# "EXISTING" ABORIGINAL RIGHTS IN SECTION 35 OF THE *CONSTITUTION ACT, 1982*

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*The Supreme Court recognises Métis rights, and Aboriginal rights in the former French colonies, without regard for their common law status. This means that "existing aboriginal rights" in section 35 of the Constitution Act, 1982 need not have been common law rights. The Supreme Court recognises these rights because section 35 constitutionalised the common law doctrine of Aboriginal rights, and not simply individual common law Aboriginal rights. As such, section 35 forms a new intersection between Indigenous and non-Indigenous legal systems in Canada. It is a fresh start – a reconstitutive moment – in the ongoing relationship between Indigenous and non-Indigenous peoples.*

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*La Cour suprême reconnaît les droits des Métis, et les droits des peuples autochtones dans les anciennes colonies françaises, sans tenir compte de leur statut en vertu de la common law. Ceci signifie que « les droits existants ancestraux » auxquels fait référence l'article 35 de la Loi constitutionnelle de 1982 n'étaient pas nécessairement des droits de common law. La Cour suprême reconnaît ces droits parce que l'article 35 constitutionnalise la doctrine de common law qui porte sur les droits des peuples autochtones, plutôt que simplement certains droits particuliers des peuples autochtones, tels que reconnus par la common law. Ainsi, cet article 35 constitue une nouvelle intersection entre les systèmes juridiques indigène et non indigène au Canada. Ceci représente un départ à neuf, un moment de reconstitution de la relation qui dure maintenant depuis longtemps entre les peuples indigènes et non indigènes.*

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## *1. Introduction*

More than a quarter-century since the enactment of section 35 of the *Constitution Act, 1982* and a decade since the Supreme Court's decision in *R v. Van der Peet*, it is worthwhile taking a fresh look at the effect of section 35 on Aboriginal or Indigenous peoples' interests. This article takes a relatively abstract and theoretical approach and expands the proposition that the common law does not delimit the content of section 35. It argues that the enactment of section 35 in 1982 was a reconstitutive moment in the relationship between Indigenous and non-Indigenous legal systems in Canada, and that this enactment resulted in newly recognised rights.

The primary function of section 35 is to recognise and protect "existing" Aboriginal and treaty rights:

> 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.[1]

This article does not address treaty rights. On an initial reading section 35 provides additional protection to Aboriginal rights which would otherwise receive ordinary common law protection in Canadian courts.[2] But it also recognises rights where before 1982 a common law court would say there were none. As Lamer C.J.C. said in *Delgamuukw v. British Columbia*:

> ... the constitutionalization of common law aboriginal rights by s. 35(1) does not mean that those rights exhaust the content of s. 35(1).... The existence of an

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Huffaker, and the anonymous readers, for their helpful and stimulating comments, but to retain responsibility for remaining errors.

1 Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Subsections (3) and (4) were added by the *Constitution Amendment Proclamation, 1983*. They are not relevant to the present analysis but for reference, see SI/84-102:

> 35 (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired
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> 35 (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

2 For example, ordinary common law protection might include protection against unlawful trespass and would probably contemplate compensation for expropriation. However, rights in this context would be subject to lawful regulation and extinguishment by statute. See *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 538, (1996) 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R.].

> aboriginal right at common law is therefore sufficient, but not necessary, for the recognition and affirmation of that right by s. 35(1).[3]

The Supreme Court said something similar in *R v. Powley*:

> Although s. 35 protects "existing" rights, it is more than a mere codification of the common law. Section 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities.[4]

These extracts suggest a need for a more nuanced understanding of what it means to be an "existing" "Aboriginal right" – a need which the present article seeks to meet. The article first shows that the Supreme Court of Canada gives effect to "Aboriginal" or "Indigenous" rights which before 1982 had no common law recognition. Secondly, with reference to common law use of the word "existing" and the common law's recognition of "pre-existing" "Aboriginal" or "Indigenous" rights, it demonstrates that common law courts have long given effect to rights which until that "recognition" had no apparent prior existence. The article shows that such rights were "pre-existing" only if a common law rights template is applied *ex-post* to that pre-common law period. It further notes that the existence and definition of "Aboriginal" or "Indigenous" peoples' rights are determined in common law systems by, and conversely indicate, the intersection between common law and Indigenous legal systems.

The article builds on these propositions by arguing that section 35 of the *Constitution Act, 1982* represents the relevant intersection between Indigenous legal systems in Canada and the common law and, in particular, that section 35 represents a newly expressed, post-1982 intersection. The effect of section 35 was, in short, to constitutionalise the common law *doctrine* of Aboriginal rights rather than many individual common law Aboriginal rights. This conclusion is the only possible explanation for the protection by section 35 of rights which the

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3 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1093, 153 D.L.R. (4th) 193 [*Delgamuukw* cited to S.C.R.]. See also *Mitchell v. Minister of National Revenue*, 2001 SCC 33, [2001] 1 S.C.R. 911 at 927, 199 D.L.R. (4th) 385 [*Mitchell* cited to S.C.R.]: "[T]he protection offered by section 35(1) also extends beyond the aboriginal rights recognized at common law;" *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 at 282, 230 D.L.R. (4th) 1 [*Powley* cited to S.C.R.]. See also *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814, 88 O.R. (3rd) 583 at 589, 231 O.A.C. 113: "Existing aboriginal rights *include* common law rights…" [emphasis added]; leave to appeal dismissed 24 April, 2008, [2008] S.C.C.A. No. 35.

4 *Powley*, *ibid.* at 282, 269.

common law did not and would never protect – rights that were "existing" before 1982 only on the basis of an *ex-post* application of the section 35 template.

Before continuing, it is necessary to clarify some terms. This article uses the term "Indigenous peoples" to refer to all customary, traditional, or tribal peoples who trace their culture to a time before the imposition of external, colonial, territorial control.[5] It therefore includes First Nation peoples, Inuit, Métis, Australian Aboriginals, Maori, Sámi, Mayan, Khoi, and so on. Rights which these people hold by virtue of their Indigeneity are "Indigenous peoples' rights" or, more simply, "Indigenous rights."

This article uses the expression "common law Aboriginal rights" to refer to those Indigenous rights, as defined above, which the common law recognises or recognised. Indigenous peoples who hold "common law Aboriginal rights" may be called "common law Aboriginal peoples." While common law Aboriginal rights are Indigenous rights, and common law Aboriginal peoples are Indigenous peoples, the converse is not necessarily true. For example, the pre-1982 common law of Canada, which consisted of "common law Aboriginal rights," likely did not recognise all Indigenous rights held by Indigenous peoples in Canada. "Native title rights" are those Indigenous rights recognised by the common law of Australia.

A further subset of Indigenous rights is "section 35 Aboriginal rights." This term refers to rights held – according to section 35 jurisprudence – by First Nation, Inuit, and Métis peoples in Canada. This article explains how this group of rights overlaps substantially with, but is not equivalent to, common law Aboriginal rights.

### *2. Pre-1982 Factual and Legal Existence*

The above quotations from *Delgamuukw* and *Powley* are the strongest judicial indication that section 35 gives effect to Indigenous rights which before 1982 were not enforceable as common law Aboriginal

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5 There is no scholarly or legal consensus on the meaning of "Indigenous." For discussion, see further Jeremy Waldron, "Indigeneity? First Peoples and Last Occupancy" (2003) 1 N.Z. J. Pub. Int'l. L. 55-82; Benedict Kingsbury, "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 A.J.I.L. 414; Karin Lehmann, "Aboriginal Title, Indigenous Rights and the Right to Culture" (2004) 20 S.A.J.H.R. 86; S. James Anaya, "Maya Aboriginal Land and Resource Rights and the Conflict Over Logging in Southern Belize" (1998) 1 Yale Human Rts. & Dev. L.J. 17.

rights. Other Supreme Court dicta and decisions support this conclusion.

*A) Métis Peoples' Rights*

In *Van der Peet* the Supreme Court held that to prove an Aboriginal right a claimant group must show that its practices, customs and traditions were integral to that group's distinctive culture before its first contact with Europeans.[6] Métis form distinct communities which derive from early-colonial intermarriage of Europeans and members of First Nations.[7] Many progeny of such inter-marriage did not assimilate into First Nations or European societies and continue to exist in independent and distinctive communities. The unique history of the Métis means that the *Van der Peet* pre-contact requirement is inappropriate – yet section 35(2) explicitly extends protection to Métis peoples' rights and interests. To resolve this problem the Court amended the *Van der Peet* test in *Powley* and held that section 35 protects customs and traditions that were "historically important features of Métis communities prior to the time of effective control [by the Crown]."[8]

Almost by definition, the "time of effective control" is after "first contact," which *Van der Peet* set as the appropriate time from which an Aboriginal right in section 35 must have existed.[9] More importantly though, effective control will often be after the assertion of sovereignty. The assertion of sovereignty is without exception the time from which common law rights in other jurisdictions must have existed.[10] It is reasonable to assume that colonial sovereignty was the appropriate time

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6 *Van der Peet*, *supra* note 2 at 554; *R. v. Sappier*, *R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686 at 703 [*Sappier*]. Such pre-contact "integrality" may be inferred from post-contact "integrality."

7 Donald Purich, *The Métis* (Toronto: James Lorimer, 1988); Paul L.A.H. Chartrand and John Giokas, "Defining 'the Métis People': The Hard Case of Canadian Aboriginal Law" in Paul L.A.H. Chartrand, ed., *Who are Canada's Aboriginal Peoples?*: *Recognition*, *Definition*, *and Jurisdiction* (Saskatoon: Purich Publishing, 2002); Lisa D. Weber, "Opening Pandora's Box: Métis Aboriginal Rights in Alberta" (2004) 67 Sask. L. Rev 315; Catherine Bell and Clayton Leonard, "A New Era in Métis Constitutional Rights: The Importance of *Powley* and *Blais*" (2004) 41 Alta. L. Rev. 1049.

8 *Powley*, *supra* note 3 at 27, 279-80.

9 *Supra* note 2. In particular circumstances the times *may* be the same, but the possibility of this result does not affect the present analysis.

10 See for example *Yorta Yorta v. Victoria,* [2002] HCA 58, 194 A.L.R. 538 at 550-53, 560-64 [*Yorta Yorta* cited to A.L.R.]; *Te Runanganui o Te Ika Whenua Inc Soc v. Attorney-General,* [1994] 2 N.Z.L.R. 20 (CA) at 23-24.

from which *common law* Aboriginal rights must have existed in order to be recognised in Canada before 1982.[11]

It is likely that some Métis rights crystallised after sovereignty but before the time of effective control,[12] and it is therefore likely that some Métis would possess rights under section 35 where they would not at common law. If this is true, it follows that before 1982 such section 35 Métis rights were not "existing" rights in the sense of being enforceable under pre-1982 Canadian common law.[13]

*B) Aboriginal Rights in Former French Colonies*

A central issue in both *R v. Côté* and *R v. Adams* was whether the absence of French colonial "recognition" of Indigenous rights in pre-British Québec precluded section 35 recognition.[14] According to the contra argument the common law, and so section 35, recognises only those rights which had the force of law under the immediately prior – in this case French – legal system. Lamer C.J.C. outlined three possible reasons to reject this argument. Firstly, French colonial law may not have denied protection to Indigenous rights as clearly as the province

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[11] For a well-argued contrary view and a more broad understanding of the meaning of the "assertion of sovereignty," see Larry N. Chartrand, "Métis Aboriginal Title in Canada: Achieving Equality in Aboriginal Rights Doctrine" in Karen Wilkins, ed., *Advancing Aboriginal Claims*: *Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004) at 151. Note that in the recent majority judgment in *R v. Marshall*; *R v. Bernard* 2005 SCC 43, [2005] 2 S.C.R. 220, 255 D.L.R. (4th) 1 [*Marshall/Bernard* cited to S.C.R.], McLachlin C.J.C. said that the Court's "task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice… into a modern legal right" at 243, 244-45, 251. This may indicate a more relaxed attitude to the pre-contact, pre-sovereignty requirements. Alternatively, and more likely, this emphasis on pre-sovereignty as the appropriate time is simply due to the fact the case concerned Aboriginal title, which uses sovereignty rather than contact as the appropriate time: see *Delgamuukw*, *supra* note 3 at 1098; *Marshall/Bernard*, *ibid*, at 247.

[12] Catherine Bell, "Metis Constitutional Rights in Section 35(1)" (1997) 36 Alta. L. Rev. 180 at 188-189.

[13] Andrea Horton and Christine Mohr, "*R. v. Powley*: Dodging *Van der Peet* to Recognize Métis Rights" (2005) 30 Queen's L.J. 772 at 784, 790; Larry N. Chartrand, "The Definition of Métis Peoples in Section 35(2) of the *Constitution Act, 1982*" (2004) 67 Sask L.R. 209 at 210.

[14] *R v. Côté,* [1996] 3 S.C.R. 139 at 151, 169, 138 D.L.R. (4th) 385 [*Côté* cited to S.C.R.]; *R v. Adams,* [1996] 3 S.C.R. 101 at 121, 138 D.L.R. (4th) 657 [*Adams* cited to S.C.R.]. See also Andrée Lajoie *et al.,* "Québec's Conceptions of Aboriginal Rights" (1998) 13 C.J.L.S. 63.

submitted.[15] Secondly, "the common law recognizing aboriginal title was arguably a necessary incident of British sovereignty," not requiring prior French recognition.[16] Thirdly, and importantly, Lamer C.J.C gave as an independent reason the direct effect of section 35:

> Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate to have received the legal recognition and approval of European colonizers.[17]

The *Constitution Act*, *1982* therefore protects non-extinguished "practices, customs and traditions central to the distinctive culture of aboriginal societies prior to contact with Europeans" even if the prior legal regime did not accord them legal recognition and approval.[18] This is important because it means that it does not matter whether such rights were "existing" according to the law as it was before 1982. As well as protecting Indigenous rights which were common law Aboriginal rights at 1982, section 35 *also* protects some rights which did not "exist" in 1982 in any common law sense.[19]

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15 *Côté*, *ibid*. at 170-72. See further Kent McNeil, "The Vulnerability of Indigenous Land Rights in Australia and Canada" (2004) 42 Osgoode Hall L.J. 271 at 286: "[T]he existence of [Indigenous land rights under the French regime] is still a matter of debate."

16 *Côté*, *ibid*. at 172. Lamer C.J.C. quoted from Professor Slattery:

> ... it was not part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there. Rather the doctrine was part of a body of fundamental constitutional law that was logically prior to the introduction of English common law and governed its application in the colony.

See Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 737-38. See further *Roberts v. Canada,* [1989] 1 S.C.R. 322 at 339, 57 D.L.R. (4th) 197 [*Roberts* cited to S.C.R.], as discussed by Lamer C.J.C. in *Côté, ibid*. at 172: "a distinct species of federal common law rather than a simple subset of the common or civil law or property law operating within the province." Indeed, the necessary implication of finding in *Commonwealth v. Yarmirr*, [2001] HCA 56, 208 C.L.R. 1 [*Yarmirr*] that recognition can occur over the territorial sea, beyond the realm of the ordinary common law, is that the common law which determines such questions is not the ordinary law concerned with matters of day-to-day life such as real property but is rather a constitutional common Law. See further Thomas W. Bennett and Cathleen H. Powell, "Aboriginal Title in South Africa Revisited" (1999) 15 S.A.J.H.R. 449 at 462.

17 *Ibid*. at 174.

18 *Côté*, *ibid*.

19 Thus answering the question raised in Horton and Mohr, *supra* note 13 at 790.

*C) An Alternative Approach in Mitchell*

Binnie J. seemed to adopt this very proposition in his concurring judgment in *Mitchell v. Minister of National Revenue*. In that case Grand Chief Mitchell (also known as Kanentakeron) claimed a right to carry goods across the St Lawrence River, which forms part of the Canada-USA border, for the purpose of trade. The Supreme Court rejected this assertion, holding that there was insufficient evidence to prove such a right.[20] In his separate judgment Binnie J. (Major J. concurring) agreed that the right did not exist as a matter of fact, and held that even if proven, any such right to trade across the border would be inconsistent with Crown sovereignty. In finding that the right did not exist Binnie J. adopted a novel two-stage approach to consideration of the existence of a section 35 Aboriginal right. Firstly, section 35 protects those rights which exist "in terms of traditional aboriginal law" as "legal rights,"[21] and which before 1982 would have been given effect as common law Aboriginal rights. Secondly, and importantly for the present discussion, Binnie J. said that section 35 recognises those rights which the common law did not recognise and which now may be enforced in Canadian law only because such enforcement is consistent with the purposes of section 35:

> In terms of post-1982 aboriginal law, consideration should be given to whether the … right asserted by the respondent would advance the objective of reconciliation of aboriginal peoples with Canadian sovereignty which, as established by the Van der Peet trilogy, is the purpose that lies at the heart of s. 35(1).[22]

Binnie J. explained the two-stage nature of this approach near the conclusion of his judgment. He suggested that a court should dispense with an otherwise prophylactic common law requirement when to do so is the only means of ensuring sufficient "constitutional space" for claimants "to be aboriginal." If a court concludes there is no *common law* Aboriginal right which could be "constitutionalised":

> … [t]he question that then arises is whether this conclusion is at odds with the purpose of section 35(1), i.e. the reconciliation of the interests of aboriginal peoples with Crown sovereignty? … A finding of distinctiveness is a judgment that to fulfil the purpose of section 35, a measure of constitutional space is required to accommodate the particular activities (traditions, customs or practices) rooted in the

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20 *Mitchell*, *supra* note 3 at 948-54.

21 *Ibid*. at 957.

22 *Ibid*.; see also 984, 991. Leonard I. Rotman has noted this two-stage approach in "Developments in Aboriginal Law: The 2000-2001 Term" (2001) 15 Sup. Ct. L. Rev (2d.) 1 at 15, 21-22 [Rotman, "Developments"].

> aboriginal peoples' prior occupation of the land. In this case, a finding against "distinctiveness" is a conclusion that the respondent's claim does not relate to a "defining feature" that makes Mohawk "culture what it is"; it is a conclusion that to extend constitutional protection to the respondent's claim finds no support in the pre-1982 jurisprudence and would overshoot the purpose of section 35(1).[23]

Thus in Binnie J.'s view any present, or at least post-1982, need for constitutional space would override a lack of common law recognition. This would, in effect, determine the right's pre-1982 "existence."[24] This approach supports the existence of two groups of rights in section 35: those which are straight common law rights, and those whose existence is recognised in order to advance reconciliation.[25]

While this was a worthy attempt to spell out the role of section 35 in the *existence* as opposed to the "recognition and affirmation" of Aboriginal rights, it did not go far enough. Despite suggesting the existence of two types of rights in section 35, Binnie J. could not accept that this new, post-1982, approach implies that section 35 created Aboriginal rights:

> … [the claimant's] counsel acknowledges that s. 35(1) itself does not purport to create rights. It affirms only *existing* rights.[26]

In Binnie J.'s view the *underlying* existence of a particular Aboriginal (or "Indigenous") right does not depend on the protection which it receives. The thrust of the present article is that this proposition is only half-true; I will return to this judgment and to this point later.[27]

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23 *Mitchell ibid*. [emphasis added, footnotes omitted].

24 See also *ibid*. at 981.

25 McLachlin C.J.C chose neither to address nor to adopt this particular approach; see *ibid*. at 954. It has received little attention in the secondary jurisprudence, with the exception of a note in Rotman, "Developments," *supra* note 22 at 22.

26 *Mitchell, supra* note 3 at 981, 995 [emphasis in the original]. See further Doug Moodie, "Thinking Outside the 20th Century Box: Revisiting '*Mitchell*' – Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government" (2003-2004) 35 Ottawa L. Rev. 1 at 38-39. Grand Chief Mitchell subsequently brought a claim before the Organization of American States' Inter-American Commission on Human Rights, arguing that the right to trade with other Indigenous peoples is protected by the right to culture in Article XIII of the *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted at the Ninth International Conference of American States, 1948. The Commission recently rejected this claim; see *Grand Chief Michael Mitchell v. Canada*, Report No. 61/08, Case 12.435, Decision on the Merits, released 25 July 2008. See also *Grand Chief Mitchell, also known as Kanentakeron* (2004), 1 C.N.L.R. 117, where the Commission ruled that the complaint was admissible for hearing.

27 See text accompanying notes 63-66 below.

Binnie J.'s judgment in *Mitchell* brings us back to the meaning of "existing" in section 35 and so to what it means for a right to be "existing" at 1982. An examination of the effect of the common law on "pre-existing" rights is helpful.

### *3. Common Law Recognition*

Case law suggests that common law recognition of Indigenous rights may be described in two ways: as an acknowledgment of "pre-existing" Indigenous rights, and as a translation or transformation of elements of an Indigenous legal system into common law rights. Each approach offers a valuable perspective on the relationship between the two legal systems.

#### *A) Pre-Existing Indigenous Rights – The Acknowledgment Approach*

In Australia a majority of the High Court has stated repeatedly that native title rights and interests *survive* the Crown's acquisition of sovereignty.[28] This suggests that the rights exist both before the assertion of sovereignty, and after that assertion. In this conception the common law does no more than acknowledge or give legal force to already existing Indigenous rights: because these rights already exist they have a form and a vitality of their own.

In this understanding the common law determines when to give effect to Indigenous rights – and when not to give effect. The common law does not, however, define those rights. As Brennan J. said in *Mabo v. State of Queensland* [*No 2*]:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[29]

And as the High Court later said in *Yorta Yorta v. Victoria* in reference to section 223 of the *Native Title Act 1993* (Cth):

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[28] *Yarmirr*, *supra* note 16 at 48, 137; *Yorta Yorta, supra* note 10 at 552, 550. See also *Mabo* [*No 2*] *v. State of Queensland* (1992), 175 C.L.R. 1 at 53-58, 67-69, 97-99, 182-83, [*Mabo* [*No 2*]]; *Western Australia v. The Commonwealth (Native Title Act Case)* (1995), 183 C.L.R. 373 at 422; *Fejo v. Northern Territory,* [1998] HCA 58, 195 C.L.R. 96 at 128, 130 [*Fejo*].

[29] *Mabo* [*No 2*], *ibid*. at 58; see also 57, 60, 70.

> To speak of the "common law requirements" of native title is to invite fundamental error. Native title is not a creature of the common law.
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> …
>
> ["Recognition by the common law" in section 223(1)(c) of the Native Title Act] … cannot be understood as a form of drafting by incorporation, by which some pre-existing body of the common law of Australia defining the rights or interests known as native title is brought into the Act. …[That] would be to treat native title as owing its origins to the common law when it does not. And to speak of there being common law elements for the *establishment* of native title is to commit the same error. [Section 223(1)(c) does not require] reference to any such body of common law, for there is none to which reference can be made.[30]

In this approach the relationship between Indigenous and common law legal systems will be categorised by dichotomies: of fact and law; of proof and recognition.[31] For example, the High Court said in *Yorta Yorta* that the ultimate source of the relevant native title rights and interests is the traditional laws and customs, which formed a "body of norms or normative system... other than the legal system of the new sovereign power."[32] Such rights and interests are not "creature[s] of the common law,"[33] nor creatures of the *Native Title Act 1993* (Cth),[34] but

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30 *Yorta Yorta, supra* note 10 at 560, *per* Gleeson C.J., Gummow, and Hayne JJ. [emphasis in the original]. McHugh J. wrote a short judgment concurring in the result and Callinan J. expressed his own reasons for concurring. It is not clear whether either support the majority's reasons. Gaudron and Kirby JJ. delivered a dissenting judgment.

31 *North Ganalanja Aboriginal Corporation v. Queensland (Waanyi Case)* (1996), 185 C.L.R. 595 at 616-17:

> A claim of native title requires an examination of facts that fall broadly into two categories: the continuity of the connection of the claimants and their ancestors with the land in which native title is claimed and the "tenure history" of that land so far as it appears from Crown grant.

See also *Wik Peoples v. Queensland* (1996), 141 A.L.R. 129 (HCA) at 157 and 151 [*Wik Peoples*] where native title was described as "derived *solely* from the traditional laws and customs of the indigenous peoples" [emphasis added]; for further discussion see *ibid*. at 220, 256, 272, 275, 279, 285-86. In *Fejo*, *supra* note 28 at 130, the Court observed that "native title rights – are not creatures of the common law." Note however that the majority also said at 120 that the *Native Title Act 1993* (Cth) "provides for the establishment of native title;" see *ibid*. at 148, 154.

32 *Yorta Yorta, supra* note 10 at 550; see also 551-53 and 589. This was the "fundamental premise" of *Mabo* [*No 2*].

33 *Wilson v. Anderson,* [2002] HCA 29, 190 A.L.R. 313 at 347 [*Wilson*]; See also *Yarmirr*, *supra* note 16 at 51; *Western Australia v. Ward,* [2002] HCA 28, 191 A.L.R. 1 at 17, 182 [*Ward*]; *Yorta Yorta, supra* note 10 at 549, 568, 589.

34 *Yorta Yorta, ibid*. at 552.

rather are "possessed under, or rooted in, traditional law and traditional custom."[35]

This appears not just to be an Australian conception. In pre-*Van der Peet* Canada, Hall J. in *Calder v. British Columbia*[36] and Dickson J. in *R v. Guerin*[37] called Aboriginal title to land a "pre-existing right."[38] The Supreme Court of Belize,[39] the New Zealand Court of Appeal[40] and the Privy Council[41] have also adopted this phrasing.[42] Along the same line, the United States Supreme Court said in *Cramer v. United States* that the common law recognition of an Indian right was like statutory

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35 *Ibid*. at 551; see also 549-52, 560, 568, 590; *Ward*, *supra* note 33 at 17.

36 *Calder v. Attorney-General of British Columbia,* [1973] S.C.R. 313 at 401-05, 34 D.L.R. (3d) 145. In contrast, see the judgment of Judson J. at 328 with its exclusive emphasis on the prior fact of indigenous existence:

> ... the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'.

37 *Guerin v. The Queen,* [1984] 2 S.C.R. 335 at 376-79, 13 D.L.R. (4th) 321. Although decided in 1985 the court applied pre-*Constitution Act* law: see also *Roberts*, *supra* note 16 at 339.

38 In *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 at 282, 220 DLR (4th) 1 [*Wewaykum* cited to S.C.R.] Binnie J. for the Court referred to a "*legal* interest that predated European settlement" but continued and noted how Marshall C.J. in *Johnson v. M'Intosh*, 21 U.S. (8 Wheaton) 543 (1823) (USSC) [*M'Intosh*] at 573-74 held that "the legal rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations…"

39 *Cal & Ors. v. Attorney General of Belize*, (Belize S.C., 18 October 2007), Conteh C.J., at paras. 76-93.

40 *Te Runanga o Muriwhenua Inc v. Attorney-General,* [1990] 2 NZLR 641 (CA) at 655; *Ngati Apa v. Attorney-General,* [2003] 3 NZLR 643 (NZCA) at paras. 13-15, 34, 58, 143,197 [*Ngati Apa*]. See also *Mangakahia v. New Zealand Timber Co,* (1881) NZLR 2 (SC) 350. For comment on *Ngati Apa* see further F.M. Brookfield, "Maori Customary Title to Foreshore and Seabed" (2003) N.Z.L.J. 295; N. Tomas & Karensa Johnston, "Treaty of Waitangi and Maori Land Law: The *Marlborough* Decision" [2003] N.Z. Law Rev. 468 at 469; Geoffrey W G Leane, "Fighting Them on the Beaches: the Struggle for Native Title Recognition in New Zealand" (2004) 8 Newc. L Rev 65.

41 *Amodu Tijani v. Secretary, Southern Nigeria,* [1921] 2 AC 399 (P.C.) 410, [*Amodu Tijani*], quoted in *Adong bin Kuwau v. Kerajaan Negeri Johor*, [1997] 1 M.L.J. 418 (SGHC), [2001] A.I.L.R. 52 (AUSTLII), upheld [1998] 2 M.L.J. 158 (SGCA); see also *Nor Anak Nyawai v. Borneo Pulp Plantation Sdn Bhd*, [2001] 6 M.L.J. 241 (SGCA), [2001] A.I.L.R. 38 (AUSTLII).

42 See also *Alexkor v. Richtersveld Community*, 2003 (12) B.Const. L.R. 1301 (CC) at para. 38 (SAFLII) [*Richtersveld*] on the common law of Aboriginal title.

recognition in that it "was in effect declaratory of a pre-existing right."[43]

*B) Rights Do Not Encompass Indigenous Experience*

The story of Indigenous rights *continuing* from before to after the assertion of sovereignty depends on an unsophisticated view of the historical relationship between Indigenous and non-Indigenous systems of authority.[44] Such a story requires that before the Crown asserted sovereignty and the common law became the nominal law of the land, Indigenous people ordered their affairs with reference to, or even in ways fully explained by, the concept of rights. By "rights" I mean legal rights – the method by which claims may be enforced.[45] More technically, such rights would be "clusters of Hohfeldian elements"[46] which include the ability to enforce a duty of action or inaction in another, and the ability to alter another's legal position.[47] On this necessarily basic level rights are not an appropriate description of pre-common law Indigenous legality because they are limited only externally – they are "hollow."[48] Indigenous claims, on the other hand,

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[43] *Cramer v. United States of America,* 261 U.S. 219, 67 L. Ed. 622 (1923) 229, relying on *Broder v. Natoma Water & Min Co,* 101 U.S. 274, 25 L. Ed. 790 (1879); at 229 U.S. the Court quoted from *Broder* which referred to the "voluntary recognition of a pre-existing right of possession." See also *Worcester v. Georgia,* 6 Pet. 515 (1832) 544 (USSC) 560; *Holden v. Joy,* 21 L. Ed. 523, 18 Wall. 211 (1872) 534; *M'Intosh*, *supra* note 38 at 574 ("legal as well as just claim to retain possession").

[44] This relies on a Whiggish view of history whereby interests that are now rights are imagined to have always been destined to be rights; see also Paul G. McHugh, "The Common Law Status of Colonies and Aboriginal 'Rights': How Lawyers and Historians Treat the Past" (1998), 61 Sask. L. Rev. 393.

[45] That is, as used by lawyers, and not necessarily "legal" because they have the force of law. Moreover, it is more correct to say "the sense in which they may be enforced or not enforced" since the above statement holds only if there is no subsequent intervention of the rules of equity.

[46] Jeremy Waldron, "Introduction" in Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984) at 10-11.

[47] Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale L.J. 710; John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980) at 199-205; Dwight G. Newman, "Aboriginal 'Rights' as Powers: Section 35 and Federalism Theory" (2007) 37 Sup. Ct. L. Rev. (2d) 163 [Newman, "Aboriginal 'Rights' as Powers"]. On the nature of rights see further Joseph Raz, "The Nature of Rights", ch. 7 of *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 165-68, 180-86. On the nature of rights, and the relationship between a right a duty, see the discussion in *MacDonald v. Montreal (City)*, [1986] 1 S.C.R. 460 at 515-21.

[48] See the discussion in Leon Trakman and Sean Gatien, "The Reconceptualization of Rights," ch. 2 in *Rights and Responsibilities* (Toronto:

generally do not conceptually separate external limitations from internal limitations.[49] Thus for the most part Indigenous jurisprudences speak of "belonging to the land," of "responsibilities," of "control over territory," of collective and contextualised action, and of holistic relationships.[50] No doubt many of these latter concepts are very similar to "rights" and can be well accommodated by rights, for example an Indigenous group may have asserted control over an area of land in a manner that closely resembled, and so now indicates, a right to exclude. But such concepts are not rights. As Jeremy Webber has said:

> Before [colonisation], the interest may well still exist – perhaps in distinctively indigenous conceptions of law, perhaps merely as the way things are – but in a form that is not well described using the common law's language of right. [51]

Indeed, the same High Court of Australia that speaks of "pre-existing" native title rights has been forced to accept the artificiality of describing the Indigenous experience of the world in terms of a system of "rights and interests":

> The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the [Native Title Act 1993 (Cth)]. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.[52]

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University of Toronto Press, 1999) at 52-60.

[49] Trakman and Gatien, *ibid*. at ch 5. "Rights, Responsibilities and Native Cultures;" Finnis, *supra* note 47 at 209-10.

[50] On the nature of Indigenous legal systems see Oren Lyons, "Spirituality, Equality and Natural Law" in Leroy Little Bear, Menno Boldt and J. Anthony Long, eds., *Pathways to Self-Determination*: *Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) at 5, 8; I. Watson, "Law and Indigenous Peoples: The Impact of Colonisation on Indigenous Cultures" (1996) 14 Law in Context 107; Maureen Tehan, "To Be or Not To Be (Property): Anglo-Australian Law and the Search for Protection of Indigenous Cultural Heritage" (1996) 15 U. Tasm. L. Rev. 267 at 274; Leslie Karen Friedman, "Native Hawaiians, Self Determination, and the Inadequacy of the States Lands Trusts" (1992) 14 U. Haw. L. Rev. 519 at 528; E.T. Durie, "Will the Settlers Settle? Cultural Conciliation and the Law" (1996) 8 Otago L. Rev. 449 at 452.

[51] Jeremy Webber, "Beyond Regret: Mabo's Implications for Australian Constitutionalism" in Duncan Ivison, Paul Patton and Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) at 60, 64 [Webber, "Beyond Regret"]. See also Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall L.J. 167 at 173, n. 10.

[52] *Ward*, *supra* note 33 at 15. On the common law's difficulty in "recognising" Indigenous groups, see Robert K. Groves, "The Curious Instance of the Irregular Band:

And so if, as these extracts suggest, Indigenous peoples did not order their existence in terms of "rights," then there were no "rights" to "survive" or to "continue" past the Crown's assertion of sovereignty.

*C) Common Law Perspective – The Translation Approach*

There has been some judicial discomfort with the idea that Indigenous rights are pre-existing and survive the assertion of sovereignty. This unease accompanies the alternative approach to the recognition of Indigenous rights, one which emphasises the translational or transformative effect of the common law and more truly acknowledges the engagement of the legal systems. Thus in their short concurring judgment in *Mabo* [*No 2*], Mason C.J. and McHugh J. said that native title:

> ... *reflects the entitlement* of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that,... the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland.[53]

Similarly, in the same case Deane and Gaudron JJ. in their concurring judgment focus not on "pre-existing rights" but on "pre-existing interests" or "claims."[54] The relevant question for these judges was therefore whether:

> ... and to what extent, such pre-existing native claims to land survived annexation and were *translated into* or recognized as estates, rights or other interests...[55]

Such "interests" or "claims" would be recognised as a whole, in the form of a "common law native title."[56] Along the same lines, McLachlin C.J.C. of the Supreme Court of Canada said in *Mitchell* that:

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A Case Study of Canada's Missing Recognition Policy" (2007) 70 Sask. L. Rev. 153.

53 *Mabo* [*No 2*], *supra* note 28 at 15 [emphasis added].

54 *Ibid*. at 81-100, 106; compare comments at 113 (pre-existing native rights). Subsequent cases have adopted the judgment of Brennan J. rather than this judgment as the lead judgment on basic principles of common law recognition of native title. The judgment of Toohey J. refers to the survival of "traditional title" and "interests" at 179-92, while the dissent of Dawson J. refers to "native interests" at 127.

55 *Ibid*. at 81 [emphasis added]; see also Samantha Hepburn, "Feudal Tenure and Native Title: Revising an Enduring Fiction" (2005) 27 Sydney L. Rev. 49 at 80-81.

56 *Ibid*. at 87-90. This appears to be the approach advocated in Lisa Strelein, "Conceptualising Native Title" (2001) 23 Sydney L. Rev. 95.

> … aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights …[57]

More recently, in *R v. Marshall*; *R v. Bernard*, McLachlin C.J.C. said that:

> … Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. The question is whether the aboriginal practice at the time of assertion of European sovereignty… translates into a modern legal right, and if so, what right?[58]

This begs the question: if the second, translation, approach is more historically accurate, why would a court adopt the former, acknowledgment approach?

*D) Fictions and Intersections*

The primary reason for adopting the acknowledgment, or "pre-existing," approach is simply that it is the common law's default position. The common law speaks in the language of rights, and because it speaks in the language of rights, it sees rights where there were none. For this reason whenever the common law sees a resource, in the past or in the present, it sees rights. To recapitulate, the *content* of the Indigenous "right" existed before sovereignty, but the particular *form* known as a right is an *ex-post* application of the common law. As this article has already noted, the pre-existence of rights is a legal fiction, whereby the common law applies a "rights template" to the past;[59] in truth, at the Crown assertion of sovereignty the common law nominally "transformed" or "translated" Indigenous practices, traditions, laws and customs into rights and interests.

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57 *Supra* note 3 at 928 [emphasis added].

58 *Marshall/Bernard*, *supra* note 11 at 243; 244-45, 251 [emphasis added]; see also 273 ("a legal transposition of the native perspective and experience into the structure of the law of property"). On the Supreme Court's struggle to effect this transformation, see Dwight G. Newman, "You Still Know Nothin' 'Bout Me: Toward Cross-Cultural Theorizing of Aboriginal Rights" (2007) 52 McGill L.J. 725 [Newman, "You Still Know Nothin' 'Bout Me"].

59 See further *Richtersveld*, *supra* note 42 at paras. 51, 54-55, where the Constitutional Court of South Africa referred to the "common law lens" and "prism of the common law"; *Bhe v. Khayelitsha Magistrate,* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para. 43, 148, (SAFLII) [*Bhe*]. See also Hanri Mostert and Peter Fitzpatrick, "Law Against Law: Indigenous Rights and the *Richtersveld* Cases" (2004) 2 Law, Social Justice & Global Development Journal (LGD) part 4, online: <http: www.go.warwick.ac.uk/elj/lgd/2004_2/mostertfitzpatrick>.

Those Indigenous rights exist at the *intersection* between Indigenous legal systems and the common law. This idea that rights exist at the "intersection" comes from the Canadian idea of common law Aboriginal rights and section 35 Aboriginal rights forming an "intersocietal law,"[60] and has featured in the recent jurisprudence of the High Court of Australia.[61] Because this intersection is manifested in common law courts those courts ultimately determine the terms of the intersection.

The second and more deliberate reason to use the acknowledgment or "pre-existing" approach is its very historical inaccuracy. This approach enables a court either to emphasise or to downplay continuity of independent Indigenous entitlement, and this is a useful tactic where there is a broader, societal uncertainty about the structural – as opposed to specific factual – existence of Indigenous rights. For example, a court will adopt this approach when it wishes to emphasise (or to downplay) continuity of independent Indigenous entitlement as a basis to accept (or reject) an Indigenous claim: if the rights were pre-existing then the common law has done nothing but give them effect; if they did not pre-exist, then the common law can deny responsibility for the rights' non-existence.

On the other hand the translation or transformative approach has greater value to courts that are comfortable describing the relationship between Indigenous and non-Indigenous systems of authority. In particular, its value is greater to courts that are comfortable accepting that the newly dominant legal structure has a substantial and fundamental impact on the prior legal system. These attributes may be useful in speeding reconciliation.

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60 See *Van der Peet, supra* note 2 at 547, 541. See also *Marshall/Bernard*, *supra* note 11 at 273 ("inter-traditional notions of ownership"); Mark D. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350 at 412-13 [Walters, "British Imperial Constitutional Law"]; Brian Slattery, "The Legal Basis of Aboriginal Title" in F. Cassidy, ed., *Aboriginal Title in British Columbia*: *Delgamuukw v. The Queen* (Lantzville, British Columbia: Oolichan Books, 1992) at 121-22. This view was perhaps first theorized in Joseph C. Smith, "The Concept of Native Title" (1974) 24 U.T.L.J. 1.

61 See *Fejo*, *supra* note 28 at 128 where the Court first noted the "intersection of traditional laws and customs with the common law" [citations omitted]; *Mabo* [*No 2*], *supra* note 28 at 58, 59-61. See also *Fejo*, *supra* note 28 at 130. The High Court has repeated this view in *Yanner v. Eaton*, [1999] HCA 56, 69, 201 C.L.R. 351 at 384-85, 382 [*Yanner*]; *Yarmirr*, *supra* note 16 at 37; *Ward*, *supra* note 33 at 37; *Yorta Yorta*, *supra* note 10 at 548, 550, 560. See also *Yanner*, *ibid*. at 408.

These insights are helpful in understanding the operation of section 35 of the *Constitution Act, 1982*.

### *4. Section 35, Constitution Act, 1982*

Just as common law courts may claim that common law Aboriginal rights "pre-exist" the common law, and may deny the role of the common law in the existence of common law Aboriginal rights, so does section 35 of the *Constitution Act, 1982* downplay its role in the existence of section 35 Aboriginal rights. Moreover, the reason is the same – it is a reflex that imposes on the past a new rights template, which then helps to downplay the significance of what was a transformative and indeed reconstitutive moment in the ongoing relationship between Indigenous and non-Indigenous systems of authority.[62]

The enactment of the *Constitution Act, 1982* represents a new start in legal relations between Indigenous and non-Indigenous Canadians. In structural terms it forms the new intersection between the common law and Indigenous legal systems and provides a new point of reference for the existence of what it calls Aboriginal rights. Just as the common law did at the colonial assertion of sovereignty, from this point of reference section 35 applies a present template to past (pre-1982) situations in which the modern conception did not exist. In the same manner that the common law applied its own rights template to the pre-sovereignty past, so does section 35 apply a post-1982 template to pre-1982 Canada.

Binnie J.'s concurring judgment in *Mitchell* is illustrative. In this judgment Binnie J. seems to accept the translational function of the common law at the colonial assertion of sovereignty, yet by holding that section 35 merely affirms "existing" rights he then adopts an acknowledgment approach to the effect of section 35.[63]

This hybrid view of section 35 relies on the following narratives of common law imperialism: upon the assertion of colonial sovereignty, Indigenous or Aboriginal laws, interests, practices, customs and

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62 This is part of what James (Sákéj) Youngblood Henderson meant when he called section 35 a "restorative vantage point;" see J. (Sákéj) Y. Henderson, "Aboriginal Jurisprudence and Rights" in Wilkins, *supra* note 11 at 67, 76. Henderson focuses on the role of Aboriginal legal systems in defining Aboriginal rights, but this ignores the role that for better or worse is played by the common law or section 35. See text accompanying notes 41-47, *supra*.

63 *Supra* notes 21-22.

traditions might be translated into a "positive legal right"[64] under the common law. At 1982 the same Indigenous or common law Aboriginal right will become a section 35 Aboriginal right, and that constitutional right would be the same right as the common law right. Alternatively, a different Indigenous right may also arise from particular Indigenous or Aboriginal laws, interests, practices, customs and traditions that were translated into right form upon a colonial assertion of sovereignty. However, at sovereignty this second right did not become a "positive legal right" – a common law Aboriginal right – under the common law because it was inconsistent with Crown sovereignty. Nevertheless, it had some form of "existence" as a matter of fact – perhaps in "claimed" status – without external protection, but in the same form as it would be if protected by section 35.[65] Upon the enactment of the *Constitution Act*, *1982* that right, so formulated, was recognised as an "existing aboriginal right" under section 35 if such constitutional status and protection fulfilled the purposes of section 35.

While there is a comfortable logic to this marriage of the translation and acknowledgment approaches, it requires a stable and indeed independent test for determining the factual existence of Indigenous, common law Aboriginal, or section 35 Aboriginal rights. As *Powley* demonstrates, there is no necessary consistency between the pre- and post-1982 tests for Aboriginal rights. Insofar as the test for existence of Métis peoples' rights derives from section 35 the test – and therefore the form of the right – did not exist before 1982 in any real sense. It is possible to argue that the pre-contact or pre-sovereignty criterion which prevented common law recognition of some Métis rights did not indicate or deny the "core" of the right in question, which a court could perhaps identify and protect at a later time.[66] But, again, this presumes that there is some *pre*-1982 means of determining which common law requirements are relevant – or irrelevant – to demonstrating the "core" of a right.

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64 *Mitchell*, *supra* note 3 at 984; see also 984, 987, 988 for additional reference to *legal* rights. See further *Wewaykum*, *supra* note 38 at 267. In Australia, French J. has acknowledged this distinction by calling the latter "the positive common law of native title;" see "The Evolving Common Law of Native Title" (2002) 6 Flinders J. Law Reform 1 at 6.

65 See further *ibid*. at 956:

> If the respondent's claimed aboriginal right is to prevail, it does so not because of its own inherent strength, but because the *Constitution Act, 1982* brings about that result.

See also *ibid*. at 957 where the same "asserted right" has different levels of legal recognition.

66 See text accompanying notes 23-25, *supra*.

There is, however, a greater problem with this approach to the protection of Indigenous peoples' rights. Just as the definition of common law Aboriginal rights requires an understanding of the intersection between the common law and Aboriginal or Indigenous legal systems, the extent of protection under section 35 requires an understanding of the manner in which section 35 *itself* forms an intersection between legal systems. It is to that intersection that this article now turns.

*A) 1982 Is the New Intersection*

*a) A Fresh Relationship*

In terms of the Canadian Crown's relationship with Indigenous peoples, the enactment of the *Constitution Act, 1982* and the patriation of the Canadian constitution formed a similar constitutional moment to the 1788 arrival in Sydney Cove, New South Wales, and the 1840 assertion of sovereignty in New Zealand. Just as colonial claims in the South Pacific and in North America were assertions of a new sovereignty over Indigenous peoples, so was the *Constitution Act*, *1982*. The former were external, imperial claims; the latter purported to be an autochthonous assertion of a nation's new identity.[67]

From 1982 a refreshed relationship exists with the nominally stated aim of reconciling the prior existence of Aboriginal or Indigenous peoples with Crown sovereignty.[68] Because this relationship starts

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67 Henderson, *supra* note 62 at 87-88, n. 85; Robert K. Groves and Bradford W. Morse, "Constituting Aboriginal Collectivities: Avoiding New Peoples 'In Between'" (2004) 67 Sask. L. Rev. 257 at 257 ("a fundamental shift in attitudes an expectations on the part of both Aboriginal peoples and non-Aboriginal Canadians"). See also Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 101, where the author comments on section 35(1), "Constitutional reform is not done to continue the status quo." See also *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, [2008] C.N.L.R. 112 at 210.

68 *Van der Peet*, *supra* note 2 at 535, 536, 537-47, 586; *R v. Gladstone*, [1996] 2 S.C.R. 723 at 774-75, 137 DLR (4th) 648 [*Gladstone* cited to S.C.R.]; *Adams*, *supra* note 14 at 134; *Delgamuukw*, *supra* note 3 at 1065, 1096; *Mitchell*, *supra* note 3 at 928, 957, 960, 978, 983, 991; *Powley*, *supra* note 3 at 269; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at 523, 524, 528-29, (2005) 245 DLR (4th) 33 [*Haida Nation* cited to S.C.R.]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 at 563, (2005) 245 DLR (4th) 193 [*Taku River Tlingit* cited to S.C.R.]; *Sappier*, *supra* note 6, at 700-02. Lamer J. described those purposes in *Van der Peet*, *ibid*. at 539:

> … the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown… [and the] recognition of the prior occupation of North America by aboriginal peoples…

anew so do the terms on which it must proceed, and so rather than protect common law Aboriginal rights, section 35 simply protects Indigenous or Aboriginal laws, interests, practices, customs and traditions. To recapitulate what the Supreme Court said in *Powley*:

> [Section 35] is more than a mere codification of the common law. Section 35 reflects a *new promise*: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities.[69]

*b) Section 35 Did Not Create Aboriginal Rights*

The presence of a new intersection might be taken to suggest that the *Constitution Act, 1982 creates* "post-1982" rights. Leonard Rotman saw this as the logical conclusion from Binnie J.'s *Mitchell* judgment,[70] although as noted earlier, Binnie J. rejected this view and adopted an approach consistent with the assumption that the form of the right would not change over time.[71]

There is something in Rotman's assertion. In order to avoid the fact that the definition, and therefore existence, of those rights unrecognised before 1982 depends on the new means for recognition, Binnie J.'s novel two-stage approach adopts the legal fiction of "pre-existence."[72] As Rotman saw, a right formerly unrecognised by the common law has a pre-1982 existence only when seen from the post-1982 perspective: the existence is determined by application of the post-1982 form of the right to the pre-1982 facts. By use of that legal fiction common law courts can and do continue to deny their role in the creation of the particular right, as Binnie J. did.

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69 *Powley*, *supra* note 3 at 282 [emphasis added] and also at 269. See also *Richtersveld*, supra note 42 at para. 51, where the Constitutional Court of South Africa said:

> While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution [citations omitted].

The Constitutional Court reiterated this point in *Bhe*, *supra* note 59 at para. 43.

70 Rotman, "Developments," *supra* note 22 at 27. See also Thomas Isaac and Anthony Knox, "Canadian Aboriginal Law: Creating Certainty in Resource Development" (2004) 53 U.N.B.L.J. 3 at 39: the "constitutional protection of aboriginal rights in section 35(1) fundamentally altered Canada's constitutional make-up by creating a body of constitutional rights…" See also *ibid*. at 5: "unprecedented and vague."

71 See text accompanying notes 63-66, *supra*.

72 *Supra* notes 21-22.

But contrary to Rotman's conclusion, explicit judicial acceptance of the use of this fiction would not require tandem acceptance that section 35 "created" any Aboriginal rights. When judges and commentators note that a particular instrument or jurisdiction did not "create" a particular Indigenous right they seek to emphasise not the continuity of the present *form* of the right, but rather that the form protects a prior *entitlement*. This is evident in the recognition of Métis peoples' rights. Section 35(2) explicitly provides that Métis rights are protected by the *Constitution Act*, *1982*, but this does not mean that Métis rights are created by section 35.[73] It is simply to say that section 35 is the location of the new intersection, and section 35 defines the new intersection in a manner that permits the recognition of Métis rights. Put in terms of the relationship between legal systems, the intersection between Métis and non-Indigenous legal systems is broad enough to protect certain Métis rights.

In a similar manner the High Court of Australia has held that the *Native Title Act 1993* (Cth) is now the relevant source of the definition of native title rights and interests;[74] commentators have noted that the *Native Title Act* gives native title rights and interests a statutory definition.[75] Yet at the same time, as commentators also note, the High Court has held that native title rights and interests are neither "creature[s] of the common law"[76] nor creatures of the *Native Title Act*.[77] So when the High Court says that Indigenous rights are not created by legislation it merely wishes to indicate that they are

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73 Compare *Powley, supra* note 3 at 280 where the Supreme Court based this recognition in the "constitutional imperative that we recognize and affirm the aboriginal rights of the Métis." See also Horton and Mohr, *supra* note 13 at 786-87.

74 *Ward*, *supra* note 33 at 16; *Wilson*, *supra* note 33 at 347; *Yorta Yorta, supra* note 10 at 543.

75 Noel Pearson, "The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*" (2003) 7 Newc. L. Rev. 1 at 5; Maureen Tehan, "A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*" (2003) 27 Melb. U. L. Rev. 523 at 556-64; Sean Brennan, "Native Title in the High Court of Australia a Decade after Mabo" (2003) 14 Public L.R. 209 at 209; Shaunnagh Dorsett and Shaun McVeigh, "Jurisprudence, Jurisdiction and Authority in *Yorta Yorta*" (2005) 56 N. Ir. Legal Q. 1; Shaunnagh Dorsett, "An Australian Comparison on Native Title to the Foreshore and Seabed" in Claire Charters and Andrew Erueti, eds., *Maori Property Rights and the Foreshore and Seabed*: *The Last Frontier* (Wellington: Victoria University Press, 2007) at 59.

76 *Wilson*, *supra* note 33 at 347. See also *Ward*, *supra* note 33 at 17, 181; *Yorta Yorta*, *supra* note 10 at 543, 568, 589.

77 *Yorta Yorta, ibid.* at 552.

"possessed under, or rooted in, traditional law and traditional custom"[78] and to emphasise that the justice of Indigenous claims lies in entitlement that is both prior and "external" to the common law.[79] In the same way, section 35 Aboriginal rights can be defined by that provision to include Métis rights, but this does not mean that section 35 "created" Métis rights. This is true for all rights that section 35 protects.

In regard to the definition of Indigenous rights, I do not believe that it is necessary to take an either/or approach to the roles of Indigenous legal systems and the common law. The role played by each legal system is not mutually exclusive of that of the other.[80] It is not possible to argue that Indigenous, common law Aboriginal, or section 35 Aboriginal rights are defined purely with reference to Indigenous or Aboriginal legal systems – the rights are a bridge between the legal systems.[81] This is the reason that the Supreme Court has held that the purposes of the *Constitution Act*, *1982* require that section 35 Aboriginal rights be defined with reference to three factors: the nature of the action; the impugned regulation; and the tradition, custom or practice relied upon to prove the right.[82] The problem is not that the common law is involved in the definition of Indigenous, common law Aboriginal, or section 35 Aboriginal rights, as this is unavoidable. Rather, it might be better asked whether the law's involvement is implicit and avoids explanation of real policy concerns.[83]

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78 *Ibid*. at 551, 549-52, 560, 568, 590; See also *Mabo* [*No 2*], *supra* note 28 at 15, 52, 58, 70; *Wik Peoples*, *supra* note 31 at 151; *Fejo*, *supra* note 28 at 128; *Yanner*, *supra* note 61 at 396; *Yarmirr*, *supra* note 16 at 39, 49; *Ward*, *supra* note 33 at 17; *Wilson*, *supra* note 33 at 347.

79 On various normative bases for supporting Indigenous claims, see Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001). See also references cited at *supra* note 5.

80 On pre-existing Aboriginal entitlement as a source of Aboriginal rights, see for example Henderson, *supra* note 62 at 87-88, n. 85, where Henderson says that Aboriginal jurisprudences and not the common law are the source of Aboriginal rights. It would be unfair to take this comment in isolation; see also pages 67, 75 where Henderson says the judiciary must "accept the challenge of comprehending those *sui generis* inherent rights in terms of the Aboriginal jurisprudence in which they have their sources." See further note 62, *supra*.

81 See *Van der Peet, supra* note 2 at 542.

82 *Ibid.,* at 547.

83 Even in Australia where rights are defined according to "traditional laws and customs" the common law has vast leeway to determine which laws and customs are traditional; see *Mabo* [*No 2*], *supra* note 28 at 58, 70; *Yorta Yorta, supra* note 10 at 550-53, 560-64; *Native Title Act 1993* (Cth) s. 223(1)(a).

As much as it is true that section 35 did not "create" any Aboriginal rights, it is unavoidable that section 35 "participated in the creation of" Aboriginal rights. Just as without Indigenous or Aboriginal legal systems there would be neither common law nor section 35 Aboriginal rights, without the common law or the *Constitution Act*, *1982* there would be no Aboriginal rights – only "laws, interests, practices, customs and traditions." And so the important issue in the basic recognition of rights is not whether section 35 has a role in determining the form of section 35 Aboriginal rights, but is whether section 35 gave rise to the underlying interests and entitlements. It did not. The rights may be new, but the underlying factual basis of section 35 rights is as ancient as that for common law Aboriginal rights. Each set of rights is merely, as Dwight Newman said of cross-cultural concepts generally, "mental placeholders for elements of physical, moral, or other reality."[84] Webber's assessment of the present transformative effect of non-Indigenous legal systems applies equally to section 35:

> … the need to express indigenous interests as "rights" may only arise once indigenous societies are confronted with colonisation… The need to characterise the interests as rights becomes relevant only when they are subjected to the threats posed by colonisation and one is forced to find some means of protection that is comprehensible to and efficacious within a non-indigenous system of law.[85]

Any greater analysis of whether the rights are "new" or created by the *Constitution Act*, *1982* would draw attention from the crucial point that they derive from entitlements and legal systems that have existed since pre-European times.

*B) The Section 35 Template*

Whether a right is "existing" at 1982 depends on the perspective of the *Constitution Act, 1982*, and therefore on the nature of the template that is applied to the pre-1982 past. The section 35 template, as it is for common law Aboriginal rights, is a function of what is now essential to the intersection between the two legal systems. This means that a court must apply to the pre-1982 past the terms that are necessary for post-1982 co-existence.

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84 Newman, "You Still Know Nothin' 'Bout Me," *supra* note 58 at 740.

85 Webber, "Beyond Regret," *supra* note 51 at 64.

*a) Constitutionalising a Doctrine*

The most essential component of the *post*-1982 intersection is the reconciliation of Aboriginal and non-Aboriginal interests.[86] As Binnie J. said for a unanimous Supreme Court in *Mikisew Cree First Nation v. Canada (Minster of Canadian Heritage)*:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.[87]

It is no coincidence that – according to the Supreme Court – the reconciliation of Aboriginal prior existence and Crown sovereignty also gives rise to the common law doctrine of Aboriginal rights. As Lamer C.J.C. said in *Van der Peet*:

> …the interests protected by s. 35(1) must be identified through an explanation of the basis for the legal doctrine of aboriginal rights, not through an explanation of why that doctrine now has constitutional status.
>
> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.

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86 *Van der Peet*, *supra* note 2 at 535, 536-47, 586; *Gladstone*, *supra* note 68 at 774-75; *Adams*, *supra* note 14 at 134; *Delgamuukw*, *supra* note 3 at 1065, 1096; *Mitchell*, *supra* note 3 at 928, 957, 960, 978, 983, 991; *Powley*, *supra* note 3 at 269; *Haida Nation*, *supra* note 68 at 523, 524, 528-29; *Taku River Tlingit*, *supra* note 68 at 563; *Mikisew Cree First Nation v. Canada (Minster of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at 393, 395, 414 [*Mikisew Cree First Nation*]; *Sappier*, *supra* note 6 at 700. See also Dwight G. Newman, "Prior Occupation and Schismatic Principles: Toward a Normative Theorization of Aboriginal Title" (2006-2007) 44 Alta. L. Rev. 779; Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 Indigenous L.J. 1; Andrew Lokan, "From Recognition to Reconciliation: The Functions of Aboriginal Rights Law" (1999) 23 Melb. U. L. Rev. 65. Other commentators have also identified the goal of reconciliation in Australian native title jurisprudence; see Garth Nettheim, "2001 Sir Ninian Stephen Lecture: Making a Difference, Reconciling our Differences" (2001) 5 Newc. L. Rev. 3; Larissa Behrendt, "Morpeth Lecture: Mind, Body and Spirit: Pathways Forward for Reconciliation" (2001) 5 Newc. L. Rev. 38; William Jonas A.M., "Unfinished Business – the Recognition of Aboriginal and Torres Strait Islander Rights" (2001) 5 Newc. L. Rev. 53.

87 *Mikisew Cree First Nation*, *ibid*. at 393. See further *supra* note 68.

> More specifically, what s. 35(1) does is to provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.[88]

Section 35 Aboriginal rights exist for the same root purpose as common law Aboriginal rights: the reconciliation of prior Indigenous or Aboriginal occupation and present Crown sovereignty. This reconciliation gives rise to the common law doctrine of Aboriginal rights and, in order to secure this reconciliation further, the common law doctrine of Aboriginal rights is constitutionalised in section 35.

*b) Section 35 and the Common Law Doctrine of Aboriginal Rights*

Perhaps because questions of Aboriginal rights arise most often in the narrow context of criminal prosecutions, Canadian courts have not settled on a standard formulation of the common law doctrine of Aboriginal rights. The closest to an explanation for the recognition by non-Indigenous law of Aboriginal or Indigenous rights is McLachlin C.J.C's majority judgment in *Mitchell*. There she first described how the continuation of Aboriginal or Indigenous interests and the Crown's assertion of sovereignty are reconciled by a "fiduciary" obligation to treat fairly and to "protect" Aboriginal or Indigenous peoples:

> …English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation… At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown… With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in Guerin v. The Queen…[89]

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88 *Van der Peet, supra* note 2 at 538 [emphasis in the original].

89 *Mitchell*, *supra* note 3 at 927. On the nature and extent of the Crown's fiduciary duty, see further *Wewaykum*, *supra* note 38. See also J. Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Markham: LexisNexis, 2008) at 57-61; see also Leonard I. Rotman, "*Wewaykum*: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" (2004) 37 U.B.C.L. Rev. 219. On the duty to consult, see Heather L. Treacy, Tara L. Campbell and Jamie D. Dickson, "The Current State of the Law in Canada on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development" (2007) 44 Alta. L. Rev. 571; E. Ria Tzimas, "*Haida Nation* and *Taku River*: A Commentary on Aboriginal Consultation and Reconciliation" (2005) 29 Sup. Ct. L. Rev. (2d) 461 at 468-73; Daniel Guttman, "Australian and Canadian Approaches to Native Title Pre-Proof" [2005] 9(3) A.I.L.R. 1.

This duty to treat Aboriginal or Indigenous peoples honourably thus arises from the very assertion of sovereignty, an understanding that the Court has since reiterated in *Haida Nation*[90] and *Mikisew Cree First Nation*.[91] In the immediately subsequent paragraph in *Mitchell*, McLachlin C.J.C. explained how this duty may then give rise to common law Aboriginal rights:

> Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them… Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada…[92]

The Chief Justice later described this process as the "doctrine of continuity," "which governed the absorption of aboriginal laws and customs into the new legal regime upon the assertion of Crown sovereignty over the region."[93]

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[90] *Haida Nation*, *supra* note 68 at 522-23; see especially the statement at 523:

> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band*… para 79.

See also *ibid*. at 528:

> This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.

See also *Taku River Tlingit*, *supra* note 68 at 563. See further Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 Sup. Ct. L. Rev. (2d) 433 at 443-45.

[91] *Mikisew Cree First Nation*, *supra* note 86 at 405, 415-16.

[92] *Mitchell*, *supra* note 3 at 928; this paragraph was recently quoted in *Marshall/Bernard*, *supra* note 11 at 275. On the effect of the Crown assertion of sovereignty, as recently considered by the Supreme Court, see further Mark D. Walters, "Constitutionalism and Political Morality: A Tribute to John D. Whyte – The Morality of Aboriginal Law" (2006) 31 Queen's L.J. 470.

[93] *Ibid*. at 953. See also Brian Slattery, *Ancestral Lands, Alien Laws*: *Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983); P.G. McHugh, *The Maori Magna Carta*: *New Zealand Law and the Treaty of Waitangi* (Oxford University Press: Auckland, 1991) at 83-87; Walters, "British Imperial Constitutional Law," *supra* note 60 at 376-77; Ulla Secher, "The Reception of Land Law into the Australian Colonies Post-*Mabo*: the Continuity and

What can be distilled from the above extracts is that, at least in Canada, Indigenous or Aboriginal laws, interests, practices, customs and traditions[94] may be reconceived as rights, and then given effect as common law rights.[95] These "rights" may be lost during the assertion of sovereignty by the effect of the very assertion itself, afterwards by the enactment of valid legislation, or by cession in a treaty.[96]

Constitutionalisation of this doctrine requires that Indigenous or Aboriginal laws, interests, practices, customs and traditions are protected as constitutional rights where they survived the assertion of sovereignty and were not subsequently removed by inconsistent legislation or surrendered in a treaty.

*c) The Terms of the New Intersection*

Because section 35 represents "a new promise,"[97] the relevant assertion of sovereignty for section 35 rights is the enactment of the *Constitution Act, 1982*. It follows that in order to prove an Aboriginal right under section 35, Indigenous or Aboriginal laws, interests, practices, customs

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Recognition Doctrines Revisited and the emergence of the Doctrine of Continuity Pro-Tempore" (2004) 27 U.N.S.W.L.J. 703. As Binnie J. acknowledged in *Mitchell*, the doctrine of continuity derives from the Imperial law of sovereign succession, a doctrine with the primary aim of protecting prior proprietary interests; see *Mitchell*, *ibid*. at 971, 983-84; *Amodu Tijani*, *supra* note 41 at 407; *Oyekan v. Adele,* [1957] 2 All ER 785 (PC) at 788.

94 Although this phrase does not exactly match the words chosen by McLachlin C.J.C., the Supreme Court has used each word independently at different times. The present combination is used to emphasise that the common law respects the entirety of an Indigenous legal culture.

95 See also *Marshall/Bernard*, *supra* note 11 at 243-47; that case demonstrates an emphasis on the continuation of "practices" at 243-45, 251 as opposed to "practices, customs and tradition" or "laws and traditions" as described in *Mitchell* in the extracts above and indeed in the *Van der Peet* test itself, *supra* note 2 at 549. Whether this emphasis was more to provide a basis for a more limited "occupation" requirement for proof of Aboriginal title, or indicates a more fundamental shift away from recognition of prior legal regimes towards recognition of manifestations of those legal cultures, is uncertain. See further *Sappier*, *supra* note 6 at 700. See also John P. McEvoy, "Aboriginal Activities and Aboriginal Rights: A Comment on *R v. Sappier*; *R v. Gray*" (2007) 6 Indigenous L.J. 1 at 13; Newman, "Aboriginal 'Rights' as Powers," *supra* note 47 at 168. On the test for proof of Aboriginal title, see also Kent McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69 Sask. L. Rev. 281; Nigel Bankes, "*Marshall and Bernard*: Ignoring the Relevance of Customary Property Laws" (2006) 55 U.N.B.L.J. 120; Paul L.A.H. Chartrand, "*R v. Marshall*; *R v. Bernard*: The Return of the Native" (2006) 55 U.N.B.L.J. 135.

96 Perhaps also by conquest.

97 *Powley, supra* note 3 at 282.

and traditions must be consistent with that sovereignty. The following parts of this article consider the nature of that assertion of sovereignty and the terms of the new intersection between the legal systems.

Consistency with the new sovereignty asserted in 1982 does not mean or require that the claimant group followed or undertook *in 1982* the relevant Indigenous or Aboriginal laws, interests, practices, customs and traditions which prove section 35 rights. In *Marshall/Bernard* the Supreme Court held that a claimant group can claim Aboriginal title on the basis of practices undertaken at the *colonial* assertion of sovereignty.[98] This ability to prove Aboriginal title on the basis of things done at the colonial assertion of sovereignty does not imply the rejection of the proposition in the present article that Indigenous or Aboriginal laws, interests, practices, customs and traditions must survive the 1982 assertion of sovereignty. The two are consistent because those laws, interests, practices, customs and traditions which at 1982 give rise to section 35 rights have a *historical* existence, and it is this *historical* existence which must be consistent with the new sovereignty.

*d) Present Existence of Historical Facts*

The importance of historical characteristics in the establishment of Indigenous rights is evident in the common law doctrine of Aboriginal rights. In paragraph 10 of *Mitchell* McLachlin C.J.C. said that "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights." Then she said in paragraph 12 that Aboriginal rights exist – including, presumably, at sovereignty – where a claimant can demonstrate the *pre-contact* existence of a practice, custom or tradition. These two statements are consistent only if the relevant laws and customs which survived the colonial assertion of sovereignty and became common law rights were those that had existed since *before contact* and so, at colonial sovereignty, had this relevant historical characteristic.

The Supreme Court has held that the Aboriginal rights which section 35 protects are proven by laws, interests, practices, customs and traditions that existed, depending on the type of right claimed: at the

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98 *Marshall/Bernard*, *supra* note 11 at 250, 251. The claimant group must also show a connection with the pre-sovereignty group, and that the right is the descendent of the antecedent group's pre-sovereignty practices. This latter requirement may be demonstrated by maintenance of a substantial connection with the land. See also Kent McNeil, "Continuity of Aboriginal Rights" in Wilkins, *supra* note 11 at 127.

time of first contact;[99] at the colonial assertion of sovereignty;[100] or at the time of effective Crown control.[101] These requirements demonstrate that the existence at first contact, colonial sovereignty or effective control, of the relevant facts, is an essential aspect of post-1982 sovereignty. In other words, the laws, interests, practices, customs and traditions that survive the *1982* assertion will be those Aboriginal laws, interests, practices, customs and traditions that existed at *first contact*, *colonial sovereignty* or *effective control*, respectively. This historical existence is a necessary part of the right's post-1982 existence.

Another characteristic of the new intersection is the recognition, as required by section 35(2), of the rights of Métis peoples.[102] In this respect the 1982 assertion of sovereignty is less broad than the colonial assertion of sovereignty which precluded recognition of many rights of Métis peoples, and the intersection is wider.

A further characteristic of the new intersection is the requirement that section 35 rights, including Métis rights, not be extinguished before 1982.[103] This characteristic can be formulated more precisely, since Métis rights did not technically exist at *common law* before 1982 and, assuming extinguishment means the withdrawal of common law recognition,[104] those Métis rights could not be "extinguished." Depending on the as-yet-unsettled Canadian test for extinguishment it is more correct to say that it is essential to the new intersection between the legal systems that section 35 rights be consistent with pre-1982 legislation, Federal Crown grant or authorised non-Aboriginal action.[105] In other words, it is essential to the new intersection between the legal systems that pre-1982 expressions of Crown sovereign will are respected. The permanence of pre-1982 extinguishment, a result which has been assumed but never confirmed, will also depend on the nature of the new intersection.

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99 *Van der Peet, supra* note 2 at 554.

100 *Delgamuukw*, *supra* note 3 at 1097-98; *Marshall/Bernard*, *supra* note 11 at 251.

101 *Powley, supra* note 3 at 27, 279-80.

102 See text accompanying notes 6-13, *supra*.

103 *Powley, supra* note 3 at 283: the Court said that the "doctrine of extinguishment applies equally to Métis and to First Nations claims." See also *R v. Sparrow*, (1990) 1 S.C.R. 1075 at 1103-04, 70 DLR (4th) 385 [*Sparrow* cited to S.C.R].

104 See *Ward*, *supra* note 33 at 17, 35, 37. See also *Yarmirr*, *supra* note 16 at 68; *Yorta Yorta*, *supra* note 10 at 568; *Ward*, *ibid*. at 179, 181, 276; *Wilson*, *supra* note 33 at 348.

105 On the ability of a province to extinguish or infringe section 35 rights, see *R v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915.

It also worth noting briefly that this new intersection might affect the doctrine of sovereign incompatibility, under which Indigenous rights that are inconsistent with Crown sovereign rights and interests are not enforceable at common law.[106] If the extent of the protection (or rather limitation) of post-1982 rights is determined by a new, post-1982 sovereignty, then that post-1982 sovereignty is the more appropriate restriction on the rights' existence than pre-1982 sovereignty. Sovereign incompatibility would be determined primarily by the reconciliation sought by section 35 rather than with reference to the common law.

*e) Common Law Rights as Section 35 Rights*

Common law tests for Aboriginal rights provide a shorthand test for most section 35 Aboriginal rights: satisfaction of a common law test indicates satisfaction of the section 35 test.[107] This is so because section 35 Aboriginal rights exist to fulfil the purposes of section 35[108] which themselves are, as Lamer C.J.C. said in *Van der Peet*, "an explanation of the basis for the legal doctrine of aboriginal rights" at common law.[109] Since these purposes give rise to the doctrine of Aboriginal rights, both at common law and under section 35, the constitutional doctrine is the same as the common law doctrine. For this reason, section 35 rights will appear in the same *form* as common law rights, except where the newly asserted sovereignty requires a different result.[110] This is what makes it correct to say, as Lamer C.J.C. did in *Delgamuukw*, that:

> [t]he existence of an aboriginal right at common law is therefore sufficient, but not necessary, for the recognition and affirmation of that right by s. 35(1).[111]

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106 See e.g. *Case of Tanistry,* (1608) Davis 28 [80 E.R. 516]; *Mabo* [*No 2*], *supra* note 28 at 29, 43, 61; *Yarmirr*, *supra* note 16 at 47-49, 65, 67-68; *Ward*, *supra* note 33 at 17; *Yorta Yorta*, *supra* note 10 at 568. See also the judgment of Binnie J. in *Mitchell*, *supra* note 3.

107 On the constitutionalisation of common law rights, see *Sparrow*, *supra* note 103 at 1111, 1118; *Van der Peet*, *supra* note 2 at 538-39, 594, 625, 627; *Gladstone*, *supra* note 68 at 770; *Côté*, *supra* note 14 at 175; *Adams*, *supra* note 14 at 134; *Delgamuukw*, *supra* note 3 at 1091-93; *Mitchell*, *ibid*. at 927, 956, 981, 995; *Marshall/Bernard*, *supra* note 11 at 241. See also *R v. Badger*, [1996] 1 S.C.R. 771 at 783, 133 D.L.R. (4th) 324.

108 *Supra* notes 86-88.

109 *Van der Peet*, *supra* note 2, at 538.

110 On the tests for non-Métis Aboriginal rights, see *ibid*. at 548-49; *Delgamuukw*, *supra* note 3 at 1097; *Marshall/Bernard*, *supra* note 11 at 240-56.

111 *Delgamuukw*, *ibid*. at 1093.

Again, and in strict terms only, this does not mean that common law Aboriginal rights *are* section 35 rights, but rather that common law rights identify the same Indigenous or Aboriginal laws, interests, practices, customs and traditions as most but not all section 35 rights. In most cases the *form* of the base Aboriginal right is the same: it is this sameness that presents the illusion of continuity from pre- to post-1982. Technically, the rights are new while the interests are old.

The Constitutional Court of South Africa has adopted a similar approach in the case *Alexkor Ltd v. Richtersveld Community*, where it upheld the land claim of a dispossessed Indigenous community made under the *Restitution of Land Rights Act 1994*.[112] The effect of this judgment is that common law Aboriginal rights in South Africa are not *per se* rights under the *Restitution of Land Rights Act*, at least not according to existing case law, but common law Aboriginal rights will identify and encompass the same customary laws, activities, and interests as do customary rights recognised by the Act. This is the same as may be said about the relationship between common law Aboriginal rights and Aboriginal rights under section 35 of the *Constitution Act, 1982*. In reaching this result, the Constitutional Court held that the Act directly recognised the claimants' customary law rights in land, and that for this reason it was unnecessary to consider separately the common law doctrine of Aboriginal title.[113] In so describing the existence, content, and possible extinguishment of the customary title recognised by the Act, the court used terms that mirrored the lower court's description of common law Aboriginal title.[114] For example, the Constitutional Court held, and relied on the conclusion, that the customary title recognised by the Act survived the colonial assertion of sovereignty and was continuously possessed from sovereignty to the relevant statutory date. Such conclusions are *prima facie* irrelevant to the proof of an extant customary interest. The Constitutional Court implicitly adopted, therefore, the test for common law Aboriginal title as the relevant test for recognition under the *Restitution of Land Rights Act*.[115] By this judicial sleight of hand, the court was able both to avoid settling the place in South African law of the doctrine of common law

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112 *Richtersveld*, *supra* note 42. See further Lehman, *supra* note 5.

113 See *supra* note 69.

114 *Alexkor v. Richtersveld Community*, 2003 (6) BCLR 583 (SCA). See also Yvette Trahan, "*Richtersveld Community & Others v. Alexkor Ltd*: Declaration of a 'Right in Land' Through a Customary Law Interest' Sets Stage for Introduction of Aboriginal Title into South African Legal System" (2004) 12 Tul. J. Int'l & Comp. L. 565.

115 T.W. Bennett and C.H. Powell "Restoring Land: the Claims of Aboriginal Title, Customary Law and the Right to Culture" (2005) 16 Stellenbosch L. Rev. 431 at 433-34.

Aboriginal title,[116] and simultaneously to recognise via the Act the same customary laws, activities, and interests as would common law rights – in effect recognising common law Aboriginal rights.

Mark Walters and, more recently, Kent McNeil and David Yarrow, have argued that section 35 is the source of a new and additional *type* of Aboriginal rights. In their view this group of Aboriginal rights arises from a doctrine of Aboriginal rights which is new, but nevertheless produces rights that co-exist under section 35 with "common law" rights.[117] Walters contrasted such "new" rights with common law rights which would be determined under an "empirical historic" approach,[118] or "normative common law" approach, perhaps with the goal of protecting a "traditional way of life"[119] or recognising prior

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[116] There is concern that the doctrine of Aboriginal title would not sufficiently distinguish, assuming it should, between minority groups with traditional cultures, and other groups which, although they can trace occupation to pre-European colonisation, form part of the majority culture and whose relationships with land have less pressing social need for legal protection: see in particular Lehman, *supra* note 5; for a contra view see Bennett and Powell, *ibid*. There is much merit in the argument that Aboriginal title protects relationships with land that are of sufficient importance to the rightholder's culture, rather than occupation *per se*, but greater consideration of this point requires more space than available in the present article. On the doctrine of Aboriginal title in South African law, see also Özlem Ülgen, "Developing the Doctrine of Aboriginal Title in South Africa: Source and Content" (2002) 46 J. Afr. L. 131; Laboni Amena Hoq, "Land Restitution and the Doctrine of Aboriginal Title: *Richtersveld Community v. Alexkor Ltd and Another*" (2002) 18 S.A.J.H.R. 421.

[117] Mark D. Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act*, *1982*" (1999) 44 McGill L.J. 711 at 740. Professor Walters has made this argument even more strongly in Mark D. Walters, "The Right to Cross a River?: Aboriginal Rights and the *Mitchell* Case" (paper presented to a conference held in Toronto by the Pacific Business & Law Institute, October 24 and 25, 2001 – copy on file with the present author), where he said at 8 that "the cultural-integrity test and the common-law continuity tests are completely different tests with completely different purposes and they produce completely different result;" Kent McNeil and David Yarrow, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?" (2007) 37 Sup. Ct. L. Rev. (2d) 176 at 187, 203-11.

[118] *Van der Peet, supra* note 2 at 640.

[119] In her dissent in *Van der Peet, ibid*. at 646, 626-30, 641, 646-49, McLachlin C.J.C had held that case law demonstrated that the "*Grundnorm* of settlement in Canada" is that Aboriginal people have a right to receive sustenance from the land, and "to live off their lands and the resources found in their forests and streams to the extent that they had traditionally done so." Aboriginal rights would therefore be limited by the Indigenous peoples' "historic reliance on the resource;" see *ibid*. at 626. Proof of the right would become a simple matter of determining whether the claimant's group used the resource in a variety of ways to sustain themselves. On continuation of the "traditional way of life," see also *Delgamuukw*, *supra* note 3 at 1126-28; and

authority.[120] McNeil and Yarrow argued that the pre-1982 "non-section 35(1) customary rights" might be broader than section 35(1) rights determined under the *Van der Peet* test, and might remain independently enforceable in common law courts.[121]

These are interesting points of discussion. However, while a legal historian might one day accept that the effect of the *Van der Peet* trilogy was to create a new test, and a new doctrine, the Supreme Court has stated that the doctrine which gives rise to section 35 rights is the same doctrine that gave rise to common law Aboriginal rights.

### *5. Conclusions*

Whenever Indigenous and non-Indigenous legal systems intersect, the Indigenous experience of the world, often expressed as laws, interests, practices, customs and traditions, must be translated into rights and interests. When a common law court so translates Indigenous laws, interests, practices, customs and traditions into rights and interests, it identifies and settles the terms of the intersection between the legal systems.

The extent to which non-Indigenous law wishes to hide such a translation is often indicated by its reference to the Indigenous, common law Aboriginal, or section 35 rights as "existing" or "pre-existing." Use of these words infers continuity, makes the translation implicit, and downplays the role of the common law.

An implicit, "acknowledgment," approach requires the adoption of the legal fiction that the Indigenous, common law Aboriginal, or section 35 Aboriginal rights pre-exist the Crown's assertion of sovereignty, whether that be a colonial assertion or the 1982 enactment of the *Constitution Act*, *1982*. Part of this fiction is the proposition that the *sole* source of the rights and interests is "traditional" laws and customs. Through such emphasis on continuity a court avoids explanation of underlying policy concerns; this can be helpful to a court seeking to avoid justifying its protection or rejection of Indigenous rights and interests.

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*Marshall/Bernard*, *supra* note 11 at 244. In *Sappier*, *supra* note 6 at 702, the Court said:

> Section 35 recognizes and affirms existing aboriginal and treaty rights in order to assist in ensuring the continued existence of these particular aboriginal societies.

120 See *Mabo* [*No 2*], *supra* note 28 at 55, 58, 70; *Yorta Yorta*, *supra* note 10 at 550, 551-53, 589.

121 McNeil and Yarrow, *supra* note 117 at 207.

An explicit, "translation," approach, on the other hand, is more likely to force judges to consider policy concerns one by one rather than as part of an overall impression. Because this gives the unsuccessful party detailed reasons for the rejection of their arguments and concerns this may be beneficial to reconciliation, especially where the structural existence of the underlying rights is not in doubt. Explicit examination of policy concerns should require that rights be defined as broadly as possible and limited only at the later "recognition" stage.[122]

Under either approach, the particular terms of translation depend on what is essential to the particular intersection. In Canada the intersection is described in broad terms by the common law doctrine of Aboriginal rights which, by section 35 of the *Constitution Act*, *1982*, has been elevated to constitutional status.

One important effect of the enactment of section 35 is that the intersection is no longer simply between Indigenous legal systems and the common law, but is now an intersection between Indigenous legal systems and a new sovereignty expressed by section 35 of the *Constitution Act*, *1982*. The particular terms of this new intersection depend on the new sovereignty, the extent of which will be revealed as Canadian courts determine the protection by section 35 of Aboriginal rights. Because section 35 forms a new intersection the rights which it protects are new rights, even if they have the same form as common law rights and arise from the same interests and historical entitlements.

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[122] *Van der Peet, supra* note 2 at 547; *Delgamuukw*, *supra* note 3 at 1104; *Marshall/Bernard*, *supra* note 11 at 243-45. This is justified as a "morally defensible position;" see *Van der Peet*, *ibid*. at 547, citing Walters, "British Imperial Constitutional Law," *supra* note 60 at 412-13. On the "political reality" of recognising Indigenous rights, see Matthew S. R. Palmer, "Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution" (2006) 29 Dal L.J. 1.