

# The Constitutional Prism of Louis-Philippe Pigeon and Jean Beetz

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Volume 30, Number 1, 1989

URI: <https://id.erudit.org/iderudit/042938ar>

DOI: <https://doi.org/10.7202/042938ar>

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Publisher(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (print)

1918-8218 (digital)

[Explore this journal](#)

Cite this article

Conklin, W. E. (1989). The Constitutional Prism of Louis-Philippe Pigeon and Jean Beetz. *Les Cahiers de droit*, 30(1), 113–136. <https://doi.org/10.7202/042938ar>

## Article abstract

After introducing the concept of an "image of a constitution", Mr Conklin examines the federalism writings and judgments of Justices Pigeon and Beetz with a view to identifying the boundaries of their respective concepts of a constitution. He argues that their writings presuppose coherent answers to such boundaries as the role of a text as the primary source of law, the posited character of rules, rules as the starting point of constitutional analysis, the scientific role of a lawyer, and a horizontal / vertical spectrum of posited rules. Mr. Conklin claims that their understanding of law collapses into a more primordial image of law whose boundaries we have for too long left unexamined.

# The Constitutional Prism of Louis-Philippe Pigeon and Jean Beetz

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William E. CONKLIN \*

*Après avoir expliqué ce qu'il entend par notion de constitution ("image of a constitution"), l'auteur examine les écrits judiciaires et doctrinaux des juges Pigeon et Beetz dans le but de voir quelle idée l'un et l'autre se faisaient de ce qu'est une constitution. Ces écrits, selon lui, se fondent sur des conceptions articulées du rôle des textes comme source du droit, du rôle des normes comme prétention de départ de l'analyse constitutionnelle, du rôle scientifique du juriste et, enfin, des positions respectives des différentes règles de droit. L'auteur conclut que cette façon de voir s'inscrit à l'intérieur d'une conception globale du droit dont les tenants et aboutissants n'ont jamais été vraiment étudiés.*

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*After introducing the concept of an "image of a constitution", Mr Conklin examines the federalism writings and judgments of Justices Pigeon and Beetz with a view to identifying the boundaries of their respective concepts of a constitution. He argues that their writings presuppose coherent answers to such boundaries as the role of a text as the primary source of law, the posited character of rules, rules as the starting point of constitutional analysis, the scientific role of a lawyer, and a horizontal/vertical spectrum of posited rules. Mr. Conklin claims that their understanding of law collapses into a more primordial image of law whose boundaries we have for too long left unexamined.*

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The central issue of studies of Canadian federalism in the English-speaking scholarly literature is that of centralism versus decentralism. During the early years of the Canadian realist movement, Bora Laskin exposed the decentralist political bias of the Privy Council<sup>1</sup>. Alan Cairns subsequently demonstrated how Laskin had interpreted a centralist bias into Privy Council judgments<sup>2</sup>. During the 1950's and 60's, William Lederman elaborated a coherent theory of constitutional adjudication, grounding his theory in a perceived inevitability of a jurist's political choice between centralist and decentralist visions of Canada<sup>3</sup>. The realist focus upon the centralist/decentralist dichotomy of Canadian federalism reached its zenith in English speaking scholarship in the social scientism of Noel Lyon<sup>4</sup>, the legal process

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1. B. LASKIN, "Peace, Order and Good Government", (1947) 25 Can. Bar. Rev. 1054 and reprinted in *The Courts and The Canadian Constitution*, W.R. Lederman, et., McClelland & Stewart, 1964.

2. "The Judicial Committee and Its Critics", (1971), 4 *Can. J. Pol. Sc.* 361.

3. LEDERMAN'S general theory is first set out in "The Common Law System in Canada", in E. McWhinney, *Canadian Jurisprudence: The Civil Law And Common Law In Canada*, Toronto, Carswell, 1958, reprinted in W. Lederman, *Continuing Canadian Constitutional dilemmas*, Toronto Butterworths, 1981. It is elaborated in "Classification of Laws and the British North America Act", in J. A. CORRY, et al., *Legal essays in honour of Arthur Moxon*, Toronto, U. of T. Press, 1953, and reprinted in LEDERMAN, *id.*, c. 12, and in LEDERMAN, ed., *The Courts and the Canadian Constitution*, Toronto, McClelland & Stewart, 1967. Lederman's theory of adjudication is the subject of W. E. CONKLIN, *Images of a Constitution*, Toronto, U. of T. Press, 1989, c. x.

4. See generally, CONKLIN, *Images of a Constitution*, *id.*, chap. ix.

analysis of Paul Weiler<sup>5</sup>, Peter Russell's political model of the Canadian Supreme Court<sup>6</sup>, and Patrick Monahan's exposé of the formalism in Canadian federalism judgments<sup>7</sup>. Each of the latter scholars has concentrated upon the apparently inevitable, oftentimes unconscious, political choices which lawyers and judges make about Canada when they resolve constitutional disputes. Each has assumed that the critical factor in that choice is one's vision of how centralist or how decentralist the Canadian political structure ought to be.

Now, I have aimed to show elsewhere that both English-speaking and Quebec commentaries about Canadian federalism have concerned a far deeper and more complex set of issues than the centralist or decentralist character of one's vision of Canada<sup>8</sup>. In *Images of a Constitution*, I have

5. See generally, P. WEILER, "Two Models of Judicial Decision-Making", (1968) 46 *Can. Bar. Rev.* 406; "The Supreme Court of Canada and Canadian Federalism", (1973) 11 *Osgoode Hall L.J.* 225; and *In the last resort; a critical study of the Supreme Court Of Canada*, Toronto, Carswell/Methuen, 1974.
6. See generally, *The judiciary in Canada: the third branch of government*, Toronto, McGraw-Hill, 1987; "The Political Purposes of the Canadian Charter of Rights and Freedoms", (1983) 61 *Can. Bar. Rev.* 30; and *Bold Statescraft, Questionable Jurisprudence* in Keith Banting Richard Simeon eds., *And No One Cheered: Federalism, Democracy and The Constitution Act*, Toronto, Methuen, 1983, at 210; P.H. RUSSELL, "Judicial Power in Canada's Political Culture", in M.L. FRIEDLAND, ed., *Courts and Trials: A Multi-Disciplinary Approach*, Toronto, U. of T. Press, 1975, at 75; P.H. RUSSELL, "The Political Role of the Supreme Court of Canada in its First Century", (1975) 53 *Can. Bar. Rev.* 576, at 576, P.H. RUSSELL, "The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform", (1968) 6 *Osgoode H.J.* 1, at 5. P.H. RUSSELL, "A Democratic Approach to Civil Liberties", (1969) 19 *U. Tor. L.J.* 1099, at 128-9.
7. "At Doctrine's Twilight: The Structure of Canadian Federalism", (1984) 34 *U. of L.J.* 47, reprinted in P. MONAHAN, *Politics and the Constitution: the Charter, Federalism and the Supreme Court of Canada*, Toronto, Carswell, 1987.
8. In this essay I concentrate upon the federalism judgments and essays of Pigeon and Beetz. For their judgments regarding the *Canadian Bill of Rights* and the *Charter of Rights*, see generally W. E. CONKLIN, *Images of a constitution*, Toronto, U. of T. Press, 1989, at chap. v and vii respectively. Although the *Patriation Reference* undoubtedly concentrated upon federalism and although the Majority of Six Reasons for judgment reflect the style, structure, and constitutional expertise of Beetz (see MACKAY, "Judicial Process in the Supreme Court of Canada: The Patriation Reference and Its Implications for the *Charter of Rights*", (1984) 21 *Osgoode Hall L. J.* 55, at 62, 63, I have omitted the *Patriation Reference* from my discussion in this essay. It is discussed at length in *Images of a Constitution*, *ibid.*, chap. iv. It should be noted that many of Beetz's federalism judgments were made prior to the enactment of the *Charter of Rights*. In Chapter VII of *Images of a Constitution*, I suggest that his more recent judgments take on the character of a "balancing of social interests". See, e.g., *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at 129g-150e. Of course, to do otherwise is not easy in the light of *R. v. Oakes*, [1986] 1 S.C.R. 103, as Dickson and Wilson have found. For Beetz' application of the *Oakes'* balancing approach to section 1 of the Charter, see *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at 122b-128c.

worked through representative judgments of every "subject-matter" of Canadian constitutional law, concluding that what has hitherto been understood as law collapses into a deep search for a response to the more primordial question, "what is a constitution?" In responding to that first question, judges, lawyers, scholars and students project boundaries which demarcate legitimate from illegitimate legal knowledge. The boundaries sort out "what is the resource material of constitutional law?", "what is a judge's institutional self-image?", "what weight should be given to institutional history?", "who counts in initiating constitutional claims?", "should extrinsic evidence be admitted?", and "what is the source of constitutional obligation?" "Reasons for judgment" express who the judge is as a person. Legal training has undoubtedly helped to mould legal consciousness to the point where lawyers share similar boundaries. The classic cases have involved a clash of boundaries. Absent a clash, law appears objective and neutral. But that very objectivity and neutrality disguises the deeper images of law which are embedded within the consciousness of the performers. That is why I have called law mere imagery. It is our image of what counts as reality that really counts.

I wish to test this general thesis by looking closely at the expression of two leading Québec legal scholars/judges during the post War era: Louis-Philippe Pigeon and Jean Beetz. I aim to show, in particular, that within the federalism essays and judgments of Pigeon and Beetz, there lies embedded a coherent picture of "what is a constitution?" The boundaries of this picture inform us as to how Pigeon and Beetz understand reality; that is, "what counts as legal knowledge?" If these boundaries can be identified, we may be rightly skeptical of the simplicity and weight which English-speaking legal scholars place upon the centralist/decentralist theme in federalism adjudication.

It is important at this point to comment on my method. Traditionally, common law lawyers read a judgment in an effort to identify the abstract rule of law which is necessary in a judge's reasoning process. The latter rule is called a *ratio*. The lawyer then tries to fit that rule cohesively into the various subject-matters of federalism law. These subject-matters are generally set out in sections 91 and 92 of the *Constitution* formerly named the *British North America Act, 1867*. Now, for reasons explained in *Images of a Constitution*<sup>9</sup>, I try to make myself contemporary with judgments as texts. I treat judgments as a judge's expression of "who s/he is" and this, in turn, hangs upon "how s/he understands reality". Accordingly, judgments and academic essays can be read interchangeably in an effort, not to seek out legal doctrine, but to understand the boundaries or horizons of one's picture of reality. Whether

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9. See CONKLIN, *Images of a Constitution*, *ibid.*, c. 1, esp. 12-15.

there is any other component to reality and, therefore, something more to federalism law than images, I shall leave to the side for the time being.

## 1. "La Règle Fondamentale" of Louis-Philippe Pigeon

### 1.1. The text as the constitution

The first question for all constitutional analysis in Pigeon's eyes remains the same as that of his English-speaking counterparts: "what is the nature of a constitution?" This first question underlies his early essays<sup>10</sup>, his reaction to a proposed bill of rights<sup>11</sup>, his reaction to the Fulton-Favreau Amendment Plan<sup>12</sup>, and his response to several constitutional claims as a Supreme Court Judge<sup>13</sup>.

A posited text, the *British North America Act*, 1867, serves as the starting point of Pigeon's image of a constitution. More correctly, Pigeon begins with only two sections of that text, sections 91 and 92. He describes the latter as "entrenched" in that neither level of government may amend them. In contrast, legislatures may amend sections 53 and 54 — without ado<sup>14</sup>. In his first published essay, *Are the Provincial Legislatures Parliaments?*, Pigeon concentrates entirely upon the exact words of the *Act*<sup>15</sup>. By reading the word "Canada" in section 17 of the *British North America Act* in the light of other sections where "Canada" is used, Pigeon expresses that "Canada" describes "the juristic federal unit" rather than a mere geographical entity<sup>16</sup>. The text, he concludes, posits parliaments "with sovereign authority" within their respective jurisdictions. Similarly, in *The Meaning of Provincial Autonomy*,

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10. L.-P. PIGEON, "Are the Provincial Legislatures Parliaments?" (1943) 21 *Can. Bar. Rev.* 826; "The Meaning of Provincial Autonomy", (1951) 29 *Can. Bar. Rev.* 1126; E. MCWHINNEY, "French Canada's Attitude to the Canadian Constitution, in E. MCWHINNEY, ed., *Canadian jurisprudence: the civil law and common law in Canada*, Toronto, Carswell, 1958.
  11. Pigeon, Brief to the joint committee on human rights and fundamental freedoms (1948) 26 *Can. Bar. Rev.* 706, at 712. Also see, PIGEON, "The Bill of Rights and the British North America Act", (1959) 37 *Can. Bar. Rev.* 66 and "The Supreme Court and the Division of Powers: Commentary", (1976) 14 *McGill L.J.* 55.
  12. PIGEON, "Le Sens de la Formule Fulton-Favreau", (1966-67) 12 *McGill L.J.* 403.
  13. See, e.g., *R. v. Drybones*, [1970] S.C.R. 282; *A.G. Can. v. Lavell*, [1974] S.C.R. 1349; *Ross v. Reg. of Motor Vehicles*, [1975] 1 S.C.R. 5; *Burns Foods Ltd. v. A.G. Man.*, [1975] 1 S.C.R. 494; *Re. Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; *A.G. Can. v. Dupond, Dupond A.G. (Can.)*, [1978] 2 S.C.R. 770; *R. v. Hauser*, [1979] 1 S.C.R. 984; *R. v. Thomas Fuller Const.*, [1980] 1 S.C.R. 695; *R. v. Zelensky*, [1978] 2 S.C.R. 940.
  14. *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198.
  15. (1943) 21 *Can. Bar. Rev.* 826.
  16. *Id.*, at 832.

Pigeon challenges the claim of centralists by appealing to the text in sections 91 and 92<sup>17</sup>. Centralists had paid "slight attention" to the "pregnant words" immediately following the POGG power, for example<sup>18</sup>. Further, centralists had erroneously rendered an historical construction to the Act — erroneous because, quoting from *Brophy v. A.-G. of Man.*<sup>19</sup>, "[t]he question is, not what may be supposed to have been intended, but what has been said."<sup>20</sup> That is, meaning emanates inherently from the text, not the framers' intent. This constitutes "a fundamental rule of legal interpretation," he claims<sup>21</sup>. What is more, one can rely upon a text in contrast to the framers' intent.

## 1.2. The fundamental rule

Starting with a posited text — the *British North America Act* — as the source of the constitution, Pigeon then narrows his focus. According to Pigeon, the text posits one "axiomatic" rule<sup>22</sup>, "the fundamental principle"<sup>23</sup>, a "general rule"<sup>24</sup>, a "basic principle"<sup>25</sup> with "a special character"<sup>26</sup>. The context of this axiomatic rule is very straight forward: provincial parliaments as much as federal parliaments are "mistresses in their own house". In short, provinces are autonomous or free from the dictates of any federal parliament.

In addition to the text, Pigeon grounds the general rule's existence in very different sources. First, notwithstanding the fallaciousness of the centralists' "historical construction"<sup>27</sup>, Pigeon continually appeals to Sankey's "inter-provincial compact" or "original contract" image of Confederation:

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the

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17. (1951) 29 Can. Bar. Rev. 1126.

18. *Id.*, at 1128.

19. [1895] A.C. 202 at 216.

20. PIGEON, "The Meaning of Provincial Autonomy", *supra*, note 17, at fn. 6.

21. *Id.*, at 1128. Also see how much weight PIGEON gave to the new text, the Canadian Charter, in L'effectivité des décisions de justice en droit public interne [constitutionnel], (1985) 26 C. de D. 995.

22. PIGEON, "The Joint Committee on Human Rights and Fundamental Freedoms", (1948) 26 Can. Bar. Rev. 706, at 714.

23. *Supra*, note 17, at 1135.

24. *R. v. Thomas Fuller Construction*, [1980] 1 S.C.R. 695.

25. *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198.

26. *Supra*, note 15, at 827.

27. *Supra*, note 19-20.

federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.<sup>28</sup>

Secondly, whereas a legislature or parliament may amend most sections of the *British North America Act, 1867* pursuant to sections 91(1a) or 92(1) without the aid of the British Parliament (such as sections 53 and 54), only the British Parliament may amend sections 91 and 92<sup>29</sup>. Thus, the general rule of provincial autonomy is "entrenched", to use Pigeon's term. Thirdly, Pigeon continually repeats Sankey's "mistress in her own house" dicta of the *Persons Case*<sup>30</sup>. Fourthly, he describes the *Act* in *French Canada's Attitude to the Canadian Constitution* as a treaty<sup>31</sup>. Finally, in 1951, Pigeon grounds the autonomy rule in Nature. Without laws, the relations amongst persons "would be governed by individual brute force."<sup>32</sup> Indeed, he goes so far as to suggest that a political regime which promises absolute freedom would lead to communism<sup>33</sup>. Absolute freedom, he defines as "total emancipation of any one man". This, in turn, means the "total domination over all others."<sup>34</sup> This obviously cannot constitute "true freedom". Accordingly, "[t]rue freedom means freedom under the law."

One needed laws, then, for "any order of things." But law-givers exercise "of necessity" very great power. "Obviously" any group which possesses "special characteristics" would wish to control its own laws. Hence, "[a] group forming what is sociologically termed a "nation" normally aspires to independence."<sup>35</sup> Federalism serves as "an attempt to reconcile the need of military, political and economic strength, which large units can only offer, with the desire for self-government that is inherent in any human group

28. *Aviation Case*, [1932] A.C. 54, at 70. Also see Sankey in *Edwards v. A.-G. for Canada*, [1930] A.C. 124, at 136, and in *British Coal Corp. v. The King*, [1935] A.C. 500, at 520-1, both cited and discussed in PIGEON, *Are the Provincial Legislatures Parliaments?*, *supra*, note 14, at 827. Laskin, in contrast, could see "no necessary relationship" between the "two founding peoples" conception and the text. See B. LASKIN, "Reflections on the Canadian Constitution after the First Century", (1967) 45 *Can. Bar. Rev.* 395, at 399.

29. *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 at 1291.

30. [1930] A.C. 124, at 136, and discussed in "Are the Provincial Legislatures Parliaments?", *supra*, note 15, at 827; "The Meaning of Provincial Autonomy", *supra*, note 16, at 1127, and *supra*, note 22, at 714.

31. *Supra*, note 9, at 25. Citing *A.-G. for Australia v. Colonial Sugar Refining Co. Ltd.*, [1914] A.C. 237, at 253, and referred to in *Bonanza Creek Gold Mining Co. Ltd. v. The King*, [1916] 1 A.C. 566, at 579.

32. "The Meaning of Provincial Autonomy", *supra*, note 17, at 1126.

33. *Id.*, at 1132.

34. *Id.*, at 1132.

35. *Id.*, at 1126.

having distinct collective feelings.”<sup>36</sup> He expresses the same point in another passage: “[a]utonomy is nothing else than freedom under the constitution.”<sup>37</sup> Pigeon’s sociology has set the ground work for what one English-speaking commentator — Albert Abel — describes as the “logic” to sections 91 and 92<sup>38</sup>.

### 1.3. The meaning of the autonomy rule

Pigeon identifies three elements of the autonomy rule. First, “limitations” or “boundaries” mark out the space over which a social group or “minority” possesses autonomous control. Secondly, autonomy implies “free movement within the area bounded by the limitations.”<sup>39</sup> As he expresses it,

[t]he true concept of autonomy is thus like the true concept of freedom. It implied limitations, but it also implied free movement within the area bounded by the limitations: one no longer enjoys freedom when free to move in one direction only. It should therefore be realized that autonomy means the right of being different, of acting differently. This is what freedom means for the individual; it is also what it must mean for provincial legislatures and governments. There is no longer any real autonomy for them to the extent that they are actually compelled, economically or otherwise, to act according to a specified pattern. Just as freedom means for the individual the right of choosing his own objective so long as it is not illegal, autonomy means for a province the privilege of defining its own policies.<sup>40</sup>

This is what Pigeon means when he continually insists that a provincial Parliament is “mistress in her own house.” Thirdly, what sets the boundary line between autonomous behaviour and external constraint is “the law” for, without law, brute force would determine the boundary line<sup>41</sup>. Sections 91

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36. *Id.*

37. *Id.*, at 1132.

38. A. ABEL believed that logic permeated sections 91 and 92 of the *British North America Acts, 1867* to present. Hence, he could entitle his major theoretical essay: “The Neglected Logic of 91 and 92”, (1969) 19 *U. of L. J.* 487. The “logic” to the grand division in sections 91 and 92, he believed, was grounded in his image of Canada (and the federal classes of subjects) as an economy and in his image of the provinces as societies. Although “highly abstract”, he considered this grounding “a good beginning”. Why? Not because it corresponded with social/political reality nor because it reflected the historical genesis and evolution of the country. Rather, because the genus of the two divisions in sections 91 and 92 represented the two more developed *sciences* of the social sciences respectively: economics and sociology. The federal classes embraced operations which were “the primary concern of economists” whereas the provincial classes served “primarily the concern of sociologists”. *Id.* at 502. Accordingly, “the Act’s scheme was comprehensive, intelligible and tidy.” *Id.* at 512.

39. *Supra*, note 17, at 1132-3.

40. *Id.*, at 1132-3.

41. Also see PIGEON *supra*, note 15.

and 92 of the *British North America Act*, 1867 are extremely important, then, in preserving civic peace for they posit the boundaries between the autonomy of a province and the autonomy of a federal parliament.

#### 1.4. The application of the general rule

From Pigeon's standpoint, the general rule of provincial autonomy leaves little room for choice. Pigeon applies the general rule as if it were some clear rule in some specialised statute rather than an open-ended principle. When relevant, the rule crystallises with full force. Unlike a principle which only points the judge to a certain direction without giving him the answer, the autonomy rule applies in an "all-or-nothing" fashion. If circumstances render the rule relevant, the rule causes one right answer<sup>42</sup>.

One can appreciate Pigeon's understanding of the "rule-like" character of the autonomy rule in three contexts. First, Pigeon feels compelled to apply the rule so as to render the *Canadian Bill of Rights* "invalid". In a *Brief* to a Parliamentary committee established in 1947 to consider what steps Canada should take to respect human rights and fundamental freedoms, Pigeon submits that a federally enacted bill of rights "would clearly amount to a curtailment of the powers of these Legislatures."<sup>43</sup> Whereas such a bill "would leave unrestricted the power of Parliament to alter the law at will, for the Provinces the enactment, if valid, would amount to a constitutional restriction of their legislative powers." Because human rights fall "mainly if not exclusively" within provincial authority and because freedoms are often regulated or restricted by both levels of government, legislative action is needed at both the federal and provincial levels at the same time. That is, the provinces effectively exercise a veto power over the implementation of any "comprehensive" bill of rights.

Pigeon believes the general autonomy rule determinative in his other published discussions about bills of rights. In his early essay *Why Provincial Legislatures are Parliaments*, for example, he claims that the provincial autonomy rule already protects human rights since the rights of minorities had been a condition precedent to enter into a federation<sup>44</sup>. In 1959 he

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42. This distinction between a rule and a principle is discussed in W. E. CONKLIN, *In defence of fundamental rights* (Alpheen aan den Rijn), Germantown, Maryland, Sijthoff & Noordhoff, 1979, at 245–248. Although Ronald Dworkin makes the most of the distinction as discussed *id.*, one can trace it back through the legal process school of 1950's to American realist writings (e.g. Pound).

43. As reprinted in (1948) 26 *Can. Bar. Rev.* 706, at 712.

44. PIGEON, *supra*, note 15 at 827.

criticises the draftsmanship of the *Canadian Bill of Rights* for ignoring the provincial autonomy rule. In particular, he complains that the preposition "in" in sections 2's "in Canada" and the general provision that "all laws in force in Canada... that are subject to be repealed, abolished or altered by the Parliament of Canada..." (section 3), have contemplated Canada as a geographical rather than as a federal juristic unit<sup>45</sup>. And this, despite the fact that the enumerated human rights and fundamental freedoms "obviously lie largely within the field of provincial jurisdiction; they include "property", one of the cardinal subjects of provincial legislative authority."<sup>46</sup> Furthermore, although the *Bill* purported to declare existing law, Parliament has "no jurisdiction to declare what provincial law is on any matter of provincial jurisdiction."<sup>47</sup> Finally, the Diefenbaker Bill of Rights "would go to the very root of civil power" and thereby subvert the provincial autonomy rule<sup>48</sup>.

English-speaking scholars have been known to condemn Pigeon's approach to the *Canadian Bill of Rights* once he joined the Supreme Court<sup>49</sup>. But once one realises that judgments are a judge's opportunity to work out his deeper image of a constitution and once one appreciates the core to Pigeon's image of a constitution, Pigeon's *Canadian Bill of Rights* judgments are not the least bit mystifying. First, Pigeon envisions the *Bill* solely as a general declaration of intent or "rule of construction" rather than as "an entrenched legal principle" or "constitutional rule".<sup>50</sup> This he imputes from the text of the *Canadian Bill of Rights* (which, in section 2, uses "construed" and "applied") plus the provincial autonomy rule. The alleged discriminatory legislation in *Drybones* arose directly out of section 91(24) of the *British North America Act*, he believes. Section 91(24) is "obviously intended to be exercised over matters that are, as regards persons other than Indians, *within the exclusive legislative authority of the Provinces*."<sup>51</sup> Equality before the law would require "complete uniformity" of legislative standards in all the provinces. Such uniformity would contradict the provincial autonomy rule.

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45. L.-P. PIGEON, "The Bill of Rights and the British North America Act", (1959) 37 *Can. Bar. Rev.* 66.

46. *Id.*, at 67.

47. *Id.*, at 68.

48. *Id.*, at 69.

49. See, e.g. P.W. HOGG, "Comment", (1974) 52 *Can. Bar. Rev.* 263; W.S. TARNOPOLSKY, "The Canadian Bill of Rights and the Supreme Court Decisions in Lavell and Burnshine: A Retreat from Drybones to Dicey?", (1974) 7 *Ott. L.R.* 1. Another example is in CONKLIN and FERGUSON, "The Burnshine Affair: Whatever Happened to Drybones and Equality before the Law", (1974) 22 *Chitty's L.J.* 303, at 305.

50. *R. v. Drybones*, [1970] S.C.R. 282, at 301, 306. See also PIGEON, *The Bill of Rights...*, *supra*, note 44 at 71 and *Lavell v. A.-G. Can.*, [1974] S.C.R. 1349.

51. *R. v. Drybones*, [1970] S.C.R. 282 at 303.

Pigeon's *Bill of Rights* judgments express the boundaries of his image of a constitution in that, secondly, the autonomy rule requires that parliament remain "mistress in her own house." Reading the *Bill of Rights* in the light of the general autonomy rule, Pigeon finds it

inescapable that Parliament, by the enactment of the Bill, has not only *fundamentally* altered the status of the Indians in that indirect fashion but also made any future use of federal legislative authority over them subject to the requirement of expressly declaring every time "that the law shall operate notwithstanding the Canadian Bill of Rights."<sup>52</sup>

Pigeon finds it "very difficult to believe" that Parliament has so intended: "[o]ne would have expected this important change to be made explicitly, not surreptitiously, so to speak." Why? Because parliament is autonomous in the sense of being "mistress in her own house". From that characteristic of Parliament, Pigeon can easily conclude that "the clearly expressed will of Parliament in whatever form" overrides the general words of the *Bill*.

The primacy of Pigeon's autonomy rule within his image of a constitution also explains his "division of powers" judgments. In *Burns Foods Ltd. v. A.G. Man.* a contract has been made outside Manitoba and, as such, it "clearly" falls outside the jurisdiction of the Manitoba Legislature<sup>53</sup>. The strict, seemingly visible boundary line between the complete exclusive freedom of the federal parliament and that of provincial legislatures prevents the latter from effectively controlling intraprovincial trade just as it prevents the federal parliament from regulating local trade. Issues of efficiency and desirability cannot override the permanence of the boundary line.

Pigeon works out the ramifications of the autonomy rule in each of his other federalism judgments. In *Re. Agricultural Products Marketing Act* he describes the autonomy rule as "the basic principle of the B.N.A. Act."<sup>54</sup> From it, he deduces that the control of production, purchase and sale are local matters within a province's autonomy. In *R. v. Thomas Fuller Construction* he describes the autonomy rule as "the general rule of the Constitution of Canada".<sup>55</sup> From this general rule he deduces the claim that the federal parliament may create courts only for the administration of federal, not provincial, laws. And in *R. v. Hauser* he believes that the autonomy rule conversely permits federal authorities to prosecute for violations of federal statutes in addition to contraventions of the *Criminal Code*<sup>56</sup>.

52. *Id.*, at 304. Emphasis added.

53. [1975] 1 S.C.R. 494.

54. [1978] 2 S.C.R. 1198, at 1297.

55. [1980] 1 S.C.R. 695, at 713. For other examples of the "givenness" of his autonomy rule, see cases cited *supra*, note 13.

56. [1979] 1 S.C.R. 984.

### 1.5. The character of a constitution

The autonomy rule serves as the starting point of constitutional analysis for Pigeon. Is there any other resource material with which Pigeon works? Yes, rules. Rules constitute the whole of a constitution. In *Drybones*, for example, Pigeon emphasizes that "one must always bear in mind the very starting point of the *Bill*, namely, that the rights and freedoms recognised are declared as existing, not as being introduced or expanded."<sup>57</sup> That is, he reads into the *Canadian Bill of Rights* the claim that the *Bill* presupposes *existing* posited rules rather than some ideal — directed natural law or social value. Secondly, in his "paramountcy" judgment of *Ross v. Reg. of Motor Vehicles* he urges that judges allow posited rules to stand if at all possible unless one rule is entirely repugnant to another<sup>58</sup>. Thirdly, Pigeon projects overall a totality of rule-making: what human behaviour the provinces may not regulate, the federal parliament may<sup>59</sup>. One set of rules may complement another set<sup>60</sup>. If there arises "a genuinely new problem which did not exist at the time of Confederation" and if one cannot find an enumerated rule in sections 91 or 92 to encompass it, there just must be some rule to authorise it. And the general residuary rule serves that function<sup>61</sup>. Finally, Pigeon pictures the *Canadian Charter of Rights and Freedoms* as an instrument which posits rules in an "all-or-nothing" fashion<sup>62</sup>. The *Charter's* most important rule is the rule in section 52 that posits "the Constitution" as the supreme law of the land.

### 1.6. The institutional self-image of Pigeon

It naturally flows, then, that a judge's primary duty is *to apply* posited rules. Pigeon objects to the lower court judges in *Drybones* in part because they have "in effect" held that by virtue of enacting the *Canadian Bill of Rights* Parliament has "implicitly repealed... *the fundamental principle that the duty of the courts* [was] *to apply the law as written* and they [were] in no case authorised to fail to give effect to the clearly expressed will of Parliament."<sup>63</sup> Pigeon's judgments read as if this enterprise were like Euclidean geometry.

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57. *R. v. Drybones*, [1970] S.C.R. 282.

58. [1975] 1 S.C.R. 494.

59. PIGEON, *The Bill of Rights...*, *supra*, note 14 at 831.

60. *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198.

61. *R. v. Hauser*, [1979] 1 S.C.R. 984.

62. PIGEON, "L'effectivité des décisions de justice en droit public interne [constitutionnel]", (1985) 26 C. de D. 995.

63. *R. v. Drybones*, [1970] S.C.R. 282 at 305. Emphasis added.

The first axiom is the fundamental autonomy rule. From it one need only deduce secondary and tertiary rules.

Admittedly, "a subjective element inevitably enters in the practical application" of secondary rules to "borderline cases".<sup>64</sup> This particularly occurs with words used to describe degrees such as "inordinate" or "substantial". Similarly, the words "gross" and "free" are "of necessity imprecise and open to subjective appreciation."<sup>65</sup> And admittedly, one may not allocate the boundary line between the autonomous conduct of provincial and federal parliaments "with mathematical accuracy."<sup>66</sup> Further, the need for rules is "essentially a moral problem". How does Pigeon resolve what he sees as the apparently inevitable subjectivity of constitutional analysis? He rejects the use of a technique of "an exact science ascertainable in the same manner as the natural sciences."<sup>67</sup> Moral problems may not be resolved "by mathematical formulas". Pigeon resolves the judge's dilemma of applying rules on the one hand against the inevitability of "moral (including legal) questions" on the other by leaving it to the legislature — not the judge — to make the moral judgments. That explains why the autonomy rule is so pivotal within Pigeon's image of a constitution. Each legislature — not the courts — possesses uncontrolled discretion to improve moral standards upon all persons within the area bounded by the limits<sup>68</sup>. Privy Council and Supreme Court judgments, he thinks, do not rest upon "a narrow and technical construction of the B.N.A. Act". Rather, such judgments are worked out from "a much higher view" which "firmly upholds the fundamental principle of provincial autonomy."<sup>69</sup> When courts must exercise choice, "French Canada's attitude naturally inclines towards provincial jurisdiction in such circumstances."<sup>70</sup>

## 2. Jean Beetz's Neutral Constitution

Jean Beetz, formerly of the Faculty of Law, University of Montreal (1953–70) and recently retired as a Supreme Court judge (1974–1987), shares Pigeon's priority rule of provincial autonomy. But Beetz adds something: he differentiates between the form and substance of a constitution. The super-rule of provincial autonomy constitutes the substance of the constitution. Judges, as neutral participants, serve as the guardians of the super-rule. Their

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64. PIGEON in McWhinney, *supra*, note 10, at 33.

65. PIGEON *supra*, note 17, at 1131.

66. *Id.*, at 1132.

67. *Id.*, at 1131.

68. *Id.*, at 1133.

69. *Id.*, at 1135.

70. PIGEON in McWhinney, *supra*, note 9 at 33.

role is to regulate social facts in the light of neutral reason and considerations of justice. The court is an active source of reason rather than a mere mirror of society's morals, beliefs and customs.

## 2.1. Substance and form

Beetz distinguishes between the form and the substance of a constitution<sup>71</sup>. The form or style of the 1867 Constitution "est caractéristique des statuts d'interprétation restrictive." He continues that "c'est un document hautement technique et par conséquent hermétique" which "entraîne normalement une interprétation purement exégétique et littérale."<sup>72</sup> By literally applying the text, judges have divorced the form of the *British North America Act*, 1867 from its substance. This schism explains the wide fluctuations in the case law, according to Beetz. The judge's duty is to look beyond form to "its operation, at its effects and at the scale of its effects." One must examine "the reality of the matter or of the matters with which in effect they deal."<sup>73</sup> Beetz himself demonstrates how one can search out "the reality" of the matters with which the *B.N.A. Act* and legislation deal in many of his federalism judgments<sup>74</sup>. Beetz shows in federalism judgments, how judges should focus upon the reality of both challenged legislation and the enumerated categories in sections 91 and 92. But what is the substance or reality of the constitution? Legislative autonomy. The terms of the *British North America Act*, 1867 are meaningful only in terms of that unalterable reality. In their literal exegesis of the *Act's* words, judges have forgotten the substance of legislative autonomy. Their literal exegesis has thereby de-stabilised the super-rule, the latter being the substance of the constitution.

Beetz advises that behind the substance there lies an abstract concept called "the Constitution". "The Constitution" possesses an objectivity and inherent imperativeness about it, independently of the interpreter. In tune with its objective nature, judges should interpret a text in a manner which "restât in changée le plus long-temps possible."<sup>75</sup> Judges should aspire for an immutable interpretation in contrast to the realist, relativistic approaches

71. BEETZ, *Les Attitudes Changeantes du Québec à l'endroit de la Constitution de 1867*, in CREPEAU & C.B. MACPHERSON, *the future of Canadian Federalism*, 1967, p. 113, at 116.

72. *Id.*, at 117.

73. *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at 452.

74. See, e.g., *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, esp. at 770-771, 773-776; *Bell Canada v. Quebec*, [1988] 1 S.C.R. 749, at 798h — 816e; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at 101a-106a, 115e-122a.

75. BEETZ, *supra*, note 71 at 119.

presumably represented in the writings of Laskin, Lederman, Lyon, Russell, McWhinney, and other English speaking realists:

[l']immutabilité de l'interprétation constitutionnelle supposait enfin un certain rejet des notions purement relatives, des données quantitatives, de l'innommé, de la jurisprudence dite "réaliste" et purement descriptive, des considérations d'ordre surtout fonctionnel; elle supposait au contraire que l'on mette l'accent sur le qualitatif, l'approfondissement et la précision des concepts, la jurisprudence analytique.<sup>76</sup>

A "constitution", he imagines, exists "out there" independently of a judge or lawyer. It is abstract rather than descriptive of social reality. It is permanent and overbearing. This imperative abstraction, this concept, which Beetz calls "the Constitution" lies behind and above the super-rule of legislative autonomy.

Beetz's *Anti-Inflation* judgment reflects how he understood the federalism issues against the projected boundary of an abstract, autonomous "Constitution".<sup>77</sup> In that case, federal counsel argued that the inflation of October 1975 had constituted a national emergency equivalent to war, pestilence or insurrection. Further, counsel argued, a parliament possesses "an implied power" to deal with an emergency for the safety of Canada as a whole. Beetz responds to these claims by describing the federal emergency power as "a temporary *pro tanto* amendment of a federal Constitution by the unilateral action of Parliament."<sup>78</sup> "The legitimacy of that power", he continues, "*is derived from the Constitution.*" More generally, Parliament possesses an implied authority to guarantee "the security and the continuation of *the Constitution* and of the nation". Quoting approvingly from Haldane in *Fort Francis*<sup>79</sup>, Beetz adopts Haldane's explanation that the preservation of the state itself justifies the implied emergency power: the power is "only to be found in that part of the constitution which establishes power in the state as a whole."<sup>80</sup> Beetz leaves

76. *Id.*, at 120.

77. [1976] 2 S.C.R. 373, at 463-4. Also see *Baisaillon v. Keable*, [1983] 2 S.C.R. 60, where a police officer had refused to reveal whether a certain person had served as a police informer. Beetz discovered an old secrecy rule, developed in trials for high treason, which prohibited judicial disclosure of a police informer's identity unless the identity demonstrated an accused's innocence. Beetz described it as "a legal rule of public order". To permit provincial legislatures to limit the exclusionary rule would erode the indivisibility of the rule because the situation would vary from one province to the next and from criminal to civil proceedings. The judicially created rule would thereby be undermined. "The Constitution" protected the indivisibility or sanctity of the posited rule.

78. *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 463. Emphasis added.

79. *Fort Francis Pulp & Paper Co. v. Man. Free Press Co.*, [1923] A.C. 695 at 704.

80. For the Hegelian background and connection to this conception of the state see generally ROBINSON, "Lord Haldane and the British North America Act", (1970) 20 *U. of L.J.* 55, and WEXLER, "The Urge to Idealize: Viscount Haldane and the Constitution of Canada", (1984) 29 *McGill L.J.* 608.

unresolved whether the state and "the Constitution" are one and the same. He leaves no doubt, though, as to the abstractness of "the Constitution" itself.

## 2.2. The substance of a constitution

If the form of "the Constitution" is an immutable, permanent abstraction, what is its content or "substance"? After all, we noted above that Beetz admonishes lawyers to examine "the reality" behind the form of the constitution<sup>81</sup>. And we noted how Beetz has aspired to do so in case after case. But this incorporation of empirical data is not without a reference point. And that reference point constitutes the core to the substance of a constitution, for Beetz. The reference point for Beetz is a horizontal/vertical spectrum. Along the horizontal axis, there lie subject matters or classes which cover the whole of human endeavour: what the federal authorities cannot legislate, the provincial authorities can; and vice versa. Within each category along the horizontal axis, different institutions (legislators, courts, regulatory agencies and public servants) may posit further rules and sub-rules which flow vertically under each subject matter. Beetz examines the real effects of legislation in terms of this horizontal/vertical spectrum. The spectrum is a "given", the substance of constitutional law for him. And Beetz is quick to point out its importance in judgment after judgment. In *Bell v. Canada*, for example, Beetz begins an extraordinarily long judgment (111 pages of the Supreme Court Reports) by setting out five "propositions", "principles" or "rules" which constitute the parameters of this horizontal/vertical spectrum<sup>82</sup>. These rules are "well known and most of them need only be stated in the form of propositions", he emphasizes<sup>83</sup>. The parameters become the "givens" in his judgments of *CN v. Courtois*<sup>84</sup> and *Alltrans Express Ltd. v. Workers Compensation Bd. of B.C. et al.*<sup>85</sup>. He incorporates empirical "reality" into that "given" picture of constitutional law. And all matters or facts, to be constitutionally relevant, are relevant in terms of the "given" rules from which he invariably starts his analysis<sup>86</sup>. If a matter or problem arises which is genuinely new in the sense that it is not explicitly or impliedly covered in the horizontal spectrum's enumerated categories, the cohesiveness and all inclusive

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81. See *supra*, note 73.

82. [1988] 1 S.C.R. 749, at 761a-766j.

83. *Ibid.*, at 761b.

84. [1988] 1 S.C.R. 868.

85. [1988] 1 S.C.R. 897.

86. Also see *A.-G. Can. v. Dupond*, *Dupond v. A.-G. Can.*, [1978] 2 S.C.R. 770; *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *R. v. Hauser*, [1979] 1 S.C.R. 984, per Pigeon which Beetz adopts.

scope of the horizontal/vertical spectrum is complete even then: the new problem simply comes within the general residual federal category<sup>87</sup>.

The crucial issue which this picture of law triggers is "what is the character of the rules which posit the boundaries within the horizontal and vertical axis?" To this question, Beetz responds that the posited rules which constitute the core of his image possess a temporal character. That is, time legitimizes the rules; time imbues the rules with authority. In his essay, "Reflections on Continuity and Change in Law Reform," he stresses that posited rules must be understood against the background of habits and customs which the rules institutionalize. "[T]he older the rule, the better it is," he claims, "for it has proved its justice and usefulness by its very duration."<sup>88</sup> If a posited rule were unfair or harmful, "man would have quickly found a way to get rid of it."<sup>89</sup> In contrast, a new rule is untried and unknown. Man mistrusts the unknown and is "partly afraid of it." Indeed, the notion of a rule itself implies "a certain duration": "[o]therwise it is an *ad hoc* rule. It is lacking in generality. It is lacking in certainty and therefore it is under suspicion of being arbitrary and illegitimate."<sup>90</sup>

Beetz works out this general picture of the temporality of posited rules in his *Dupond* judgment<sup>91</sup>. Dupond had attacked the constitutionality of a Montreal by-law and ordinance. The by-law had authorised the city's executive committee to "by ordinance, take measures to prevent or suppress" the holding of assemblies, parades or gatherings which endangered the safety, peace or public order. The executive committee had enacted an ordinance pursuant to the by-law. The ordinance prohibited "the holding of any assembly, parade or gathering anywhere and at any time on the public domain" for thirty days.

The key to Beetz's response to the *Dupond* challenge is that posited rules constitute the exclusive substratum of a constitution. The Montreal by-law and ordinance did not allow for any uncertain, unknown, open-ended new rules. First, the by-law and ordinance had prohibited the holding of *all* assemblies, parades or gatherings, irrespective of religion, ideology or political opinion. Secondly, a municipal officer had not been granted an uncontrolled discretion to enact new rules. To the contrary. Authority was vested in the Executive Committee of the city. The Executive Committee could exercise its

87. See *R. v. Hauser*, [1979] 1 S.C.R. 984, per Pigeon, at 1000.

88. J. BEETZ, "Reflections on Continuity and Change in Law Reform", (1972), 22 *U. of T. L.J.* 129 at 130.

89. *Id.*, at 130, fn. 2.

90. *Id.*, at 132.

91. *A.-G. Can. v. Dupond*, *Dupond v. A.-G. Can.*, [1978] 2 S.C.R. 770.

authority only after the directors of the police department and of the city's law department had expressed "that an exceptional situation warrants preventive measures." The report had to give reasons, the reasons had to be justified in terms of the by-law's standard, and the prohibition had to be temporary. Thus, the by-law and ordinance had posited a clear, known, certain rule.

Posited rules constitute the starting point of Beetz's expression in *Dupon*, thirdly, in that this known posited By-law contrasts with counsel's argument that the rule conflicts with the fundamental freedoms of speech, assembly, association, press and religion. Beetz reacts that the latter are abstract, vague, metaphysical and unknown concepts antithetical to his preoccupation with known posited rules. In Beetz's own words,

*I find it exceedingly difficult to deal with a submission couched in such general terms.* What is it that distinguishes a right from a freedom and a fundamental freedom from a freedom which is not fundamental? Is there a correlation between freedom of speech and freedom of assembly on the one hand and, on the other, the right, if any, to hold a public meeting on a highway or in a park as opposed to a meeting open to the public on private land? How like or unlike each other are an assembly, a parade, a gathering, a demonstration, a procession? Modern parlance has fostered loose language upon lawyers. As was said by Sir Ivor Jennings, the English at least have no written constitution and so they may divide their law logically. (W. Ivor Jennings, "The Right of Assembly in England", (1931-32), 9 New York University Law Quarterly Review, 217.)<sup>92</sup>

Worse still, the right to hold public meetings on the public domain had not been posited, "being unknown to English law." Being unknown, such a right "did not become part of the Canadian Constitution under the preamble of the *British North America Act*, 1867."

### 2.3. Beetz's institutional self-image

Notwithstanding the abstractness of the form — as opposed to the substance — of "the Constitution", Beetz's boundaries of "what is a constitution" delineate a specific role for a judge. A judge's duty is to guard "the Constitution". The judge may neither amend the Constitution nor imperceptibly aid its erosion. "It is the duty of the Courts," he expresses in the *Anti-Inflation Reference*, "to uphold the Constitution, not to seal its suspension..."<sup>93</sup> But how may a judge uphold "the Constitution" and prevent its erosion when, because it is an abstract formal entity, it is open to different interpretations as to its nature and meaning?

92. *Id.*, at 798. Emphasis added.

93. *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at 463-4.

Beetz resolves this dilemma by focusing upon the reasoning process justifying any one decision. So long as a judge appeals to external criteria, external to himself, his reasoning process remains neutral. Beetz describes this process in *Les Attitudes changeantes du Québec à l'endroit de la Constitution de 1867*:

En réalité, cette méthode d'interprétation, bien loin d'élaborer des règles neutres, objectives, désintéressées qui permettraient uniquement de trouver la signification d'un texte et l'intention de son auteur, dicte à l'interprète des maximes d'ordre public qui mettent en œuvre des critères fondamentaux auxquels l'on veut accorder la priorité même à l'encontre, dans certains cas, de la volonté expresse du législateur.<sup>94</sup>

The process of appealing to criteria, values, principles "above the rules and above the law" legitimates a particular rule or system of positive law<sup>95</sup>. That is why in *Dupond*, for example, Beetz emphasizes that a demonstration is not a form of speech. A demonstration is "of the nature of a display of force rather than of that of an appeal to reason." Why so? Because a demonstration, he thinks, is inarticulate. To be articulate and, therefore, inclusive within the term "expression" in the *Charter of Rights*, a picketing demonstration must be "of a kind which had as its purpose or object the conveying of information or opinion, or of persuading anyone to a point of view, or any purpose or object which could reasonably come within the term 'expression'," according to Beetz in *Dolphin Delivery*<sup>96</sup>. The inarticulate character of a demonstration prevents demonstrations "from becoming part of language and from reaching the level of discourse," as Beetz explains in his *Anti-Inflation* judgment<sup>97</sup>.

Beetz connects the importance of a neutral reasoning process to the content of a constitution. The content, again, is made up exclusively of posited rules of which the provincial autonomy rule is fundamental. Rules are posited by two sources: legislatures and courts. Judges uphold the Constitution, first, by appealing to the external standards posited by legislatures. So, for example, Beetz explains in the *Anti-Inflation Reference* that a court may not hold the suspension of the Constitution legitimate unless Parliament has already expressly and unmistakably signalled the invocation of the emergency power<sup>98</sup>. Furthermore, judges may not legitimately make "findings of fact justifying even a temporary interference with the normal constitutional

94. BEETZ, *Les Attitudes Changeantes...*, *supra*, note 71, at 115. His emphasis.

95. See Beetz, "Reflections on Continuity...", *supra*, note 88, at 131.

96. *Dolphin Delivery Ltd. v. Retail, Wholesale and Dept. Store Union, Local 580, Peterson and Alexander*, [1984] 3 W.W.R. 481, per Hutcheon J.A., at 495, whose reasons for judgment were adopted by Beetz on appeal in [1986] 2 S.C.R. 573, p. 604.

97. *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at 464.

98. *Id.*

process unless Parliament has first assumed responsibility for affirming in plain words that the facts are such as to justify the interference.”<sup>99</sup> The judge’s role begins “*after* the affirmation has been made.”<sup>99</sup> Otherwise, a judge would be invoking the emergency power on his/her own and making a subjective assessment of the facts. By appealing to the opinion of the Legislature (the other), the judge’s reasoning process cleanses itself and maintains its neutrality.

Short of suspending “the Constitution”, secondly, a judge appeals to judicially-created posited rules precisely because of their externality to the judge. The older the rule, the more legitimate and neutral is the judge’s appeal to the rule. In *Baisaillon v. Keable*, for example, Beetz discovers a rule posited centuries ago in trials for high treason. Time has placed the rule beyond the whims of the contemporary political process. By appealing to it, Beetz objectifies his reasoning process and maintains the neutrality to which a judge is compelled to adhere. Similarly, in *Dupond*, he sees his first duty in terms of finding known posited rules. Counsel’s abstract, vague and general terms fail to serve as the external clear rules which Beetz needs, he believes, to legitimise his reasoning process. And in *Construction Montcalm Inc. v. Minimum Wage Commission*<sup>100</sup>, Beetz shows how important it is for a federal system of government that there be effectively clear, certain rules<sup>101</sup>.

In *Montcalm*, the Minimum Wage Commission sought to recover wages and fringe benefits from Construction Montcalm Inc. on behalf of the latter’s employees pursuant to provincial enactments. The employer claimed that the latter did not apply to employees of a Quebec enterprise which was doing construction work on the new international airport (Mirabel) located on federal land and pursuant to a contract with the federal Crown. On behalf of the majority of the Supreme Court, Beetz wrote that the employer’s claim failed.

Let us look at the employer’s main submission to see how important clear, certain rules are to Beetz. The employer argued that aeronautics is a class of subjects which comes under federal jurisdiction and comprises the construction of airports, including the conditions of employment therein. Further, the employer alleged that Mirabel was a federal work or undertaking. In an interesting passage of his judgment,<sup>102</sup> Beetz worked out the ramifications of the employer’s main submission and these ramifications went to the need for certainty and clarity in the content of the constitution. For one thing, the

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99. See *supra*, note 77.

100. [1979] 1 S.C.R. 754.

101. *Ibid.*, at 775-6.

102. *Ibid.*, at 776.

record revealed little with respect to the nature of *Montcalm's* business operation. Further, the employer's claim "implied" that the nature of a construction undertaking varied with the character of each construction project or construction site. Beetz found the consequences of this claim "far reaching": "constitutional authority over the labour relations of the whole construction industry would vary with the character of each construction project."<sup>103</sup> But why would that be of a concern? Beetz immediately answers: "[t]his would produce great confusion." After offering an example, he insists that "I cannot be persuaded that *the Constitution* was meant to apply in such a disintegrating fashion."<sup>104</sup> And further, "[t]o accept Montcalm's submission would be to disregard *the elements of continuity* which are to be found in construction undertakings and to focus on *casual or temporary factors*..."<sup>105</sup> Stability, certainty, continuity, and permanence join together as the core factors in this expression (judgment) of Beetz' image of "what is a constitution".

### 3. Shared Boundaries

How the Pigeon/Beetz image of a constitution might differ from that of their English-speaking contemporaries on the Bench is left for another essay. That they share a coherent picture of reality with steadfast boundaries, there can now be little doubt. What, precisely, are those boundaries? How do Pigeon and Beetz distinguish legitimate from illegitimate legal knowledge? That is, what constitutes reality within their image of a constitution?

First, Pigeon understands a constitution as discoverable in a text. The Canadian constitution is found primarily in a legislated text, the *British North America Act*, 1867 or, more correctly, sections 91 and 92 thereof. Except for his excursion into the nature of persons and societies, Pigeon appeals to both the *British North America Act* and judicial *dicta* as the source of the constitution, the latter of which is also a *text*. For Beetz, a constitution possesses a form and a substance. The form of a constitution is an idea or metaphysical abstraction hovering overhead. The super-rule of legislative autonomy and other posited rules, written in legislative and judicial texts, constitute the substance or reality of that form. For both Pigeon and Beetz, rules form the critical and effective source of constitutional law. Notwithstanding Beetz's appeal to some metaphysical and mystical abstraction called "the

103. Emphasis added.

104. Emphasis added.

105. *Supra*, note 86.

Constitution" and his incorporation of empirical data into his characterization of legislated rules, he understands the core content or substance of the idea of "the Constitution" as a horizontal/vertical spectrum of rules.

But we know that posited rules need not be the only or even the core element of a constitution. Other Canadian jurists have understood a constitution to be the social/economic reality (as in the case of Laskin, the scholar), institutional history (as in the case of Martland and Ritchie in the *Patriation Reference*), social, economic and political history (as in the case of Ivan Rand), moral/political values (as in the cases of Noel Lyon, Rand, LeDain, McIntyre and others), or even speculative moral/political inquiry into the nature of rights, justice and other ideal-directed, abstract concepts (such as Madame Justice Wilson in her *Charter* judgments). But Pigeon would discard these other possible sources as irrelevant to the conscious enterprise of understanding constitutional law. Beetz most certainly incorporates social/economic data into his classificatory process, but he does so with reference to his prior picture of the horizontal/vertical spectrum of posited rules. Pigeon and Beetz most certainly would admit these latter inquiries as important to being an enlightened or even a good person. Each would, no doubt, admit that perceptions of social fact, history, moral/political values, and even speculative moral/political inquiry enter into the judicial process of finding, deducing and applying the rules. But such considerations enter into Pigeon's image of what constitutes legitimate or valid legal knowledge accidentally "by the back-door", as it were, only to the extent that the content of a rule directs a lawyer to incorporate history or the like or to the extent that the lawyer unconsciously incorporates such perceptions or values in his or her analytic process. We have seen that Beetz does incorporate legislative history and economic consequences into his search for the real matter of legislated rules. Once again, though, the latter pursuit is secondary to the "given" horizontal/vertical core of posited rules.

There emerges a second boundary within the Pigeon and Beetz prism of understanding the legal world. The rules, themselves, are *posited*. Although the rules may well have slowly evolved over time and although they may have grown from an imperceptible genesis, it is not until some institution has *posited* the rule that it becomes a part of a constitution. The rules, further, may well direct one to make inevitably value-laden choices. But it is the initial *positing* of the rule itself — not the moral character of the rule's content nor the ultimate choice — which legitimates the content of a constitution. Finally, Pigeon and Beetz might well believe that rules describe the social reality or, at least, that rules initially do so when first posited. But the *positing* of the rule, not the social reality underlying or causing the enactment of the rule, legitimates a rule as the substance of a constitution.

Thirdly, and interrelated with the above, *rules* constitute the starting point of constitutional analysis. Pigeon and Beetz presuppose a totality of rules in the sense that if the parent rules in section 92 do not authorise the control of human conduct, the rules in section 91 do so. The rules in sections 91 and 92 and the rules posited pursuant to those rules exhaust all legal knowledge. Vague customary standards, moral/political beliefs, social/economic data or, indeed, personal images of a constitution themselves: none of these constitutes the starting point of constitutional analysis unless or until one can find them in a written rule, unless the rule has been posited, unless the posited rule has posited further rules incorporating these latter considerations, and, in the case of Beetz, unless the rules are posited coherently with reference to the horizontal/vertical spectrum.

Posited rules act as prisms through which one understands all else in the world. Rules direct a lawyer to an answer. Indeed, a rule directs a lawyer to one right answer. The lawyer's or judge's reasoning appeals to rules to legitimate one's opinion/decision. One can summarize the rules at the start of one's judgment or opinion, as does Beetz from time to time. One can "see" the rules physically on the page. Through the rational process, the lawyer deduces secondary rules from existing rules. Each exception to a rule constitutes a new rule. And later judges identify a new rule out of an earlier judge's conclusion in another case. Or, so Pigeon and Beetz picture the judiciary's elaboration of law. Pigeon and Beetz derive all rules from the super-rule and that, in turn, from a posited text. Pigeon's judgments particularly read as if the super-rule causes one, clear-cut answer.

Fourth, rationality serves as the means to discover the rules. The manner in which Pigeon and Beetz work out the ramifications of the super-rule in their judgments manifests a rational technique. Admittedly, Beetz widens the tools of rationality to include economic studies, social statistics and social science data generally. Given the certainty of the horizontal/vertical spectrum of posited rules, the application of the super-rule to the facts takes on a necessity of its own in each case. Pigeon and Beetz use rationality to infer intermediate conclusions from the given super-rule of provincial autonomy in Pigeon's case and the horizontal/vertical axis in Beetz'. The conclusions "necessarily follow". The conclusions, if logically sound in terms of the prior "given", simply must be accepted. Accordingly, what is, ought to be. Pigeon and Beetz picture a constitution (and law) as if rationality could actually *cause* a particular conclusion. Because one conclusion posits a rule from which one begins anew in the next "similar" circumstance, rationality effectively formulates or posits the starting rules in each analytic exercise. And all this reinforces a picture of law as objective somehow divorced from the boundaries of one's pre-judgments about reality.

What function, then, does a text — such as “Reasons for Judgment” — serve for Pigeon and Beetz? The text offers a language for the necessary discourse in which rationality is presumed to cause the rules. That is, the prime function of a statute or judgment is not to posit rules as Pigeon and Beetz assume at first glance. Rather, legal texts initiate the language — the terms, the concepts, the words, the style — for the lawyer and thereby reinforce the social monopoly which lawyers possess over the interpretation of the texts.

Fifth, Pigeon and Beetz share an image of a lawyer as a scientist who is duty-bound to investigate the world beyond him/her in an objective, impartial, passive and neutral fashion. For Pigeon, the lawyer/judge exceeds his or her role by questioning the content of any rule posited by a legislature. Autonomy, being analogous to individual freedom, means that a legislature can exercise unrestrained conduct (that is, posit any rule on any subject or person) within the posited boundary lines of the freedom. For Beetz, the objective world includes social/economic “matter” which the lawyer must expose in his/her enterprise of classifying legislation into the pre-existing horizontal/vertical axis. And Pigeon applies the super-rule of provincial autonomy as if the super-rule exists objectively in the external world of fact and as if rationality can deductively cause one right answer from the given super-rule in any circumstance.

The final critical boundary shared in the images of Pigeon and Beetz is that constitutional law becomes imagery. A posited horizontal/vertical axis of rules constitutes the beginning of legal discourse for them. Yes, Beetz does urge lawyers to pierce the form of a constitution in order to strike at “the reality of the matter.” But that reality is interpreted against a given horizontal/vertical axis which is assumed to encompass — as a potential if not an actuality — the whole of human conduct. That is, Beetz’s horizontal/vertical axis pre-censors the “reality” which he wishes lawyers to expose. Further, rationality serves as the technique to discover, elaborate or apply the horizontal/vertical axis of posited rules in the social world. Thus, a constitution — or, more correctly, their images of a constitution — closes off any inquiry beyond the boundaries or parameters of their images. The jurist may not legitimately critique the content of the image from the outside in terms of the empirical social/economic reality on the one hand or the ends of Justice or Goodness on the other. Their image of a constitution as a horizontal/vertical axis of posited rules excludes an independently existing social reality or independent ends of Justice or Goodness as non-knowledge, as beyond the boundaries of the image. The image pre-censors both and to that end, the image is primordial to the rules, the texts, the rational technique and the scientific role of the lawyer. What we have taken to be constitutional law thereby collapses into the prior image whose boundaries we have for too long left unexamined.