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Les Éditions Thémis
Faculté de droit, Université de Montréal
C.P. 6128, Succ. Centre-Ville
Montréal, Québec
H3C 3J7

Téléphone : (514)343-6627
Télécopieur : (514)343-6779
Courriel : themis@droit.umontreal.ca

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Jean Beetz as Judge and Colleague

Hon. Gerald Le Dain, C.C., Q.C., LL.D.[1]

I attempted to sum up my general impressions of Jean Beetz as a judge and a person in the necessarily brief tribute I was invited to prepare for the memorial ceremony in the Supreme Court of Canada on October 16, 1991. I take the liberty of quoting that tribute here because it serves as a convenient point of departure for the further things I propose to say about Jean Beetz as a judge and a colleague, with reference to his participation in some important constitutional cases. Its quotation here has perhaps the further merit of disclosing at the outset that, in addition to having great respect and admiration for Jean Beetz as a jurist, I was very fond of him as a person, although I do not think that has coloured my appreciation of his qualities as a judge and a colleague. On that occasion I said:

> *As a judge Jean Beetz displayed not only an exceptionally powerful and penetrating intellect but also wisdom and intellectual integrity, qualities of judgment and character which do not invariably accompany superior intelligence. He had very high standards of judicial craftsmanship, which have provided a model of scholarship, precision and clarity.*
>
> *As a person Jean Beetz was a gentleman of the old school, of unfailing courtesy and charm in personal relations. He was highly cultivated, had a delightful sense of humour, and behind his great personal dignity revealed a capacity for warmth and affection in friendship. His capacity for friendship was not the least of his many gifts and will live in the memory of his friends alongside his great professional achievement.*

The qualities which I wish to emphasize in this further appreciation of Jean Beetz are his constitutional scholarship and insight, his statesmanlike approach to constitutional adjudication, his judicial craftsmanship and his collegiality. I propose to illustrate these qualities by reference to his contribution to the work of the Supreme Court of Canada in three areas of constitutional law ,, language rights, federal undertakings and the peace, order and good government power ,, as I was able, as a colleague, to appreciate that contribution because of my own special interest in those areas.

I propose to speak first of Jean Beetz's collegiality. One cannot fully appreciate a judge's contribution to the work of an appellate court unless one has known the contribution which that judge has made to the thinking in cases in which he or she is not shown as the author of an opinion. Judgment in an appellate court is a collegial process, and Jean Beetz was generous with his time and effort in contributing to that

process. His qualities as a judge were a source of great strength in the Court and of assistance to his colleagues during years in which the Court was confronted by particularly important and difficult constitutional law challenges. I recall a colleague saying to me once, by way of encouragement, when we were both concerned about the direction which certain thinking in the Court seemed to be taking, "Remember that we have the intellectual resources of Jean Beetz".

I particularly remember the collegial contribution of Jean Beetz in *Reference re Manitoba Language Rights*[2], because of the constitutional importance and difficulty of that case. In that appeal, on which I sat about a week after I had been sworn in, the Court was confronted by two very challenging, difficult and delicate problems of legal theory and judicial policy, involving the constitutional relationship between the Court and the Manitoba government and legislature. The problems arose because of the practical situation created by the fact that all of the statutes of Manitoba enacted since 1890 were invalid for having been enacted in English only, contrary to section 23 of the *Manitoba Act, 1870.* The problems were how to avoid the condition of legal chaos in Manitoba that would otherwise result from a finding of invalidity, while at the same time trying to ensure that the government of Manitoba complied with the Constitution by translating the statutes into French and re-enacting them in both official languages as soon as possible.

The first problem was a jurisprudential one „ the development of a constitutional theory or rationale for deeming the invalid Manitoba statutes to be valid and of force and effect, retrospectively and prospectively, for the period judged to be necessary to complete their translation and re-enactment. The second problem was one of jurisdiction and judicial policy „ the precise form that the Court's judgment should take, and, in particular, the extent to which the Court could and should attempt to compel, direct, prod or encourage the Manitoba government to take the necessary steps to translate and re-enact the statutes of Manitoba as soon as possible. Jean Beetz did not draft the Court's judgment in *Reference re Manitoba Language Rights,* but he made a helpful contribution to the Court's thinking on these two serious and difficult questions.

What was really in issue on the first question was the constitutionality, in view of the terms of section 52(1) of the *Constitution Act, 1982*[3], of a declaration by the Court that the invalid Manitoba statutes were deemed to be valid and of force and effect for the minimum period of time necessary for their translation, re-enactment, printing and publication. I may say that some of us, including Jean Beetz, had some concern, at least for a time, about the legal foundation and adequacy of the proposed constitutional rationale for such a declaration, particularly its purported retroactive effect, and would, on grounds of constitutional policy, have preferred a political solution to the problem by the intervention, while the appeal was under reserve, of a constitutional amendment, if that were possible and likely within an acceptable period of time.

The principle or doctrine that was ultimately developed and unanimously accepted as a constitutional rationale for the action which the Court was obliged to take in order to save the Manitoba legal order was what was referred to as an aspect of the Rule of Law „ the constitutional duty, in the circumstances, to preserve the legal order for the duration of the temporary necessity. Although there was some support for this constitutional doctrine in existing legal theory, it would be idle to pretend that its precise formulation and application in *Reference re Manitoba Language Rights* was not, to a considerable degree, a boldly creative act of judicial statesmanship. It would be wrong to credit any one member of the Court alone for the conception and final formulation of the doctrine and its application because it was a truly collegial exercise, but my papers show that Jean Beetz made interesting and helpful suggestions for improvement of its formulation and application, as an implied term of section 52(1) of the *Constitution Act, 1982,* with particular reference to the relationship between the concepts of

validity and operative effect. They were suggestions for a formulation that would, as he put it, be "more elegant" and "more sound in legal terms". Elegance and soundness in legal terms were, indeed, characteristics of his own writing. His approval of the final formulation was important because of the respect within the Court for his scholarship, wisdom and craftsmanship in such matters.

On the second important and difficult question in *Reference re Manitoba Language Rights* ,, what the Court could or should do, if anything, to try to ensure that the Manitoba government complied with its constitutional obligation as soon as possible ,, an early draft of the Court's judgment contained a disposition in the nature of an order to the Manitoba government. Some of us, including Jean Beetz, were strongly opposed to such an order for jurisdictional and constitutional reasons. Again, his intervention on this issue, in which he expressed the view that the proposed order "would considerably weaken the legitimacy and even constitutionality of our judgment", carried particular weight. The solution that was finally adopted at a further conference of the Court was to invite the parties to apply for another hearing to assist the Court to determine the necessary period of temporary validity. This proved to be a wise and effective course.

In *Société des Acadiens* v. *Association of Parents*[4], the Court was again confronted by a difficult constitutional challenge in the field of language rights and once again Jean Beetz exhibited his statesmanlike approach to constitutional adjudication. The issue in *Société des Acadiens* was whether the right to use French in any court of New Brunswick, which was guaranteed by section 19(2) of the *Canadian Charter of Rights and Freedoms*[5], included the right to be understood by a court in that language and if so, how that right was to be ensured as a practical matter. The issue of judicial policy was whether we should recognize a *constitutional* guarantee of the right to be understood in French, in addition to affirming the existence of that right under the New Brunswick *Official Languages Act* and the common law principles of fair hearing. The issue, as Jean Beetz saw it, was how far the "purposive" approach to the interpretation of the *Charter* should be applied to the interpretation of a constitutional guarantee of language rights that had clearly been modelled on the similar language guarantee in section 133 of the *Constitution Act, 1867*[6]. His reasoning on this issue, with which a majority of the Court agreed, reflected his feel for the history and special nature of Canadian federalism in the field of language rights as one of political compromise which it would be unwise to attempt to reshape by an act of judicial activism. These considerations, which reflect what I have referred to as the judicial statesmanship and wisdom of Jean Beetz, are to be seen in the following passages from his reasons for judgment in *Société des Acadiens*:

> *Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle* [...]

[...]

> *This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.*

[...]

> *I think it is accurate to say that s. 16 of the* Charter *does contain a principle of advancement or progress in the equality of status or use of the two official languages. I find it highly significant however that this principle of advancement is linked with the legislative process referred to in s. 16(3), which is a codification of the rule in* Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182. The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise.*

[...]

> *If however the provinces were told that the scheme provided by ss. 16 to 22 of the* Charter *was inherently dynamic and progressive, apart from legislation and constitutional amendment, and that the speed of progress of this scheme was to be controlled mainly by the courts, they would have no means to know with relative precision what it was that they were opting into. This would certainly increase their hesitation in so doing and would run contrary to the principle of advancement contained in s. 16(3).[7]*

The fact that no one on the Court had a greater personal commitment to bilingualism or was a finer exemplar of it, speaking and writing with equal facility and distinction in the two official languages, imparted a particular authority and persuasiveness to this counsel of judicial restraint in an important and sensitive area of the Constitution. This was particularly so, because the right to be understood by a court in French by one means or another was to be sufficiently ensured in practice by the provisions of the New Brunswick *Official Languages Act* and the principles of natural justice.

In *Bell Canada* v. *Quebec (Commission de la Santé et de la sécurité du travail)[8]*, one of a trilogy of cases dealing with legislative jurisdiction with respect to federal undertakings, Jean Beetz gave another characteristic and impressive demonstration of some of the judicial qualities I have referred to above: the powerful and penetrating quality of his analysis and reasoning; the depth and breadth of his constitutional law scholarship; the clarity and precision of his judicial craftsmanship; and what I have referred to as his "intellectual integrity", which, I suppose, is just another expression for intellectual honesty, reflected particularly in a sturdy independence of academic opinion and labelling.

The issue in *Bell Canada 1988* was whether provincial legislation of general application respecting occupational health and safety was constitutionally applicable, in the absence of conflicting federal legislation, to a federal undertaking like Bell Canada. This issue involved a consideration by the Court of its decision in *Commission du Salaire minimum* v. *Bell Telephone Company of Canada[9]*, in which the Court had held that provincial legislation of general application respecting the fixing of minimum wages was not constitutionally applicable to a federal undertaking, even in the absence of conflicting federal legislation, because such a matter fell within the exclusive jurisdiction of Parliament with respect to such undertakings and not merely within its "ancillary" or "necessarily incidental" power. In delivering the unanimous judgment of the Court in *Bell Canada 1966,* Mr. Justice Martland adopted and applied the following *dictum* of Mr. Justice Abbott in the *Stevedoring* case (*Reference as to the Validity and Applicability of the Industrial Relations and Disputes Investigation Act*):

> *The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in case of undertakings which fall*

within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures.[10]

Bell Canada 1988 was of special interest to me because I had argued *Bell Canada 1966* as counsel for the Quebec Minimum Wage Commission and the Attorney General for Quebec in the Quebec Court of Appeal and the Supreme Court of Canada and had lost in both courts. I have been told by former students of my constitutional law course in Osgoode Hall Law School of York University that when I came to the discussion of *Bell Canada 1966* in class I seemed to be reliving and rearguing it, as if before another tribunal. In *Bell Canada 1988*, I was required to revisit *Bell Canada 1966* as a judge with the responsibility of final decision and the enlarged perspective afforded by a much more complex legislative and regulatory context and some twenty years of experience by courts, administrative authorities, management and labour with the operational consequences of the 1966 decision.

Jean Beetz's opinion in *Bell Canada 1988* was a powerfully reasoned statement why *Bell Canada 1966* was correctly decided and why it should be followed and applied in *Bell Canada 1988*. In it we see not only the usual masterly restatement of the applicable principles of constitutional law in the grand doctrinal manner, but a penetrating and exhaustive analysis of the nature and effects of the provincial legislation and regulatory scheme in issue and the functional implications of recognizing the constitutional applicability of provincial legislation to federal undertakings in the field of occupational health and safety. After alluding to the potential for conflict "between two systems of regulations, investigation, inspection and remedial notices, which are increasingly complex, specialized and perhaps inevitably highly detailed", he said:

A division of jurisdiction in this area is likely to be a source of uncertainty and endless disputes in which the courts will be called on to decide whether a conflict exists between the most trivial federal and provincial regulations, such as those specifying the thickness or colour of safety boots or hard hats.
Furthermore, in the case of occupational health and safety, such a twofold jurisdiction is likely to promote proliferation of preventive measures and controls in which the contradictions or lack of co-ordination may well threaten the very occupational health and safety which are sought to be protected.[11]

This was, as far as I was concerned, the answer to the policy consideration I had urged on the Court as an advocate in *Bell Canada 1966* „ that federal undertakings like Bell Canada and the railways should not, in the absence of federal legislative initiative, be left in a regulatory vacuum, immune from the kinds of provincial regulation for the protection of employees that applied to other large businesses.

Jean Beetz's opinion in *Bell Canada 1988* was also noteworthy for its explicit refutation, from a doctrinal as well as a policy point of view, of the academic criticism of the decision in *Bell Canada 1966*. This may have come as somewhat of a surprise to commentators who tended to label him as a judge with a philosophic inclination in favour of provincial jurisdiction. If so, his performance in *Bell Canada 1988* was a commentary on the intellectually superficial and futile exercise of trying to predict what judges are likely to do in particular cases on the basis of over-simplified philosophic characterizations.

R. v. *Crown Zellerbach Canada Ltd.*[12], was another case in which I had particular reason to appreciate the quality of the constitutional law thought of Jean Beetz, and it was also a case in which I had a special interest, this time because of something I had said about the subject as an academic. The issue in *Crown Zellerbach* was the application of the national concern doctrine of the federal peace, order and good government power to the control of marine pollution by the dumping of substances in marine waters, including provincial marine waters.

Jean Beetz had written what was generally regarded to be the outstanding opinion on the peace, order and good government power in *Re Anti-Inflation Act*[13], and it dominated the thinking in *Crown Zellerbach*, in which I wrote the majority opinion. He had been kind enough to suggest in his opinion in the *Anti-Inflation Act* reference, and to me privately at the time, that he had been helped by something I had said a year or two earlier concerning the problem of characterization of legislative subject matter in the application of the national concern doctrine of the peace, order and good government power. He was referring to the following passages in my article "Sir Lyman Duff and the Constitution", in which I referred to the peace, order and good government power as the "general power":

> *As reflected in the* Munro *case, the issue with respect to the general power, where reliance cannot be placed on the notion of emergency, is to determine what are to be considered to be single, indivisible matters of national interest and concern lying outside the specific heads of jurisdiction in sections 91 and 92. It is possible to invent such matters by applying new names to old legislative purposes. There is an increasing tendency to sum up a wide variety of legislative purposes in single, comprehensive designations. Control of inflation, environmental protection, and preservation of the national identity or independence are examples.*
>
> *Many matters within provincial jurisdiction can be transformed by being treated as part of a larger subject or concept for which no place can be found within that jurisdiction. This perspective has a close affinity to the notion that there must be a single, plenary power to deal effectively and completely with any problem. The future of the general power, in the absence of emergency, will depend very much on the approach that the courts adopt to this issue of characterization.*[14]

Professor W.R. Lederman, who was also cited by Jean Beetz in the *Anti-Inflation Act* reference, had expressed his own agreement with the above observations in his article "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation"[15]. In view of this judicial and academic approval I could hardly be unmindful, when I came to write my opinion in *Crown Zellerbach*, of what I had said concerning the issue of characterization in "Sir Lyman Duff and the Constitution". In his dissenting opinion in *Crown Zellerbach*, Mr. Justice La Forest quoted from what I had said in that article, but I did not understand him to quarrel with my statement of the applicable test, which I had based on Jean Beetz's opinion in the *Anti-Inflation Act* reference. In that opinion Jean Beetz had said, in words that reflect perhaps as well as any the quality of his constitutional law thought and writing:

> *I fail to see how the authorities which so decide lend support to the first submission. They had the effect of adding by judicial process new matters or new classes of matters to the federal list of powers. However, this was done only in cases where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form. The scale upon which these new matters enabled Parliament to touch on provincial matters had also to be taken into consideration*

before they were recognized as federal matters: if an enumerated federal power designated in broad terms such as the trade and commerce power had to be construed so as not to embrace and smother provincial powers [Parson's case] *and destroy the equilibrium of the Constitution, the Courts must be all the more careful not to add hitherto unnamed powers of a diffuse nature to the list of federal powers.*[16]

The test which I adopted, based on the above passage, for the characterization of a matter, whether it existed at Confederation or not, as one of national concern falling within the federal peace, order and good government power was the following: "For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution". The quarrel in *Crown Zellerbach* did not appear to be with that statement of the applicable test but with the conclusion I had come to in applying it to the particular facts of the case.

When I circulated my reasons in *Crown Zellerbach* Jean Beetz came into my office, as he usually did, to discuss them. He gave me to understand, with his characteristic blend of courtesy and candour, that he agreed with my restatement of the law and that he found my reasoning persuasive, but I could see that he had some concern about what he perceived to be the possible implications of my conclusion on the facts in this particular case for the future of the peace, order and good government power. I was, therefore, not really surprised when, despite the initial impression I had received that he was inclined to agree with me, he concurred in the dissenting opinion of Mr. Justice La Forest.

Although I remained convinced that the specific matter in issue in *Crown Zellerbach* „ the control of marine pollution by the dumping of substances in marine waters, including provincial marine waters „ met the test I had formulated, based on Jean Beetz's opinion in the *Anti-Inflation Act* reference, I understood and appreciated his concern. Trying to perceive the implications of a proposed decision for the future of the law and its operating effect in a particular area was one of our most important and demanding responsibilities in the Supreme Court of Canada. It was Jean Beetz's particular sensitivity to this responsibility, in addition to his great ability as a jurist, that made him such a wise judge and such a helpful colleague.

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[1]Retired Justice on the Supreme Court of Canada.

[2][1985] 1 S.C.R. 721.

[3]Section 52. (1) provides as follows: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K., 1982, c. 11).

[4][1986] 1 S.C.R. 549.

[5]Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K., 1982, c. 11).

[6](U.K.), 30 & 31 Vict., c. 3.

[7]*Société des Acadiens* v. *Association of Parents*, *supra*, note 3, 578-580.

[8][1988] 1 S.C.R. 749 (referred to hereafter as "*Bell Canada 1988*").

[9][1966] S.C.R. 767 (referred to hereafter as "*Bell Canada 1966*").

[10][1955] S.C.R. 529, at 592.

[11]*Bell Canada 1988*, *supra*, note 7, at 843.

[12][1988] 1 S.C.R. 401.

[13][1976] 2 S.C.R. 373.

[14]Gerald Le DAIN, "Sir Lyman Duff and the Constitution", (1974) 12 *Osgoode Hall L.J.* 261, at 293.

[15]W.R. LEDERMAN, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", (1975) 53 *Can. Bar Rev.* 597, 610.

[16]*Re Anti-Inflation Act*, *supra*, note 12, at 458.