

REVIEW

Making Appellate Law Legal History and How It Sometimes Gets Written: Remembering Jean Beetz and Taking a Second Look at the Supreme Court of Canada

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Mélanges Jean Beetz, ed. by Jean-Louis Baudouin *et al.*
Montréal: Les Éditions Thémis, 1995, 1002 pp.

The Captive Court: A Study of the Supreme Court of Canada, by Ian Bushnell.
Montréal and Kingston: McGill-Queen's University Press, 1992, xiii + 604 pp.

I. REFLECTIONS ON THE PRESENT

MAKING LEGAL HISTORY at separate appellate court levels is largely a twentieth century invention, with many of the world's national constitutional, and final general, courts of appeal only created after World War II. That is not to say that appellate law could not exist before such judicialisations, or that earlier mechanisms were not available for the appeal of a criminal sentence or even a civil judgment, usually to executive, whether royal or presidential, authority. Canada's Supreme Court was created by statute in 1875; but Canadian appellate law goes back well before the constitutional creation of the Supreme Court of the United States (1789) or the statutory shaping of the Judicial Committee of the Privy Council (1833). Many will agree with Professor Bushnell that Canada only effectively achieves its own final court of appeal in 1949, when London's Privy Council jurisdiction for Canada was abolished by Canadian (and hence imperial) statute.

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Accordingly, the common view is that the Supreme Court of Canada, created by statute in 1875, was a "captive" of colonialism until 1949. It understandably follows that the writing of appellate law legal history, everywhere except in the United States, appears to have been equally slow to develop out of the mid-century shadows.

This may be true regarding the work of Canada's professional legal historians, but others have been busy for more than a century executing that task. In Canada, and for common law and British Commonwealth countries, any appearance of a lack of appellate law legal history belies the realities of university-based, doctrinal academic law teaching. The transfer of legal education, since the turn of the century, out of law office apprenticeships and into universities, has been more than a merely coincidental chronological parallel to the maturing of appellate law. Indeed, in Canada the relationship between judges and jurists is becoming symbiotic, as it was in the imperial Roman era. Outside of Quebec, the university law curriculum and case-book method has overwhelmingly depended on reported appellate, not trial, judgments for classroom analytical criticism.¹ At the same time, appellate judges have increasingly allowed such secondary legal scholarship, including that of living academics, to be cited for authority in legal argument and in their own judgments, while gradually opening their witness boxes to experts from academe.

In Canada, legal historians have yet to invent their own scholarly analyses of provincial and federal appellate law and courts. And while few of their academic law colleagues in the university would style themselves legal historians, that is precisely what they are, when gripping the lectern in doctrinal law classes or putting pen to law journal case commentaries. They can now work from the hottest-off-the-electronic-print services of appellate courts, primarily that of the Supreme Court of Canada. Their lawyers' perspective creates a unique form of intellectual history, more accurately a history of current legal ideas, devoted to finding the doctrinal rules and their chronologically rooted lines of authorities. All of this is narrowly based on the primary evidence of select reported case judgments, although one can really score in the classroom or courtroom by exhuming an unreported appellate judgment on point.

Legal historians, perhaps subconsciously, have ceded the appellate law territory to doctrinal law teaching colleagues, without formally recognising them as equal practitioners of the art. Their focus has been mainly on trial courts, crime, institutions, functional results, and social contexts, such as studying the conflicts that drove individuals into the courts. We have only two books on the Supreme Court of Canada (one to be discussed later in this essay), none on provincial appellate

¹ On the Quebec lawyer's legal method for history, see N. Kasirer, "Canada's Criminal Law Codification Viewed and Reviewed" (1990) 35 McGill L.J. 841.

courts. On the other hand, university-based legal education has been putting greater emphasis on postgraduate thesis degree offerings; this in turn has begun to produce doctrinal studies that include some historical identification of Canadian borrowings and uniquenesses, for example, in its laws of contract, property, torts, and so on.² The dangers in identifying academic, doctrinal lawyers as legal historians may be two-fold, constituting a triviality or a treachery. To such law teachers, the inclusion may appear to be as significant as being told that one speaks in prose. To professional historians, such an inclusion may seem to broaden too far the perimeters of “real” legal history.³ Regardless, Canadians now have two recent books offering two different approaches, one more and one less within the doctrinal school of analysis, but both meriting the label of appellate law legal history.

II. THE JEAN BEETZ LEGACY

MÉLANGES JEAN BEETZ EXEMPLIFIES at great length how vital and varied the memorialising of one judge’s life and work can be. To friends this sort of book is *un hommage*, to cynics an extended intellectual obituary. In fact the book is much more than both. And as with all writing of legal history, the motive should matter less than the matter, and the product should be all. My simple motive, therefore, is to produce a critical appreciation of this particular collection of essays, within a broader examination of how we do, and ought to do, this sort of legal history. Because we often learn best through comparisons, my review will then place this book alongside Ian Bushnell’s *The Captive Court: A Study of the Supreme Court of*

² History-minded examples, such as D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), and K. Swinton, *The Supreme Court and Canadian Federalism: the Laskin-Dickson Years* (Toronto: Carswell, 1990), stand out by being glaringly different from the case-book syndrome, just as the Canadian legal literature on tax law offers a stunning example of history-myopia.

³ An even bigger issue, concerning the place of legal history in a law school curriculum, exists whether or not one accepts my claim that everything taught there constitutes particular forms of legal history and should be recognised as such. Arguments for and against separate or integrated, optional or required, legal history must await analysis elsewhere and in the context of what, in a law school’s curriculum, is often distinguished as “practitioners’ law” from “academic law”? Advocates of the former’s exclusive claim, especially from within provincial law societies, suggest that the tough case-book course must be the core, exemplified by those that are called the LAW OF courses, such as torts, the constitution, property, insurance, etc. This presumption deems the others as soft perspectives, theoretical, contextual courses, labelled as LAW AND economics, literature, gender, race, etc. Jurisprudence and legal history seem to fall between the two. The fact that such a dualism constructs the minds of most lawyers, whether academics or practitioners, is rapidly, repeatedly communicated to first year law students. However, these are matters that require separate attention and are raised here purely for provocation. I plan to explore such issues in my presentation to the XVth International Congress of Comparative Law, Bristol, UK, August 1998, and gratefully welcome the thoughts of readers in the meantime.

Canada.⁴ In this brief essay, perhaps we can begin to define, even begin to invent, what appellate law legal historians need to do.

The editors have produced this *Mélanges* mostly out of the University of Montreal's Faculty of Law, where Jean Beetz earned his law degree, taught for twenty years, and served as dean. The book provides its readers with lists of his publications and of his judgments, from his time on the Court of Appeal of Quebec (1973) and on the Supreme Court of Canada (1974–88). For the former, where he served for less than one year, he participated in twenty-nine published decisions. During his fourteen years in Ottawa, there are two lists of cases for which he was impanelled: the first notes sixty-three, between 1979 and 1988, where one cannot know his role as writer, and the second identifies the 134 cases in which he did write. So much for lingering rumours about his relatively reluctant judicial pen!

The book first offers one hundred pages of primary evidence, the full texts of twenty-five of Justice Beetz's "Addresses and Speeches," from 1973 to 1989. These include eight for university events, seven as part of judicial ceremonies, and five funeral eulogies for colleagues. They reveal the Beetz inner character: thoughtfulness, modesty, gentleness, and an incisive intellect. If the reader then goes outside this book to any of Beetz's judgments, one still must read deeply between the lines to surmise anything about the sources of his character's substance: classical education, Québécois Catholicism, civilian legal discipline, and a pre-disposition for finding a constitutional law aspect in every case. His public *allocutions et discours* are noteworthy for not raising issues of law or anything debatable that might create a public persona. The truth is that Jean Beetz remained an intensely private person, almost monkish, who often took lunch alone in a local Ottawa cafeteria and went to Montreal most weekends to care for his aging mother and to partner her in regular games of bridge. When Justice Chouinard's sudden illness swiftly incapacitated and then hospitalised him, Beetz would quietly slip away from the Court to visit his bedside, stroke his hand, and soothe his wife's anguish. By the time of his own stoical death, Justice Beetz had seen to the destruction of all working case files and personal papers.

Because there can be no Beetz archive, there can be no thorough biography, only this sort of admiring *hommage*, written by friends in the immediate, emotional after-glow of his public life. As for biographical data that might help to explain the persona, we get a few formalised reminiscences but even they serve the jurisprudential mask that hides the person. He made sure that only the formal record of his visit on earth would survive in his reasons for judgments. Even Solomon has more revealed of himself, beyond that most conservative self-definition of a judge that we see in Beetz: distant impartiality and intellectual austerity. Thus, we must be

⁴ I. Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montréal and Kingston: McGill-Queen's University Press, 1992).

grateful for whatever testimonial evidence we can get, by way of these essays, lest posterity lose the measure of his juridical impact at a crucial time in Canada's legal history.

The remaining 868 pages are divided into three personal remembrances, five essays with a private law focus and twenty-two devoted to public law topics. Of the total, eight are in English and the rest in French. We get a formal sense of Jean Beetz's analytical method, with pin-pointed examples from his judgments, in the opening essay by Louis-Philippe de Grandpré: "Il faut alors disséquer les textes juridiques pertinents, découvrir leur objet, chercher les moyens employés et retrouver leur logique interne. Le cas échéant, cela oblige à rechercher [1] les sources du texte; [2] son histoire; et [3] si cette histoire nous amène à l'ancien droit, il faut en faire une étude aussi approfondie que possible" (at 136–37).⁵ This captures Beetz's classical textualism and historicism. He had had no trial court experience as a judge, but his temperament was perfectly matched to the demands of an appellate court judge: he could pay close attention to a trial court's reconstruction of existential facts, while balancing this with the case's essential abstractions. His was a naturally exegetical mind, employing a close textual reading of previous judgments and a tenacious historicist sense, to seek and to apply the law as it was at the time of the actionable act. This Beetz approach is vivaciously analysed by Dr. Luce Patenaude in her essay "L'empreinte," where she meticulously, even statistically, dissects Beetz's carefully consistent form and content in judgment writing, with limited comparisons to that of his judicial colleagues.

Prior to his judicial career, as Gérard La Forest warmly recalls, Beetz had applied the same precision and clarity of mind to his work as a pre-eminent constitutional adviser. Beetz, La Forest, and Julien Chouinard had overlapped their common law studies at Oxford as Rhodes Scholars (1949–52). In the 1960s they worked closely on constitutional issues leading to the Victoria Charter. Because the private papers of Beetz and Chouinard do not survive, perhaps Justice La Forest some day will be able to fill the large evidentiary blanks that currently exist, for this crucial era of constitutional prelude to 1981–82.

The body of the book divides into twenty-seven essays and all but one are written exclusively for it. Virtually all of the French-language contributions offer substantive, original, and up-to-date (1995) case analyses and secondary bibliographies on point. Each reaches far beyond the Beetz contribution to establish itself as the starting-point for current and future legal scholars. And all abundantly exemplify my claim that such doctrinal studies constitute an essential form of

⁵ "One must dissect legal texts, identify their objects, seek out their method and discover their internal logic. If need be, this requires one to identify (1) the text's sources, (2) its history and provenance, and (3) if this history takes us back to the previous law, then one needs to study that as deeply as possible" [Author's translation, with major help from Nicholas Kasirer].

appellate law legal history, a claim that anyone so thoroughly history-minded as Jean Beetz would approve.

Two of the eight English-language contributions will attract the specialist's attention. First, John Durnford (McGill) studies Beetz's "only foray" into tax law, regarding alimony payments, in an essay that enhances the definitive study by Albert Bohémier (Montreal) and Brigitte Lefebvre (UQAM) of "La faillite et le patrimoine familial." Both essays actually fall into the family law category, as does Roger Comtois's answer to "Que reste-t-il de la société d'acquêts?"⁶ And second, Peter Oliver (King's College, London) superbly summarises his Oxford doctoral thesis on historical and jurisprudential links, Great Britain to Canada, in the 1982 constitutional patriation, with special emphases on Dicey, Kelsen, and Hart. Oliver thereby offers intellectual context, but no direct link, for Beetz's central role within the Supreme Court of Canada in "brokering" the path-clearing three judgments (1981) for the latest federal constitution. We can only hope that enough primary evidence at the Court, and from participants, will survive and eventually surface to document further his part in these constitutional and Charter-creating processes. More generally and briefly, Beetz's focus on federalism is addressed in succinct essays by Brian Dickson, Gerald Le Dain, Peter Hogg (Osgoode), and James MacPherson, while Pierre Blache (Sherbrooke) examines the impact of the Charter on Québec's immediate future. These are all essential readings for constitutional lawyers.

There are a number of longer essays, all in French, that combine strong historical reconstruction with careful doctrinal analyses. Pierre Rainville (Laval) elegantly locates the civil law tradition's role for "acknowledgment" in quasi-contract, alongside the common law notion of reliance. Paul-André Crépeau (McGill) writes definitively on Beetz's view of Canadian approaches to statutory interpretation, literalism, and original intent. Albert Meyrand similarly narrates the Supreme Court of Canada's use of precedential authority in cases since the end of appeals to the Judicial Committee of the Privy Council; but he does so without specific reference to Beetz. Gérald-A. Beaudoin (Ottawa) neatly documents Beetz's view of division of legislative powers and his application of it across a broad range of public and private law issues. Fabien Gélinas studies the doctrine of inter-jurisdictional immunities and Beetz's contribution to that aspect of the division of powers debate. Finally, Jean Leclair (Montreal) provides both sound historical and case analysis in an attempt to measure Beetz's impact on notions of legislative competence rooted in the *British North America Act* (1867).

While such essays seek to document Beetz's search for rules of constitutional interpretation, two others move beyond the doctrinal focus towards a higher

⁶ "What remains of the partnership of acquêts?" (I.e., in goods acquired during marriage.)

meaning and deeper source for Beetz's principles regarding the *Charter's* Section One. Guy Rocher (Montreal) provides the strictly historical background to Alexis de Tocqueville's (1805–59) notion of a “free and democratic society,” making only the faintest attempts to relate this to Beetz or to Section One's vocabulary or to the twentieth century or to the article by Andrée Lajoie and colleagues. They are at the Research Centre in Public Law (Montreal) and have painstakingly traced Beetz's use of language to excavate the principles buried in his use of Section 1's key words: liberty, democracy, society. Both the Lajoie methodology and results are uniquely imaginative and important, not least for the application of linguistic analysis to reported judgments. There is a third essay worthy of de Tocqueville's inspiration: Jacques-Yvan Morin's splendid comparative legal history of the accountability of judicial power in a democracy, using Juvenal's penetrating query, *sed quis custodiet ipsos custodes?*⁷ Morin defines the balances in the U.S., French, and English constitutions between control and independence of judges. Then he looks to the realities, historical and current, of judicial status at the highest appellate courts in Washington, Paris, and Strasbourg. The essay is a *tour de force*, more in the Beetz spirit of intellectual inquiry than in reference to any of his written judgments.

The remaining seven essays in this mammoth volume add substantially to what we can know about vital areas of Canadian law and Beetz's contributions to them. Both Max Yalden and José Woehrling (Montreal) grapple with human rights issues, the latter particularly addressing anglophone language and cultural rights within Québec. Pierre Patenaude (Sherbrooke) provides the book's only direct contribution to criminal law, in his essay on the evidentiary status of hypnosis and polygraph tests. Pierre-André Coté (Montreal) provides a case comment on *Laurentide Motels Ltd. v. Beauport*,⁸ in which Beetz addressed issues of negligence related to governmental liability. The *Oakes* decision is revisited by Frances Lamer, for Beetz's views on freedom of expression, while Robert Décary dedicates his essay to the subject of labour relations laws.

Finally, two essays assess Jean Beetz's role in shaping modern administrative law. Yves Ouellette (Montreal) measures the impact of the *Charter* and then Claire L'Heureux-Dubé writes a warmly collegial and witty appreciation of “The Bibeault Judgment: An Anchor in a Stormy Sea.”⁹ In addition to sustaining the maritime metaphor throughout, she shows how Beetz crafted his subtle and nuanced answer

⁷ “But who will watch the watchers?": Juvenal (circa 55–127 A.D.), Satire VI, lines 347–48, in A.F. Cole, ed., *The Satires of Juvenal* (New York: G.P. Putnam's Sons, 1906) at 118; written in the context of a bitter, bawdy attack on women and marriage.

⁸ [1989] 1 S.C.R. 705.

⁹ “L'arrêt Bibeault: une ancre dans une mer agitée.”

to cut across administrative, labour, and constitutional laws, in order to resolve the question: when should a law court substitute its judgment for that of an otherwise autonomous administrative tribunal?

Does this massive product of Beetz's own Montreal Faculty of Law, written largely by its doctrinal scholars, add up to a legal history for his time at the Supreme Court of Canada, 1974–88? Of course it does, in a topically selective manner. By taking one legislatively or judicially defined theme, such as division of powers, or one case or one developed line of judicial authorities, and then searching backwards to its origins and sources, old and new, the authors become historians of ideas, whether of rules or interpretations. And just like soundly trained historians, these authors employ a dialectic that drives them back to primary evidence. The text of the reported judgment rules, albeit more exclusively and teleologically than most historians would allow or advise. And there are no signs of archival adventurousness, of needing to search beyond the reported judgment's text, into contextual explanations or the permutations of draft ideas that preceded the final text. Even the more overtly historical essays here, e.g., by Morin and Rainville and Rocher, employ variations on the lawyer's case commentary methodology, albeit interpreting texts in a broader manner, be it from de Tocqueville or Dicey. Many legal historians will see this as elementary or entry-level, but none should deny that it is at least that, and therefore of fundamental worth in the history of legal ideas.

The most troubling omission, however, is the sense of any institutional context for reconstructing the typicality of any case.¹⁰ Any search for the leading case dictates that, when found, it is deemed to be the typical and representative statement of the law on point for its time and place. Lawyers, whether in the common law or, as most of these authors, in the civil law, are trained to think in linear case terms, chronologically and precedentially. Case law research to them means finding a chain of relevant judgments. They certainly are not trained to ask a legal historian's major question: how typical is the one case in its time and place? Or, over a defined period of time? It comes as no surprise that virtually all of these authors stick to linear reasoning, whether drawn from cases or codes, and see little need for raising such contextual concerns. They are, after all, tracking rules and practices back from and towards the present.

The greater deficiency is that we get little if any sense of the institution that produced these rules and practices: its structure, personnel, development, procedures, volume and variety of business. The inner history of *La Cour suprême du Canada* remains in the shadows. The rules and practices articulated in any reported

¹⁰ While I find Peter McCormick's article, "Statistical Investigation of Citation Practices" (1993) 22 Man. L.J. 286, interesting and useful, especially when he applies this to diverse Canadian appellate courts, such numerical score-cards do not address doctrinal or contextual issues, by which one can determine typicality.

judgment remain pristinely abstracted, particularly because they are the law and the scene is at the appellate level. In *Mélanges Jean Beetz* we get to see at least one person in action, but few others. And if we are to know his place of action, the Supreme Court of Canada, we are left to look outside the doctrinal academic lawyer's narrative approach, to separate court histories such as Ian Bushnell's *The Captive Court*.

III. CANADA'S HIGHEST COURT

THIS HISTORY OFFERS 494 PAGES full of ideas and information, with the Beetz era comprising roughly the final 163 pages. Its first twenty chapters (277 pages) expand on the first 171 pages of the first book written on *The Supreme Court of Canada: History of the Institution*.¹¹ After describing the Court's creation in 1875, Bushnell sets two generic perspectives: "the judge as adjudicator" and "the judge as law-reformer." These are presented by way of a rich selection of anecdotes about most of the pre-1950 judges; but they somehow do not add up to a coherent analysis of how appellate judges were expected to judge and, in many of their cases, how they actually did judge. The author promises "a history that focuses on the judicial function, how the judges ... functioned, what role they considered that they were fulfilling within Canadian society, and what role others expected"¹² of them.

From this one might expect an American legal realist's approach: one that replaces doctrine-shaping with more profane exposés of the vested interests and "real" agenda operating behind the scenes in cases and courtrooms, and one that follows Karl Llewellyn's dictate to understand law and its courts by studying the judges as much as their judgments.¹³ Bushnell provides an enormous service by gathering a great deal of descriptive information that could serve this realist mission. He is no rule-skeptic, although he is interested in the pre-appointment, formative facts about any judge. As for the parties to appellate litigation, we get the facts of each case as reported in the printed judgments, but little else about its diverse actors and their identifiable intentions. The who and why behind each case's dispute seem to matter less, and certainly no more than they do for the doctrinal authors of *Mélanges Jean Beetz*.

¹¹ J.G. Snell & F. Vaughan (Toronto: The Osgoode Society, 1985).

¹² Bushnell, *supra* note 4 at xi.

¹³ K.N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Oceana Publications, 1951) at 73; *idem*, *Jurisprudence: Realism in Theory and Practice* (Chicago: The University of Chicago Press, 1962), at 138–156; *idem*, *The Common Law Tradition: Reading Appeals* (Boston: Little Brown and Company, 1960), esp. Appendix B, on behavioural readings of law reports; and J. Frank, *Law and the Modern Mind* (New York: Doubleday & Co., 1963).

Bushnell's is *The Captive Court*, borrowing the label from Bora Laskin,¹⁴ to suggest sterile juridical servility to the Judicial Committee of the Privy Council until 1949. The author at least promises to test this hoary cliché but then, in turn, becomes its captive, by making the "was it then a captive court?" his sole test for measuring each case and stage in the Court's history that he narrates. Other criteria for explaining Court accomplishments and failures, 1875–1949, are not developed because Laskin's cliché continues its ghostly suffocation of serious research and re-thinking. One need not disparage Laskin's legal nationalism, or Gilbert Kennedy's 1948 assertion that "we have no jurisprudence of our own" (at 294); but one ought to question whether such opinions, then and now, accurately diagnose historical realities, which Bushnell does not do. This belittling of the Court expands, with his repeating the correlative to the "captivity" cliché, in sweeping assertions about the colonial "sterility of the Canadian legal system" (at 295). Dare we hope for a dose of historical revisionism soon?

The post-1949 Court, which coincides with the opening of Jean Beetz's career as a lawyer, is entitled "a new beginning?", and the question mark is the key. What difference did re-patriating Canada's ultimate appellate power make to its law? Aside from increasing its citations to Supreme Court of the United States cases, the most noteworthy fact of the 1950s and 60s seems to Bushnell to be that the Court's judges were even more conservative legalists than preceding generations of "colonial captives." At this point, the "captivity" thesis struggles between those judges supposedly enthralled by Canadian statutory literalism and those, like Bertha Wilson (born and educated in Britain), who might still prefer the House of Lords and Privy Council to Canadian authorities (at 378). All in all, this is not an edifying portrait for an independent, creative, nationalistic judiciary, particularly after 1949.

How does Beetz fit into Bushnell's presentation? He is only cited for judgments in constitutional cases, which is one reason why the *Mélanges Jean Beetz* approach is so much more fertile, because of its broader and deeper doctrinal areas and analyses. He is presented as a supporter of provincial autonomy, specifically Quebec's, and of legal formalism, but also as someone who could find the Trudeau 1981 constitutional strategy both legal and un-constitutional. Beetz had arrived at the Court in time to dissent with Laskin in their minority finding that the *Bill of Rights* (1960) was not simply statutory but "quasi-constitutional"; but he could then reject arguments that invited the "loose language" of "civil liberties" that he found in Canada's written constitution of the 1970s. Bushnell's method is to record such apparent inconsistencies without explanation, whether by further scrutinising the judge or the judgments.

¹⁴ "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 Can. Bar Rev. 1038. In the final 19 pages, Laskin selectively surveys the constitutional and "*stare decisis*" cases at the S.C.C. but with only occasional references to J.C.P.C. "judgments."

This type of appellate law legal history, then, does not look at the Court's inner workings, nor evidently even at its administrative and procedural records at the Court and the National Archives. Particularly for the post-1950 Court, Bushnell remains the consummate doctrinalist, tracking rules as ideas by turning his history into a forum for his seriatim, select case commentaries. At the same time he sustains reader interest by repeating each case's facts, to spice the narrative, but without researching beyond those found in the reported judgments. The final 200+ pages faithfully fulfil the doctrinalist's approach, making published judicial debates about rule-making the sole focus of what is deemed "institutional" and "functional." Like *Mélanges Jean Beetz*, Bushnell's book offers commendably thorough up-to-date citations to the secondary literature at every stage and page.

Thus we have in these two very long books two variations on the doctrinalist's construct for writing appellate law legal history. *Mélanges Jean Beetz* focuses on one person and then practises a unique type of prosopography, that is, multiple authors producing a multiplicity of "Beetz's" on a multiplicity of doctrinal topics, all held together by consensus about his admirable character and intelligence. Bushnell's *Supreme Court of Canada* asserts an institution found wanting, in most of its judges' characters and intelligences, for most of its history, including certain parts of Beetz's era. But it does so with an abundance of information and case analysis.

IV. REFLECTIONS FOR THE FUTURE

IF WE ARE TO begin to invent a comprehensive strategy for legal historians when doing appellate law legal history, we must look to five components: the case, the court, the personnel, the judgment, and the law. The obvious problem with the strictly doctrinal approach, exemplified in these two books and practised in most law schools, is that it only accounts for the last two. In the *Mélanges*, some essayists find their doctrinal base in a single judgment, fitting it into a broader narrative about the law on point. The Bushnell approach commendably attempts all five, but only in bits and pieces scattered across thirty-five chapters and only insofar as each serves the ultimate focus on doctrine.

Because appellate courts are created expressly to review, reform, refine, and construct legal doctrine, in the forms of substantive and adjectival rules, it is fitting that doctrine should be the first focus of any appellate law legal history. Both books clearly, albeit almost exclusively, fulfil that mission in profoundly different ways. The one, as a form of biography that only occasionally lapses into hagiography, allows us to see how (or if?) one person still matters, in law and history, at the end of a century noted for its homogenising of humanity and legal culture. Its mission is to measure one person's contribution to the doctrinal state of the law in the essayists' time. The other, as an attempt at institutional and functional history, tries to give us a second focus that will unite the descriptive and prescriptive: how did

the Court actually function? How should it have functioned, presuming that we can agree as to its *raison d'être*? To design a strategy for measuring this, we need to look closely at the five elements suggested above.

First the case itself arrives in the appellate court after trial and judgment, with its own history built on a vast variety of evidence, mostly the product of adversarial procedures. The legal historian's ideal would be to have the trial court's formal file and all the other files: those of the plaintiff, the plaintiff's lawyer's client files, the defendant's, the defendant's lawyer's client files, the police and prosecutor and victim's files in criminal cases, all third-party files, and so on, allowing for rules of confidentiality, privacy, and privilege. All actors involved at each stage, pre-trial included, would ideally also have less formal evidence such as correspondence files and diaries. Then there would be evidence from the cases' popular penumbra, mainly from the news media, particularly newspapers. Because appellate level cases, especially civil as opposed to criminal, are distillate products of a process that begins with thousands of initiated trial cases, most of which never even need to be resolved directly by the court, the appellate law legal historian will be dealing with a more manageable volume.

Beyond any one case, legal historians need to look hard at the full corpus of cases at a given time, not just the constitutional or high profile ones, whether at the Judicial Committee of the Privy Council,¹⁵ the Supreme Court of Canada, or any provincial appellate court. Only then can we begin to appreciate the dimensions, intellectual and practical, positive and negative, of one judge's or one era of one court's impact on law, on the ways and reasons by which judges construct rules to resolve conflicts. Otherwise we can begin and end with clichés like "captivity" and "sterility," sweeping in scope and shallowly selective regarding research, based on assertion, not proof. Basic fairness requires a comprehensive approach to a court's business, to reconstruct its patterns of litigation, to establish empirically the context and typicality noted earlier.

In moving from anecdotal to aggregative case analysis, we shift the focus to the second historical component—the court.¹⁶ By surveying an appellate court's total business at any one case's time and place, we provide the juridical context by which to measure its significance to the court (i.e., as the problem of the one and the

¹⁵ D.B. Swinfen, *Imperial Appeal: the Debate on the Appeal to the Privy Council, 1833–1986* (Manchester: Manchester University Press, 1987) offers one chapter on Canada as a solidly researched narrative start; but the entire book offers virtually no perspective on the development of legal doctrine, unlike the two books reviewed here, and thus does not study the cases or the law.

¹⁶ For an excellent model of appellate law legal history generally, and one that offers a modified "anecdotal to aggregative case analysis" by examining all cases on a specific theme in a specific jurisdiction, see J.W. Walker, "Race," *Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Waterloo: Wilfrid Laurier University Press, 1997).

many!). Once inside the court, we confront its realities for resolving disputes: its procedural rules and paper-paths, its operational officials such as registrars and editors of reports, the administrative personnel, and its research assistants such as law clerks and librarians. Each plays a role in shaping the system that any appellate litigant encounters and that the legal historian must understand. And each produces a paper-trail, or increasingly a more elusive electronic trail (if minus the print-out!), which may yield clues as to an anecdotal case's path within a court. The court's institutional history must include much more, about its physical structure, financial resources, and linkages to other governmental institutions, first and foremost the ministry of justice.

This leads directly to the third component, the personnel, which obviously means more than studying only the judges. We must return to that chain of trial files outlined above, regarding the anecdotal case, and decide how much we need to know about: the litigants, lawyers, witnesses, police, prosecutors, victims, court personnel, judges and case commentators, academic and media. To rely only on the sparse personal facts gleaned from the printed reasons for judgment, concerning the litigants, barely scratches the surface. The same must be said about the criminal case's victim, too often lost in the shuffle of trial procedures and appeals on points of law. Trial courts are intersections for multiple stories about a single event, and the appellate law legal historian must take each seriously.

Of course we need to ask deeper questions about the individual judges, their formative backgrounds, families, educations, social life-styles, ideological, even theological views, political connections, types of law practiced prior to appointment, and so on. But the bottom line is always in their judgments, studied carefully and comprehensively to identify where their sources, models, and inspirations for "the answers" come from. Each appellate case forms around abstracted questions of law, rarely of fact. Therefore the doctrinal academic lawyer ought to be best equipped to write this sort of legal history, and *Mélanges Jean Beetz* illustrates diverse attempts in this direction. But we need to know more than that The Honourable Justice Jean Beetz was a thoroughly good human being if we are to begin to explain any single judgment or the sum of his judgments. And we need to study and teach case law for more than mere rule-mongering.

For this we need the primary evidence of lives and careers and courts; we need archives. Both of these books are largely written without questions about judges and institutions which require such research resources. For starters we ought to repeatedly remind ourselves, our readers, and our students, that each case in a "court of record" is required to leave a treasure-trove of primary documents, just waiting to be studied in any federal and provincial government's record centre. What differences would this make to the legal historian's ideal world in which all the requisite evidence survives?

To study individual judges (or lawyers), their personal and family records can document the natures and nuances of character-formation, helping one to understand an individual's values and priorities within the social contexts that nurtured them.¹⁷ Records from one's law practice, always allowing for client confidentiality, can locate the kinds of law and of client experiences that generated the jurisprudence that they took to the bench. Once there, the appellate law legal historian needs the judge's working case files, the individual notes (like a trial judge's bench-books) and drafts that can trace the intellectual processes which produced the final, reported judgment's text. Notes and bench-books are the only primary sources for what a court actually hears and reads, i.e., what is received out of the cacophony of lawyers' voices, factums, and media coverage that can inundate it. Most appellate cases do not attract public attention, but all contain a judge's journey through a series of draft judgments to each case's legal "truth," which is mapped inside the working case file and can give directions to the key question: how did the judge get to that judgment?

On the institutional side of that question, for the anecdotal case, the court and the personnel, one must begin with a court's official case file and whatever else survives. The good news is that, as a common law court of record, any trial and appellate court's official case file must be permanently preserved.¹⁸ The bad news is that an untested presumption for centuries continues to allow judges to treat bench-books and working case files as their private property. Thus, only the occasional collection survives, often by accident, and in an incomplete and "weeded" condition. Prospects therefore remain slight for ever being able to piece together a judgment's gestation, to learn how a court reached the final texts, majority and minority, of its judgments, and for knowing what lines of law and reasoning got lost or added in the process. For most Supreme Court of Canada judges, including Jean Beetz, all such files are lost forever. As for all of the other trial court participants' case files, chances of survival and access have thus far been somewhere between bleak and hopeless. This catastrophic crisis of survival for a case's evidence, other than in the trial and appellate courts' case files and judgments, certainly explains why the doctrine contained therein gets so much exclusive attention in appellate law legal history: in almost all cases, what else is there to work from?

After that negative archival and evidentiary scenario, we can at least return to the positive reality of the fourth and fifth components in appellate law legal

¹⁷ At least two oral history projects in Canada, at The Osgoode Society for Ontario and at the Faculty of Law in Victoria for British Columbia, offer invaluable reminiscences by activist lawyers and judges, mainly focused on their recall of individual cases.

¹⁸ For the Supreme Court of Canada, these are all microfilmed and available in the National Archives of Canada, Ottawa.

history, the judgment and the law. In other words, we move back from trying to document the appellate judicial *process* to the more firm ground of its *product*. Most of such doctrinal history can be, and is, written out of any professional law library. We are back to the formalistic, selected, published judgments, with reasons, and to the codes and statutes, with rare reference to regulations. The method is teleological, as a search for pre-identified rules in the cases, and not epistemological, as research for knowledge *per se* about the cases. The former is the lawyer-judge's doctrinal search, the latter is the legal historian's social-functional research. The juxtaposition applies in both the common law and civil law systems in Canada, as well as within all law schools. And at present we have much more of the first, doctrinal sort of legal history, and far too little of the legal historian's sort.

For the immediate future we have these two highly readable books, providing two variations, the one-person and the institutional perspectives, for the legal academic's doctrinal style of appellate law legal history. Both ought to inspire larger efforts to secure the primary, appellate law evidence and to encourage a multiplicity of perspectives, based on that broader range of primary evidence that we must begin to track down and deliver into the archives. At the very least, these two books illumine the need to create a common purpose among scholars, judges, and lawyers regarding the preservation of the appellate record of a case, from start to finish, so that Canadians of the twenty-first century can know better the what, the how, and the why behind their appellate law process.

It remains for Canada's legal historians to welcome the continuing work of their doctrinal colleagues, to encourage them to be more historical and archival minded, and to seize the initiative in order to create a broader, deeper, more critical balance in our understanding of how Canadian appellate judges make and un-make our laws. *Mélanges Jean Beetz* and *The Captive Court* plant important seeds for such future studies.¹⁹

¹⁹ One 1997 optional membership volume for The Osgoode Society will be Professor Bushnell's *A History of the Federal Court of Canada, 1875 to 1992*.

