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Federalism, Civil Law and the Canadian Judiciary: an Integrated Vision

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This book represents a tribute that would have deeply moved Justice Jean Beetz, B.A., LL.L., M.A., F.R.S.C., for the spirit in which it was conceived embodies so many of the qualities that personified Justice Beetz: a willingness to collaborate in the search for a deeper understanding of issues that confront our society; a profound love of the law; and a deep appreciation of the value of friendship and loyalty.

When I was invited to contribute to this collective effort to assess Jean Beetz's contribution to Canada, memories of our shared experiences came rushing back. I could recall when I first heard that he was to join us on the Supreme Court of Canada. I was delighted. I had already come to admire his work and had heard people speak of him in glowing terms. Over time, we developed a warm friendship and a close professional relationship. Some of the memories that I cherish most involve cases on which we

worked together, a few of which I will turn to shortly. With great sadness I learned from Jean that he would not be able to continue with us on the Court. I then watched his courageous struggle with cancer. One of my lasting memories is of a lunch that Jean and I had in Montreal with Chief Justice Lamer after Jean had retired and shortly before his death: Jean was as witty, charming and erudite as ever. In his final years, he displayed all of the qualities that I had long come to admire in that gentle, modest, brilliant man: he faced his final battle with the same courage, dignity and integrity with which he had lived his life.

Justice Beetz's career included an astonishing series of accomplishments. He obtained his first law degree from the Université de Montréal. A superb student, he won a Rhodes scholarship to attend Oxford University where he and the late Justice Julien Chouinard cemented a friendship that lasted a lifetime and that saw them together on the Supreme Court of Canada. At Oxford, Jean pursued a wide range of interests, rounding out his early legal training with a broader course of studies that exposed him to philosophy, literature, politics - in short, to the foundations of a liberal education. As a result, he came to see and understand law as something that fits into a broader social context. His earliest training provided him with tools that would later lead him to formulate a particularly sophisticated vision of law in context, a vision that is noteworthy both for its integrated nature and for its conviction that it was important to work toward ensuring that the Canadian federation remained viable.

Upon his return to Montreal from Oxford, Jean practised law briefly before beginning his career as an academic at the Faculty of Law at the Université de Montréal. He was renowned for his popularity with students and colleagues alike. His contribution to that faculty was impressive and in itself represents a legacy of which any professional could rightly be proud. Among his many accomplishments in building up his faculty's reputation was his involvement in establishing the Université de Montréal as a leading centre for public law analysis. Indeed, in May of 1961, Jean was named the director of the university's newly created Institute for Research into Public Law. The Institute's mandate was to pursue and promote research in the fields of constitutional and administrative law.

One of Jean's more astute hiring decisions involved his first research assistant, Pierre Trudeau, who joined the Institute in November of 1961[2]. Trudeau would go on to write some of his most important pieces on federalism while at the Institute[3]. The intellectual atmosphere was vibrant and Beetz and Trudeau would later have ample opportunity to voice their views on federalism as shaped through research conducted while at the Institute. That they did not always agree on the particulars of given constitutional questions would become apparent. But there can be no doubt that they both shared a profound concern for Quebec's place in Canada and that we are all richer for having had the benefit of their dialogue about this issue.

Later, Trudeau would ascend rapidly to become Prime Minister of Canada. For his part, Jean Beetz went on to serve as Assistant Secretary to the federal cabinet from 1966 to 1968, then Dean of Law at the Université de Montréal from 1968 to 1970, and then as Special Counsel to the Prime Minister for constitutional matters from 1968 to 1971. Shortly thereafter, he was appointed to the Quebec Court of Appeal in 1973 and then, at age forty-six, to the Supreme Court of Canada in 1974.

Once on the bench, Justice Beetz deployed his skills to great effect. Indeed, I can think of no finer tribute to his elegant turn of phrase in both French and English than the one that Gérald Beaudoin published soon after Jean's death:

> *Jean Beetz avait le culte du mot juste. Sa langue était châtiée, sa phrase toujours bien construite et claire, son style élégant et sa pensée profonde. Nous étions en présence d'un juriste, d'un philosophe et d'un humaniste.*[4]

In this article, I will focus on some of the ideas that Jean Beetz expressed so eloquently. In particular, I will concentrate on his vision of federalism and of the courts' role in managing the tensions inherent in federalism. Justice Beetz was always concerned about Quebec's place in Canada and in my view this concern may be seen, firstly, in his reflections on federalism and, secondly, in his approach to the interpretation of Quebec's Civil Code. He was well aware of the difficulties Canada confronted as it struggled to come to terms with changes to Quebec's social fabric. For him the challenge as a judge was to ensure that the law adapted in order to manage those changes as effectively as possible. It was a challenge that he was always ready to meet.

I. LEGITIMACY: THE BALANCE BETWEEN TRADITION AND REFORM

In an extraordinary piece written in 1971, as Jean Beetz stood on the boundary between his career as a scholar and senior civil servant and his equally distinguished career as a judge, he revealed that his humanist training and experience as a public lawyer had given him a profound understanding both of the human condition and of the way in which law's roots lie in the very fabric of our community[5]. He considered carefully issues that he would confront time and time again as a judge, most notably the tension between a community's desire to protect its customs and the need for tradition, legal or otherwise, to adapt to new realities. He recognized that law must be a living process, responsive to changing human needs and not a potpourri of fine-spun technicalities and arcane rules.

Central to this debate, however, in Jean's view, was the question of legitimacy. He recognized the limitations of the judicial process. He was acutely aware that the challenge any society faces is to ensure that its habits, customs and values are viewed as legitimate by those who must abide by the practices and laws that flow from their community's traditions. It was his view that legitimacy could most usefully be defined as having been attained when there was a "coincidence of established law with the aspirations and considered wishes of a free people"[6].

Jean stressed that legitimacy must not be confused with popularity. I am keenly aware of the importance of this proposition. Ensuring that the law and the judiciary retain legitimacy frequently involves having to hand down judgments that one is fully conscious will not satisfy everyone; indeed, Jean explained that

> *the purpose of the law is the regulation of social facts in the light of reason and consideration of justice. The law is a discipline in all senses of the word. It may have to oppose public opinion strenuously in order to protect the weak and repress the mighty. It may have to go against fashion and public mood with a view to maintain and to elevate standards of justice. This role is not compatible with the passive reflexion of society. To deny this role to the law is to deny its normative nature. Let us entertain little doubt about it: the law may be respected but it is seldom popular.*[7]

Thus, the challenge was to ensure that law was respected. But maintaining respect and legitimacy requires a willingness to adapt to evolving circumstances. Just as a community's values evolve, so too the law must evolve. In Jean Beetz's opinion, the advent of law reform commissions as part of that adaptive process was a welcome development.

Reform does not, however, necessarily mean a complete overhaul of a given area of law. Beetz was quick to stress that "reform presupposes the preservation of that which is being reformed, the modernization and restoration of old systems with a view to saving them by adapting them to new circumstances"[8]. At the same time, he recognized that reform might on occasion entail creating new systems intended to last. His vision was a subtle one that encouraged careful analysis and efforts to improve law, that was particularly concerned to avoid unnecessary disruption and instability, but recognized that at times one cannot avoid major systemic reform. No doubt that some would view Jean's vision of law and law reform as conservative. But in my view his vision was realistic and displayed a keen appreciation for the special role of law as a stabilizing, but never static, force in a democratic society.

Other contributors to this volume will concentrate on the work of Jean Beetz as a public lawyer. As a result, I do not propose to explore his efforts to reform this area of law so as to ensure that it retained its legitimacy in the face of dramatic changes in the nature and role of the State after the Second World War. But I do think it worth emphasizing that Jean applied his views about the nature of law and the role of reform to his analyses of such matters as the structure of administrative law in Quebec. And when he saw a need for radical surgery, he was quick to suggest ways in which the law could be improved. Working from his base at the Institute, he observed that:

> *Le désordre général du droit administratif québécois est imputable au fait que l'on n'a jamais tenté d'en avoir une vue d'ensemble.*[9]

He went on to suggest ways in which to develop a global perspective on administrative law, to bring order to the tangled web of administrative bodies and procedures that were in place in the early 1960s, and to ensure that the public was better informed about the ever growing phenomenon of the modern administrative State. Jean Beetz's willingness to see this corpus of rules and bodies evolve to meet changing times is a perfect example of his life-long commitment to the proposition that law must not stand still if it is to retain its legitimacy[10].

II. FEDERALISM'S INHERENT TENSIONS: THE CHALLENGE TO LEGITIMACY

Jean Beetz was not only a public lawyer with a broad understanding of the way in which law penetrates and sustains the social fabric, he was also a first rate private lawyer. And as a keen student of the civil law, he was especially preoccupied about how to ensure that this legal system evolved so as to retain its legitimacy and to remain pertinent for his fellow citizens.

Inevitably, this commitment to the civil law and its role in shaping private relations in Quebec led him to reflect on the extent to which federalism provided a satisfactory structure for the ongoing evolution of civilian principles. He could not but consider whether federalism was a sufficiently sophisticated governmental arrangement to allow the civil law to remain a BODY BGCOLOR= "#FFFFFF" of law that *would* coincide with the expectations of those that it affected on a daily basis. In turn, he was driven to consider whether the flexibility needed to sustain a distinct legal system was compatible with the long term viability of the federation.

In a piece written in 1965, while still director of the Institute[11], Jean conducted a probing analysis of Quebec's evolving perspective on Confederation. The piece appeared in a volume published in conjunction with the work of the Royal Commission on Bilingualism and Biculturalism. It provides a cross-section of views about our federation at a time when its very legitimacy was being thrown into question. The book is particularly interesting because it contains the work of such people as Messrs. Trudeau and Lalonde on the one hand and Mr. Parizeau on the other hand, authors whose views would later become more clearly distinct than at this early stage in their careers, when politics had not yet forced them to suppress many of the subtleties woven through their reflections on federalism. Moreover, the volume provides an early example of the dialogue in which Trudeau and Beetz would engage over the years. Trudeau's piece, not surprisingly, consisted of a strong argument against nationalism in any form and in favour of a federation built on reason[12]. Beetz's work involved a careful assessment of Quebec's changing views on the federation.

Beetz began his analysis by observing that a minority that is culturally homogeneous and wants to safeguard its collective identity has to protect itself from two distinct threats. First, an external threat that comes from the possibility that the majority's traditions will overwhelm those of the minority. Second, an internal threat that may arise if that minority does not take every available step to develop its own identity. In his view, the second threat was the more serious:

> *Le péril qui vient de l'intérieur est le plus grave: une collectivité dynamique, sûre d'elle-même et de ses moyens, a moins à craindre de ses voisins, en quelque domaine que ce soit*.[13]

Beetz was profoundly concerned to ensure that conditions existed that would enable Quebec to develop its identity within Confederation. He thought it essential that Quebec have the tools to enable it to be dynamic, confident - in short, to feel that it could realize its potential to the fullest within Canada.

Jean went on to suggest that one could distinguish at least two phases in Quebec's attitude toward Confederation. The first was passive and viewed the Constitution as designed to protect the francophone minority. The second was more active and viewed the Constitution both as a brake holding back Quebec's development and as a document that was seriously flawed.

With respect to the first of these perspectives, he noted that those who drafted the Constitution had deemed it appropriate to preserve the minority's culture through juridical protection of certain strategic sectors. Particularly critical, from Quebec's point of view, was the exclusion of federal power in matters relating to education and civil law: education, because many thought that it was the key to ensuring that Quebec's religion, language and culture were preserved; civil law because it intimately affects the individual, gives structure to the family and serves to regulate the use of property.

But this initial promise of protection needed to be reinforced through appropriate judicial interpretation. And it was not self-evident from the wording of the Constitution that the courts would necessarily maintain the protection that this document was supposed to provide. But the Privy Council, in a series of cases decided early this century, ensured that the protection offered was in fact real. While some have criticized the Privy Council's jurisprudence, Beetz explained that "[j]e suis personnellement d'avis que le Conseil privé a correctement interprété les articles 91 et 92 à ce point de vue, compte tenu des imperfections et même des contradictions du texte, que l'interprète ne peut supprimer, et dont il ne peut que s'accommoder"[14]. Indeed, once on the bench, Beetz would himself come to rely heavily on the Privy Council's reasoning, notably its understanding of the critical concept of "property and civil rights" found in section 92(13) of the *Constitution Act, 1867*[15].

In Jean Beetz's view the Privy Council had successfully identified the feature that lies at the very heart of the Constitution and is at the same time the source of internal tension. That is, the Privy Council had given expression to the principle of federalism. He went on to note:

> *Mais le principe fédéral, le seul que la Constitution exprime, et encore, seulement dans son préambule, n'est point neutre. Il propose le dilemme de la centralisation et de la décentralisation*.[16]

One of Jean's ongoing preoccupations was to find a balance between respecting the principle of federalism and ensuring that the tensions inherent within this principle did not prove so destructive as to undermine the Constitution itself. But as his early writing reveals, he was well aware this would be no easy task.

Indeed, it was his view that one of the great challenges that the federation faced stemmed from the way in which Quebec's evolution would aggravate tensions inherent in federalism. In its early and passive phase Quebec had not made full use of the powers of the State[17]. With time, however, Quebecers had come to have less faith that the Constitution and the civil law alone could secure their well-being. They now saw an important role for the State in the formulation of legislation in a wide range of sectors that had not traditionally been regulated through the Civil Code.

Jean Beetz's role as one of Quebec's leading public lawyers could not help but sensitize him to the ever increasing presence of the State in the lives of his fellow citizens. Indeed, we have already seen that as director of the Institute he was particularly preoccupied with the question how to reform relations between the State and the individual in light of the rapid growth of administrative agencies. Labour relations, securities law, the marketing of agricultural products, rent control, consumer protection - these were all examples of new areas in which the Government of Quebec had taken action. For Jean these were positive developments that revealed that Quebec had adopted a more active approach to its development. He noted:

> *Si le péril qui menace une minorité vient non seulement de l'extérieur, mais aussi de l'intérieur, de la passivité même de cette minorité, c'en est un que la minorité québécoise tente vigoureusement de surmonter*.[18]

But with this more activist approach to exercising the levers of governmental power that lay within the province's jurisdiction, new tensions would inevitably arise. As Quebec came to realize just how free it was to formulate legislation designed to move society forward, it would inevitably feel frustration in areas where its jurisdiction was limited. And it would feel doubly frustrated when the federal government sought to increase the scope of its jurisdiction in part through an aggressive use of its power to tax, something that Jean believed was equally inevitable. Moreover, because the Privy Council's jurisprudence had provided for expansive provincial jurisdiction, the risk was that the provinces would view any jurisprudential development that gave the federal government new power as a set-back. Beetz summarized the dilemma in the following terms:

> *Juridiquement, la Constitution peut donc se prêter à toutes les centralisations, mais ce n'est*

qu'avec difficulté qu'elle pourra se décentraliser plus qu'elle ne l'est, abstraction faite des modifications constitutionnelles. D'un point de vue québécois, cette situation signifie que le nombre des domaines dans lesquels la minorité peut agir comme une majorité n'est pas susceptible d'augmentation tandis que celui des domaines où elle ne peut exercer que la pâle influence des minorités peut, parfaitement, lui se multiplier. Potentiellement, la Constitution actuelle menace donc de placer les Québécois en minorité sur un nombre de plus en plus grand de domaines.[19]

Faced with this dilemma, Beetz perceived the challenge as twofold. First, it was important to ensure that federalism remained sufficiently flexible to allow provinces room to develop evolving legal systems which would retain legitimacy in the eyes of those whose lives these systems governed. It was therefore essential that there be careful management of ever growing tensions between the limits of a highly decentralized federation and the desire of a federal government to exercise its powers in such a way as to tackle problems that did not fit neatly within the heads of power set out in our Constitution. Second, it was essential that the civil law, one of the most critical components of Quebec's legal framework, be given full and rich expression - a project that could in turn help to legitimize federalism as a vehicle for the development of French Canada. It is, I believe, useful to see how Jean set about dealing with each aspect of this challenge.

III. MANAGING THE TENSIONS OF FEDERALISM: THE ROLE OF THE JUDICIARY

If one begins with the somewhat broader dimension of this problem, one discovers very quickly that Justice Beetz was deeply committed to the proposition that it was important to ensure Quebec retained the power to fashion law in ways that would respect its citizens' evolving social values. The consequences of this proposition for his understanding of the nature of federalism was in many ways most obvious in the majority's judgment in the *Patriation Reference*[20]. While I am obviously not in a position to discuss the way in which the judgments in that case came to have the shape they did, I think it important to note that Jean Beetz's role in the process whereby the Supreme Court of Canada reached a conclusion was extremely important. His views on federalism were very much in evidence in this instance.

A minority of the Court, the reader will recall, had interpreted the questions referred to the Court in such a way as to suggest that the only matter on which the Court should opine was whether the consent of *all* of the provinces was necessary in order to effect constitutional change[21]. These judges then found that there was no convention that requires that *all* of the provinces consent to constitutional change.

A majority of the Court, of which Jean and I were a part, did not interpret the questions before us in quite the same way[22]. We viewed them as being fundamentally about whether there is a constitutional convention that the federal Parliament would not proceed alone to modify the Constitution. From this perspective, the central question was "whether or not there is a conventional requirement for provincial agreement, not on whether the agreement should be unanimous assuming that it is required"[23]. After a thorough review of constitutional amendments that had directly affected federal-provincial relationship, we, the majority, concluded that "no amendment changing provincial legislative powers has been made

since Confederation when agreement of a province whose legislative powers would have been changed was withheld"[24]. While we felt that it would not be appropriate for the Court to devise a specific formula that would indicate the measure of provincial agreement required for the convention to be complied with, we were prepared to state that "at least a substantial measure of provincial consent is required"[25].

We then went on to explain the reason for this rule in language distinctly reminiscent of Jean's work in the nineteen-sixties. Indeed, we stressed that "[t]he reason for the rule is the federal principle"[26]. And in our view, the federal principle could not "be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities"[27].

This proposition was, in my view, consistent with Jean Beetz's profound concern to ensure that the tensions inherent within the federal principle be properly managed, lest they undermine the federation. In a country where one of the few constitutional principles that was clear was the federal principle, consensus with respect to change among the members of the federation was a prerequisite for ensuring that change did not lead to chaos.

I also think it interesting to note that the split within the Court may have been to some extent a reflection of distinct legal educations. Chief Justice Bora Laskin and Justice Estey, trained at Harvard University, were a good deal less sympathetic to arguments about convention than were Justice Beetz and Justice Chouinard, both of whom were exposed to public law at Oxford University.

In my view, the United States, with its written constitution, often displayed less receptiveness to arguments about constitutional convention than Great Britain, whose constitution is fundamentally rooted in convention. Thus, the decision in the *Patriation Reference* is of interest because it embodies a tension in interpretive approaches that reflects the differences in the legal histories of two countries that have greatly influenced constitutional jurisprudence in Canada.

Of course the decision provoked heated debate. Jean's former colleague Pierre Trudeau would later argue that the majority judgment had embraced a form of the compact theory of Confederation at the expense of a vision of Canadian sovereignty rooted in the Canadian people[28]. On the other hand, others like Professor Lederman, one of Canada's leading constitutional scholars, were of the view that the conception of federalism embodied in the majority's judgment accurately reflected the principles underlying the Constitution. Lederman concluded an article in the *McGill Law Journal* with these words:

> *What should be said here is a word or two in praise of the Supreme Court of Canada. All nine judges identified the three fundamental theoretical issues that had to be faced as a matter of constitutional iurisprudence. They differed in critical ways on the right answers concerning those issues, but when they discovered that this was so, they grouped themselves very effectively into two majorities and two minorities. The resulting four judgments explored the basic themes thoroughly from all angles with great professional skill and distinguished scholarship. Choices had to be made and they were made. The judges faced the music so to speak. Majority (J)udgment II on convention emerged, and had the effective result described earlier. I think authoritative judicial review is alive and well and living in Canada.*[29]

Regardless of the decision's merits, it seems to me that it was consistent with the vision of the

Constitution that Justice Beetz had enunciated in some of his earlier work. As Professor Swinton has observed, a classical conception of federalism helped to shape his approach to our Constitution. This vision of the federal principle demanded respect for the autonomy both of provincial governments and of the federal government within the jurisdictions that had been allocated to them[30]. It comes as no surprise, then, that Justice Beetz viewed the Supreme Court of Canada's responsibility as being to implement the federal principle and he understood that principle to entail that there must be a substantial degree of provincial consent to any attempt to modify the terms upon which the provinces could exercise their powers within their jurisdiction.

We know from Jean's earlier work that he was rather ambivalent about the merits of federalism. But I think it a measure of his integrity that once on the bench he saw that his responsibility was to uphold the federal principle. Until such time as the federal government and provinces agreed to change that basic principle, it was his view that the highest court in the land had no business doing anything other than ensuring that the principle was respected. For the Court to take it upon itself to rewrite the terms of Confederation would have placed the courts in an invidious position, one that would have had long term ramifications for their legitimacy as arbiters of constitutional disputes.

As Justice Beetz had noted several years earlier, maintaining legitimacy is not to be confused with popularity. This is not to say that those who saw flaws with the principle of federalism as it had developed over many years in Canada did not have reason to be concerned with some of the results that flowed from that principle. Indeed, Jean himself often expressed grave concerns. But it is to say that one must carefully examine the respective roles of courts and legislatures when considering how best to alter the federal principle. When what is at stake is the very framework upon which the country is built, it is not appropriate for courts to initiate systemic change to that framework. To move down this path would undermine the court's subsequent role in upholding the terms of any new framework. Where reform on this scale is sought, it is best for elected representatives to reach agreement about how to alter the most fundamental rules governing our society.

Justice Beetz's respect for the federal principle shaped his decisions in many other instances, notably those involving disputes over the proper scope of the provinces' powers. For example, in *Reference re: Anti-Inflation Act*[31] the issue was whether the federal government was competent to enact wage and price control legislation that purported to apply to the provincial private sector. While I was of the view that the legislation was valid for the peace, order and good government of Canada and that Parliament had acted in response to what it perceived to be a serious national emergency, Jean concluded that Parliament was intruding in areas of provincial competence and that it had not indicated in sufficiently clear terms that it was relying on its emergency powers.

Justice Beetz first considered the federal government's submission that the subject matter of the legislation was the containment of inflation and that this was a matter that went beyond local provincial concern. His thorough review of the Privy Council's early efforts to protect provincial jurisdiction picks up where his earlier analysis of this jurisprudence as an academic left off[32]. He dismissed the proposition that containment and reduction of inflation was a new subject matter that properly belonged within federal jurisdiction. In his view, this proposed heading was simply an aggregate of several subjects, some of which formed substantial parts of provincial jurisdiction. In his view, "[i]ts recognition as a federal head of power would render most provincial powers nugatory"[33].

Justice Beetz then dealt with the federal government's submission to the effect that the inflationary situation in October 1975 constituted a national emergency and that the legislation should be upheld under the federal government's power to deal with national emergencies. He stated that the:

> Anti-Inflation Act *is, as its preamble states, clearly a law relating to the control of profit margins, prices, dividends and compensation, that is, with respect to the private sector, a law relating to the regulation of local trade, to contract and to property and civil rights in the provinces, enacted as part of a program to combat inflation. Property and civil rights in the provinces are, for the greater part, the pith and substance or the subject matter of the* Anti-Inflation Act. *According to the Constitution, Parliament may fight inflation with the powers put at its disposal by the specific heads enumerated in s. 91 or by such powers as are outside of s. 92. But it cannot, apart from a declaration of national emergency or from a constitutional amendment, fight inflation with powers exclusively reserved to the provinces, such as the power to make laws in relation to property and civil rights. This is what Parliament has in fact attempted to do in enacting the* Anti-Inflation Act.[34]

In Beetz's view, the extraordinary nature of the emergency power dictated that the manner and form in which it should be invoked and exercised also be extraordinary. At the very least, there should not be the slightest degree of ambiguity that the power was being invoked. He asserted that "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"[35]. While such a signal was not conclusive in establishing the legitimacy of Parliament's actions, its absence was fatal.

Thus, Justice Beetz's commitment to defending the federal principle had once again driven him to adopt a solution that did not tolerate intrusions into provincial jurisdiction, particularly where the provinces' power over property and civil rights was at stake. In his view, in order to manage the tensions inherent in federalism it was important that there be no unjustifiable weakening of the cornerstone on which rested critical aspects of provincial jurisdiction (for example, the Civil Code in Quebec). And the list of cases in which Justice Beetz took a firm stance in defence of the proposition that each level of government should respect the federal principle does not stop here.

In yet another instance, *Construction Montcalm Inc.* v. *Minimum Wage Commission*[36], Justice Beetz, writing for a majority of the Supreme Court of Canada, held that provincial minimum wage laws continued to apply to employees of a Quebec based building company even when that company's employees were working under contract with the Crown in right of Canada in connection with the construction of an airport. It was his view that the construction of an airport was *not* in every respect an integral part of aeronautics. Relying this time on a series of Privy Council decisions that considered the limit of the federal government's jurisdiction over railways, he held that the payment of wages remained a matter subject to provincial jurisdiction even if the wages were received in connection with a project ultimately subject to federal jurisdiction.

Moreover, he stressed that the exclusive power of the provinces to make laws in relation to property and civil rights was *not* limited by the fact that one was dealing with federal lands. The only limitation was that the activity take place within the province. As he put it, "[t]he federal Crown lands do not constitute extra-territorial enclaves within provincial boundaries"[37].

Thus, the *Patriation Reference*, the *Anti-Inflation* case and the decision in *Montcalm* serve to illustrate that in Jean Beetz's view the courts' role was to uphold one principle underlying our Constitution that is clear: the federal principle[38]. At the same time, he understood that that principle would inevitably give rise to tensions. He therefore saw the courts' role as involving a second dimension: managing those tensions. In this way, he considered the rule of law essential to ensuring that federalism remained a

viable framework around which to build our country. It seems to me that while legitimate differences of opinion may exist with respect to the appropriate balance of federal and provincial power in our federation, the proposition that courts must manage tensions inherent in federalism highlights the essential role the judiciary fulfils in our federation.

IV. FEDERALISM AND THE CIVIL LAW

It is when one turns to the work of Justice Beetz on the civil law that one sees most clearly his vision of federalism married to his understanding of the way in which courts should work to ensure that law retains its legitimacy in the eyes of those it affects. Moreover, it is here one sees Jean coming to terms with what I have suggested was the second limb of the challenge he had set for himself in his quest to secure Quebec's place within the federation. For if legitimacy was attained when there was a "coincidence of law with the aspirations and considered wishes"[39] of those law is there to serve, then it was essential that the law properly within Quebec's jurisdiction evolve so as to remain coincident with the expectations and aspirations of those it affected directly. In Quebec, this meant that civil law, codified or otherwise, had to respond to changing times.

Jean Beetz was of course a dynamic civilian jurist. He was perpetually concerned to push the civil law forward, to ensure that it remained pertinent and sensitive to changing time. And over the course of our shared years on the bench, I was repeatedly struck by the extent to which the rigour with which he pursued this task struck a cord in Canadian civil law faculties. Jean Beetz's work ensured that the Supreme Court of Canada is not only acknowledged as the highest court in the land, but is also held in esteem across this country. The profound respect accorded to Justice Beetz's civil law jurisprudence is without question one of the most important reasons why we can today assert that some of the early hostility directed toward the Supreme Court's analysis of civil law issues is truly a thing of the past[40]. As Jean knew all to well, the very legitimacy of the Court and the law rests ultimately on the quality of its jurisprudence.

Justice Beetz's work in the civil law area was every bit as subtle and complex as his work on federalism. He was never one to accept that the civil law should be sacrificed at the altar of dogmatic assertions about the role it should play in fostering a given vision of Quebec. As his early observations on Quebec's changing perspectives on federalism revealed, he was well aware of the dangers of projects that were ideologically driven. He was far from convinced that a healthy society could be built on anything other than a calm sense of self-confidence alert to that society's traditions.

This perspective was very much at work in his civilian scholarship. Unlike some of his predecessors, Justice Beetz was not concerned to defend a given conception of the nature and structure of the civil law[41]. Rather, his primary concern was to ensure that the civil law remained sensitive to people's day-to-day lives and not lose touch with a rich legal heritage. At the same time, he was not averse to looking to other legal traditions in order to ensure that the civil law absorbed new ideas. This was not done with a view to grafting principles on to the Civil Code that could not possibly be thought to fit. Rather, it was done in the belief that the civil law would produce more imaginative answers to contemporary problems consistent with the system's own logic if it were sensitive to how other systems grappled with similar issues. In this respect, I believe Jean would have thoroughly approved of the process that has recently led to the adoption of a new *Civil Code of Québec*[42]. This process has involved the kind of open-mindedness and willingness to respond to changing times that Jean strove for in his own work. The new Code has seen fit to overhaul areas of private law in a manner that is clearly sensitive to developments in other jurisdictions but is nonetheless faithful to the particularities of Quebec's civilian heritage.

In short, Jean's vision of the civil law was outward looking yet sensitive to its deep rooted traditions. He refused to fall prey to that perspective on the world that he had once characterized as self-destructive: an inward-looking approach that refused to stand up with confidence in order to examine how the rest of society was dealing with its problems. At the same time, he was faithful to his earlier reflections on the nature of law reform: he knew that law reform was not simply about abandoning tradition. Rather, it was about modernizing tradition in a way that retained its strengths.

Nowhere is this vision more obvious than in his decision in *Cie Immobilière Viger Ltée* v. *Laureat Giguère Inc*.[43]. Faced with a situation in which a contractor had done work on property subsequently transferred to a BODY BGCOLOR= "#FFFFFF" that was not a party to the original contract, the contractor sued that third party with respect to the balance owing for the work done. This gave Justice Beetz an opportunity to consider whether there is a doctrine of unjust enrichment in the civil law, despite the absence of a clear provision to this effect in the *Civil Code of Lower Canada*.

In the course of affirming that the theory of unjust enrichment was undeniably a part of the civil law, Justice Beetz traced the doctrine's evolution. He asserted that the civil law's commitment to the principle of unjust enrichment was no longer in doubt and that discussion now concerned the doctrine's theoretical basis. While he noted that some support for the doctrine could be found in particular articles of the Code, he stressed that:

> *On peut également trouver un tel support dans une extrapolation des multiples dispositions du* Code civil *qui n'en sont que des applications particulières*. Le Code civil ne contient pas tout le droit civil. Il est fondé sur des principes qui n'y sont pas tous exprimés et dont il appartient à la jurisprudence et à la doctrine d'assurer la fécondité.[44]

Justice Beetz thereby revealed that he was prepared to approach the Civil Code in a creative manner, sensitive to the traditions that informed its provisions, but willing to go beyond these provisions if this were necessary to ensure that the Code was responsive to contemporary legal needs. It seems to me that this is a perfect example of Jean's refusal to accept dogmatic assertions about specific provisions of the Civil Code being the sole source of legal principle.

Justice Beetz went on to lay out a framework for the analysis of questions of unjust enrichment that is logical, clear and to the point. Indeed, as I sought to inject order into the common law's approach to questions of unjust enrichment[45], I often wished that the common law were as straightforward as the elegant structure that my brother Beetz put in place. More particularly, he stated that an action for unjust enrichment was subject to the following conditions:

> *1. un enrichissement;*

2. un appauvrissement;
3. une corrélation entre l'enrichissement et l'appauvrissement;
4. l'absence de justification;
5. l'absence de fraude à la loi;
6. l'absence d'autre recours.[46]

In my view, Justice Beetz's decision in *Giguère* reveals the way in which a skilful judge can address

gaps in the law that become apparent with the course of time. Even more importantly, *Giguère* illustrates that provided the tension within the federal principle is well-managed, creative-civilian thinking can indeed flourish in our federation.

Nor was *Giguère* an isolated incident. Time and time again, faced with jurisprudence that was moving down problematic paths, Justice Beetz would focus his efforts on clarifying governing principles and on putting matters back on track. For example, in *Rubis* v. *Gray Rocks*[47], he was faced with a situation in which a lower court judge had relied on analogies with common law principles governing occupiers' liability to find a hotel liable for a young child's injuries when that child had climbed up on a window ledge, pushed on a screen and fallen through a window. The plaintiff invoked three arguments, each one turning on a distinct provision of the Civil Code concerned with the law of quasi-delict.

First, the plaintiff pointed to article 1054 of the Code, which provided that a person is responsible for the damage caused by the fault of things he has under his care. Beetz held that article 1054 was not applicable where the damage did not stem from the autonomous behaviour of the thing itself. And in this instance, it was not possible to talk about the child's injuries stemming from the autonomous behaviour of the screen since it had been pushed by the child.

Second, the plaintiff invoked article 1055 of the Civil Code, which provided that the owner of a building is responsible for the damage cause by its ruin, where that ruin has "happened from want of repairs or from an original defect in its construction". After a thorough review of the jurisprudence concerning this provision, Jean observed that:

> *Si la victime d'un accident fait du bâtiment ou d'une partie du bâtiment un usage contraire à sa destination, elle ne peut tenir le propriétaire responsable du dommage qui résulte de sa ruine. La jurisprudence est constante sur ce point.*[48]

Finally, and for our purposes most significantly, the plaintiff had argued that the window constituted a trap and had gone on to invoke arguments frequently found in the common law with respect to the liability of a proprietor toward invitees. But Jean made clear that in his view it was important not to lose sight of the distinctive traditions embodied in the civil law. He stated:

> *je suis d'avis que c'est une erreur d'invoquer en droit civil ces catégories de la common law. Elles dérogent à la généralité de l'art. 1053, ne tiennent pas compte de la présomption de l'art. 1054 et des particularités de l'art. 1055 et on ne peut pas être assuré qu'elles conduisent nécessairement au même résultat que les principes du droit civil.*[49]

Justice Beetz went on to point to Mignault's observations in *Desrosiers* v. *The King*[50], to the effect that the civil law and the common law were distinct legal systems and that it was important that one interpret each system in a manner consistent with its own traditions. Only where a rule had clearly been imported from the other system was it appropriate to resort to a principle developed within that system.

In the course of sweeping away jurisprudence that had awkwardly sought to graft common law concepts on to the civil law, Jean made clear that the principles that were applicable were none other

than those embodied in articles 1053 and 1055. While Jean was the first to encourage jurists to look to legal traditions other than their own for inspiration, he was equally committed to the proposition that the civil law had to remain sensitive to its distinctive heritage. Evolution that absorbed new ideas and that took place in a manner consistent with that heritage was entirely appropriate. Reaching out to a distinct tradition in order to import legal concepts that could not readily be integrated with civil law principles was quite inappropriate. All the more so when the Civil Code was quite clear about the principles that governed the situation before the Court.

In the process, Justice Beetz crafted an elegant judgment that forced one to return to basic principles underlying particular sections of the Civil Code. This he would do time and time again. Indeed, one of his finest pieces of work involved a careful distinction between an article of the *Civil Code of Lower Canada* that concerned questions of parental authority and an article of the *Civil Code of Québec* that concerned the custody of children.

More precisely in *C. (G.)* v. *V.-F. (T.)*[51] , Justice Beetz faced a situation in which the appellants sought to obtain physical custody of their nephew and niece on the ground that the father of these children had lost the attributes of parental authority as a result of the absence of affection between himself and his children. Beetz emphasized that one had to distinguish between a loss of parental authority and a loss of custody rights.

With respect to the loss of parental authority, article 654 of the *Civil Code of Québec* stated that the court had to declare that the parent in question had been totally or partially deprived of that authority and that this authority could only be deprived "for serious cause and in the interest of the child"[52]. Counsel for the appellants had suggested that an award of custody would in effect amount to a partial deprivation of parental authority. But Jean was quick to disentangle the concepts that were run together in this argument.

He held that the granting of custody in accordance with article 30 of the *Civil Code of Lower Canada* did not amount to the total or partial deprivation of that authority, it simply amounted to a modification of the exercise of the right[53]. In his view it was essential that one not confuse the principles underlying article 654 of the *Civil Code of Québec* and article 30 of the *Civil Code of Lower Canada*. With respect to the former, Jean noted that:

> *Qu'elle soit totale ou partielle, la déchéance n'entraîne pas seulement la perte de l'exercice des attributs de l'autorité parentale, mais également la perte de l'autorité elle-même dont le titulaire cesse alors d'être investi. Elle ne peut être prononcée que pour un motif grave et dans l'intérêt de l'enfant* [...][54]

Turning to article 30, he stated:

> *Tandis que la déchéance partielle enlève au titulaire le droit de garde lui-même, l'attribution de la garde à un tiers en application de l'art. 30 C.c.B.-C. ne permet que d'en aménager l'exercice.*[55]

Having neatly distinguished the purpose of these provisions, Beetz then embarked on a thorough analysis of the various articles of the *Civil Code of Procedure*, the *Civil Code of Lower Canada* and the *Civil Code of Québec* that govern questions concerning custody and the interests of the child with a view to drawing out the principles underlying this statutory framework. Once again, he was not content simply to scratch the surface of the Codes. He pushed relentlessly to clarify the premises underlying their provisions in the conviction that it was only in this way that one could obtain a truly rich understanding of the Codes' objectives. The result was a masterful review of the objectives underlying the Codes' approach to questions of custody. He concluded:

> *La jurisprudence précitée illustre qu'il n'est pas nécessaire, aux fins de l'art. 20 C.c.B.-C., de parvenir à une conclusion défavorable sur la conduite du titulaire de l'autorité parentale pour que la garde soit accordée à une tierce personne* [...]
>
> [...] *le titulaire qui perd l'exercice du droit de garde n'est pas dépouillé de tous les attibuts de l'autorité parentale. Le démembrement de l'exercice de l'autorité parentale ne fait pas perdre au parent ou gardien sa qualité de titulaire de l'autorité parentale.*[56]

Once again, then, Beetz had succeeded in straightening out a difficult BODY BGCOLOR= "#FFFFFF" of law. As in *Rubis*, his technique involved going back to the relevant articles of the Codes and clarifying the principles that gave shape to these provisions. The result was yet another decision that stands out for its crisp reasoning and the elegant analytic structure with which the reader is provided.

Whether it was a matter of giving shape to principles of unjust enrichment, reminding colleagues of the foundations of quasi-delict, straightening out muddled arguments in family law or clarifying some other area of the civil law[57], Jean was always prepared to approach the exercise with an open mind and a willingness to be creative. At the same time, he was sensitive to the importance of tradition in maintaining legitimacy. He was always careful to make clear how his solutions were linked to the principles that underlie the civil law. The result was some of the finest civilian decisions that the Supreme Court of Canada has handed down to date.

CONCLUSION

In the course of producing a rich BODY BGCOLOR= "#FFFFFF" of civilian jurisprudence, Jean Beetz ensured that the law that was properly within provincial jurisdiction evolved to meet changing legal needs. In this way, he revealed that provided the tensions inherent in federalism are properly managed, it is indeed possible to generate law that retains its legitimacy because it is sensitive to the community's deepest traditions and values. At the same time, Jean's approach to the civil law was outward looking and always willing to move forward to embrace new approaches to the promotion of justice. His careful mix of creativity, respect for tradition and meticulous reasoning was the secret to developing a BODY BGCOLOR= "#FFFFFF" of jurisprudence that continues to inspire all those who are students of the civil law.

Underpinning his approach to the civil law was a deep commitment to the proposition that if federalism is to remain viable, then the judiciary must ensure that the federal principle is respected until governments agree to some other constitutional arrangement. His understanding of the critical role of the

rule of law in a federal state and its implications for the judiciary's responsibilities in upholding the foundation of that federation was truly insightful.

Jean's integrated vision of federalism, the civil law and the pivotal role that the judiciary must play in ensuring that the civil law does indeed flourish in Canada reveals a remarkably balanced understanding of the ways in which federalism can foster the development of French Canada. He showed us all that while federalism is far from problem free, if the federal principle is carefully managed then all Canadians can be part of a country that is much richer for having more than one legal culture. The management of competing visions of federalism is of course no easy task. But if anyone succeeded in an area notorious for its pitfalls, it was Jean Beetz.

Jean was in every sense a great Canadian. Though I deeply miss his friendship, I know that his contribution to legal scholarship and legal practice in this country was so profound that his memory will not be forgotten; he has left us an extraordinarily rich legal legacy.

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[1]Supreme Court of Canada, Chief Justice (Retired). I acknowledge with thanks the research assistance of Robert Yalden, Faculty of Law, McGill University, in the preparation of this article.

[2]"Inauguration de l'Institut de recherche en droit public", (1962) *Thémis* 66.

[3]See, for example, Pierre TRUDEAU, "Quebec and the Constitutional Problem", in *Federalism and the French Canadians*, Toronto, MacMillan Company of Canada Limited, 1968, at pp. 3-51.

[4]Gérald A. BEAUDOIN, "L'héritage du juge Jean Beetz", *Le Journal du Barreau*, 1er décembre 1991, p. 20.

[5]Jean BEETZ, "Reflections on Continuity and Change in Law Reform", (1972) 22 *U. of T.L.J.* 129.

[6]*Id*., at 132.

[7]*Id*., at 138.

[8]*Id*., at 138 and 139.

[9]Jean BEETZ, "Uniformité de la procédure administrative", (1965) 25 *R. du B.* 244, 250.

[10]For examples of Jean's work in this area see his decision in *Syndicat des Employés de Production du Québec et de l'Acadie* v. *Canada Labour Relations Board*, [1984] 2 S.C.R. 412; *Blanchard* v. *Control Data*, [1984] 2 S.C.R. 476; *Syndicat national des employés de la Commission scolaire régionale de l'Outaouais* v. *Union des employés de Service et Bibeault*, [1988] 2 S.C.R. 1048.

[11]Jean BEETZ, "Les attitudes changeantes du Québec à l'endroit de la Constitution de 1867", in Paul-André CRÉPEAU and C.B. MacPHERSON (eds.), *The Future of Canadian Federalism*, Toronto, University of Toronto Press, 1965, at pp. 113-138.

[12]Pierre TRUDEAU, "Federalism, Nationalism and Reason", subsequently republished in *Federalism and the French Canadians*, *op. cit.*, note 2, at pp. 183-203.

[13]J. BEETZ, *loc. cit.*, note 10, at 113.

[14]*Id.*, at 117 and 118, footnote 11. It is interesting to note in this regard that Pierre Trudeau was also sympathetic to the Privy Council's jurisprudence in this area. See his "Federalism, Nationalism and Reason", in *Federalism and the French Canadians*, *op. cit.*, note 2, at p. 198.

[15]See the discussion of *Reference re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, *infra*, note 30.

[16]J. BEETZ, *loc. cit.*, note 10, at 119.

[17]*Id.*, at 121, where Jean Beetz notes that "... les Québécois craignaient l'État".

[18]*Id.*, at 129.

[19]*Id.*, at 133.

[20]*Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

[21]*Id.*, at 850, where the minority (Chief Justice Laskin and Justices Estey and McIntyre) observed:

"From the wording of the questions and from the course of argument it is clear that the questions mean the consent of *all* the provinces. This then is the question which must be answered on this part of the

References. An affirmative answer would involve a declaration that such a convention, requiring the consent of *all* of the provinces exists, while a negative answer would, of course, deny its existence. No other answers can be open to the Court for, on a reference of this nature, the Court may answer only the questions put and may not conjure up questions of its own which, in turn, would lead to uninvited answers..."

[22]*Id*., The majority also included Justices Martland, Ritchie, Chouinard and Lamer.

[23]*Id*., at 875.

[24]*Id*., at 893.

[25]*Id*., at 905.

[26]*Id*.

[27]*Id*., at 905 and 906.

[28]Pierre TRUDEAU, "How the state was set for the abdication to the provinces", (April 1991) *Canadian Speeches* 2, at 5. It is not entirely clear how one can reconcile the vision that underlies this proposition with the vision that is at play in some of Trudeau's earlier work. See, for example, p. 198 of "Federalism, Nationalism and Reason", *loc. cit*., note 11, where he observes: "it has long been a custom in English Canada to denounce the Privy Council for its provincial bias; but it should perhaps be considered that if the law lords had not leaned in that direction, Quebec separatism might not be a threat today; it might be an accomplished fact." In my view, it is the very same vision of federalism at play in the Privy Council's jurisprudence that helped to shape the majority's position in the *Patriation Reference*.

[29]W.R. LEDERMAN, "The Supreme Court of Canada and Basic Constitutional Amendment „ An Assessment of Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)", (1982) 27 *McGill L.J.* 527, at 536. In a footnote at p. 540, Lederman said, in part:

"The Foreign Affairs Committee of the British House of Commons (the Kershaw Committee), in their First Report published on 30 January 1981, had concluded, for purposes of advising the British Parliament of its constitutional position, that some substantial measure of provincial consent rather than unanimity was what constitutional convention required, at least so far as the British Parliament was concerned. This Report and the two that soon followed are very distinguished documents, fully researched and thoroughly argued. Obviously the Reports owe much to the guidance of leading British experts in constitutional matters who either were part of the staff of the Committee or gave testimony to it."

[30]K. SWINTON, *The Supreme Court and Canadian Federalism ,, The Laskin ,, Dickson Years*, Toronto, Carswell, 1990, at p. 260. Professor Swinton observes: "His vision of the constitution was indeed guided by a concern for provincial autonomy, a value which he embedded in Canadian traditions and the language of the constitutional document, but his reading of that document was influenced by a classical vision of the federal system, which demanded respect for the autonomy of the federal, as well as the provincial governments in the areas of jurisdiction which the constitution allocated to each". Nor was Justice Beetz the only jurist to subscribe to this school of thought: see, for example, Louis-Philippe PIGEON, "The meaning of Provincial Autonomy", (1951) 29 *Can. Bar Rev.* 1126.

[31]*Reference re: Anti-Inflation Act*, *supra*, note 14.

[32]See especially his analysis of these decisions in "Les attitudes changeantes du Québec à l'endroit de la Constitution de 1867", *loc. cit.*, note 10.

[33]*Id*., at 458.

[34]*Id*., at 452.

[35]*Id*., at 463 (my emphasis).

[36]*Construction Montcalm* v. *Minimum Wage Commission*, [1979] 1 S.C.R. 754.

[37]*Id*., at 777.

[38]Jean's classical vision of the Constitution was, of course, at work in his decisions concerning other previsions of the *Constitution Act, 1967*: see, for example, his restrictive approach to the interpretation of the federal government's criminal law power in *Attorney-General for Canada* v. *Dupond*, [1978] 2 S.C.R. 770.

[39]J. BEETZ, *loc. cit.*, note 4.

[40]For a discussion of some of this criticism, see J.G. SNELL and F. VAUGHAN, *The Supreme Court of Canada*, Toronto, Osgoode Society, 1985, at p. 254.

[41]Whereas some have suggested that a jurist like Mignault had views about the structure of the civil law that were a good deal more firm. In this respect, see David HOWES, "From Polyjurality to Monojurality: the Transformation of Quebec Law, 1875-1929", (1987) 32 *McGill L.J.* 523.

[42]*Civil Code of Québec*, S.Q. 1991, c. 64.

[43]*Cie Immobilière Viger Ltée* v. *Lauréat Giguère*, [1977] 2 S.C.R. 67.

[44]*Id*., at p. 76 (my emphasis).

[45]See, for example, my decisions in *Rathwell* v. *Rathwell*, [1978] 2 S.C.R. 436; *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834; *Sorochan* v. *Sorochan*, [1986] 2 S.C.R. 38.

[46]*Supra*, note 42, at p. 77.

[47]*Rubis* c. *Gray Rocks*, [1982] 1 S.C.R. 452.

[48]*Id*., at 460.

[49]*Id*., at 468.

[50]*Desrosiers* v. *The King*, (1920) 60 S.C.R. 105, at 126.

[51]*C. (G.)* v. *V.-F. (T.)*, [1987] 2 S.C.R. 244.

[52]Article 654 of the *Civil Code of Québec* (1981) provided:

"Le tribunal peut, pour un motif grave et dans l'intérêt de l'enfant, prononcer, à la demande de tout intéressé, la déchéance totale ou partielle de l'autorité parentale à l'égard des père et mère, de l'un d'eux ou du tiers à qui elle aurait été attribuée."

"The court may, for serious cause and in the interest of the child, on the motion of any interested person, declare the father, the mother or either of them, or a third person on whom parental authority may have been conferred, to be totally or partially deprived of such authority".

[53]The opening of article 30 of the *Civil Code of Lower Canada* stated that:

"L'intérêt de l'enfant et le respect de ses droits doivent être les motifs déterminants des décisions prises à son sujet."

"In every decision concerning a child, the child's interest and the respect of his rights must be the determining factors".

[54]*Desrosiers* v. *The King*, *supra*, note 49, at 260.

[55]*Id*., 266.

[56]*Id*., at 280 and 281.

[57]Other notable decisions include *Banque Nationale du Canada* v. *Soucisse*, [1981] 2 S.C.R. 339 and *Desgagné* v. *Fabrique de la paroisse St-Philippe d'Arvida*, [1984] 1 S.C.R. 19.