relating to negotiable instruments." Côté, supra at 27, cites the Bills of Exchange Act, R.S.C. 1970, c. B-5 (now R.S.C. 1985, c. B-4); and the Criminal Code, R.S.C. 1970, c. C-34 (now R.S.C. 1985, c. C-46), as Canadian examples.

It is interesting to note that Côté, supra at 27, states that a single statutory provision which enacts an existing common law rule may be called a codification. Bennion, n. 86 at 97, expresses a similar view, as did the New Brunswick Court of Appeal in Carpenter v. Baniuk, n. 384 at 393-394, Ayles J.A. Craies, however, seems to reserve the term for

legislation that provides a comprehensive code of the whole law on a given subject: see n. 1 at 59. In this paper, I use the term to include any enactment that converts into legislative form one or more common law rules.

429. Craies, n. 1 at 59; Odgers, n. 213 at 334-335; Cross, n. 59 at 6; and Côté, n. 3 at 27.
430. Côté, n. 3 at 27, and Bennion, n. 86 at 519. Only when the term "codification" is given this broad meaning does it make sense to say that a codification is presumed not to be intended to change the law. On the question of whether such a presumption exists, there seems to be some disagreement. The prevailing view is that there is no such presumption: see Bank of England v. Vagliano Brothers, n. 428 at 144-145, Lord Herschell; Maxwell, n. 117 at 25-26; and Odgers, n. 213 at 335 and 349. However, support for the existence of a presumption can be found in British and Foreign Marine Insurance Co. v. Samuel Sanday & Co., [1916] 1 A.C. 650 at 673 (H.L.), Lord Wrenbury; in Craies, n. 1 at 364; and in Bennion, n. 86 at 519. As Maxwell, n. 3 at 24, points out, the rationale for the alleged distinction between consolidating and codifying enactments is "obscure."
431. Craies, n. 3 at 59, and Re Ferguson and Imax Systems Corp. (1983), 43 O.R. (2d) 128 at 137 (C.A.), Brooke J.A. Lord Herschell demonstrated the distinction in delivering judgment in Bank of England v. Vagliano Brothers, n. 428. At p. 144, he stated that the Bills of Exchange Act, 1882 "was intended to be a code of the law relating to negotiable instruments," there using the term "code" in its broad sense. Later on, at p. 145, he used that term in its narrower sense when he said: "The Bills of Exchange Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter, and did alter it in certain respects." In British and Foreign Marine Insurance Co. v. Samuel Sanday & Co., n. 430 at 673, Lord Wrenbury used the terms "codifying" and "codification" in these two different senses in the same sentence.
432. Odgers, n. 213 at 334-335.
433. Bennion, n. 86 at 97.
434. Supra, n. 3 at 27.
435. See the discussion supra at 131-133.
436. Specifically, consolidations and other re-enactments of existing law: see Ouellette v. Canadian Pacific Railway Co., n. 424, and Latif v. Canadian Human Rights Commission (1979), [1980] 1 F.C. 687 (C.A.). Craies, n. 1 at 364, observes: "Acts codifying the law, so far as they embody statute law, are subject to the same rules as consolidation Acts." And at

p. 59, he remarks that consolidating acts "may be regarded as Acts codifying the statute law upon a subject as opposed to other forms of law . . . ."

437. Craies, n. 1 at 58; Odgers, n. 213 at 291-292; and Bennion, n. 86 at 87-88. As Craies observes, the term was originally restricted to statutes that clarified the common law.
438. Côté, n. 3 at 414. Note that the term "declaratory" is sometimes used in a general sense to refer to situations where the legislature has laid down what the law is deemed to have been, but no legislative interpretation is involved: for examples of this, see Boulevard Heights, Ltd. v. Veilleux (1915), 52 S.C.R. 185; K.V.P. Co. v. McKie, [1949] S.C.R. 698; Nova Scotia (A.-G.) v. Davis, [1937] 3 D.L.R. 673 (N.S.S.C. en banc); and Gruen Watch Co. of Canada v. Canada (A.-G.), [1950] O.R. 429 at 440 (H.C.), McRuer C.J.H.C., aff'd (sub nom. Bulova Watch Co. v. Canada (A.-G.)) [1951] O.R. 360 (C.A.). In this subsection, I use the term in its specialized sense to refer to legislative clarifications, explanations or interpretations of existing law.
439. Côté, n. 3 at 413-414, and Craies, n. 1 at 13-15.
440. Supra, n. 3 at 419.
441. R. v. Dursley (Inhabitants) (1832), 3 B. & Ad. 465, 110 E.R. 168 (K.B.).
442. A.G. v. Pougett (1816), 2 Price 381, 146 E.R. 130 (Ex.).
443. For example, the Territorial Waters Jurisdiction Act, 1878 (U.K.), 41 & 42 Vict., c. 73, considered in R. v. Dudley (1884), 14 Q.B.D. 273, was passed by the British Parliament in order to overcome the decision in R. v. Keyn (1876), 2 Ex. D. 63 (C.C.R.), respecting the limits of British territorial waters. The Sand and Gravel Act, S.A. 1951, c. 77, considered by the Supreme Court of Canada in Western Minerals Ltd. v. Gaumont, n. 304, was, according to its preamble, passed to resolve doubts about sand and gravel ownership that had arisen as a result of the trial decision in that case. See also the discussion in Craies, n. 1 at 58-59.
- It is interesting to note that declaratory legislation may have the effect of curing previously invalid conduct: see Holmes Foundry Ltd. v. Point Edward (Village) (1963), 39 D.L.R. (2d) 621 (Ont. C.A.).
444. Harding v. Queensland (Commissioner of Stamps), [1898] A.C. 769 at 775 (P.C.), Lord Hobhouse. Côté, n. 3 at 416, states: "The courts do not insist that declaratory legislation be enacted in any special form."
445. See, for example, the statute considered in A.-G. v. Theobald (1890), 24 Q.B.D. 557.

446. Côté, n. 3 at 415, notes that the most common indicator of a declaratory enactment is the successive use of the present and past tenses.
447. [1941] 3 D.L.R. 284.
448. S.Q. 1938, c. 72, s. 1, amending R.S.Q. 1925, c. 145, s. 92.
449. Côté, n. 3 at 416, and M.F.F. Equities Ltd. v. R., [1969] S.C.R. 595 at 599, where Pigeon J. states that an act must contain specific declaratory language in order to operate retrospectively as a binding legislative interpretation of the meaning of existing law.
450. Russell v. Ledsam (1845), 14 M. & W. 574, 153 E.R. 604 at 610 (Ex.), Parke B. See also Craies, n. 1 at 146-149; Côté, n. 3 at 423-439; and Bennion, n. 86 at 554. As Côté points out at p. 424:
- In order to legislate, Parliament must appreciate the meaning and effect of existing legislation. Legislative action often implicitly reveals Parliament's conception of existing law.
451. Supra, n. 3 at 416-423. Bennion, n. 86 at 422, seems to suggest the same thing.
452. This type of declaratory enactment is found in cases where the court decides that an enactment makes no change in the meaning of the existing law. Having determined this, the court will conclude that the legislature intended to clarify existing law: see Zadvorny v. Saskatchewan Government Insurance (1985), 38 Sask. R. 59 (C.A.). Implicitly declaratory enactments are thus not immediately identifiable, and a court is just as likely to interpret the revised wording of a new enactment as intended to change the meaning of existing law as it is to interpret it as intended to clarify that law: see Gravel v. St-Léonard (City) (1977), [1978] 1 S.C.R. 660 at 668, Pigeon J.; and Côté, n. 3 at 421.
- Note that subs. 45(3) of the federal Interpretation Act, R.S.C. 1985, c. I-21, precludes any presumption that the repeal or amendment of an enactment involves an implicit declaration as to the previous state of the law. Subsection 45(2), which relates specifically to amendments, precludes any presumption that the act of amending an enactment involves an implicit declaration that the previous law was different from the amended law.
453. The courts have sometimes used the term "declaratory" in this special and restricted sense: Edmonton (City) v. Northwestern Utilities Ltd., [1961] S.C.R. 392 (court contrasted legislation that retroactively changes the law with legislation that merely declares the law as it presently stands); Wellesley Hospital v. Lawson (1977), [1978] 1 S.C.R. 893 (in response to an argument that the revised wording of a new

enactment pointed to a legislative intention to change the previously existing law, Laskin C.J.C. stated that the legislature may be found to have enacted a declaratory provision (ex abundantia cautela); and Jasperson v. Romney (Township) (1908), 12 O.W.R. 575 (S.C.), aff'd (1908), 12 O.W.R. 734 (Div. Ct.) (court concluded that legislation was not declaratory after finding that it changed the law as established by a prior court decision). A good example of this type of legislation is discussed in Clardy, n. 424. Note that the term is used in this restricted sense in para. 44(f) of the federal Interpretation Act: see supra at 129-130.

454. Supra, n. 443.
455. S.O. 1962-63, c. 97, subs. 1(1), amending R.S.O. 1960, c. 274, s. 64.
456. Craies, n. 1 at 58-59 and 395; Driedger (1983), n. 164 at 191 and 198; and Côté, n. 3 at 422-423. In fact, Louis-Philippe Pigeon, in Drafting and Interpreting Legislation, 2d ed., trans. R. Clive Meredith (Toronto: Carswell, 1988) at 81-83, defines declaratory legislation solely in terms of retroactive operation. He uses the term "interpretative legislation" to refer to legislative interpretations of existing law that operate in a purely prospective fashion.
457. Supra (1983), n. 164 at 198.
458. Côté, n. 3 at 422; Craies, n. 1 at 395; and Odgers, n. 213 at 291-292.
459. Supra, n. 86 at 87-88.
460. Craies, n. 1 at 395; Maxwell, n. 3 at 224; Odgers, n. 213 at 291; Côté, n. 3 at 422; Bennion, n. 86 at 87-88; Inland Revenue Commissioners v. Joiner, n. 123 at 1062, Lord Diplock; and Hornby Island Trust Committee v. Stormwell, n. 117 at 442, Lambert J.A. Bennion even goes so far as to suggest that declaratory enactments are presumed to operate retroactively. But Driedger (1974), n. 149 at 147, and (1983), n. 164 at 191; and Pigeon, n. 456 at 82, disagree.
461. Illustrations of this may be found in Holmes Foundry Ltd. v. Point Edward (Village), n. 443; Mortgage Corporation of Nova Scotia v. Walsh, [1925] 1 D.L.R. 665 (N.S.S.C. en banc), aff'g (1924), 57 N.S.R. 547 (S.C.) (act establishing liability for taxes and imposing tax lien on property was required by declaratory enactment to be construed as though certain words contained in it had never been contained therein); and Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission of Ontario, n. 7 (act was interpreted by the Ontario Legislature as foreclosing the possibility of any action being taken against the power commission without the consent of the Attorney General, in

spite of the fact that the trial court had already found otherwise).

462. Côté, n. 3 at 423, quoting P. Roubier, Le droit transitoire, 2d ed. (Paris: Dalloz et Sirey, 1960) at 248. "Acts of this kind, like judgments, decide similar cases pending when the judgments are given, but do not reopen decided cases:" Craies, n. 1 at 395, cited with approval in Western Minerals Ltd. v. Gaumont, n. 304 at 370, Cartwright J.
463. Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G., n. 40 at 613. And see Lord Diplock (dissenting) in the same case at p. 638; Salomon v. A. Salomon and Co. (1896), [1897] A.C. 22 at 38 (H.L.), Lord Watson; Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission of Ontario, n. 7 at 822, Middleton J.A.; Esso Resources Canada Ltd. v. R. (1988), 88 D.T.C. 6469 at 6477 (F.C.T.D.), Reed J.; and Craies, n. 1 at 66-67. This theory of statutory interpretation underlies the well-known comment of the Earl of Halsbury L.C. in Hilder v. Dexter, [1902] A.C. 474 at 477 (H.L.):
- [I]n construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed.
464. In other words, it will not always be clear when legislation is genuinely meant to clarify or explain existing law and when the legislature seeks instead to adjust the meaning of existing law to meet a newly perceived requirement.
465. Stock v. Frank Jones (Tipton) Ltd., n. 59 at 953, Lord Simon of Glaisdale. See also Cross, n. 59 at 22-30; Bridge, infra, n. 469 at 143; and Allan, n. 12 at 117-118.
466. Côté, n. 3 at 413-414; Craies, n. 1 at 13-15; Raz, n. 14 at 200-201; and the Rt. Honourable Brian Dickson, P.C., "The Rule of Law: Judicial Independence and the Separation of Powers" (Address to the Canadian Bar Association Conference, Halifax, N.S., August 21, 1985) (1985) 9:3 Prov. Judges J. 4. And see Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission of Ontario, n. 7 at 823, where Middleton J.A. observed that the legislature transcends its function when it says that legislative language means and always has meant something other than the courts have determined it to mean.
- I realize that this statement is somewhat of an oversimplification, given the administrative complexity of modern government and the desirability of having some laws interpreted and applied by specialist tribunals. Nonetheless, at the very least, the rule of law requires that non-judicial interpreters of the law be independent, impartial and subject to the general supervision of the courts.

467. Holmes Foundry Ltd. v. Point Edward (Village), n. 443 at 625, Schroeder J.A.; and supra, n. 462.
468. Côté, n. 3 at 423, quoting Roubier, n. 462 at 248; Gravel v. St-Léonard (City), n. 452 at 667, Pigeon J.; and supra at 135-136.
469. This occurred when the British Parliament passed the War Damage Act 1965 (U.K.), 1965, c. 18, to reverse the decision of the House of Lords in Burmah Oil Co. (Burmah Trading) Ltd. v. Lord Advocate (1964), [1965] A.C. 75. The implications of this are discussed in J.W. Bridge, "Retrospective Legislation and the Rule of Law in Britain" (1967) 35 U.M.K.C. L. Rev. 132. When a legislature applies its interpretation so as to resolve a particular case, its assumption of the judicial role becomes complete.
- The general rule is that declaratory legislation has no effect on final judgements, which are protected by the principle of res judicata: supra, n. 462. However, the legislature may overcome this rule by specifically making its interpretation applicable to pending and decided cases, as the British Parliament did in the case of the War Damage Act 1965.
- It should also be noted that the courts may be less willing to allow declaratory legislation to affect cases that are the subject of pending litigation than cases that have not reached that stage: see the discussion of the factors to be considered in determining legislative intention, infra in chapter V at 185 and 198.
470. This may be a consequence of poor drafting or of conflicting judicial interpretations. In Re Thoburn (1938), [1939] 1 D.L.R. 631 at 634 (Que. K.B.A.D.), Rivard J. described the meaning of the legislation interpreted in that case as being "in suspense."
471. Odgers, n. 213 at 292, and Bridge, n. 469 at 139-140.
472. See the discussion infra in chapter V at 182 ff.
473. Supra at 137-138.
474. Declaratory legislation that is implicitly declaratory (i.e., legislation that simply clarifies or explains existing law without altering its meaning) can be justified as an exception to the presumption against retrospective operation. On the other hand, all declaratory legislation should be read subject to the presumption against retroactive operation because of the highly fictional character of retroactivity.
475. In the manner of what Pigeon calls "interpretative legislation:" see supra, n. 456. This approach seemed to commend itself to the Ontario High Court in Re Inglis Ltd. and Ontario (Minister of Environment) (1988), 65 O.R. (2d) 798.

476. See Black's Law Dictionary, n. 11 at 343.
477. Fuller, n. 14 at 54-55, gives an example of the nefarious conduct that could be legalized by a so-called "curative" statute.
478. Phillips & Jackson, n. 12 at 53-54.
479. Refer to the discussion of acts of indemnity in Phillips v. Eyre, n. 125 at 23-25, Willes J. See also Bridge, n. 469 at 138, and Walker, n. 231 at 100.
480. Hochman, n. 221 at 704-706, and Smead, n. 109 at 786, fn. 36.
481. Toronto (City) v. Russell, [1908] A.C. 493 (P.C.); Mount-cashel v. Grover (1847), 4 U.C.Q.B. 23; and McCutcheon Lumber Co. v. Minitonas (Municipality) (No. 2) (1912), 7 D.L.R. 664 (Man. C.A.).
482. Refer to the validating legislation considered in Capital Regional District v. Heinrich (1981), 33 B.C.L.R. 137 (C.A.). See also Ontario (Ministry of Municipal Affairs) v. Thunder Bay (City) (1988), 38 M.P.L.R. 257 (Ont. H.C.) (legislation rectifying failure of government officials to follow prescribed procedure in presenting evidence at rezoning hearing).
483. Dwyer v. Port Arthur (Town) (1893), 22 S.C.R. 241, and Massey v. McClelland (1895), 2 Terr. L.R. 179 (S.C. en banc). See also Windsor (City) v. Detroit and Windsor Subway Co. (1988), 66 O.R. (2d) 353 (H.C.), dealing with statutory validation of previously invalid agreements. It is interesting to note that curative legislation may be declaratory in form: Holmes Foundry Ltd. v. Point Edward (Village), n. 443.
484. Such as the retroactive United Kingdom legislation (5 & 6 Vict., c. 113; 6 & 7 Vict., c. 39; and 7 & 8 Vict., c. 81) passed to overcome the effects of the House of Lords decision in R. v. Millis (1844), 10 Cl. & F. 534, 8 E.R. 844. That decision declared null and void numerous marriages that had been celebrated in Ireland by Presbyterian ministers and other persons not episcopally ordained: see the discussion in Phillips v. Eyre, n. 125 at 24-25, Willes J.
485. Hochman, n. 221 at 705-706.
486. They may be a windfall in the sense that they are entirely unexpected and arise out of conduct that causes no real prejudice to the individual.
487. Hochman, n. 221 at 720-722, and Munzer (1982), n. 225 at 470. As Munzer points out, curative laws often favour "those who rely on the underlying merits of a claim rather than those who grasp at legal technicalities." According to Sherbaniuk,

n. 108 at 742-746, a similar rationale is used to justify amendments to taxation legislation that are designed to overcome inadvertent defects in the existing law.

488. See the discussion of beneficial enactments in the following subsection.
489. Thus Walker, n. 231 at 100, states: "An Act of indemnity, the purpose of which is to validate or legalise ex post facto that which was initially invalid or illegal, must by its nature be retroactive." Strictly speaking, however, while an act of indemnity is by nature retroactive or retrospective, it need not go so far as to legalize previously illegal conduct. Its essential purpose is simply to protect those who have engaged in such conduct from the consequences of having done so.
490. Gold Seal Ltd. v. Alberta (A.-G.), n. 301; Capital Regional District v. Heinrich, n. 482; and Hornby Island Trust Committee v. Stormwell, n. 117.
491. Dwyer v. Port Arthur (Town), n. 483, and Massey v. McClelland, n. 483.
492. Technically, once the court has decided that a particular enactment is curative, it has made the decision about its retroactive or retrospective effect. As I have already pointed out, curative legislation is, by definition, either retroactive or retrospective in its operation. Therefore, the question must be whether an enactment that would have a curative effect if it were accorded retroactive or retrospective operation should be read subject to the general presumption against those types of operation. Accordingly, many of the references to curative legislation in the remainder of this subsection should be read as references to potentially curative legislation.
- As a practical matter, it is important to recognize that curative legislation almost invariably contains language pointing unmistakably to a retroactive or retrospective effect. Consequently, it is essentially a formality to treat potentially curative legislation as being subject to the presumption against retroactive and retrospective operation. Doing so, however, makes for consistent analysis. Also, there may be practical implications with regard to determining the extent of the retroactive or retrospective operation of a curative enactment (for instance, whether or not it applies to fact-situations that are the subject of pending litigation): see infra, chapter V at 185 and 198.
493. See the discussion infra in chapter V at 185, 194 and 199-200.
494. Recall that most of the exceptions previously discussed had to be defined in restricted terms (i.e., purely procedural

enactments, straight consolidations, straight codifications and declaratory enactments that bring about no change in the meaning of the law).

495. Bridge, n. 469 at 138-140, and Hochman, n. 221 at 721. This is an important use of a curative act, given that judicial decisions are themselves retrospective in nature, and thus capable of causing a significant disruption of expectations when they go against the prevailing interpretation of the law and impugn the validity of practices that were based on that interpretation.
496. See the legislation that was passed to overcome the effects of R. v. Millis, n. 484; the legislation considered in Boulangier v. Fédération des producteurs d'oeufs de consommation du Québec, n. 99 (duties collected under ultra vires federal legislation deemed to have been collected under intra vires provincial legislation), and Air Canada v. British Columbia, [1989] 4 W.W.R. 97 (S.C.C.) (taxes collected under ultra vires legislation deemed to have been paid under subsequently enacted intra vires legislation); and The Language Act, S.S. 1988, c. L-6.1, which was passed in response to Mercure v. Saskatchewan (A.G.), [1988] 1 S.C.R. 234, the Supreme Court of Canada's recent decision on language rights in Saskatchewan. Consider also the ramifications of the Supreme Court's decision in Reference Re Manitoba Language Rights, n. 68. In this regard, see Dale Gibson and Kristin Lercher, "Reliance on Unconstitutional Laws: The Savings Doctrines and Other Protections" (1986) 15 Man. L.J. 305, especially at 323-328.
- Hochman, n. 221 at 721, gives an American example: the Portal-to-Portal Act of 1947. This statute validated numerous employment contracts that had been rendered invalid as a result of the United States Supreme Court's unexpected interpretation of the Fair Labor Standards Act in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).
497. Fuller, n. 14 at 53-54. Fuller gives the example of a statute governing the validity of marriages that is neither well-publicized nor capable of being complied with. He explains that a curative act could remedy the dislocations that would otherwise result from the legislature's failure to observe these two basic requirements of the rule of law principle. As he later comments at p. 74, "a retrospective 'curative' statute can perform a useful function in dealing with mishaps that may occur within a system of rules that are generally prospective." In a similar vein, Colvin, n. 13 at 130, states that retroactive laws may sometimes be justified "as a curative response to a mishap or breakdown of legal order."
498. Munzer (1982), n. 225 at 469.

499. Hochman, n. 221 at 720. This reasoning can only apply in respect of a generally held and objectively verifiable misapprehension of the law. Individual or subjective misunderstanding or outright ignorance of the law do not justify making an exception to the rule. Only if the erroneous perception of the law is widespread and indisputable can a curative enactment be said to preserve legitimate expectations.
500. Bridge, n. 469 at 138-139, and Fuller, n. 14 at 53. Note the similarities between this type of curative legislation and foreshadowed legislation. The latter is discussed infra in chapter V at 184 and 192-193. See especially n. 631.
501. Supra, n. 481.
502. Ex parte Hum Bing You, n. 99.
503. Re Margaritis (Galaxie Family Restaurant) (1977), 16 O.R. (2d) 83 (C.A.)
504. See the discussion infra in chapter V at 185, 194 and 199-200.
505. Supra (1983), n. 164 at 198. See also pp. 199 and 203. I read this to mean purely benevolent consequences, as did the Alberta Court of Appeal in Snider v. Smith (1988), 55 D.L.R. (4th) 211. See also Bennion, n. 86 at 446.
506. Supra (1983), n. 164 at 203. See also pp. 198-202.
507. Supra, n. 1 at 396. See also Bennion, n. 86 at 445-446.
508. R. v. Vine (1875), L.R. 10 Q.B. 195 (provision disqualifying convicted felons from holding a licence to sell liquor was viewed as protecting the public from innkeepers of bad character and was therefore applied retrospectively in respect of a licence holder who had been convicted prior to the enactment of the provision).
509. Brosseau v. Alberta Securities Commission, n. 140 (provisions conferring new powers on securities commission to suspend the privileges of securities traders alleged to have issued false and misleading prospectuses was found to be for the protection of the public and was given a retrospective interpretation largely on that account). Bennion, n. 86 at 446, suggests that tax avoidance provisions may be enacted in the public interest (i.e., to protect the public treasury from the evasive practices of certain taxpayers), and thus may be freer from the presumption against retrospective operation. Note that the public protection argument may have influenced the decision in Re a Solicitor's Clerk, [1957] 1 W.L.R. 1219 (Q.B.).

510. The R. v. Vine case, n. 508, is best explained on these grounds. Furthermore, the handling of the Brosseau v. Alberta Securities Commission case, n. 140, by the Supreme Court of Canada lends some support to this view. While the court seemed, for the most part, to proceed on the ground that the presumption against retrospectivity was inapplicable because the legislation in question was designed to protect the public, it concluded (at p. 321) that the presumption had been "effectively rebutted."
511. Thus, in R. v. Vine, n. 508, Lush J. dissented, expressing the view (at p. 201) that the provision in question was highly penal in its operation because it would require a person who had previously been convicted to forfeit his licence. He went on to conclude that the enactment in question contained insufficient evidence of intention to rebut the presumption against retrospective operation.
512. Similarly, it is incorrect to say that remedial legislation is an exception to the rule. A statute that is remedial for one person may be prejudicial to another: Ishida v. Itterman, n. 242 at 146-147, Fulton J.; Côté, n. 3 at 110; and supra, n. 242. In any event, by virtue of s. 12 of the federal Interpretation Act, R.S.C. 1985, c. I-21, all legislation is deemed to be remedial.
513. Infra at 190-192 and 199-200.
514. Supra, chapter III at 65 and n. 242.
515. S.C. 1960, c. 44 (reprinted in R.S.C. 1985, App. III).
516. Supra, n. 69.
517. With respect to the Canadian Bill of Rights, see Elmer A. Driedger, "The Meaning and Effect of the Canadian Bill of Rights: A Draftsman's Viewpoint" (1977) 9 Ottawa L. Rev. 303 at 307, and the dissenting judgement of Wilson J. in Stevens v. R., n. 200 at 1172-73. With respect to the Charter, see Re McDonald and R., n. 6 at 348, Morden J.A.; and the dissenting judgement of Wilson J.A. in Stevens v. R., supra at 1172-73.
518. Arguably, this is the thinking behind para. 44(e) of the federal Interpretation Act and para. 11(i) of the Charter, which provide for the retrospective operation of enactments that reduce the punishment for an offence. Driedger (1983), n. 164 at 199, gives the example of a statute that lowers the voting age, but it is difficult to see how such an enactment could possibly have a retrospective effect when applied in respect of subsequent elections. Consider, however, the case of a statute legitimizing children who were born out of wedlock prior to its enactment: see Anonymous, "Pending Actions and Retrospective Legislation" (1957) 2 Vict. U. Well. L.

Rev. 189 at 189, and the confused analysis by Ellen M. Hedden in Case Comment on Re Bagaric and Juric (1982) 60 Can. Bar Rev. 171.

519. Supra, n. 200.

520. R.S.C. 1970, c. C-34, subs. 146(1).

521. See, for example, R. v. James, n. 121, and the cases cited in n. 200. But consider Gamble v. R., n. 91.

522. Opposing arguments on this issue can be found in William Black, "Charter of Rights -- Application to Pre-enactment Events" (1982) U.B.C. L. Rev. (Charter Ed.) 59, and David H. Doherty, "'What's Done is Done:' An Argument in Support of a Purely Prospective Application of the Charter of Rights" (1982), 26 C.R. (3d) 121.

523. Re McDonald and R., n. 6 at 344, 349 and 352-353, Morden J.A.; and R. v. Lucas, n. 117 at 236-238, Morden J.A. As Morden J.A. put it in the latter case, at p. 237:

There are often potential examples of injustice on either side of the line when a new law comes into effect. It is no more easy to do perfect justice in this area of the law than many others but, by and large, the traditional rules relating to the prospective and retrospective application of new law have arrived at a reasonable compromise of the interests of justice -- including the important factor of predictability.

See also North Star Inn Ltd. v. Winnipeg (City) (1986), 44 Man. R. (2d) 81 (C.A.).

524. In Re McDonald and R., n. 6, the Ontario Court of Appeal rejected arguments for a retrospective application of s. 15 of the Charter, pointing out that to do so would infringe the principle of equality in the administration of the law. At pp. 352-353, Morden J.A. explained:

Persons of the same age who committed offences during the same period when a particular law was in force describing the consequences relating to a conviction, would not be treated equally. The distinction, depending on whether the proceedings were finally terminated before or after April 17, 1985 would be an arbitrary and capricious one. It would turn the administration of justice into a game and would ignore the important principle of justice that equals should receive equal treatment.

525. In R. v. Lucas, n. 117 at 236, Morden J.A. opined:

I think that the decisions in applying, in the main, the traditional principles relating to the possible retrospective application of statutes have fairly resolved the issues in a manner that is probably consonant with the intention of the framers of the Charter and with considerations of even-handed justice.

526. Rawls, n. 14 at 237. This has been described as an element of "the integrity of the law" (Re McDonald and R., n. 6 at 353, Morden J.A.) and as essential to promoting respect for the law (R. v. James, n. 121 at 632-633, Tarnopolsky J.A.). As Colvin, n. 13 at 142, points out: "The rule of law is integrally connected with the principle of formal justice, which requires that like cases be treated in like manner and different cases differently." Working against the rule of law principle in cases of this nature is the value of human liberty.
527. Accord, Colvin, n. 13 at 141-142, noting that an exception from the general rule for this type of beneficial legislation is not an "inexorable conclusion" that can be drawn from the logic of the rule of law principle.
528. Generally speaking, the rule of law has been conceived of as a bulwark protecting the individual from certain types of abuse of power by the state. Where the rule of law prevails, individuals enjoy a basic level of protection from the arbitrary actions of government and a corresponding degree of liberty: see the discussion supra in chapter II at 12-13. The state, on the other hand, is often viewed as neither needing nor capable of benefiting from the rule of law principle. Despite this, I am not entirely convinced that the state (which, after all, represents the collective interests of its subjects) should be barred from invoking in its behalf the very principle to which it is expected to adhere.
529. Infra at 194-195 and 199-200.
530. In cases involving retroactive or retrospective penal legislation, there is an additional question of constitutional validity to be considered: refer to the discussion of constitutional limitations on legislative power, supra in chapter II at 29-31. Once legislative intention to enact such legislation has been determined in light of the presumption, the court must decide if that intention is constitutionally permissible. Only if it is will legislative intention prevail. As McNulty, n. 4 at 13, fn. 3, puts it: "The question of the intended temporal scope of a law is basically a question about its meaning. It is therefore anterior to the question of the validity of that scope." See also ibid. at 18, fn. 15; and Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd. (1988), 63 Alta. L.R. (2d) 361 (Q.B.).
- In all cases but one, the presumption contained in the general rule of interpretation works in favour of constitutional validity, given that the general effect of the relevant Charter provisions is to prohibit both retroactive and retrospective penal laws. Accordingly, the legislature is presumed, by virtue of the general rule of interpretation, not to intend to create an offence out of a past innocent act (para. 11(g)), to add to punishment already imposed or to provide for the retrial of a completed case (para. 11(h)), or

to increase the punishment for an offence previously committed (para. 11(i)). Only if this presumption is rebutted by clear evidence of retroactive or retrospective intention will the statute be considered unconstitutional and of no force or effect, in accordance with subs. 52(1) of the Charter.

In the exceptional case, which arises where the punishment for an offence has been decreased by legislation brought into force after such an offence has been committed, but before sentencing, para. 11(i) of the Charter requires retrospective operation. This Charter provision is supplemented by a statutory presumption of intention, found in para. 44(e) of the federal Interpretation Act, R.S.C. 1985, c. I-21, that runs contrary to the general rule and works in favour of retrospectivity. Thus, even in the exceptional case where the Charter demands retrospective operation, there is a presumption of interpretation working in favour of constitutional validity. Again, only if this presumption is rebutted can the legislation be declared unconstitutional.

531. In some cases where it has been determined that retroactive operation is in issue, it may be necessary to ask a supplementary question, namely, whether or not the retroactive operation would have to be of a retrospective nature in order to apply to the fact-situation at hand: see supra, n. 321.
532. For example, in the context of retroactive operation, a curative enactment that brings the law into line with what it had generally been perceived to be, and in the context of retrospective operation, a purely procedural act, a consolidating or re-enacting act, a straight codifying act or any other enactment that would not have the effect of altering the substantive legal consequences of prior events if it were allowed to govern them. As I observed supra in chapter IV at 121-133, purely procedural enactments and consolidating enactments are not only exceptions to the general rule of interpretation against retrospective operation, they are also subject to a reverse presumption in favour of such operation.
533. "For retroactivity the question is: Is there anything in the statute to indicate that it must be deemed to be the law as of a time prior to its enactment?:" Driedger (1983), n. 164 at 197.
534. "For retrospectivity the question is: Is there anything in the statute to indicate that the consequences of a prior event are changed, not for a time before its enactment, but henceforth from the time of enactment, or from the time of its commencement if that should be later?:" Driedger (1983), n. 164 at 197-198.
535. Where the presumption against retroactive operation has been successfully rebutted, the court may have to go on to determine whether the retroactive operation was intended to be

retrospective in nature -- that is, whether the legislation in question was intended to apply so as to govern events that occurred prior to its effective commencement date: see supra, nn. 321 (particularly the case of Grabbe v. Grabbe cited therein) and 531.

It is interesting to note that the issues of retrospectivity raised in Re Sanderson and Russell, n. 117, and Williams v. Williams, n. 5, were resolved by following the procedure that I have just outlined. In doing so, however, the courts involved did not expressly refer to the second stage of analysis. This stage is often bypassed in cases where the legislation being interpreted is clearly not of a type to qualify as an exception to the general rule.

536. Supra (1953), n. 148 at 11-18, and (1974), n. 149 at 143-147. Although Driedger talks about a test for retrospectivity in these writings, recall that prior to revising his views in 1976, he used the term "retrospective operation" to refer to what I have defined as and what he himself later came to call "retroactive operation." Upon revising his views, he came to see the test in question as a test for retrospectivity: see (1983), n. 164 at 191-192 and 196, and my discussion in the next section on determining whether retrospectivity is in issue.
537. See The Family Law Reform Act, 1978, S.O. 1978, c. 2, s. 4, considered in Re Murray and Murray (1979), 25 O.R. (2d) 321 (Div. Ct.).
538. See the legislation considered in R. v. Vine, n. 508, and Re a Solicitor's Clerk, n. 509.
539. See The Securities Act, R.S.O. 1960, c. 363, subs. 54(3), considered in R. v. Coles (1969), 9 D.L.R. (3d) 65 (Ont. C.A.).
540. See The Blind Persons' Rights Act, R.S.S. 1978, c. B-3.1 (Supp.), subs. 4(1), considered in Peters v. University Hospital Board, [1983] 5 W.W.R. 193 (Sask. C.A.).
541. Subsection 60(1) of The Family Law Reform Act, 1978, S.O. 1978, c. 2, considered in Yuill v. McMullen (1979), 25 O.R. (2d) 178 (H.C.), aff'd (1980), 28 O.R. (2d) 624 (C.A.).
542. R.S.C. 1985, c. I-21.
543. Supra, n. 219 at 372-373.
544. In addition to the cases discussed in the text, see R. v. Martin (1892), 20 S.C.R. 240; St. Joachim de la Pointe Claire (Village) v. Pointe Claire Tur. & Ice Road Co. (1895), 24 S.C.R. 486; Hemphill v. McKinney (1915), 27 D.L.R. 345 (B.C.C.A.); Ward v. British Oak Insurance Co., n. 212; Zilkie v. Thompson, [1950] 2 W.W.R. 941 (Sask. C.A.); R. v. Coles,

- n. 539; Central Mortgage and Housing Corp. v. Co-operative College Residences, Inc. (1975), 13 O.R. (2d) 394 (C.A.); R. v. Asham (1979), [1980] 2 W.W.R. 232 (Sask. C.A.), leave to appeal to S.C.C. refused (sub nom. Asham v. Keeper of the Common Gaol at the Regional Psychiatric Centre (Prairies)) (1979), 31 N.R. 179 (S.C.C.); Re Yat Tung Tse and College of Physicians and Surgeons of Ontario (1978), 18 O.R. (2d) 546 (Div. Ct.); Re Parentela and Liquor Licence Appeal Tribunal (1981), 33 O.R. (2d) 836 (Div. Ct.); and Barillari v. Larratt-Smith (1982), 37 O.R. (2d) 74 (H.C.), particularly at 78. But see Re Hourston Estate and Hourston (1919), 14 Alta. L.R. 552 (S.C.A.D.), and Levin v. Active Builders Ltd., n. 146.
545. Supra, n. 253.
546. (U.K.), 46 & 47 Vict., c. 52, subs. 32(1).
547. Supra, n. 253 at 736.
548. Ibid. at 740.
549. Supra, n. 253.
550. S.A. 1937, c. 18.
551. The same conclusion was reached on comparable facts in Yuill v. McMullen, n. 541.
552. Re Murray and Murray, n. 537. And see Martelli v. Martelli, n. 289, dealing with the applicability of legislation governing the division of "family assets." In that case, the British Columbia Court of Appeal concluded that the legislation could only affect property that was a family asset prior to its coming into force, but which had ceased to be a family asset before that date, if it were interpreted as operating retroactively.
553. R. v. W.D.P. (1987), 82 N.S.R. (2d) 81 (S.C.A.D.).
554. Latif v. Canadian Human Rights Commission, n. 436; Peters v. University Hospital Board, n. 540; and Re Royal Insurance Co. of Canada and Ontario Human Rights Commission (1985), 51 O.R. (2d) 797 (Div. Ct.).
555. Driedger did not expressly link the test for retroactivity to the always-speaking rule as I have done. Furthermore, he obscured his analysis by leaving the impression that the outcome of the test depended upon whether the application of the legislation was triggered by the holding of a particular status or by the occurrence of a particular event. He strongly identified the latter situation with retroactive operation and the former with non-retroactive operation: (1953), n. 148 at 11-15; (1974), n. 149 at 143-147; and (1976), n. 219 at

114-118. In doing so, he deflected attention from the central concern of the test, which is with the timing of the application of statutory provisions.

There are, of course, no grounds for making a distinction on this basis. As I have indicated in the text, a statute describing individuals by reference to their status would be given a retroactive operation if it were applied to individuals who held that status only for some period prior to the statute's actual coming into force. On the other hand, a statute describing individuals by reference to an event might contemplate pre-enactment as well as post-enactment events (e.g., "Where a debtor has been declared bankrupt, he shall not . . ."), and thus could apply to certain individuals in respect of past events without operating retroactively.

To reiterate, the key question is whether the fact-situation under consideration matches the description contained in the legislation at some point after the latter's actual coming into force or, to put it another way, whether the fact-situation matches the description contained in the legislation at some point during the period in which the legislation is actually speaking.

556. Driedger (1953), n. 148 at 15-22, and (1983), n. 164 at 130-131, gives some examples of inherently ambiguous grammatical constructions and points out the problems of interpretation to which they can give rise.
557. Supra, n. 508. See also Emerson v. Skinner (1906), 4 W.L.R. 255 (B.C.S.C. en banc).
558. Supra, n. 221 at 692.
559. Supra (1977), n. 222 at 382.
560. See supra, chapter III at 57-58; (1976), n. 190 at 16-17; (1978), n. 190 at 267; and (1983), n. 164 at 191-192 and 196. Prior to 1976, he had seen it as a test for what I have defined as retroactivity: see supra, n. 536.
561. When applied in respect of cases involving potentially retrospective legislation, Driedger's test runs afoul of the following admonition of Lord Pearce, included as part of his dissenting judgement in Commissioners of Customs and Excise v. Gallaher Ltd. (1969), [1971] A.C. 43 at 66 (H.L.):
- . . . the presumption against retrospection is not a technicality. It is a general rule of justice not dependent on forms of words. It is founded on a judicial preference, where choice is possible, for the reading which does not invalidate existing rights and obligations.
- Note also that in Re Sanderson and Russell, n. 117 at 436-437, the Ontario Court of Appeal cast doubt on the appropriateness of Professor Driedger's test by questioning his interpretation of R. v. Vine, n. 508.

562. Supra, n. 405. Some other cases in which Driedger's test would clearly be found wanting, even using his own definition of retrospectivity, are R. v. Vine, n. 508; Martindale v. Clarkson (1880), 6 O.A.R. 1; Upper Canada College v. Smith, n. 117; Dixie v. Royal Columbian Hospital, n. 81; Metro-politan Toronto (Municipality) v. Reinsilber, n. 267; Homex Realty and Development Co. v. Wyoming (Village), [1980] 2 S.C.R. 1011; and Tritt v. United States of America (1989), 68 O.R. (2d) 284 (H.C.).
563. S.B.C. 1947, c. 57, s. 3, amending R.S.B.C. 1936, c. 170, s. 19.
564. Insofar as Driedger's test suggests that a statute's application to an event which occurred after its commencement could not involve retrospective operation, it is also in error. A statute could be addressed to the occurrence of an event, that event could take place after the statute comes into force, and the application of the statute to that event might still be retrospective: see Re Trites, [1954] 2 D.L.R. 523 (N.B.S.C.A.D.) (statute conferring right to apply for payment out of unsatisfied judgement fund upon obtaining court judgement would operate retrospectively if it were applied in respect of a cause of action that arose prior to its coming into force, even though judgement in the cause had been obtained after that date).
565. This was acknowledged by Reed J. in Esso Resources Canada Ltd. v. R., n. 463 at 6475: "What will be a right, how to define its scope, the time at which it can be said to have arisen will always be a bit of a metaphysical enquiry."
566. See supra, chapter III at 39 and chapter IV at 102 ff.
567. It must be remembered, however, that not all of the consequences of an event will give rise to expectations that can be relied upon. I am referring here to purely procedural consequences: see the discussion of procedural enactments, supra in chapter IV at 121 ff.
- Note also that the legal consequences of certain events, such as a marital separation or divorce, may to some extent be indeterminate. When it comes to family support obligations, for instance, the book is never closed. "Unlike liability for negligence, the determination of liability to pay maintenance is never final, and in contrast to damages, the assessment of the amount of maintenance may be varied:" Trapp v. Wendell (1988), 68 Sask. R. 1 at 2 (Unif. Fam. Ct.), Halvorson J.
568. R. v. Vine, n. 508 (disqualification from selling spirits by retail).
569. Re a Solicitor's Clerk, n. 509 (disqualification from employment as a solicitor's clerk).

570. Ward v. Manitoba Public Insurance Corp. (1974), [1975] 2 W.W.R. 53 (Man. C.A.), leave to appeal to S.C.C. refused (1975), 49 D.L.R. (3d) 638n (S.C.C.) (auto insurance premiums increased according to the number and nature of offences committed by an insured).
571. R. v. Johnston, [1977] 2 W.W.R. 613 (N.W.T.C.A.), aff'd [1978] 2 S.C.R. 391; R. v. Boguslavsky (1934), [1935] O.R. 99 (H.C.), aff'd [1935] O.R. 203 (C.A.); R. v. Tod, [1977] 2 W.W.R. 168 (B.C.C.A.); R. v. Negridge (1980), 54 C.C.C. (2d) 304 (Ont. C.A.); and R. v. Wanderingspirit (1987), [1988] N.W.T.R. 121 (Terr. Ct.).
572. Lownds v. Kenley (1986), 74 N.S.R. (2d) 36 (S.C.A.D.) (repeal of provision limiting right of passenger to recover damages against vehicle operator to cases of gross negligence did not apply retrospectively so as to alter the consequences of an accident that had occurred prior to the date of the repeal). Conversely, the legal consequences of an accident that did not involve tortious conduct would include the right of all parties to be free from any liability in tort: Sun Alliance Insurance Co. v. Angus, n. 73 (repeal of provision barring interspousal tort suits did not apply retrospectively so as to alter the legal consequences of a motor vehicle accident that had occurred prior to the date of the repeal).
573. Compare the conclusions reached in Re Trites, n. 564; New Brunswick (Provincial Secretary-Treasurer) v. Hastie, [1955] 3 D.L.R. 371 (N.B.S.C.A.D.); Canadian Pacific Ltd. v. Alberta (Public Trustee) (1972), [1973] 1 W.W.R. 1 (Alta. S.C.), aff'd (1973), [1974] 2 W.W.R. 75 (Alta. S.C.A.D.); Payne v. Saskatchewan Government Insurance (1982), 14 Sask. R. 372 (Q.B.), aff'd November 18, 1982 (Sask. C.A.) [unreported]; and Nadeau v. Cook, n. 137.
574. Reynolds v. Nova Scotia (A.-G.), n. 189 at 244, Lord Morris; and Canada (P.G.) v. Cie de publication La Presse, n. 234 at 76, Abbott J.
575. Acme Village School District No. 2296 v. Steele-Smith, n. 174 at 60, Crocket J.
576. For example, in R. v. Vine, n. 508; Acme Village School District No. 2296 v. Steele-Smith, n. 174; Ward v. Manitoba Public Insurance Corp., n. 570; and Ontario (Regional Assessment Commissioner, Region No. 13) v. Downtown Oshawa Property Owners' Association, n. 166, the courts, while for the most part appearing to deny that retrospective operation was even in issue, seemed ultimately to rest their decisions on the legislation's demonstrated intention to affect events that occurred prior to its enactment.
577. I defined and explained the exceptions to the rule in chapter IV, part B, section 3 (supra at 117 ff.). Although I do not

re-address them in this part, the existing exceptions discussed in the introduction to the section of chapter IV just referred to must also be exempted from the application of the general presumption, despite the fact that they cannot be justified by recourse to the rule of law principle.

578. For a rare case where a retroactive enactment that was neither curative nor declaratory in nature had no disruptive effect on expectations, see Gagnon v. R., n. 99. The statute considered in that case had the effect of retroactively re-enacting previously existing law.
579. For a discussion of the language required to bring about retroactive operation, see supra, chapter IV at 96-97, and infra at 182-183. One possible practical difference relates to cases in which the extent of the retroactive operation of a clearly retroactive statute is in issue. There may, for example, be a question as to whether the statute should be construed as being applicable to pending litigation: see the discussion infra at 185.
580. Upper Canada College v. Smith, n. 117.
581. Howard Smith Paper Mills Ltd. v. R., n. 267; R. v. LeSarge, n. 397; R. v. Bourassa (1977), 38 C.C.C. (2d) 110 (Alta. S.C.A.D.); and R. v. MacGregor, n. 222.
582. Hyde v. Lindsay, n. 398; Boyer v. R., n. 398; Fleming v. Atkinson, [1956] S.C.R. 761; and Flores de Garcia v. Canada (Minister of Employment and Immigration), [1979] 2 F.C. 772 (C.A.). The general rule seems to be that rights of appeal crystallize upon the commencement of proceedings. From that point onward, the question of appeal jurisdiction is considered to involve a matter of substance. But see Ontario (Regional Assessment Commissioner, Region No. 13) v. Downtown Oshawa Property Owners' Association, n. 166, and Stewart v. Mississauga (City) Fire Marshal (1988), 64 O.R. (2d) 403 (Div. Ct.).
583. Martin v. Perrie, n. 155; Stephenson v. Parkdale Motors Ltd., n. 396; Dixie v. Royal Columbian Hospital, n. 81; and Elliot v. Saskatoon (City), n. 396.
584. Such as the procedure to be followed in order to obtain a trial by jury (Haffner v. Weston, n. 388) or the rules concerning costs (Shea v. Miller (1970), [1971] 1 O.R. 199 (H.C.), aff'd (1970), [1971] 1 O.R. 199 (C.A.)).
585. Supra, n. 86 at 447. And see Elliot v. Saskatoon (City), n. 396.
586. Upper Canada College v. Smith, n. 117 at 442, Anglin J.; and Hackett v. Ginther, n. 352 at 399, Wakeling J.A.

587. Re Stern and Kish (1976), 14 O.R. (2d) 470 at 473 (Div. Ct.), O'Leary J.
588. See supra, chapter IV at 121-122, and Wildman v. R., [1984] 2 S.C.R. 311.
589. R.S.C. 1985, c. I-21.
590. Howard Smith Paper Mills Ltd. v. R., n. 267; R. v. Ali, n. 2; Wildman v. R., n. 588; Hudson v. Biddulph (Township) (1919), 49 D.L.R. 476 (Ont. S.C.A.D.); Truman v. Wilkins, [1971] 3 O.R. 630 (C.A.); and R. v. LeSarge, n. 397.
591. See supra, n. 387.
592. Supra, chapter IV at 129 ff.
593. Trans-Canada Insurance Co. v. Winter, n. 418.
594. Montréal (Ville) v. ILGWU Center Inc. (1971), [1974] S.C.R. 59, and supra, n. 425 and accompanying text.
595. For instance, compare the majority and minority views in Gaysek v. R., [1971] S.C.R. 888. It is interesting to note that the Supreme Court of Canada recently went so far as to affirm a Northwest Territories Court of Appeal decision which held that the re-enactment of a Criminal Code offence provision brought about no change in the law concerning the offence, in spite of the fact that the punishment for the offence was increased at the time of re-enactment: R. v. Johnston, n. 571. This strikes me as a questionable decision. Several lower courts had previously come to the opposite conclusion: see R. v. Clarke, [1918] 2 W.W.R. 752 (Alta. S.C.A.D.); R. v. Fox, [1918] 3 W.W.R. 197 (Alta. S.C.A.D.); R. v. Boguslavsky, n. 571; and R. v. Tod, n. 571.
596. See Bathurst Paper Ltd. v. New Brunswick (Minister of Municipal Affairs) (1971), [1972] S.C.R. 471.
597. This is provided by subs. 45(2) of the federal Intepretation Act.
598. Ouellette v. Canadian Pacific Railway Co., n. 424.
599. Canadian Pacific Railway Co. v. Carruthers (1907), 39 S.C.R. 251; Bitumar Inc. v. Canada (Minister of Energy, Mines and Resources) (1987), 78 N.R. 18 (Fed. C.A.); and Clardy, n. 424. As I indicated supra in n. 409 and in chapter IV at 137-138, consolidations and re-enactments may include declaratory provisions. Putting the matter another way, some declaratory enactments (i.e., those that do not alter the meaning of the previously existing law) simply consolidate or re-enact previously existing law.

600. As Lord Shaw observed in the Ouellette case, n. 424 at 575, if there were such a presumption attached to a change in the language of an enactment, some of the benefits of revisions and consolidations would be lost. See also Coté's comment, n. 3 at 337.
601. Craies, n. 1 at 362.
602. Bennion, n. 86 at 71, 85 and 517-519; and Cross, n. 59 at 171. Maxwell, n. 3 at 24, uses the term "plain consolidation" to describe a consolidation that does not change the meaning of the existing law.
603. Montréal (Ville) v. ILGWU Center Inc., n. 594 at 77, Pigeon J.
604. This may be the result of what Odgers, n. 213 at 334, calls a consolidation with corrections and minor improvements or what Bennion, n. 86 at 88, calls a consolidation with amendments. For an interesting discussion of a consolidation in which substantive changes were made to the law, see Paul Matthews, "Consolidations, Coroners and Democracy" (1989) 86:2 Law Society's Gazette 28.
605. Canada (A.-G.) v. Giroux, n. 423, and Re Brock and Toronto (City), n. 425. As Bennion, n. 86 at 517, explains, a consolidation with amendments must be interpreted by the same rules as an ordinary amending act. See also subs. 9(2) of An Act respecting the Revised Statutes of Canada, S.C. 1964-65, c. 48; and subs. 18(3) of the Statute Revision Act, R.S.C. 1985, c. S-20.
606. Supra (1983), n. 164 at 214. Driedger argues that this presumption exists only in the United Kingdom, basing his conclusion on the fact that a special procedure for dealing with consolidating enactments is followed in that country.
607. Re Turner's Will Trusts (1936), [1937] Ch. 15 (C.A.); R. v. Brixton Prison Governor (1958), [1959] 1 Q.B. 268 (C.A.), aff'd (sub nom. De Demko v. Home Secretary) [1959] A.C. 654 (H.L.); and the authorities cited supra in n. 424. See also the following note.
608. Such a presumption has been applied in Canada in the context of a general revision: see Bell v. Prince Edward Island (A.G.), n. 419, where Pigeon J. relied upon subs. 9(1) of An Act respecting the Revised Statutes of Canada, S.C. 1964-65, c. 48, a provision which stipulated that the revised statutes were not to be interpreted as new law, but as a consolidation and as declaratory of the law contained in the repealed statutes for which they were substituted.
609. Bennion, n. 86 at 517.

610. See the cases cited supra in n. 418.
611. R. v. Novis, n. 419, and R. v. Green (1986), 75 N.S.R. (2d) 18 (Prov. Ct.).
612. R. ex rel. Davis v. James, n. 419, and R. v. Donald B. Allen Ltd. (1975), 11 O.R. (2d) 271 (Div. Ct.).
613. See paras. 44(a) and (f) of the federal Interpretation Act. This follows from the fact that the flow of legal authority to make such appointments and subordinate legislation is considered to have been uninterrupted by the repeal that accompanies the consolidation or re-enactment.
614. Supra, n. 86 at 97.
615. Ibid. at 517.
616. This conclusion is based on reasoning analogous to that used to justify the presumption in favour of interpreting consolidations and other re-enactments retrospectively.
617. See supra, n. 430.
618. Maxwell, however, in n. 3 at 24, remarks that the rationale for making such a distinction between consolidating and codifying enactments is "obscure."
619. See supra, chapter IV at 142.
620. See supra, chapter IV at 146-148.
621. In view of this fact, it is debatable whether the courts should presume that declaratory legislation brings about no change in the meaning of the law.
622. Supra (1983), n. 164 at 186. See also p. 197.
623. This is probably the most familiar indicator of retroactive intention. It is used frequently in fiscal legislation. Driedger (1974), n. 149 at 141, and (1983), n. 164 at 186, gives as an example An Act to amend the Customs Tariff, S.C. 1969-70, c. 6. This act was assented to on December 19, 1969, but ss. 4 to 9 thereof were deemed to have come into force on June 4, 1969. For other examples, see R. v. Canada Sugar Refining Co., n. 298 (Tariff Act amendment enacted on July 22, 1895, deemed to have come into force on May 3, 1895); Woodward Estate v. British Columbia (Minister of Finance) (1972), [1973] S.C.R. 120 (amendment to Succession Duty Act enacted on April 3, 1970, deemed to have come into force on April 1, 1968); Canada (A.-G.) v. Foster (1892), 31 N.B.R. 153 (S.C. en banc); Gruen Watch Co. of Canada v. Canada (A.-G.), n. 438; Gagnon v. R., n. 99; Zadvorny v. Saskatchewan Government Insurance, n. 452; and Esso Resources

Canada Ltd. v. R., n. 463 (amendment to Excise Tax Act, enacted March 4, 1986, deemed to have repealed certain provisions as of June 1, 1985).

624. Driedger (1974), n. 149 at 140, and (1983), n. 164 at 186, gives as an example the act of indemnity considered in Phillips v. Eyre, n. 125, but this would seem to be incorrect. That act of indemnity was retrospective -- not retroactive -- in its operation. It ratified the actions in question as of the date of its enactment, and not as of a prior date: compare Schmidt v. Ritz, n. 233, a case that dealt with legislation which validated certain judicial orders for sale. For some authentic examples, see Re Clement Estate, [1962] S.C.R. 235 (amendment to the Ontario Child Welfare Act provided that "an adopted child, upon the adoption order being made, becomes the child of the adopting parent . . . as if born in lawful wedlock" and then went on to say that it applied to "every person heretofore adopted under the laws of Ontario;" it thus applied to previous adoptions as of the time they occurred); Gold Seal Ltd. v. Alberta (A.-G.), n. 301 (previously invalid proclamations and orders-in-council deemed to have been validly made); Healey v. Quebec (A.G.), [1987] 1 S.C.R. 158 (Crown grants made prior to enactment deemed to have been made subject to a three-chain reserve for fishing purposes); Florence Mining Co. v. Cobalt Lake Mining Co. (1909), 18 O.L.R. 275 (C.A.), aff'd (1910), 43 O.L.R. 474 (P.C.) (previous sale of land deemed to have been valid "as and from" the date of its occurrence); and Boulanger v. Fédération des producteurs d'oeufs de consommation du Québec, n. 99 (marketing duties collected prior to enactment deemed to have been collected under a provincial, rather than a federal, act).
625. Declaratory enactments, or enactments purporting to interpret previously existing law, are included in this description: see Stackhouse v. R., n. 447 (provision declaring what the term "senior judge" in the Quebec Courts of Justice Act "means and has always meant"); R. v. Richardson, n. 308 (provision establishing who was a Crown servant for the purposes of the Exchequer Court Act for a period commencing more than six years prior to the enactment of that provision); Western Minerals Ltd. v. Gaumont, n. 304 (enactment stating that the owner of the surface of land "is and shall be deemed at all times to have been" the owner of all sand and gravel in the land); Holmes Foundry Ltd. v. Point Edward (Village), n. 443 (amendment stipulating what "the approval of the Board" in an existing enactment "shall be deemed always to have meant"); and Re Thoburn, n. 470 (amendment to the Quebec Companies Act setting out the capacity that every company "has and always has had").

As for enactments directing how the previous law is to be read, see Quinn v. Prairiedale No. 321 (Rural Municipality), n. 99 (repealed provision deemed to have never been contained

in the statute in which it was contained); Mortgage Corporation of Nova Scotia v. Walsh, n. 461 (amending act deleted words from amended act and declared that the latter should be construed as if the words struck out had never been contained therein); and Canadian Union of Professional and Technical Employees -- Aircraft Operations Group v. R. (1978), [1979] 1 F.C. 553 (C.A.), leave to appeal to S.C.C. refused (1979), 26 N.R. 360 (S.C.C.) (enactment revising the definition of "compensation plan" contained in the Anti-Inflation Guidelines specified that the definition was to be read as revised from the date of its inception).

626. This technique brings about the same result as a statement of what the law must be deemed to have been or to have meant, but it accomplishes this result in a more roundabout way. Instead of deeming the previous law to have been one thing or another, it deems certain facts to have occurred whether they actually occurred or not. The usual consequence in both cases is that previous events are treated as though they took place under a legal regime different from the regime under which they actually took place. In the case where certain facts are deemed to have occurred, this result is attributable to the fact that the legal effects of events that actually did occur are determined, not by the law that applied to them when they occurred, but by the law applicable to the events that are deemed to have occurred in their stead. For examples, see Albert Brick, Lime, and Cement Co. v. Nelson (1888), 27 N.B.R. 276 (S.C. en banc) (corporate certificate that was not filed on time deemed to have been filed on time); McCutcheon Lumber Co. v. Minitonas (Municipality) (No. 2), n. 481 (acts that were not carried out in compliance with the procedure prescribed for tax sales deemed to have been carried out in accordance with that procedure); and Walker v. Keating (1973), 6 N.S.R. (2d) 1 (S.C.A.D.) (teacher deemed to have had a permanent employment contract during a period when in fact he did not).

627. See, for example, St. Joachim de la Pointe Claire (Village) v. Pointe Claire Turnpike Road Co., n. 544. For a rare exception to this statement, see Healey v. Quebec (A.G.), n. 624 (amendment to retroactive provision found to be retroactive by implication).

Note also that legislation may infrequently be construed as implicitly authorizing the making of retroactive regulations or orders. This authority may be implicit in the object or scheme of the legislation: see Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission (1978), 87 D.L.R. (3d) 727 (B.C.C.A.); Re British Columbia Teachers Federation and Burnaby School District No. 41 (1978), 95 D.L.R. (3d) 273 (B.C.C.A.), aff'g (1977), 83 D.L.R. (3d) 190 (B.C.S.C.); Nova Corp. v. Amoco Canada Petroleum Co., n. 289; and Côté, n. 3 at 105, 107-108 and 109-110. As Côté points out at p. 105, such cases involve a question of the jurisdiction of the subordinate lawmaking authority.

628. One exception arises in cases where there is a question of the extent to which a retroactive enactment operates retroactively: see the discussion of the applicability of retroactive legislation to pending proceedings, infra at 185.
629. This analysis was suggested by Hochman, n. 221 at 717-726. Hochman discusses these factors in the context of their influence on the United States Supreme Court in passing judgement on the constitutionality of retroactive and retrospective legislation. However, his analysis is also of practical utility in interpreting potentially retroactive or retrospective legislation and, in particular, in assessing the reasonableness and likelihood of the legislature having had a retroactive or retrospective intention.
630. Refer to R. v. Canada Sugar Refining Co., n. 298, and Air Canada v. British Columbia, n. 99 at 378, Lambert J.A. In such cases, taxes are usually collected in accordance with the new legislation in anticipation of its enactment: see E.A. Driedger, "A Comment on Budget Taxation" (1982) 30 Can. Tax J. 562.
631. There is a close parallel of effects between this type of legislation and curative legislation that has the effect of bringing the previous state of the law into line with what it had commonly been perceived to be (discussed supra in chapter IV at 146-148). There are, however, notable differences. In the former case, people are under no illusions about the actual state of the law prior to the retroactive legislation being enacted. Furthermore, they fully expect that the law as they know it will be retroactively altered.
632. Munzer (1982), n. 225 at 431-432. Of course, one of the requirements of the rule of law is that the law be enforced in accordance with its terms. Nonetheless, in cases where this requirement has not been observed for some reason, retroactive legislation of the type referred to in the text will not be as offensive as retroactive legislation normally is. Note that this argument also applies with respect to retrospective legislation.
633. Howard de Walden v. Inland Revenue Commissioners (1941), [1942] 1 K.B. 389 at 398 (C.A.), Lord Greene M.R.; and Odgers, n. 213 at 292. Presumably, this means that Parliament can more easily rebut the presumption in such circumstances -- in other words, less unequivocal indicia of retroactive intention will be required to do so.
634. This may be viewed as one outgrowth of the common law tradition of strictly construing taxation statutes in favour of the taxpayer: see Driedger (1983), n. 164 at 203-207, and Côté, n. 3 at 390-398.

635. Legislative interference in the judicial process is particularly obvious when a legislature enacts declaratory legislation that is applicable to pending or decided cases. This type of retroactive legislation infringes the rule of law on two counts. Not only does it threaten expectations that have developed in reliance on the law as it previously stood, it usurps the judicial interpretive function by substituting the legislature's opinion for that of the courts: see the discussion of declaratory enactments, supra in chapter IV at 135 ff.
636. Re Joseph Suche & Co., n. 393; Dorosh v. Bentwood Chair & Table Co., [1939] 2 W.W.R. 150 (Man. C.A.); Zadvorny v. Saskatchewan Government Insurance, n. 452; and Hornby Island Trust Committee v. Stormwell, n. 117. Note that transitional provisions may specifically exclude the application of retroactive legislation to pending cases: Université du Québec à Hull v. Québec (Sous-Ministre du Revenu) (1988), 10 A.C.W.S. (3d) 147 (Que. C.A.), and Université de Montréal v. Québec (Sous-Ministre du Revenu) (1988), 10 A.C.W.S. (3d) 148 (Que. C.A.).
- On the other hand, there are cases in which retroactive legislation has been found to clearly indicate an intention to apply to pending proceedings: Gold Seal Ltd. v. Alberta (A.-G.), n. 301; R. v. Richardson, n. 308; Western Minerals Ltd. v. Gaumont, n. 304; Woodward Estate v. British Columbia (Minister of Finance), n. 623; Smith v. London (City), n. 7; Nova Scotia (A.-G.) v. Davis, n. 438; Gruen Watch Co. of Canada v. Canada (A.-G.), n. 438; Quinn v. Prairiedale No. 321 (Rural Municipality), n. 99; Canadian Union of Professional and Technical Employees -- Aircraft Operations Group v. R., n. 625; and Zainal bin Hashim v. Malaysia (1979), [1980] A.C. 734 (P.C.).
637. Ordinarily, the principle of res judicata will apply to prevent completed cases from being reopened by retroactive or retrospective legislation: see Eyre v. Wynn-Mackenzie (1895), [1896] 1 Ch. 135 (C.A.); Lemm v. Mitchell, [1912] A.C. 400 (P.C.); Western Minerals Ltd. v. Gaumont, n. 304; and Craies, n. 1 at 395. In Hornby Island Trust Committee v. Stormwell, n. 117, the principle of res judicata was even extended to protect a trial judgement that was under appeal. For an illustration of the extraordinary lengths to which courts may go to avoid allowing a concluded case to be affected by retroactive legislation, refer to Kelwood Corp. v. Calgary (City), [1971] 5 W.W.R. 177 (Alta. S.C.).
638. See the first corollary rule discussed supra in chapter IV at 110-111.
639. Hochman, n. 221 at 706-711, especially at 706.
640. See the discussion of the public interest factor in Hochman,

n. 221 at 703-706 and 720-722, and in Munzer (1982), n. 225 at 468-470.

641. See Sherbaniuk, n. 108 at 742-746.

642. Côté, n. 3 at 92-94, 109-110 and 125-128.

643. Upper Canada College v. Smith, n. 117.

644. Although it is true that by my definition of retrospective operation (see supra, chapter IV at 102 ff.), legislation can operate retrospectively without altering the consequences of previous events, once it has been determined that the legislation under consideration does not qualify as an exception to the rule against retrospectivity, the final point to be determined in the interpretation process is reduced to that indicated in the text.

645. Supra (1983), n. 164 at 197-198.

646. The courts decidedly shrink from this challenge when they attempt to bolster their decisions with fallacious arguments like the following:

(a) The use of the auxiliary verb "shall" in relation to subjects or fact-situations, as in "unless the agreement shall be in writing" and "all actions shall be commenced," points to the future and indicates a purely prospective intention: see Moon v. Durden, n. 117 at 392-393, Platt B.; Upper Canada College v. Smith, n. 117 at 422, Duff J.; Quebec (A.G.) v. La Chaussure Brown's Inc., [1988] 2 S.C.R. 712 at 743-745; Jasperson v. Romney (Township), n. 453 at 577, Teetzel J.; and Dixie v. Royal Columbian Hospital, n. 81 at 391, Sloan J.A.

(b) The use of the present perfect or the past tense, as in "where damages have been caused," "any person whose acquittal has been set aside," "after a decree nisi has been obtained," and "where a municipality has filed a lien," indicates a retrospective intention: see Manufacturers Life Insurance Co. v. Hanson, [1924] 1 W.W.R. 809 at 809 (Alta. S.C.A.D.).

Both of these arguments are very weak, especially in view of the modern style of legislative drafting. They ignore the fundamental rule that legislation is to be construed as always speaking: see supra at 161-162. The first argument overlooks the fact that, in legislation, "shall" is almost invariably used as an imperative auxiliary rather than a future auxiliary. It was quite properly rejected in Tomashavsky v. Nichols, n. 79, and Acme Village School District No. 2296 v. Steele-Smith, n. 174, Crocket J. The second argument was dismissed in Re Athlumney, Ex parte Wilson, n. 220; Singer v. R. (1931), [1932] S.C.R. 70; and Husted v. Husted, n. 119. See Driedger (1953), n. 148 at 18-19; (1974), n. 149 at 147-148; (1976), n. 219 at 116-117; and

(1983), n. 164 at 191 and 195-196, for a thorough denunciation of these arguments.

647. McLean v. Leth, n. 405.

648. Dixie v. Royal Columbian Hospital, n. 81.

649. In Singer v. R., n. 646; Dixie v. Royal Columbian Hospital, n. 81; McLean v. Leth, n. 405; Re Trites, n. 564; Husted v. Husted, n. 119; and Latif v. Canadian Human Rights Commission, n. 436, the court correctly interpreted general language in accordance with the presumption. Nevertheless, there are many instances where courts have ignored the presumption and read general words literally: see West v. Gwynne, n. 150; Acme Village School District No. 2296 v. Steele-Smith, n. 174; Paton v. R., n. 228; Chapin v. Matthews, n. 253; Nadeau v. Cook, n. 137; and Moulton v. Moulton, n. 166. Professor Côté, n. 3 at 125, explains this simplistic approach as follows:

On numerous occasions, they [the courts] have simply noted that the wording of the statute seems to apply indiscriminately to all legal situations, whether constituted before or after the commencement of the statute. The literal method tends to assign to the legislature the intention to affect vested rights whenever the statute fails to distinguish between legal situations constituted before or after commencement of the new statute: since Parliament has failed to draw a distinction, the judge would have no right to do so either.

650. Minchau v. Busse, [1940] 2 D.L.R. 282 (S.C.C.) (amendment limiting actions on mortgage covenants made applicable to mortgages made prior to its coming into force); K.V.P. Co. v. McKie, n. 438 (new rules on granting injunctions stated to be applicable to pending proceedings); Yuill v. McMullen, n. 541 (statute barring right to bring certain actions made applicable to some existing causes of action); R. v. Budic (No. 2), n. 323, and R. v. Logan, n. 103 (amendment providing increased punishment for offence made applicable to offences committed prior to its enactment); and McLaren v. McLaren, n. 371 (provision abolishing the common law presumption of advancement made applicable to conveyances made prior to its enactment). See also Levin v. Active Builders Ltd., n. 146; Mazur v. Mazur, [1980] 3 W.W.R. 289 (Man. C.A.), leave to appeal to S.C.C. refused (1980), 109 D.L.R. (3d) 211n (S.C.C.); and Royal Bank of Canada v. Andres (1988), 54 Man. R. (2d) 211 (Q.B.).

Of course, it is quite possible for transitional provisions to work in favour of a purely prospective operation by expressly limiting the applicability of an enactment's general language to events that take place after its coming into force: see Kaufman v. Belding-Corticelli Ltd., [1940] S.C.R. 388; Westeel-Rosco Ltd. v. South Saskatchewan Hospital Centre (1976), [1977] 2 S.C.R. 238; Hemphill v. McKinney, n. 544;

Picard v. Public Service Staff Relations Board (1977), [1978] 2 F.C. 296 (C.A.); Re Owners of Lands Requiring Drainage and Mariposa (Township), n. 387; Grabbe v. Grabbe, n. 321; and Vail v. Vail Estate (1988), 14 R.F.L. (3d) 215 (Ont. C.A.).

651. Lenoir v. Ritchie (1879), 3 S.C.R. 575 (statute passed in 1874 authorized the granting of precedence to members of the bar who had been appointed Queen's Counsel after July 1, 1867); Levin v. Active Builders Ltd., n. 146 (provision imposing new duty on landlord to maintain premises was stated to apply "during the tenancy," and the court interpreted this to mean that the new responsibility applied in respect of events which occurred during that part of the leasehold term which had already expired when the provision came into force); Re George Sebok Real Estate Ltd. and Woodstock (City), n. 226, and Toronto (City) v. Shields (1985), 7 O.A.C. 386 (C.A.) (bylaw establishing new building standards made applicable to buildings built prior to enactment of by-law); and R. v. Sowa (No. 2) (1979), [1980] 2 W.W.R. 83 (Sask. C.A.) (parole rules enacted in 1978 were made applicable to all sentences, whether they were imposed before, on or after March 25, 1970).
652. Kluz v. Massey-Ferguson Finance Co. of Canada (1972), 27 D.L.R. (3d) 496 (Sask. C.A.), aff'd (1973), [1974] S.C.R. 474 (amendment setting out new procedure to be followed in repossessing goods pursuant to conditional sales contracts expressly excluded prior repossessions from its application -- implication was that amendment applied to prior cases in which a right to repossession had arisen but had not been exercised); Fewtrell v. Martin Transports Ltd., [1938] O.R. 674 (C.A.) (court applied expressio unius exclusio alterius rule in concluding that, since it was expressly stated not to be applicable to pending litigation, statute removing estate's right of action for deceased's loss of expectation of life applied to all outstanding causes of action that were not yet the subject of litigation); and Lemyre v. Trudel, [1979] 2 F.C. 362 (C.A.). But see Re Stern and Kish, n. 587; Re Frank Johnston's Restaurants Ltd. and Prince Edward Island (A.-G.), n. 189; and R. v. Copley (1988), 28 O.A.C. 81 (C.A.).
653. Retrospective operation will be implied in cases where the enactment would not otherwise fully achieve its purpose: see Brosseau v. Alberta Securities Commission, n. 140 (purpose of new powers of securities commission was to protect the public, and this justified applicability of legislation in respect of offences that were committed prior to its enactment); Toronto (City) v. Presswood Brothers, n. 226 (whole object and purpose of zoning bylaws was to alter and restrict ownership rights in the public interest); Bank of Nova Scotia v. Desjarlais (1983), 19 Man. R. (2d) 122 (C.A.) (purpose of consumer protection pointed to retrospective application of amendment curtailing seller's right of repossession under

- conditional sales contracts); and Saskatchewan Power Corp. v. TransCanada Pipelines Ltd., n. 189 (regulations prescribing prices to be paid for natural gas had to be applied in respect of existing supply contracts in order to ensure effective implementation of new energy policy).
654. Edmonton (City) v. Northwestern Utilities Ltd., n. 453 (in view of the fact that board had previously considered itself without jurisdiction to make retrospective orders, amendment to public utilities legislation was construed as conferring jurisdiction to make retrospective orders); R. v. Côté (1972), 11 C.C.C. (2d) 551 at 553 ff. (Que. C.A.), Casey J. (new right of appeal from conviction for criminal contempt was intended to remedy "impossible situation" where the only appeal available to an accused was an appeal from sentence); and R. v. Beaton, n. 173 (1951 amendment containing new rules for designating beneficiaries in soldiers' insurance policies had to apply to policies previously issued because no such policies had been issued or could have been issued since 1933).
655. See Côté, n. 3 at 127-128.
656. Acme Village School District No. 2296 v. Steele-Smith, n. 174 (all teaching contracts made subject to rules establishing new termination procedure); Bellechasse Hospital Corp. v. Pilotte (1974), [1975] 2 S.C.R. 454 (all contracts between doctors and hospitals made subject to rules establishing new procedure for suspension and termination); and Board of Commissioners of Public Utilities v. Nova Scotia Power Corp., n. 172 (new public utility rate review legislation applied to all supply contracts). With respect to another area of the law, see Easton v. Longchamp (1847), 3 U.C.Q.B. 475 (new rules altering judgement execution rights intended to put all judgement creditors on the same footing).
657. North Star Inn Ltd. v. Winnipeg (City), n. 525 (in order to avoid injustice, each municipal assessment roll had to be treated according to the law under which it was created). Compare the majority and minority judgements in McLaren v. McLaren, n. 371, and see the discussion supra in chapter IV at 150-152.
658. "The fact that a statute is remedial is entitled to great weight in considering whether or not its provisions are intended to be retroactive:" Zilkie v. Thompson, n. 544 at 944, Martin C.J.S. See also the other cases cited infra in n. 686.
659. R.S.C. 1985, c. I-21.
660. Côté, n. 3 at 110.

661. "The fact that legislation serves a generally laudable or desirable purpose is not by itself sufficient to displace the rule against retrospective operation:" Latif v. Canadian Human Rights Commission, n. 436 at 702, LeDain J. See also Meurer v. McKenzie, n. 117 at 117, McFarlane J.A.; and Snider v. Smith, n. 506.
662. R. v. Tod, n. 571 at 171, Seaton J.A.
663. See the discussion infra at 195.
664. See supra, n. 629.
665. Husted v. Husted, n. 119 at 331, McDermid J.A.
666. As was suggested by the Alberta Court of Appeal in Chapin v. Matthews, n. 253 at 469-470, Stuart J. (citing The "Iron-sides" (1862), Lush. 458, 167 E.R. 205 at 209 (Adm.), Lushington J.).
667. Craies, n. 1 at 393-395, describes statutes having a delayed commencement date as statutes containing a postponement clause.
668. In Acme Village School District No. 2296 v. Steele-Smith, n. 174 at 60, Crocket J. viewed the delayed commencement of the statute under consideration as an implicit indication that Parliament intended it to have retrospective effect. This argument has been accepted in some cases (see Haffner v. Weston, n. 388, and the cases cited in the following note), but often rejected (see Côté, n. 3 at 128, and infra, n. 672 and accompanying text). In this regard, it is interesting to compare the majority and minority judgements in R. v. Ali, n. 2. The majority judgement questions the validity of the foreshadowing argument, while the minority judgement seems to accept it.
669. See Towler v. Chatterton (1829), 6 Bing. 258, 130 E.R. 1280 (C.P.); R. v. Leeds and Bradford Railway Co. (1852), 18 Q.B. 343, 118 E.R. 129; Grantham v. Powell (1853), 10 U.C.Q.B. 306; The "Ydun", [1899] P. 236 (C.A.); Glynn v. Niagara Falls (City), n. 117; Beattie v. Dorosz, [1932] 2 W.W.R. 289 (Sask. C.A.); Fewtrell v. Martin Transports Ltd., n. 652; and Craies, n. 1 at 393-395.
670. Note the similarities between the foreshadowing argument in this context and the argument in favour of an exception to the general rule against retrospectivity for purely procedural legislation.
671. The argument in favour of retrospectivity in such a case is, however, less compelling the less unequivocally the new legislation manifests a retrospective intent. This is due to the uncertainty factor: individuals would be less sure that

the new legislation will in fact apply retrospectively when it does come into force. Compare the taxation example discussed supra at 184.

672. Moon v. Durden, n. 117; Re Roden and Toronto (City) (1898), 25 O.A.R. 12; Sidback v. Field, n. 117 (mine owner could do nothing to protect himself from the effect of new miner's lien ordinance where employment contract had been made prior to its enactment); and Zilkie v. Thompson, n. 544 (rights of heirs on intestacy accrued upon the death of the intestate and heirs could do nothing to protect themselves against subsequently enacted dependants' relief legislation).
673. Curative legislation is often directed against such hollow rights. These rights may lack merit because of the questionable conduct of the individual claiming them or because of the absence of real prejudice to his expectations: see Hochman, n. 221 at 703-706 and 720-722. See also my discussion of curative enactments, supra in chapter IV at 143 ff.
674. See, for example, Toronto (City) v. Russell, n. 481 (defects in carrying out sale of land for unpaid taxes cured by retrospective legislation).
675. Odgers, n. 213 at 292, suggests that "a new class of legislation, namely, legislation against tax evasion . . . may be freer from any presumption against retrospective effect." See also Craies, n. 1 at 404, and Sherbaniuk, n. 108 at 742-754.
676. See Hochman, n. 221 at 706-711, and Munzer (1982), n. 225 at 448-450 and 469-470.
677. Refer to the discussion of beneficial enactments, supra in chapter IV at 149 ff. See also Association pharmaceutique de Québec v. Livernois (1900), 31 S.C.R. 43 at 47 ff., Gwynne J. (dissenting); Dubois v. R., [1985] 2 S.C.R. 350; and Re Lyle and Canada (Minister of Employment and Immigration), n. 381.
678. R.S.C. 1985, c. I-21.
679. Supra, n. 69.
680. In certain circumstances, the value of individual liberty may be viewed as outweighing the value of the rule of law: see the discussion supra in chapter II at 15-18 and n. 104, and in chapter IV at 119-120.
681. This rule is discussed in Driedger (1983), n. 164 at 207-208.
682. Note, however, that the Charter itself has generally been construed as operating prospectively only, despite its guarantees of individual rights and its beneficial purpose: see supra, chapter IV at 150-152.

683. I am referring here to any legislation that confers benefits (such as social welfare payments) upon some individuals, while not operating to the obvious detriment of others.
684. It is interesting to note, however, that individual rights to social welfare benefits from the state have not historically been promoted by the courts with nearly the same zeal as have individual liberty and the right of the individual to keep his property from the clutches of the tax collector: see Cross, n. 59 at 183-184.
685. See the discussion supra in chapter IV at 149 ff. and Hardy v. Manitoba (Director of Welfare (Eastman Region)) (1976), [1977] 1 W.W.R. 141 (Man. C.A.).
686. Zilkie v. Thompson, n. 544; Chapin v. Matthews, n. 253 (legislation empowering court to relieve parties to farm machinery sale agreements from unreasonable terms applied to agreements made prior to its coming into force); Re Hourston Estate and Hourston, n. 544 (married women's relief legislation applied to allow widow of man who had died prior to its enactment to obtain relief thereunder); Tomashavsky v. Nichols, n. 79 (amendment to contributory negligence legislation remedied an injustice to joint tortfeasors and was accordingly applied in respect of an accident that had occurred prior to its enactment); and Re Sanderson and Russell, n. 117 (legislation establishing new support obligations for unmarried couples was given retrospective interpretation in view of the fact that it was social legislation designed to provide a remedy for those who found themselves in situations of need).
687. See the cases cited supra in n. 686.
688. Supra at 189-190.
689. It could perhaps be argued that legislation must rectify some patent unfairness or injustice in the law in order for a retrospective interpretation to be more easily justified: see Robert W. Langholz, Jr., Case Comment (1986) 14 Pepperdine L. Rev. 200. Of course, the fact that legislation has the effect of remedying an injustice does not, without more, suffice to rebut the presumption against retrospectivity. It is only a factor to be taken into account in assessing legislative intention: Snider v. Smith, n. 505.
690. For example, contractual rights to have certain actions performed in the future or proprietary rights (such as patent rights) encompassing future rights of ownership in accordance with the law in effect at the time of acquisition.
691. Such as a right to compensation arising out of tortious conduct or a breach of contract. Even though they may not be

enforced until some later date, these remedial rights crystallize at the time the wrongful conduct occurs.

692. Supra, n. 233. See also Gardner and Co. v. Cone, n. 139.
693. S.N.B. 1938, c. 42.
694. This corollary rule was discussed supra in chapter IV at 110-111.
695. Recall that Professor Côté felt that this difference in proximity was sufficient to distinguish retrospective operation from interference with vested rights: see supra, chapter III at 56 ff.
696. Nonetheless, even unplanned conduct can give rise to expectations. Estimates of the potential liability for engaging in certain activities are based on the law as it stands at a particular moment in time. Insurance ratings are a good example of this: see Sun Alliance Insurance Co. v. Angus, n. 73 at 268-269, LaForest J.; Gallop v. Co-Operators Insurance Association (Guelph), n. 187 at 51, Estey C.J.O.; and Maguire, n. 47 at 188-189, fn. 26.
697. This argument has limited value in a strict rule of law analysis because it implies that past infractions of the rule of law somehow make current ones more palatable. Nevertheless, in those areas where there is a sufficiently strong public interest in continuing law reform to compensate for the effects of disruptive changes in the law, it is not unreasonable for a court to take into account the fact that reliance interests may well be weaker.  
Note, however, that even in cases involving frequent and anticipated change, the courts will be concerned to protect the interests of those who have altered their position or otherwise acted in reliance upon the previously existing law: see Husted v. Husted, n. 119.
698. See supra, nn. 636 and 637. One of the most egregious examples of legislative interference in the judicial process and with the traditional constitutional role of the judiciary is the War Damage Act 1965 (U.K.), 1965, c. 18, which effectively reversed the decision of the House of Lords in Burmah Oil Co. (Burmah Trading) Ltd. v. Lord Advocate, n. 469. See Bridge, n. 469, for a good discussion of the ramifications of this case.
699. Minchau v. Busse, n. 650; Bingeman v. McLaughlin (Bingeman), n. 353; Cornill v. Hudson (1857), 8 El. & Bl. 429, 120 E.R. 160 (Q.B.); Coulson v. Sangster (1865), 5 N.S.R. 676 (S.C. en banc); Mitts v. Leclair (1957), 10 D.L.R. (2d) 662 (Ont. H.C.); Iscar Ltd. v. Karl Hertel GmbH, n. 344; Happy Investments Management Ltd. v. Dorio (Kanata Plumbing & Heating)

- (1987), 20 B.C.L.R. (2d) 300 (S.C.); Farm Credit Corp. v. Lindberg, n. 405; and Snider v. Smith, n. 506.
700. This rule was discussed supra in chapter IV at 110-111.
701. Hochman, n. 221 at 711-717.
702. Kluz v. Massey-Ferguson Finance Co. of Canada, n. 652, and Bank of Nova Scotia v. Desjarlais, n. 653.
703. Tomashavsky v. Nichols, n. 79, and Meurer v. McKenzie, n. 117.
704. Upper Canada College v. Smith, n. 117, and British Columbia (A.-G.) v. Parklane Private Hospital Ltd. (1974), [1975] 2 S.C.R. 47.
705. Fewtrell v. Martin Transports Ltd., n. 652, and Dixie v. Royal Columbian Hospital, n. 81.
706. Contrast the effects of a statute limiting the amount of rent chargeable for existing apartment units (Re Apple Meadows Ltd. and Manitoba, n. 173) with the effects of a statute creating new ownership rights in previously acquired property (McLaren v. McLaren, n. 371, and Martelli v. Martelli, n. 289).
707. Supra at 15-18.
708. See, for example, Canada (A.-G.) v. Hallet & Carey Ltd., n. 173 (interpretation of the National Emergency Transitional Powers Act, 1945).
709. See Hochman, n. 221 at 697-703, and Côté, n. 3 at 128.
710. See supra, chapter IV at 149-150 and accompanying notes. See also Chapin v. Matthews, n. 253; Re Hourston Estate and Hourston, n. 544; Re Sanderson and Russell, n. 117; and Bank of Nova Scotia v. Desjarlais, n. 653. This may also be true of legislation that is intended to promote the public interest in orderly development: see Canadian Petrofina Ltd. v. Martin, n. 189.
711. Hochman, n. 221 at 703-706 and 706-711; Bridge, n. 469 at 137-138; and Munzer (1982), n. 225 at 468-470. Refer also to the discussion of curative enactments, supra in chapter IV at 143 ff.
712. Supra, n. 125.
713. Ibid. at 27, Willes J.
714. Note that a statute may contain a provision establishing the date upon which it is to expire. This type of statute is

treated as self-repealing and is interpreted as though it were repealed on the date set for expiration: see subs. 2(2) of the Interpretation Act, R.S.C. 1985, c. I-21; Côté, n. 3 at 83-84; and Re McDonald and R., n. 6.

715. This includes so-called implied repeal, which occurs where a new enactment is so incompatible with an existing enactment that the latter is considered to have been rendered inoperative by the former: see Driedger (1983), n. 164 at 226-235, and Côté, n. 3 at 75-77.

All of these situations may result in implicit amendments to other statutory provisions. Professor Côté points out, at pp. 73-74 and 238, that an amendment may affect the meaning of provisions other than the provision being directly amended. As he puts it at p. 73, the effect of an amendment "can ricochet throughout the statute." This may involve a narrowing or a widening of the scope of existing provisions: see Gravel v. St-Léonard (City), n. 452; Wildman v. R., n. 588; and Nepean (Township) v. Leikin, n. 176. But see Bathurst Paper Ltd. v. New Brunswick (Minister of Municipal Affairs), n. 596, and Bera v. Marr, n. 8, for cases where the courts refused to allow an amendment or repeal to implicitly alter the meaning of other provisions.

716. See Fewtrell v. Martin Transports Ltd., n. 652 (rule against retrospective operation is not confined to cases where the right in question arose under the common law -- it also applies in cases where statutory rights are threatened), and Lownds v. Kenley, n. 572 (causes of action should be governed by the statutory or common law rules that were in effect at the time they arose).

717. Supra at 95 ff.

718. Hardy v. Manitoba (Director of Welfare (Eastman Region)), n. 685, and Young v. Canada (Secretary of State), [1982] 2 F.C. 541 (T.D.), are two cases where the court ensured that these requirements were met.

719. Although this statutory rule of interpretation is addressed to the effect of repeal, subs. 2(2) of the federal Interpretation Act enlarges the scope of the term "repeal," making it broad enough to encompass amendments:

(2) For the purposes of this Act, an enactment that has expired, lapsed or otherwise ceased to have effect is deemed to have been repealed.

Therefore, the provisions of para. 44(b) apply not only to acts which have been expressly repealed, but also to expired acts, amended acts, and acts that have been implicitly repealed by subsequently enacted incompatible legislation. In all of these cases, it can be said that the previous legislation has ceased to have effect in the sense that its

prescriptions no longer exist in the terms they once did: see Wildman v. R., n. 588 (amendment by addition of words treated as a repeal and substitution), and Manufacturers Life Insurance Co. v. Hanson, n. 646, Stuart J. (amendment said to bring an end to the life of amended provision as it stood prior to amendment). For a contrary view, see R. v. Beaton, n. 173 at 547-548 (Pratte J.) and 550 (Verchere D.J.).

It should be noted that paras. 43(c), (d) and (e) of the Interpretation Act also work against a retroactive interpretation of repealing enactments. However, these provisions pertain more directly to the question of retrospective operation and are therefore discussed in the following section.

720. Kay v. Goodwin (1830), 6 Bing. 576, 130 E.R. 1403 (C.P.). See also Lemm v. Mitchell, n. 637; Brown v. Black, n. 405; and Quinn v. Prairiedale No. 321 (Rural Municipality), n. 99.

721. Kay v. Goodwin, n. 720 at 1405, Tindal C.J.

722. Surtees v. Ellison (1829), 9 B. & C. 750, 109 E.R. 278 at 279 (K.B.), Lord Tenterden. And see Cunningham v. Pollock (1841), 3 N.B.R. 324 (S.C. en banc), and Nepean (Township) v. Leikin, n. 176.

There is some suggestion in the case law that the effect at common law of the expiry of a statute was different from the effect of repeal: see Steavenson v. Oliver (1841), 8 M. & W. 234, 151 E.R. 1024 at 1027 (Ex.), Parke B.; Spencer v. Hooton (1920), 37 T.L.R. 280 (K.B.); Saltcoats No. 213 (Rural Municipality) v. Nabozniak, n. 119; and Craies, n. 1 at 409-410. However, the Cunningham and Leikin cases cited earlier in this note make no such distinction.

723. This impression is fortified by another common law rule on the effect of repeal. Prior to 1850, where an enactment was repealed and the repealing enactment was itself later repealed by a third act, the first enactment was presumed to have been revived ab initio (i.e., not merely from the date of commencement of the second repealing enactment). The second repealing enactment was thus deemed to have operated prior to the date of its actual commencement, and the operation of the first repealing enactment was overridden except (presumably) with respect to concluded actions or closed transactions: see supra, chapter IV at 118-119.

724. Unlike statute law, common law rules are not repealed, but only superseded or overridden by incompatible statutory provisions. Therefore, they were never subject to these common law rules on the effect of repeal. Perhaps one indicator of the former judicial hostility towards statute law is the fact that the prior operation of superseded common law rules was never called into question by the courts. For a discussion of the survival of common law rules in order to protect acquired rights, see infra at 210-211.

725. Jaques v. Withy (1788), 1 H. Bl. 65, 126 E.R. 40 (C.P.); Hitchcock v. Way (1837), 6 Ad. & E. 943, 112 E.R. 360 (K.B.); R. v. Mawgan (Inhabitants) (1838), 8 Ad. & E. 496, 112 E.R. 927 (K.B.); and Ruttan v. Burk (1904), 7 O.L.R. 56 (Div. Ct.).
726. The original replacement was para. 38(2)(b) of the Interpretation Act, 1889 (U.K.), 52 & 53 Vict., c. 63.
727. See Craies, n. 1 at 412, and Odgers, n. 213 at 357. Maxwell, n. 117 at 16-19, does not make this claim.
728. Subsection 3(1) of the federal Interpretation Act states that the provisions of that act apply to every enactment unless a contrary intention appears. As a result, the statutory rules contained in s. 43 can be read as operating similarly to the common law rule against retroactivity and retrospectivity. Both establish prima facie presumptions of legislative intention: see R. v. Copley, n. 652 (predecessor provisions of s. 43 governed where no clear contrary intention was shown).
729. So in the case of amendment by repeal and substitution, not only are the substituted provisions in the repealing enactment presumed not to operate retroactively, the repealing provision itself is presumed not to operate in that fashion. Of course, an enactment may rebut this presumption by specifically providing that it is to be construed as repealing existing legislation retroactively: see Lemm v. Mitchell, n. 637; Mortgage Corporation of Nova Scotia v. Walsh, n. 461 (deleted words deemed never to have been contained in statute); Quinn v. Prairiedale No. 321 (Rural Municipality), n. 99 (repealed provision deemed never to have been contained in statute); and T.G. Bright & Co. v. Institut national des appellations d'origine des vins et eaux-de-vie (1981), 130 D.L.R. (3d) 12 (Que. C.A.) (repealing statute deemed to have come into force prior to its enactment).
730. Supra at 102 ff.
731. It is misleading to suggest, as Côté does in n. 3 at 84-85, 89, 93, 95, 114-115, 127, 128, 132-133, 135 and 136-137, that this kind of limited reading of new legislation somehow delays its operation. In fact, the new legislation is given immediate operation, but its scope of application is restricted to future events. The only thing that is delayed is an across-the-board implementation of the policy embodied in the substituted legislation. Some cases in which courts have inaccurately suggested that the operation of new legislation would be delayed by a prospective reading of its terms are Glynn v. Niagara Falls (City), n. 117 at 7, Mulock C.J. Ex.; Re Wicks and Armstrong, n. 393 at 211-212, Grant J.A.; R. v. Budic (No. 2), n. 323 at 337, Morrow J.; Moulton v. Moulton, n. 166 at 307, Hughes C.J.N.B.; and Bank of Nova Scotia v. Desjarlais, n. 653 at 131, Huband J.A.

732. These statutory rules apply with respect to both repeals and amendments: see supra, n. 719.
733. Supra at 203-204.
734. See Jagues v. Withy, n. 725; Hitchcock v. Way, n. 725; Ruttan v. Burk, n. 725; Craies, n. 1 at 411-415; Odgers, n. 213 at 358; and Côté, n. 3 at 77-78. Accordingly, a mere right to take advantage of a repealed enactment that was not exercised prior to the date of repeal did not constitute a right capable of preservation: see Abbott v. New South Wales (Minister for Lands), [1895] A.C. 425 at 431 (P.C.), Lord Halsbury L.C. See also Odgers, n. 213 at 358, and Côté, n. 3 at 115-122.
735. The original statutory provision was para. 38(2)(c) of the Interpretation Act, 1889 (U.K.), 52 & 53 Vict., c. 63.
736. Gustavson Drilling (1964) Ltd. v. Canada (M.N.R.), n. 154 at 283, Dickson J.; Nepean (Township) v. Leikin, n. 176 at 572, Evans J.A.; Re Apple Meadows Ltd. and Manitoba, n. 173 at 67, Philp J.A.; Craies, n. 1 at 412 and 415; and Odgers, n. 213 at 357-358, all treat the statutory rule as a codification of the common law rule, while Re Drewry (1917), 36 D.L.R. 197 at 199-200 (Alta. S.C. en banc), Walsh J.; and Flores de Garcia v. Canada (Minister of Employment and Immigration), n. 582 at 775-776, Pratte J., suggest the opposite.
737. First of all, the statutory rule contains no requirement that rights and liabilities be based on transactions that are past and closed. Many acquired rights and incurred liabilities do not meet this test for the simple reason that they contain some future element. Secondly, it has been suggested that para. 43(c) broadens the common law rule by preserving "accruing" as well as "accrued" rights and liabilities: Re Rai (1980), 27 O.R. (2d) 425 (C.A.); Re Falconbridge Nickel Mines Ltd. and Ontario (Minister of Revenue), n. 223; Re Kleifges, [1978] 1 F.C. 734 (T.D.); and Owners of Strata Plan VR 29 v. Registrar, Vancouver Land Registration, [1978] 6 W.W.R. 557 (B.C.S.C.). The reference to accruing rights and liabilities would seem to offer clearer protection for rights and liabilities that have not crystallized at the time of repeal.
738. See supra, n. 728. So, for example, agreements entered into under the authority of repealed legislation will continue to operate after the repeal in the absence of a specific provision declaring them to be of no further force or effect: St. Catharines (City) v. Hydro-Electric Power Commission (1927), [1928] 1 D.L.R. 598 (Ont. S.C.), aff'd [1928] 3 D.L.R. 200 (Ont. S.C.A.D.), aff'd (1929), [1930] 1 D.L.R. 409 (P.C.); and contractual rights that were acquired under repealed law will continue to be governed by that law: Ortved v. Bailey, n. 164. Similarly, tortious conduct that occurred while repealed legislation was in force will continue to be

- governed by that legislation: Yuill v. McMullen, n. 541, and Lambert v. Saanich (District) (1989), 14 A.C.W.S. (3d) 117 (B.C.S.C. Master); and proprietary rights acquired under repealed legislation will continue to be governed by that legislation: Ruttan v. Burk, n. 725; Re Margaritis (Galaxie Family Restaurant), n. 503; Northland Bank v. Van de Geer (1986), 49 Alta. L.R. (2d) 113 (C.A.); and Miller v. Canada Trust Co., [1987] 5 W.W.R. 134 (Sask. C.A.), rev'g (sub nom. Re Ball Estate) (1986), [1987] 2 W.W.R. 431 (Sask. Surr. Ct.).
739. R. v. Ali, n. 2, and R. v. Carnation Co. (1968), 67 D.L.R. (2d) 215 (Alta. S.C.A.D.).
740. R. v. M'Kenzie (1820), Russ. & Ry. 429, 168 E.R. 881; R. v. Mawgan (Inhabitants), n. 725; Craies, n. 1 at 351 and 411-414; Maxwell, n. 117 at 16; and Côté, n. 3 at 78.
741. This reasoning is evident in Reynolds v. Nova Scotia (A.-G.), n. 189 (power to grant renewal of mining licence terminated upon repeal of governing legislation); Cunningham v. Pollock, n. 722 (statutory right of action for survey fee terminated upon repeal of statute that conferred it); and Armstrong v. Campbell (1854), 4 U.C.C.P. 15 (legal status of Crown receipt terminated upon repeal of statute conferring that status).
742. Supra, n. 724. In rare cases, the term "repeal" has been used to denote the succession of common law rules by statutory rules: see, for example, R. v. Firkins, n. 391. It seems preferable, however, and certainly more in keeping with traditional common law usage, to reserve this term for situations in which statutory provisions terminate the operation of other statutory provisions. Where common law rules are superseded, they are more properly described as being replaced or abolished: see McLaren v. McLaren, n. 371.
743. See, for example, Sidback v. Field, n. 117, and Meurer v. McKenzie, n. 117.
744. The original statutory rules were contained in paras. 38(2)(c), (d) and (e) of the Interpretation Act, 1889 (U.K.), 52 & 53 Vict., c. 63.
745. Refer to Fowler v. Vail, n. 242, where the Ontario Court of Appeal viewed the Ontario Interpretation Act rules on repeal as forming part of the legal doctrine on the issue of retrospectivity.
746. Driedger (1983), n. 164 at 224, states:  
At common law when a statute was repealed it was deemed never to have existed, except as to transactions past and closed. This rule has been eroded by statute. Section 36 [sic] [now s. 43] of the Interpretation Act provides for the continuance of the life of the statute

for certain purposes. Thus, a repeal of a statute does not affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment, or any investigation, legal proceeding or remedy in respect thereof.

At pp. 242-243, he elaborates on this point:

Section 35 [now s. 43] abolishes the common law rules that a repealed statute was deemed never to have existed and that the repeal of a repealing statute revived the repealed Act. The effect of s. 35 is to keep a "repealed" Act partially alive forever for the purposes set out in the section.

747. There are numerous cases in which legislation has had to be interpreted as surviving its repeal in order to preserve acquired rights. While they relate to various areas of the law, these cases all involve rights and liabilities that were conferred or imposed by statute. What follows is a sampling:

(1) In penal law:

Association pharmaceutique de Québec v. Livernois, n. 677 (liability to fine for illegal sale of drugs continued notwithstanding repeal of penal provision); R. v. Ali, n. 2, and R. v. Copley, n. 652 (breathalyzer certificate that was properly issued under repealed law continued to be valid after the date of repeal); and R. v. Carnation Co., n. 739, R. v. Coles, n. 539, and R. v. Ireco Canada II Inc. (1988), 65 C.R. (3d) 160 (Ont. C.A.) (liability to prosecution under repealed enactment continued notwithstanding its repeal).

(2) In tort law:

Sun Alliance Insurance Co. v. Angus, n. 73 (repealed provision barring interspousal tort suits survived to bar claim in respect of accident that occurred prior to its repeal); New Brunswick (Provincial Secretary-Treasurer) v. Hastie, n. 573, and Quigley v. Insurance Corporation of British Columbia (1988), 22 B.C.L.R. (2d) 259 (C.A.), supplementary reasons in [1988] I.L.R. 1-2356 (acquired right to obtain compensation from no-fault insurance fund survived repeal of provision conferring that right); and Lownds v. Kenley, n. 572 (provision restricting actions by gratuitous passengers to cases of gross negligence survived so as to govern legal consequences of accident that occurred prior to its repeal).

(3) In property law:

Canadian Westinghouse Co. v. Grant, n. 188 (patent rights); Re Teperman & Sons Ltd. and Toronto (City), n. 226, and Re Frank Johnston's Restaurants Ltd. and Prince Edward Island (A.-G.), n. 189 (right to obtain building permit); Nepean (Township) v. Leikin, n. 176 (realty

transfer requirements); and Saltcoats No. 213 (Rural Municipality) v. Nabozniak, n. 119 (subdivision requirements).

(4) In contract law:

Filteau v. Nesbitt, n. 166; Canadian Imperial Bank of Commerce v. Noseworthy, n. 214; and Droit de la famille -- 483 (1988), 15 R.F.L. (3d) 139 (Que. C.A.) (right to revoke designation of beneficiary under life insurance policy, which right had been acquired upon divorce, survived repeal of provision conferring that right).

(5) In family law:

Re Drewry, n. 736 (right to dependant's relief), and Re Hunt and Lindensmith, n. 205 (paternity obligations).

(6) In administrative law:

Central Mortgage and Housing Corp. v. Co-operative College Residences, Inc., n. 544 (entitlement to loan), and Flores de Garcia v. Canada (Minister of Employment and Immigration), n. 582 (jurisdiction to make immigration order).

(7) In civil and criminal procedure:

Hyde v. Lindsay, n. 398, Sedgwick v. Montreal Light, Heat and Power Co. (1909), 41 S.C.R. 639, rev'd on other grounds [1910] A.C. 598 (P.C.), Fleming v. Atkinson, n. 582, and Petrofina Canada Ltd. v. Lynn (1978), 19 O.R. (2d) 97 (Div. Ct.) (right of appeal governed by repealed provision); and Penman v. Winnipeg Electric Railway Co., [1924] 2 W.W.R. 587 (Man. C.A.), and Kearley v. Wiley, n. 405 (limitation period determined in accordance with repealed provision).

748. In R. v. Coles, n. 539 at 68-69, Laskin J.A., speaking for the Ontario Court of Appeal, contrasted the "natural life" of a statute with its "artificially extended life." See also Re Hunt and Lindensmith, n. 205 at 242, Middleton J.; and Abell v. Royal Canadian Mounted Police Commissioner (1979), 49 C.C.C. (2d) 193 at 202 (Sask. C.A.), Bayda J.A.

749. The survival of repealed enactments is, to this extent, just the converse of retroactive operation. There are, however, two major distinctions between survival and retroactive operation. Firstly, repealed legislation is allowed to survive for a limited purpose only -- i.e., that of permitting the enforcement of rights previously acquired under the repealed legislation. Retroactive legislation is not similarly limited in its effects. Secondly, there is no conflict between a surviving enactment and the enactment that succeeds it. In contrast, a retroactive enactment almost invariably conflicts with the law that it replaces.

750. As opposed to crystallized or fully realized rights, such as a right of action to recover compensation for a tort or breach of contract, or a right to a remedy for interference with property. I dealt with this distinction supra in chapter III at 56 ff.
751. See Canadian Westinghouse Co. v. Grant, n. 188, and Kaufman v. Belding-Corticelli Ltd., n. 650 (future enjoyment of patent rights); Toronto General Trusts Corp. v. Gooderham, [1936] S.C.R. 149 (future operation of disability insurance policy containing statutory trust); Alexo Coal Co. v. Livett (1947), [1948] 1 W.W.R. 195 (Alta. S.C.A.D.) (future operation of collective agreements); and Canadian Imperial Bank of Commerce v. Noseworthy, n. 214 (future operation of chattel mortgage contract).
752. Bell Canada v. Palmer, n. 404 at 190-191, Thurlow J.; Abell v. Royal Canadian Mounted Police Commissioner, n. 748; McDoom v. Canada (Minister of Manpower and Immigration) (1977), [1978] 1 F.C. 323 (T.D.); and Côté, n. 3 at 80. For a contrary suggestion, see Lemyre v. Trudel, n. 652, and Berling v. Alberta (Solicitor General), n. 253. Section 43 deals with the effect of repeal generally, while s. 44 deals with the effect of repeal in the context of a repeal and substitution. Therefore, s. 43 applies to all cases of repeal, but is qualified by s. 44 in cases where the repeal is accompanied by a substitution.
753. See the discussion of procedural enactments as an exception to the general rule against retrospective operation, supra in chapter IV at 121 ff.
- Similarly, the provisions of s. 43 must be read in light of para. 44(f), which deals with consolidations and other re-enactments of existing law. As I explained supra in chapter IV at 129 ff., these types of enactments, like purely procedural enactments, are legitimate exceptions to the general rule against retrospectivity. They pose no threat to acquired rights and are presumed to operate retrospectively.
- Paragraph 44(e) sets out another exception to the general rule against retrospectivity, but it cannot be rationalized in the same way. In operating in favour of a retrospective application of provisions that reduce the punishment for existing offences, it cannot unequivocally be said to be founded on the principle of the rule of law: see the discussion supra in chapter IV at 119-120 and 149 ff. It does, however, promote a constitutional reading of such provisions: see supra, nn. 104 and 530.
754. As would be the case where a purely procedural enactment is involved, or where the enactment in question has the effect of reducing the punishment for an existing offence.
755. This applies whether the new legislation simply repeals existing legislation or repeals existing legislation and

substitutes new legislation in its place. It means that any substituted provisions must be read as being inapplicable to prior events and that the repealing provision must be interpreted so as to permit the survival of the repealed law for the purpose of enforcing acquired rights: see Boyer v. R., n. 398 at 92, Rinfret C.J.; and Driedger (1976), n. 219 at 111 (implication from new law not applying in respect of prior transactions is that repealed law must continue to apply).

It is difficult to understand how the effect of repeal can be separated from the effect of substituted provisions the way the court tried to do in Lemyre v. Trudel, n. 652. Where repealing and substituted provisions are contained in the same enactment or brought into force at the same time, the temporal effect of one is entirely dependent upon the temporal effect of the other.

756. Much in the manner of Maxwell's well-known textbook on statutory interpretation (the most recent editions of which were cited supra in nn. 3 and 117), an armoury of authoritative arguments that seems, in the words of Sir Maurice Amos, to have been written mainly "to provide counsel with something to say:" "The Interpretation of Statutes" (1934) 5 Cambridge L.J. 163 at 175.
757. Witness Estey J.A.'s comments in Re Ontario (Regional Assessment Commissioner, Region No. 2) and Ontario Steel Products Co., [1973] 3 O.R. 795 at 800 (C.A.), aff'd on other grounds (1975), [1976] 2 S.C.R. 721.

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