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Justice Jean Beetz „ A Rich and Enduring Legacy in Canadian Constitutional Scholarship and Jurisprudence

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I had the privilege of knowing Justice Jean Beetz in two contexts. My first contact with him was in the early 1980s when I was Director of Constitutional Law for the Government of Saskatchewan and came to Ottawa several times a year to argue constitutional cases before the Supreme Court of Canada. Although Justice Beetz was a lifelong student of, and acknowledged expert in, Canadian constitutional law, he did not intervene often or vigorously in the presentation of a case. He was not, however, entirely silent. Usually, towards the end of counsel's presentation, Justice Beetz would ask with great courtesy several succinct and, I always thought, penetrating questions. The distinctive features of his questions were how scholarly and how deeply rooted in Canadian political and constitutional history they were.

After I went to work as Executive Legal Officer at the Supreme Court of Canada in the mid-1980s I came to know Justice Beetz quite well indeed, partly because we shared a great passion for Canadian constitutional history and law and enjoyed discussing them together. The judge I saw behind the formal public courtroom was a refined, hard-working, scholarly and exceptionally kind man. He treated everyone in the building, from the Chief Justice to the maintenance staff, with unfailing courtesy and kindness. He was particularly close to his own law clerks and indeed to many of the law clerks who worked with the other justices, a relationship that, I suspect, was a carryover from his many years as a law teacher, a portion of his career which he remembered with genuine fondness. I recall two illustrations „ one minor, the other significant „ of his affection for, and special relationship with, the law clerks who worked at the Court. The minor illustration is his faithful attendance every year at the annual baseball game between the law clerks and the Court's administrative staff. He was the only justice to regard this as an important annual event! The more significant illustration is that Justice Beetz, alone on the court, would regularly invite a law clerk to stay for a second year. This was a much prized and

usually accepted invitation which underlined the very strong professional and personal bonds that would develop between Justice Beetz and his clerks.

The Jean Beetz I knew and have tried to describe here is a man easily recognizable by all who knew him well, as well as, in many cases, those who met him only occasionally. He was, put simply, a judge and person who exhibited in greater measure than most the qualities of gentleness, courtesy, grace, humility and kindness.

Yet, in spite of these personal qualities, I believe that Justice Beetz lived a professional career marked by some other quite different qualities „ adherence to principle, strength, tenacity and even competitiveness. There were two long components to his professional life „ his years as a law teacher and scholar and his years as a judge. In the 1950s and 1960s the major scholarly voices in the constitutional law field in Quebec were Frank Scott, Pierre Trudeau and Jean Beetz. In the 1970s and 1980s the significant judicial voices in Canadian constitutional law (at least in the federalism components of that field) were Chief Justice Bora Laskin, Chief Justice Brian Dickson and Justice Jean Beetz. In both contexts, Justice Beetz was, at a personal level, the quietest and least public of the triumvirates. In both contexts, he was also the least productive author. As academics, Frank Scott and Pierre Trudeau wrote more than Jean Beetz; as judges Justices Laskin and Dickson wrote many more constitutional decisions than Justice Beetz. Yet, in spite of his reserved, almost deferential persona, and in spite of his modest productivity, my thesis is that Professor and Justice Beetz occupied a very distinctive position in both of these academic and judicial triumvirates, that his conception of Canadian federalism was sharply different from the conceptions of Scott, Trudeau, Laskin and Dickson, that there was a remarkable consistency in Beetz's conception throughout his entire career, that he worked tenaciously to articulate and gain support for his conception, and that in several important respects, especially one, his views prevailed and, therefore, left a lasting legacy in Canadian constitutional law. In short, my thesis is that Jean Beetz was a *distinctive* voice in the history of Canadian constitutional law, that he knew his views were different from those of his academic and judicial colleagues, and that he worked hard to make his views prevail. There was humility and grace in every pore of Jean Beetz the person; there was steel in Jean Beetz the academic and judicial interpreter of the Constitution.

JUSTICE BEETZ AND CANADIAN FEDERALISM

It is possible to illustrate Jean Beetz's distinctive approach to Canadian constitutional law and his distinctive and, in my view, enduring legacy to the interpretation of the Constitution by identifying and analyzing the essential components of his conception of Canadian federalism. I will mention six of those components; others who have studied his decisions more carefully or talked with him more often might choose others.

First, Jean Beetz was a profound Canadian historian. I do not say that in a technical, professional sense „ he was, after all, a professor in a law faculty, not a history department, and he was a judge, not the curator of a museum. What I mean is that Jean Beetz knew and loved Canadian history and that in his eyes history was an important source for interpreting the Constitution. I have already mentioned how his questions to counsel in constitutional cases were often rooted in historical considerations. His judgments exhibit the same attention to, and reliance on, history. In decisions like *Reference Re Anti-Inflation Act*[2] and *DiIorio*[3] , he relied heavily on pre-Confederation constitutional documents (like the *Quebec Act, 1774*) and stated emphatically that the wording in those documents and the everyday experience under them should guide the interpretation of the words in sections 9l and 92 of the *Constitution Act, 1867*.

Secondly, Justice Beetz was a judicial `conservative' in the sense that he believed that judges and courts should display a genuine fidelity to previous constitutional decisions. He studied those decisions closely, he tried hard to understand individual decisions and to knit together all of the decisions in a particular domain and, having done these things, he made decisions and wrote judgments that attempted to be faithful reflections of the existing jurisprudence. He admired (like Professor Trudeau, but unlike Professor Scott and Professor and Justice Laskin) the constitutional decisions of the Judicial Committee of the Privy Council and he used them to ground his own judgments. Moreover, he consistently and vigorously refused to participate in attempts to overrule previous decisions of either the Privy Council or the Supreme Court of Canada. His judgments in *Re Ontario Public Service Employees' Union*[4] (refusal to overrule *McKay*[5]) and in *Commission de la santé et de la sécurité du travail* v. *Bell Canada*[6](refusal to overrule *Commission du Salaire Minimum* v. *Bell Telephone Co. of Canada*[7]) are vivid examples of his conservative view of the nature of the judicial role.

Thirdly, Justice Beetz was the most articulate and forceful exponent on the modern Court (post-1949) of the classical conception of Canadian federalism. In an important recent article Professor Bruce Ryder has described and contrasted the "classical" and "modern" paradigms of constitutional interpretation in a federalism context:

> *The classical and modern paradigms represent different judicial approaches to defining "exclusivity" of federal and provincial powers, and thus of preserving provincial autonomy. The classical paradigm is premised on a "strong" understanding of exclusivity: there shall be no overlap or interplay between federal and provincial heads of power....*
>
> *The modern paradigm, on the other hand, is premised on a weaker understanding of exclusivity. Instead of seeking to prohibit as much overlap as possible between provincial and federal powers, the modern approach to exclusivity simply prohibits each level of government from enacting laws whose dominant characteristic ("pith and substance") is the regulation of a subject matter within the other level of government's jurisdiction. Exclusivity, on this approach, means the exclusive ability to pass laws that deal predominantly with a subject matter within the enacting government's catalogue of powers. If a law is in pith and substance within the enacting legislature's jurisdiction, it will be upheld notwithstanding that it might have spillover effects on the other level of government's jurisdiction.*[8]

There can be no doubt that Jean Beetz, as professor and judge, was an adherent of the classical paradigm. As a law professor, he shared this conception of Canadian federalism with most other Quebec constitutional scholars, including Louis-Philippe Pigeon, who became a justice of the Supreme Court of Canada, and Pierre Elliot Trudeau. These professors agreed that the distribution of powers in the *Constitution Act, 1867* was intended to preserve a degree of provincial autonomy which Quebec could use to protect the essential features of its distinct language, culture and law. They might disagree on the content of provincial powers (certainly Justice Pigeon's and Justice Beetz's views on this were very different from those of Prime Minister Trudeau). But they did not disagree on the conceptual nature of Canadian federalism ,, namely, an emphasis on the clean division of powers between federal and provincial governments.

Central to the Beetz conception of classical federalism was a strong aversion to the notion of overlapping or concurrent powers. In perhaps the best article from his academic days, Professor Beetz explained the rationale for this aversion in these terms:

> [L]*e juriste québécois sera porté à s'inquiéter de la tendance* [...] *vers une extension des compétences communes: il lui semble que l'adoption de deux lois, l'une fédérale, l'autre provinciale, toutes deux destinéees à régir le même but et sous le même aspect, est clairement exclue par la constitution sauf en matière d'agriculture, d'immigration, et de pension de vieillesse; mais surtout, cette tendance a pour effet d'étendre la zone de suprématie des lois féderales; elle est nettement centralisatrice.*[9]

On the Supreme Court of Canada Justice Beetz and Chief Justice Dickson shared the view that the provincial powers in the *Constitution Act, 1867* were important ones that should be interpreted in a large and liberal fashion. On this they were challenged throughout the 1970s and 1980s by Chief Justice Laskin whose view of Canadian federalism, a view shared by Professor Scott and, increasingly, Pierre Trudeau as Prime Minister, was a highly centralist one. However, Justice Beetz and Chief Justice Dickson disagreed sharply on how best to preserve provincial jurisdiction.

Chief Justice Dickson believed, perhaps more than any judge in our history, that the Constitution permitted a great deal of overlap between federal and provincial powers. The words of section 92 of the *Constitution Act, 1867* were broad words and if one did not erect too thick a wall, by invocation of such doctrines as exclusivity or "watertight compartment" or implied federal "occupation of the field", then a natural and fair interpretation of the words of section 92 would be sufficient to protect the appropriate level of provincial jurisdiction. In a well-known passage in *Re Ontario Public Service Employees' Union*, he summarized his conception of the relevant doctrinal principles in these words:

> *The history of Canadian constitutional law has been to allow a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.*[10]

Justice Beetz, who holidayed each summer on the shores of Maine, probably thought that Chief Justice Dickson got his tides and undertows mixed up[11]! To Justice Beetz, interplay, overlap, aspect and restrained approach to concurrency were not the core principles of federalism; rather exclusivity and the avoidance of overlap were required. In his most famous judgment, the long *Bell Canada II* judgment which he worked on for more than two years and which was released shortly before his retirement, Justice Beetz set out five propositions of constitutional interpretation. In one of them, he expressed reservations about the aspect doctrine, certainly the oldest and perhaps the most respected doctrine in Canadian constitutional law. He argued for a cautious interpretation of the doctrine, saying in a passage remarkably similar to the one set out above from the law review article written almost a quarter-century before:

> *The reason for this caution is the extremely broad wording of the exclusive legislative powers listed in ss. 91 and 92 of the* Constitution Act, 1867 *and the risk that these two fields of exclusive powers will be combined into a single more or less concurrent field of powers governed solely by the rule of paramountcy of federal legislation. Nothing could be more directly contrary to the principle of federalism underlying the Canadian Constitution* [...]

> *The double aspect doctrine is neither an exception nor even a qualification to the rule of exclusive legislative jurisdiction. Its effect must not be to create concurrent fields of jurisdiction, such as agriculture, immigration and old age pensions and supplementary benefits, in which Parliament and the legislatures may legislate on the* same *aspect. On the contrary, the double aspect theory can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction.*[12]

The fourth feature of Justice Beetz's jurisprudence that I would mention flows from the third. Justice Beetz's identification of exclusivity as the touchstone for Canadian federalism was not simply a doctrinal choice. For him, exclusivity served the absolutely fundamental goal of protecting Quebec's centuries-long jurisdiction over the subject matters crucial to its distinct identity: language, culture, law, education. The preservation of provincial autonomy was the dominant theme of the *Report of the Royal Commission of Inquiry on Constitutional Problems* (the Tremblay Commission) in 1956 and served as the anchor for the scholarship of most Quebec constitutional scholars in the 1960s, 1970s and 1980s. It was the dominant theme throughout these years of such scholars as Louis-Philippe Pigeon, Jacques-Yvan Morin, André Tremblay, Pierre Patenaude and Gil Remillard. As both a relatively quiet and invisible professor and a visible and powerful judge of Canada's highest court, Jean Beetz consistently supported and gave voice to this overriding concern, from a Quebec perspective, about Canadian federalism.

In this respect, Jean Beetz differed sharply from the two other great constitutional scholars of his professorial days, Frank Scott and Pierre Trudeau. They did not believe that provincial autonomy was synonymous with, or necessary to, the protection of the French-Canadian identity. They believed that in the 1850s and 1860s, when geography and cultural dualism had threatened to tear Canada apart, a federal system with a strong central government had been agreed to by both English- and French-speaking leaders. That federal system had been effective and had proved, over the years, to be compatible with social and economic prosperity and with the preservation of the French fact in Quebec.

A fifth feature of Justice Beetz's philosophy of federalism was his belief that provincial powers should be accorded a large content. This is particularly evident in his judgments in the labour cases like *Montcalm Construction*[13] and *Four B Manufacturing*[14], the administration of justice cases like *DiIorio*[15] and in his very broad interpretation of the phrase `matters of a local nature' in section 92(l6) in cases like *Dupond*[16].

Moreover, as a corollary of the broad interpretation of section 92(l6), Justice Beetz believed that the words of section 9l, particularly the vague and general ones, should be approached with substantial caution. For example, in *Montcalm Construction* he was not prepared to extend the federal aeronautics power or the power over federal works and undertakings to the construction of runways. The construction of runways, as opposed to their maintenance, was not an integral part of aeronautics.

Justice Beetz's most sustained analysis of the scope of federal legislative powers took place in the *Anti-Inflation Reference*. He was not prepared to extend the national dimension component of the federal peace, order and good government power to a subject matter which, although labelled one thing, inflation, was in his mind in fact an amalgam of several subject matters traditionally in provincial jurisdiction. Moreover, he refused (although in dissent on this point) to uphold a federal law on the basis of the emergency component of the peace, order and good government power without there being an explicit indication or signal that Parliament was in fact relying on this extraordinary power. In a

powerful and, in my view, beautiful passage which illustrates both his respect for federalism and his respect for the proper roles of governments and courts in a constitutional democracy, he wrote:

> *The extraordinary nature and the constitutional features of the emergency power of Parliament dictate the manner and form in which it should be invoked and exercised. It should not be an ordinary manner and form. At the very least, it cannot be a manner and form which admits of the slightest degree of ambiguity to be resolved by interpretation. In cases where the existence of an emergency may be a matter of controversy, it is imperative that Parliament should not have recourse to its emergency power except in the most explicit terms indicating that it is acting on the basis of that power. Parliament cannot enter the normally forbidden area of provincial jurisdiction unless it gives an unmistakable signal that it is acting pursuant to its extraordinary power. Such a signal is not conclusive to support the legitimacy of the action of Parliament but its absence is fatal. It is the duty of the Courts to uphold the Constitution, not to seal its suspension, and they cannot decide that a suspension is legitimate unless the highly exceptional power to suspend it has been expressly invoked by Parliament. Also, they cannot entertain a submission implicitly asking them to make findings of fact justifying even a temporary interference with the normal constitutional process unless Parliament has first assumed responsibility for affirming in plain words that the facts are such as to justify the interference. The responsibility of the Courts begins after the affirmation has been made. If there is no such affirmation, the Constitution receives its normal application. Otherwise, it is the Courts which are indirectly called upon to proclaim the state of emergency whereas it is essential that this be done by a politically responsible BODY BGCOLOR= "#FFFFFF".[17]*

The sixth and final feature about Justice Beetz's jurisprudence that I would mention is his great contribution to describing in understandable terms the analytical framework and important doctrinal principles of Canadian constitutional law. No judge has ever better described the process of characterizing a law[18]. And his discussion of the notions of exclusivity, aspect doctrine, immunity, concurrency and paramountcy in many cases is as clear, and yet sophisticated, as any in our history. Along with Chief Justice Laskin and Chief Justice Dickson, he elevated the level of discourse in Canadian constitutional law in the 1970s and 1980s.

CONCLUSION

My conclusions about Jean Beetz and his career as a law teacher and scholar and as a jurist are relatively simple ones. First, there was a remarkable consistency in his thinking and writing throughout his career. The constitutional professor and the constitutional judge were the same man. Secondly, the quality of Justice Beetz's thinking and writing was very high indeed. The best way I can illustrate this point is by saying that for sixteen years I have told my first year constitutional law students on some cold February morning: "In preparation for tomorrow's class, would you please read the *Anti-Inflation Reference*. You will be reading what is, in my opinion, the single best written judgment in a distribution of powers case in the history of Canadian constitutional law „ the dissenting judgment of Justice Jean Beetz."

Finally, I would say that Justice Beetz's contribution to Canadian constitutional law is an enduring one „ in two senses. First, as I mentioned above, he contributed a great deal to the development of constitutional doctrine. Secondly, at the end of the day, it is Justice Beetz's classical paradigm of

Canadian federalism that is, in my view, the dominant paradigm at the present time. And it is Justice Beetz's, and Chief Justice Dickson's, balanced interpretation of the contents of federal and provincial powers that appears to be firmly anchored in the Court's jurisprudence today, even though one has retired and, lamentably, the other, the scholarly and gracious Jean Beetz, has died.

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[2]*Reference Re Anti-Inflation Act*, (1976) 68 D.L.R. (3d) 452 (S.C.C.) (hereinafter: "*Anti-Inflation Reference*").

[3]*DiIorio and Fontaine* v. *Warden of the Common Jail of Montreal and Brunet*, (1976) 73 D.L.R. 491 (3d) 491 (S.C.C.).

[4]*Re Ontario Public Service Employees' Union and Attorney General for Ontario*, (1987) 41 D.L.R. (4th) 1 (S.C.C.).

[5]*McKay* v. *The Queen*, (1965) 53 D.L.R. (2d) 532 (S.C.C.).

[6]*Commission de la santé et de la sécuritié du travail* v. *Bell Canada*, (1988) 51 D.L.R. (4th) 161 (S.C.C.) (hereinafter: "*Bell Canada II*").

[7]*Commission du Salaire Minimum* v. *Bell Telephone Co. of Canada*, (1966) 59 D.L.R. (2d) 145 (S.C.C.) (hereinafter: "*Bell Canada I*").

[8]Bruce RYDER, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations", (1991) 36 *McGill L.J.* 308.

[9]Jean BEETZ, "Les attitudes changeantes du Québec à l'endroit de la Constitution de 1867", in Paul-André CRÉPEAU and Crawford Brough MACPHERSON (eds.), *The Future of Canadian Federalism*, Toronto, University of Toronto Press, 1965, p. 113, at p. 121.

[10]*Supra*, note 3, at 11.

[11]I should state my own preference here. It is for Chief Justice Dickson's approach. I remember fondly many long conversations with Justice Beetz on this question.

[12]*Supra*, note 5, at p. 172 (emphasis in original).

[13]*Montcalm Construction Inc.* v. *Minimum Wage Commission*, (1978) 93 D.L.R. (3d) 641 (S.C.C.).

[14]*Four B Manufacturing Ltd.* v. *United Garment Workers of America*, (1979) 102 D.L.R. (3d) 385 (S.C.C.).

[15]*Supra*, note 2.

[16]*Attorney General of Canada* v. *Dupond*, (1978) 84 D.L.R. (3d) 420 (S.C.C.).

[17]*Supra*, note 1, at 528 and 529.

[18]See, for example, *id.*, at 518 and 519.