Doucet-Boudreau, Dialogue and Judicial Activism: Tempest in a Teapot?

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> *"In our view, judicial restraint and metaphors such as "dialogue" must not be elevated to the level of strict constitutional rules to which the words of s. 24 can be subordinated."*[1]

It has been ten years since a group of French-speaking parents in Nova Scotia, frustrated with ongoing government delays, stood before the court hoping to realize their constitutional right to send their children to school in French. Little did they know at the time, their case would be headed to Ottawa and would result in one of the sharpest divisions ever between the nine judges of the Supreme Court of Canada.

In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, the Supreme Court upheld the trial judge's order that the province and school boards provide homogeneous French language facilities and programs to secondary school students and, more controversially, that they attend a series of reporting hearings to update the court on their progress.[2] The trial judge considered these reporting hearings necessary to ensure that the provincial government and French language school board implemented the substance of the order, which required them to comply with their constitutional obligations under s. 23 of the *Charter*.

If the trial judge's order to retain jurisdiction in *Doucet-Boudreau* caused a stir, the Supreme Court's 5-4 decision to affirm that order caused a tempest.[3] In the academic literature, some scholars have suggested that the majority's decision represents an exception to an established pattern

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1 *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, at para. 53.

2 (2000), 185 N.S.R. (2d) 246 (S.C.), rev'd (2001), 194 N.S.R. (2d) 323 (C.A.), rev'd [2003] 3 S.C.R. 3.

3 See Lorne Gunter "Judicial Arrogance Borders on Monarchical" *National Post* (20 November 2003), A18 [Gunter]; Kirk Makin "Top Court Pursuing Activism" *The Globe and Mail* (13 November 2003), A16 [Makin]; Alan Young "Court Gives Our Toothless *Charter* Sharp Fangs" *The Toronto Star* (23 November 2003), F07.

of judicial restraint under s. 24(1) of the *Charter*. It has been argued that in sanctioning supervisory jurisdiction as a legitimate constitutional remedy, the Supreme Court in *Doucet-Boudreau* stepped away from well-established principles of "dialogue" and mutual respect between the various branches of government and stepped directly into the exclusive territory of the executive.

This paper suggests that, in fact, the opposite may be true. That is, in the right case, a remedial order such as the one crafted by the trial judge in *Doucet-Boudreau* may actually serve to strengthen the dialogue between the courts and the executive. In contrast to a detailed mandatory order enforceable through contempt proceedings, flexible orders like the one in *Doucet-Boudreau* ensure compliance with constitutional obligations while leaving detailed choices regarding implementation to the executive. Further, looking to the experiences in other common law jurisdictions, it may be argued that there is a relationship between the need for supervisory orders and the health of the democratic process and its institutions.

In fleshing out this view, the first part of this paper will review the decision in *Doucet-Boudreau* and highlight key elements of both the majority and dissenting opinions. Second, this paper will consider the competing views on the importance of *Doucet-Boudreau* to the dialogue metaphor and questions of judicial activism. This section also considers and explains similar experiences in the United States, India and South Africa. The third part of the paper considers the benefits and drawbacks of three types of orders commonly made in minority language rights cases: (1) detailed mandatory orders enforceable by contempt; (2) flexible mandatory orders with supervisory jurisdiction; and (3) detailed interlocutory orders. Finally, the fourth part discusses the daunting question raised by the aftermath of *Doucet-Boudreau*: what is the right case for retaining jurisdiction as a constitutional remedy?

PART I: THE GENESIS OF *DOUCET-BOUDREAU*

In *Doucet-Boudreau*, a group of francophone parents brought an application pursuant to s. 23 of the *Charter* asking the Court to order the Nova Scotia Department of Education and le Conseil Scolaire Acadien Provincial to provide homogeneous French language programs and facilities at the secondary-school level in five regions of the province. For many years, the parents had been urging the government to provide the

required programs and facilities to high school students, in addition to those already being provided to primary school students. The problem in *Doucet-Boudreau* was not legislative—s. 23 of the *Charter* clearly provided the applicants with a right to have their children educated in French and there seemed to be little debate that the "numbers warrant" test was met. Indeed, in 1996, the Nova Scotia government created the Conseil Scolaire for the purpose of implementing the parents' s. 23 rights. Rather, the problem was one of government (in)action—notwithstanding promises to do so, homogenous French-language facilities were never built. In 1998, sixteen years after minority language education rights were enshrined in the *Charter*, the parents were compelled to seek assistance from the court in realizing their constitutional rights.

Against this backdrop of systemic delay, and in view of the "assimilation of the minority into the English-speaking majority ... reaching critical levels," the trial judge ordered the government to use its best efforts to provide French language facilities and programs by specific dates and to report back to him on its progress in scheduled reporting sessions.[4]

Several reporting hearings were held between July 2000 and March 23, 2001. Prior to each session, the trial judge directed the province to file an affidavit from an official at the Department of Education, outlining the Department's progress in implementing the order. The trial judge also allowed the parents and the Conseil Scolaire to file rebuttal evidence.

Before the final scheduled reporting session, the Nova Scotia Court of Appeal allowed the government's appeal of the order on the basis that "[t]he continuous post-trial intervention by the trial judge, in this case, into the area of the administrative branch of government is both unnecessary and unwarranted."[5] In the view of that court, the trial judge's decision to retain jurisdiction under s. 24(1) of the *Charter* "is the very kind of intervention that could lead to an impairment of the harmonious relations between the judicial and other branches of government which we presently enjoy in this country."[6]

The Supreme Court of Canada reversed the decision of the Court of Appeal and upheld the trial judge's original order by a narrow 5-4

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4 (2000), 185 N.S.R. (2d) 246 (S.C.), at para. 215 [Trial judgment].

5 (2001), 194 N.S.R. (2d) 323 (C.A.), at para. 48 [Appeal judgment].

6 *Ibid*. at para. 49.

majority. The majority emphasized the wide discretion afforded to trial judges under s. 24(1) of the *Charter* in crafting an appropriate and just remedy. On this point, Justices Iacobucci and Arbour recalled the following words of Justice McIntyre in *Mills v. The Queen*:

> It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.[7]

The majority went on to outline "some broad considerations that judges should bear in mind when evaluating the appropriateness and justice of a potential remedy."[8] They directed that, when considering whether a remedy under s. 24(1) is appropriate and just, judges should consider the following five principles:

1. An appropriate and just remedy meaningfully vindicates the rights and freedoms of the claimants. A remedy that is "smothered in procedural delays and difficulties" does not meaningfully vindicate the right.[9]

2. An appropriate and just remedy must use means that are legitimate within the framework of a constitutional democracy. The functions of each branch are not separated by a bright line in all cases, although the court must not "depart unduly or unnecessarily" from its role as an adjudicator of disputes.[10]

3. An appropriate and just remedy is a judicial remedy, which vindicates the *Charter* right while invoking the powers and function of a court. The powers and function of a court may be partially inferred from the tasks with which a court is normally charged and for which procedures and precedent have been developed.[11]

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7 [1986] 1 S.C.R. 863, at p. 965, quoted in *Doucet-Boudreau*, *supra* note 1 at para. 52.

8 *Supra* note 1 at para. 54.

9 *Ibid*. at para. 55.

10 *Ibid*. at para. 56.

11 *Ibid*. at para. 57.

4. An appropriate and just remedy is also fair to the party against whom it is made and "should not impose substantial hardships that are unrelated to securing the right."[12]

5. The judicial approach to a remedy under s. 24(1) should be flexible and responsive to the needs of any given case, keeping in mind "that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*."[13]

The majority held that the trial judge's order was crafted in accordance with the principles outlined above. In their view, the trial judge had identified the optimal solution for vindicating the parents' s. 23 rights, having particular regard to the "serious rates of assimilation and a history of delay in the provision of French-language education" in the five regions in question.[14] Further, the majority noted that the trial judge's reporting order reflected access to justice considerations, which may impact whether a remedy can be said to effectively vindicate the right at issue. On this point, Justices Iacobucci and Arbour noted:

> In the absence of reporting hearings, the appellant parents would have been forced to respond to any new delay by amassing a factual record by traditional means disclosing whether the parties were nonetheless using their best efforts. A new proceeding would be required and this might be heard by another judge less familiar with the case than LeBlanc J. All of this would have taken significant time and resources from parents who had already waited too long and dedicated much energy to the cause of realizing their s. 23 rights. The order of reporting hearings was, as Freeman J.A. wrote "a pragmatic approach to getting the job done expeditiously"(para. 74). LeBlanc J.'s order is a creative blending of remedies and processes already known to the courts in order to give life to the right in s. 23.[15]

On the important question of separation of powers, the majority held that the reporting order did not depart unduly or unnecessarily from the role of the court in Canada's constitutional democracy. Indeed, the majority noted that that the "best efforts" aspect of the order allowed the

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[12] *Ibid*. at para. 58.

[13] *Ibid*. at para. 59.

[14] *Ibid*. at para. 60.

[15] *Ibid*. at para. 61.

Department of Education some flexibility in its approach to implementing the order. In other words, "[i]n these circumstances, it was appropriate for LeBlanc J. to craft the remedy so that it vindicated the rights of the parents while leaving the detailed choices of means largely to the executive."[16]

Justices LeBel and Deschamps, writing for the minority, challenged the trial judge's reporting order as violating the principle of separation of powers because it amounted to interference in the management of public administration. In their view, there were alternative remedies to cure the *Charter* breach, such as a more detailed order enforceable through contempt proceedings. As a result, "the trial judge's remedy undermined the proper role of the judiciary within our constitutional order, and unnecessarily upset the balance between the three branches of government."[17] The dissenting judges would have found that the retention of jurisdiction is not an appropriate and just remedy under s. 24(1) of the *Charter*.

Justice LeBel and Deschamps placed significant weight on the importance of judicial restraint and mutual respect between the judicial and executive branches. Reflective of this approach, they stated:

> However, the principle of separation of powers has an obverse side as well, which equally reflects the appropriate position of the judiciary within the Canadian legal system. Aside from their duties to supervise administrative tribunals created by the executive and to act as vigilant guardians of constitutional rights and the rule of law, courts should, as a general rule, avoid interfering in the management of public administration.[18]

In their view, the trial judge should have "precisely defined the terms of the remedy, in advance."[19] In the event of non-compliance, such an order could have been enforced by the parents by way of a contempt proceeding. This approach, they argued, would have been an "equally effective, well-established, and minimally intrusive alternative."[20]

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[16] *Ibid*. at para. 68.

[17] *Ibid*. at para. 118.

[18] *Ibid*. at para. 110.

[19] *Ibid*. at para. 133 [emphasis in original].

[20] *Ibid*. at para. 136.

The majority rejected a formalistic approach to determining the limits on the court's role in any given case: "Determining the boundaries of the courts' proper role, however, cannot be reduced to a simple test or formula; it will vary according to the right at issue and the context of each case."[21] On this point, Justices Iacobucci and Arbour noted that the right at issue concerned a positive obligation on the government to provide education in French, and the context included long delays and rapid cultural erosion.

Even more centrally, Justices Iacobucci and Arbour challenged the minority's argument that a contempt proceeding is inherently more respectful of the role of the executive branch simply because it is a more traditional method of ensuring compliance with court orders:

> The threat of contempt proceedings is not, in our view, inherently more respectful of the executive than simple reporting hearings in which a linguistic minority could discover in a timely way what progress was being made towards fulfillment of their s. 23 rights.
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> [...]
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> The order in this case was in no way inconsistent with the judicial function. There was never any suggestion in this case that the court would, for example, improperly take over the detailed management and co-ordination of the construction projects. Hearing evidence and supervising cross-examinations on progress reports about the construction of schools are not beyond the normal capacities of courts.[22]

In their view, the supervisory order in this case fell well within the proper functions of a court. Indeed, the majority opinion in *Doucet-Boudreau* suggests that, in some cases, a supervisory order is more respectful of the executive's authority and expertise than are contempt proceedings, which require a detailed mandatory order and involve the threat of fines and/or imprisonment.

Many, including the four dissenting judges of the Supreme Court of Canada, disagree. The following section will explore the competing views on the relationship between *Doucet-Boudreau*, the dialogue metaphor and questions of judicial activism.

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[21] *Ibid*. at para. 36.

[22] *Ibid*. at paras. 67 and 74.

PART II: *DOUCET-BOUDREAU*, DIALOGUE AND JUDICIAL ACTIVISM

A. WHAT IS INSTITUTIONAL DIALOGUE?

Much has been made of the dialogue metaphor since its introduction by Peter Hogg and Allison Bushell Thornton in their article "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)."[23] The authors suggested that, in considering the legitimacy of judicial review under the *Charter*, it is helpful to understand that the judicial response to unconstitutional government behaviour is rarely the end of the story. Thus, although the *Charter* gave the court new powers of review, Hogg and Bushell found that the court's decisions usually left room for, and received, a response from the legislature. In their review of the *Charter* case law, most of the responses from the government cured the constitutional deficiencies identified by the court while maintaining the legislative intent of the original law. In theory, and in some cases in practice, this dialogue could continue for several rounds.[24] Thus, under the *Charter*, an institutional dialogue between the court and legislature was born.

Although the value of the dialogue metaphor has been questioned by some, it has been largely embraced by the courts. In their article "Does the Observer Have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada's Courts," Richard Haigh and Michael Sobkin note that between 1997 and 2007, the Supreme Court has referenced the dialogue metaphor in ten cases.[25] In four of those cases, they argue that the court has used the metaphor in a prescriptive sense, that is, as a benchmark for determining the appropriate *Charter* remedy.

Two such cases are *Corbière v. Canada (Minister of Indian and Northern Affairs)*,[26] and *Bell Express Vu v. Rex*.[27] In both of these cases,

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[23] Peter Hogg and Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997), 35 Osgoode Hall L.J. 75.

[24] See for example *Vann Media Group Inc. v. Oakville (Town)* (2008), 95 O.R. (3d) 252 (C.A.). Of the sixty-five cases reviewed by Hogg and Bushell for their 1997 article, only thirteen cases received no response from the government. See *ibid*. at p. 97.

[25] Richard Haigh and Michael Sobkin, "Does the Observer Have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada's Courts" (2007), 45 Osgoode Hall L.J. 67.

[26] [1999] 2 S.C.R. 203.

the concept of institutional dialogue was linked to the proper function of the democratic process. In her concurring opinion in *Corbière*, Justice L'Heureux-Dubé described this link in the following terms:

> The link between public discussion and consultation and the principles of democracy was recently reiterated by this Court in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 68: "a functioning democracy requires a continuous process of discussion." The principle of democracy underlies the Constitution and the *Charter*, and is one of the important factors guiding the exercise of a court's remedial discretion. It encourages remedies that allow the democratic process of consultation and dialogue to occur. In P. W. Hogg and A. A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997), 35 *Osgoode Hall L.J.* 75, the authors characterize judicial review under the *Charter* as a "dialogue" between courts and legislatures. The remedies granted under the *Charter* should, in appropriate cases, encourage and facilitate the inclusion in that dialogue of groups particularly affected by legislation. In determining the appropriate remedy, a court should consider the effect of its order on the democratic process, understood in a broad way, and encourage that process.[28]

Further, in *Bell Express Vu*, Justice Iacobucci used the dialogue metaphor to explain the relationship between judicial review and the democratic process:

> This last point touches, fundamentally, upon the proper function of the courts within the Canadian democracy. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 136–42, the Court described the relationship among the legislative, executive, and judicial branches of governance as being one of dialogue and mutual respect. As was stated, judicial review on *Charter* grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches. "The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even

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[27] [2002] 2 S.C.R. 559.

[28] *Supra* note 26, at para. 116.

overarching laws under s. 33 of the *Charter*)" (*Vriend*, *supra* at para. 139).[29]

It may be said that the Supreme Court has recognized a connection between the court's remedial discretion under s. 24(1) of the *Charter* and a healthy democracy. In *Doucet-Boudreau*, the long delay in implementing the claimants' s. 23 rights could easily be understood as evidence of a breakdown in the democratic process. In stating that "judicial restraint and metaphors such as 'dialogue' must not be elevated to the level of strict constitutional rules,"[30] Justices Iacobucci and Arbour seem to be suggesting that a formalistic understanding of judicial restraint and the principle of mutual respect unnecessarily fetters the court's discretion under s. 24(1). Arguably, limiting the court's discretion under s. 24(1) too much may impede the "proper function of the courts within the Canadian democracy."[31]

B. DIFFERING VIEWS: THE IMPACT OF *DOUCET-BOUDREAU* ON DIALOGUE AND THE PRINCIPLE OF MUTUAL RESPECT

Much has been made of the majority's reference to the role of dialogue and judicial restraint in *Doucet-Boudreau*, and many have commented that the decision to affirm the supervisory order represents a new (or in the opinion of some, simply a further) step toward judicial activism. In the media, the case has been described as "testing the waters of judicial activism"[32] and an example of "judicial arrogance."[33] For their part, long-time *Charter* critics Christopher Manfredi and James Kelly have argued that "the Court has systematically enhanced the scope of remedial powers under the *Charter* from *Schachter v. Canada* (1992) to *Doucet-Boudreau v. Nova Scotia* (2003)."[34]

In Part II of their article "*Charter* Dialogue Revisited – Or 'Much Ado About Metaphors,'" Peter Hogg, Allison Bushell Thornton and Wade Wright review and comment on the Supreme Court's consideration and

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29 *Supra* note 27 at para. 65.

30 *Supra* note 1.

31 *Supra* note 27 at para. 65.

32 See Makin, *supra* note 3.

33 See Gunter, *ibid*.

34 Christopher P. Manfredi and James B. Kelly, "Misrepresenting the Supreme Court's Record?" (2004), 49 McGill L.J. 741.

application of the dialogue metaphor since 1997.[35] They conclude that the dialogue metaphor "has been influential in guiding the courts in their increasing use of suspended declarations of invalidity" under s. 52. Further, they submit that the concept of institutional dialogue could also serve as an appropriate influence in guiding the court's choice of remedy under s. 24(1). On this point, the authors note that judicial respect for the role of the executive in administrative matters has resulted in a pattern of judicial restraint under s. 24(1). However, they argue that the majority decision in *Doucet-Boudreau* represents "a remarkable exception to the pattern of restraint" and stands in contrast to the court's previously-expressed views that constitutional remedies should foster the dialogue between the various branches. They challenge the majority's decision and its characterization of the role of dialogue and judicial restraint in the decision-making process:

> Justices Iacobucci and Arbour, writing for the majority, were obviously troubled by their espousal of dialogue in other contexts and their affirmation of the draconian supervisory order in this case. They said that "judicial restraint and metaphors such as 'dialogue' must not be elevated to the level of strict constitutional rules to which the words of section 24 can be subordinated." We would only comment that there is no need to elevate dialogue to the level of a strict constitutional rule in order for the courts to exercise their remedial discretion under section 24 with due respect for the competence and good faith of the executive branch. [footnotes omitted][36]

Haigh and Sobkin have also argued that, in affirming the supervisory order in *Doucet-Boudreau*, the majority exhibited "a change of heart in the Court's view of the [dialogue] metaphor."[37] In their view, the majority's decision is a positive shift away from the court's earlier jurisprudence, which relied on the dialogue metaphor to inform the court's choice of remedy. In fact, they challenge the usefulness of the metaphor to the court's decision-making under s. 24(1), and suggest that

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[35] Peter W. Hogg, Allison A. Bushell Thornton, and Wade K. Wright, "*Charter* Dialogue Revisited – Or 'Much Ado About Metaphors'" (2007), 45 Osgoode Hall L.J. 1.

[36] *Ibid.* at p. 19.

[37] *Supra* note 25 at pp. 76–77.

the decision in *Doucet-Boudreau* makes this "a good time to move on from discussing the metaphor at all."[38]

Others dispute that the decision in *Doucet-Boudreau* has changed the dialogue landscape at all. For instance, in *Language Rights in Canada*, Mark Power and André Braën comment that "*Doucet-Boudreau* does not mark an end to the dialogue between the judiciary and the executive branches of the State, but rather reaffirms its importance."[39] Further, in an article comparing the use of supervisory orders in Canadian and South African jurisprudence, Kent Roach and Geoff Budlender argue that supervisory jurisdiction does not impinge on the separation of powers, and falls well within the scope of the proper judicial function. In their view,

> remedial activism is set in a different light when it is recognized as an attempt to remedy a lack of capacity that prevents the government from complying with the constitution. Supervisory jurisdiction with reports back to the court should not be seen as a punishment of government for defiance of the Constitution. Rather, it is simply a means of ensuring effective compliance with the Constitution, which must be the core concern of the courts.[40]

In "*Doucet-Boudreau* and the Development of Effective Section 24(1) Remedies: Confrontation or Cooperation?", Debra M. McAllister argues that the majority's decision in *Doucet-Boudreau* reinforces the concept of institutional dialogue and the principle of mutual respect:

> [T]he concept of judicial restraint and the tradition of mutual deference and cooperation are at the core of the majority's reasoning in *Doucet-Boudreau*. Although the trial judge's reporting order could be seen as a foray into the realm of the executive, the simple truth is that it worked. The government voluntarily complied with the order, delivering French language programs and schools, on schedule, and fulfilling the promise of section 23 minority language rights in Nova Scotia. Government representatives attended the hearings, filed evidence, challenged

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[38] *Ibid*. at p. 90.

[39] Mark Power and André Braën, "The Enforcement of Language Rights" in Michel Bastarache, ed., *Language Rights in Canada* (Quebec: Éditions Yvon Blais, 2004), at p. 559.

[40] Kent Roach and Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate and Just?" (2005), 122 S. African L.J. 325, at p. 350.

> the trial judge's jurisdiction and ultimately appealed, without the difficulties experienced in the United States. The Supreme Court embraced the broad remedial authority in superior courts, but at the same time reinforced the principle of respect for the constitutional roles of the executive and legislative branches of government.[41]

Her article contrasts the decision in *Doucet-Boudreau* with the decision in *Eldridge v. British Columbia (Attorney General)*,[42] where the Supreme Court unanimously declared the lack of sign language services in hospitals unconstitutional and directed the government to remedy the breach within six months. In her view, the remedy in *Eldridge* may be considered more interventionist than the supervisory order in *Doucet-Boudreau* because, although in the form of a declaration, it effectively required the government to implement a specific course of action when there may have been other policy options available. Indeed, she notes that "*Doucet-Boudreau* provides an alternative perspective that recasts the issue as one of cooperation and mutual respect, rather than confrontation between branches of government."[43] This critique is especially interesting because the Court in *Eldridge* emphasized that its preference for a declaratory order was based on its desire to leave the government with the discretion to choose between the "myriad options" available to it.[44]

The overarching critique of *Doucet-Boudreau* is not that retaining supervisory jurisdiction as a remedy under s. 24(1) pre-empts a response from the government *per se*—after all, its very point is to mandate a government response. Rather, the argument seems to be that post-trial supervision by the court of its own order strains the dialogic relationship between the court and the executive by appointing the trial judge as manager of the executive's administrative process. In effect, the court overtakes the institutional dialogue by expanding its proper functions to include those of the executive, which tests principles of mutual respect and separation of powers.

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41 Debra M. McAllister, "*Doucet-Boudreau* and the Development of Effective Section 24(1) Remedies: Confrontation or Cooperation?" (2004), 16 Nat'l J. Const. L. 153, at p. 172.

42 [1997] 3 S.C.R. 624.

43 *Supra* note 41, at p. 173.

44 *Supra* note 42, at para. 96.

In response to these critics, many others have argued that the remedy in *Doucet-Boudreau* may, in some cases, be more effective and ultimately more respectful of the institutional roles of the court and the executive. Arguably, *Doucet-Boudreau* also reaffirms the notion that it is the role of the judicial, executive and legislative branches to work co-dependently toward fostering a healthy Canadian democracy.

C. DIALOGUE AND DEMOCRACY

McCallister's comment on "the difficulties experienced in the United States" is a reference to the controversial role played by the judiciary during the American civil rights movement, most notably in the aftermath of the U.S. Supreme Court's desegregation decision in *Brown v. Topeka Board of Education*.[45] Faced with serious opposition from some states in implementing the decision, the Supreme Court heard separate arguments on the question of remedy.[46] The court recognized that the specific relief required in each case would vary depending on the types of problems faced in each state. It therefore ordered the district courts in each region to oversee the implementation process and "to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."[47] The district courts were also charged with considering "the adequacy of any plans the defendants may propose to meet these [implementation] problems and to effectuate a transition to a racially nondiscriminatory school system."[48] During this period of transition, the Supreme Court also ordered the district courts to retain jurisdiction over the implementation process. The result of this ongoing supervision was a series of detailed mandatory orders by the courts to ensure compliance with the Supreme Court's original decision in the case.

The decision in *Brown II* strained the relationship between the legislative, executive and judicial branches of government, as many viewed the district courts' ongoing supervision and detailed implementation orders as unacceptable examples of pure judicial activism. It seems likely that the U.S. Supreme Court did not relish the idea of ordering district courts to retain jurisdiction to ensure compliance

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45 347 U.S. 483 (1954) [*Brown I*].

46 349 U.S. 294 (1955) [*Brown II*].

47 *Ibid*. at p. 299.

48 *Ibid*. at p. 301.

with its decision, precisely because of the negative reaction it would—and did—receive from state actors. Arguably, however, the court recognized that it was necessary to protect the claimants' rights in a meaningful way.

Supervisory orders have also been used by Indian courts in response to a new form of litigation known as "Public Interest Litigation." This type of litigation, a result of the expansion of the *locus standi* principle, allows constitutional actions to be brought on behalf of disenfranchised persons by social activists and lawyers. Under this rubric, the High Courts and the Indian Supreme Court have decided cases relating to gender equality, the availability of food, access to clean water, safe working conditions, gender discrimination and prisoners' rights. As Chief Justice K.G. Balakrishnan of the Indian Supreme Court has commented, public interest litigation in India has evolved "with a view to bringing justice within the easy reach of the poor and disadvantaged sections of the community."[49]

In attempting to breathe life into India's democratic institutions while maintaining respect for the role of the executive, "the Indian Courts have pushed the boundaries of constitutional remedies by evolving the concept of a 'continuing mandamus' which involves the passing of regular directions and the monitoring of their implementation by executive agencies."[50] For instance, in *People's Union for Civil Liberties v. Union of India*, the court ordered the government to comply with a policy to provide lunches to children in government run Anganwandi Centres.[51] Implementation has been a long process, and the court has required that compliance reports be filed by every State and Union Territory.[52] Supervisory orders have also been used to monitor compliance with orders regarding the government's environmental obligations. Indeed, a special Green Bench has been constituted to maintain judicial supervision over Indian forest conservation measures.[53]

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[49] Chief Justice K.G. Balakrishnan, "Growth of Public Litigation in India" (Speech presented to the Singapore Academy of Law, 15th Annual Lecture, October 2008), at p. 6, citing *Bihar Legal Support Society v. The Chief Justice of India & Ors*, AIR 1987 SC 38.

[50] *Ibid.* at p. 4.

[51] See (2007) 1 SCC 728, cited by Chief Justice Balakrishnan, *ibid*. at p. 17, and the follow-up decision in Case No. 196/2001, unreported, April 22, 2009.

[52] *Ibid*.

[53] *Supra* note 49 at p. 17.

These creative constitutional remedies have been criticized for exceeding the scope of judicial authority. However, as Chief Justice Balakrishnan has noted, "[i]t must be remembered that meaningful social change, like any sustained transformation, demands a long-term engagement."[54]

The Constitutional Court in South Africa has also affirmed the availability of a supervisory order as a constitutional remedy in appropriate cases, but appears to share the reticence of courts in Canada and other common law jurisdictions in exercising such authority.[55] Like other jurisdictions, South African courts have often relied on declaratory orders that note that the government is not fulfilling its constitutional obligations and require them to take steps to ensure compliance. This was the case in *Government of the Republic of South Africa v. Grootboom et al.*,[56] where the Constitutional Court issued a declaratory order obliging the government to comply with its constitutional obligation to provide adequate housing; however, the Court has also asserted its authority to go further where necessary. In *Minister of Health v. Treatment Action Campaign (No 2)*, the Treatment Action Campaign challenged the government's policies for distributing anti-retroviral drugs to pregnant women.[57] Although the Constitutional Court overturned the High Court's decision to grant a supervisory order, it acknowledged the court's jurisdiction to grant mandatory relief, including "the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented."[58]

In 2005, the Constitutional Court considered the circumstances in *Sibbiya v. Director of Public Prosecutions (Johannesburg High Court)* to be an appropriate case for issuing a supervisory order.[59] Approximately ten years before *Sibbiya*, the Constitutional Court had declared the death penalty unconstitutional and ordered that the sentences for prisoners on death row be substituted with lawful punishments. The applicants in

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54 *Ibid*.

55 See Roach and Budlender, *supra* note 39, and Mitra Ebadolahi, "Using Structural Interdicts and The South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008), 83 N.Y.U.L. Rev. 1565.

56 2001 (1) SA 46 (S. Afr. Const. Crt.).

57 2002 (5) SA 721 (CC).

58 *Ibid*. at para. 104.

59 2005 (5) SA 315 (CC).

Sibbiya challenged the slow response from the government in implementing their rights. The court ordered the government to take all steps necessary to convert the remaining death sentences and to report back to the court on its progress within sixty days. Emphasizing the government's delay in implementing its constitutional obligations, the court stated as follows:

> The process of the substitution of sentences has taken far too long. It is important that all outstanding death sentences be set aside and substituted as soon as it is possible.
>
> Counsel for the [government] was inclined to concede that the substitution process should be completed quickly. I accept his statement to the effect that the relevant authorities envisage that the process of the substitution of sentences will be completed by the end of June. However, the process has taken so long that it will be inadvisable for this Court to assume that the death sentences will be substituted as envisaged.
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> This Court has the jurisdiction to issue a mandamus in appropriate circumstances and to exercise supervisory jurisdiction over the process of the execution of its order.[60]

In *Sibbiya*, the Constitutional Court noted that a supervisory order may be issued in appropriate circumstances, including where it is "inadvisable for [the] Court to assume" that the order will be carried out in a timely fashion.[61]

Although the availability of supervisory orders has been affirmed in Canada, the United States, India and South Africa, criticisms that such orders stretch the legitimate authority of the court still linger. However, in each of these jurisdictions, supervisory jurisdiction has been recognized as a meaningful and effective constitutional remedy in the appropriate case. The need for such remedies may be amplified in developing countries, where democratic institutions often suffer from significant capacity restraints. On this point, it is not surprising that the courts in India have devised remedies, such as the Green Bench, that go far beyond the order in *Doucet-Boudreau*. Arguably, the more marginalized rights holders are from the democratic institutions created to serve them, the

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[60] *Ibid*. at paras. 40–42.

[61] *Ibid*. at para. 60. For further discussion on this point, see Roach and Budlender, *supra* note 39 at p. 333.

more important it is for the court to "encourage and facilitate the inclusion ... of groups particularly affected" in the dialogue between the courts and the legislature.[62] In Chief Justice Balakrishnan's own words:

> The main rationale for 'judicial activism' in India lies in the highly unequal social profile of our population, where judges must take proactive steps to protect the interests of those who do not have a voice in the political system and do not have the means or information to move the Courts. This places the Indian Courts in a very different social role as compared to several developed nations."[63]

In the Canadian context, the remedy in *Doucet-Boudreau*, although unconventional, fits squarely within the court's role to ensure governments protect and uphold the constitution. This was perhaps best put by Chief Justice McLachlin in a speech she gave in 2001 on the role of judges in our modern society:

> While the legislative and executive branches of government have a front line role to play in supporting human rights, the difficult burden of interpreting the rights and maintaining them even in the face of governmental intransigence if need be rests on the shoulders of the courts.[64]

Supervisory orders, when used properly, may be a useful tool to the court in crafting meaningful remedies under s. 24(1). Arguably, as will be reviewed in the next section, some remedies traditionally available to the courts to ensure compliance with constitutional obligations may interfere more, rather than less, with the role of the executive branch.

PART III: CASE LAW TRENDS IN REMEDIAL ORDERS ENFORCING S. 23 RIGHTS

In *Doucet-Boudreau*, the dissenting judges argued that the traditional remedies available to the court would have been more appropriate than the supervisory order chosen by the trial judge. In their

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62 *Supra* note 26 at para. 116.

63 *Supra* note 49 at p. 6.

64 The Right Honourable Beverley McLachlin, P.C., "The Role of Judges in Modern Society" (Remarks to the Fourth Worldwide Common Law Judiciary Conference, May 5, 2001).

view, any breach by the government could have been cured by bringing a contempt proceeding, which would have more appropriately respected the separate roles of the judiciary and the executive branch.

Interestingly, Kent Roach has commented that a contempt proceeding in *Doucet-Boudreau* would likely have been unsuccessful, given the "best efforts" nature of the order at issue. In the article "Principled Remedial Discretion," Roach challenges the minority's opinion in *Doucet-Boudreau* in the following terms:

> In (*Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120), the majority of the Court emphasized the need for precision should injunctions, including structural injunctions, be used. Given the need for a clear order and breach of that order before a person or an organization can fairly be found in contempt of court, it is doubtful that the trial judge's remedy could actually have been enforced through contempt.[65]

Because an order must be sufficiently precise to be enforceable by contempt, this type of remedy may require trial judges to make detailed implementation choices that might otherwise be left to the discretion of the executive. This approach is arguably more interventionist than the trial judge's decision in *Doucet-Boudreau* to craft a flexible order but to maintain supervisory jurisdiction over its implementation. Further, where several stakeholders are involved and numerous steps are required to implement the constitutional rights in a fulsome way, requiring a trial judge to make a detailed mandatory order may further complicate an already complex proceeding.

The remainder of this section considers the benefits and drawbacks to three types of orders commonly made in minority-language rights cases: (1) detailed mandatory orders enforceable by contempt; (2) flexible mandatory orders with supervisory jurisdiction and; (3) detailed interlocutory orders. In analysing these three types of orders, strengths and weaknesses of each become apparent. Although the detailed mandatory orders are within the realm of traditional measures used by courts, they nonetheless infringe on the executive in significant ways and have often involved some form of continued jurisdiction. The more flexible orders with supervisory jurisdiction do not provide the same

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[65] Kent Roach, "Principled Remedial Discretion" (2004), 25 S.C.L.R. (2d) 101, at p. 120.

"teeth" as a mandatory order, but have been effective in spurring the executive to action while allowing the court to avoid making detailed mandatory orders without the necessary information and expertise to effectively do so. Finally, detailed interlocutory orders draw on the best elements of both. Interlocutory injunctions are mandatory and violations of them hold serious consequences. They also allow the court to make an order with as many details as it feels comfortable including at the time, while maintaining continued jurisdiction. Nonetheless, such injunctions are limited in that they are unlikely to be used where the relief sought will oblige governments to make significant capital investments. They are more commonly used as short-term, "band aid" solutions.

A. DETAILED MANDATORY ORDERS ENFORCEABLE BY CONTEMPT

At issue in *Conseil des Écoles Séparées Catholiques Romaines de Dufferin et Peel v. Ontario (Ministre de l'Éducation et de la Formation)* was a one-year moratorium on all capital projects introduced by the Minister of Education.[66] The moratorium had been introduced as a costs saving strategy. Parents who had been seeking the construction of a French language secondary school for the previous seven years challenged the moratorium on the grounds that it violated their s. 23 *Charter* rights. The applications judge held that "the open-ended delay in funding the construction of Ecole Secondaire Sainte-Famille after seven years of temporary and inadequate facilities constituted an infringement of the applicant's rights under s. 23."[67]

On the question of remedy, the applications judge issued a declaration that the Sainte-Famille project be exempted from the moratorium. However, he also made a mandatory order requiring the Ministry of Education to issue final approval for the construction of the Sainte-Famille project, and to disburse grant money to the school board up to a total of $10,182,752 as its share of the site acquisition and construction.

The case *Association française des conseils scolaires de l'Ontario v. Ontario* involved an application by the French school board association for a declaration that amendments to the *Education Act*, which reduced

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[66] (1996), 30 O.R. (3d) 681 (Div. Ct.), stay not granted pending appeal (1996), 30 O.R. (3d) 686 (C.A.).

[67] *Ibid*. at para. 8.

the number of francophone trustee electors (and thus French representation on Ontario school boards), were unconstitutional.[68]

The application judge referred the constitutional questions to trial, but also stated that the amendments were "inconsistent with the provisions of s. 23."[69] As a remedy, he made a declaration under s. 24(1) that the amendments were of no force and effect for the purposes of the upcoming election. The effect of the declaration would have made it impossible for the elections to be held on the scheduled date.

On appeal, the Ontario Court of Appeal recognized that the application judge had the power to fashion a remedy under s. 24(1) of the *Charter* if he had found an infringement or denial of rights. However, because he had referred the constitutional questions to trial, it was incumbent upon the trial judge to fashion his remedy in consideration of the three-part test for an interim order. In undertaking this analysis itself, the Court of Appeal found that there was a serious issue to be tried and, in the case of the school boards most affected by the amendments, "the impact is detrimental to the French language electoral group."[70]

In the result, the Court of Appeal ordered that "all matters which are not within the exclusive jurisdiction of one or other language components of the board shall require a majority of each language component of the board ('double majority')."[71] This order allowed the election to proceed but bound several school boards not even party to the litigation to the double-majority regime after the election.

Although the remedy in this case was not said to be made under s. 24(1), it was premised on the court's understanding that the proposed amendments were likely to have serious negative effects on French language representation on the school boards, and were therefore inconsistent with s. 23 of the *Charter*. The effect of the Court of Appeal's remedy was to "amend" laws regulating school board voting practices as they applied to the affected school boards. Further, because the double-majority voting requirement fell entirely outside the legislative structure within which school boards operated, any disputes arising from its operation had to be resolved by the courts. Although technically an interim order, this court-ordered voting structure remained in place and

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68 (1988), 66 O.R. (2d) 599 (C.A.).

69 As reprinted in the Court of Appeal judgment, *ibid*. at p. 603.

70 *Ibid*. at p. 605.

71 *Ibid*.

governed the affected school boards until the voting regime was changed and the next school board election was held.

Although in the broader context of language rights writ large, the Northwest Territories Court of Appeal recently considered a mandatory structural injunction ordered against the territory in *Fédération Franco-Ténoise v. Canada (Attorney General).*[72] In that case, the Fédération Franco-Ténoise commenced an action against the government of the Northwest Territories for failure to implement the minority language rights provided in the *Official Languages Act* (the "OLA").[73] They also claimed against the government of the Northwest Territories and the federal government for breaching the minority language rights provided in sections 16 to 20 of the *Charter*. The evidence indicated that the Northwest Territories had been largely unable to provide French language services to its residents, contrary to its constitutional and statutory obligations.

The trial judge held that because the government's *Charter* obligations overlapped with its obligations under the OLA, she did not need to address the *Charter* claims. With respect to the OLA, the trial judge found that the government of the Northwest Territories had violated its obligations, due to its poor understanding of language rights and its failure to implement the OLA efficiently. Because the government appeared unwilling to provide the services required by the OLA, the trial judge held that declaratory relief was not sufficient. Instead, she ordered the government to draft a comprehensive implementation plan within one year to address the provision of French language services to the public. The order detailed certain elements that should be included in the government's plan, including consultation, job creation, recruitment, training, and retention of an expert consultant. The trial judge also ordered that the government prepare regulations designating which institutions were required to comply with the OLA.

The Court of Appeal upheld the trial judge's order, rejecting the governments' submission that the order intruded on the authority of the executive and legislative branches. Although the case had many similarities to *Doucet-Boudreau*, the Court of Appeal concluded that the

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[72] (2008), 440 A.R. 56 (N.W.T.C.A.), leave to appeal to the S.C.C. refused, [2008] S.C.C.A. No. 432 (*Fédération Franco-Ténoise).*

[73] R.S.N.W.T. 1988, c. O-1.

trial judge's mandatory order was appropriate and just in the circumstances:

> The right asserted by the respondents is a broad-based right to access French language services when dealing with government offices. The circumstances of the denial are myriad. The trial judge found systemic failure to implement the *OLA* at many levels. This is not a case of one or a few breaches, but rather almost innumerable breaches. The most significant breach is the failure of the GNWT to design an effective system of implementation of the *OLA* throughout the long period since its passage. There are many factors in this case similar to those in *Doucet-Boudreau*, including the danger of assimilation (established by expert evidence and never contradicted by the appellants) and the fact that the respondents have already waited too long and have had to dedicate too much time and energy to realizing their rights.
>
> The trial judge strove to respect the separation of functions between the courts and the legislature, but concluded that the history of the respondents' complaints justified more specific directions being given to the GNWT. The evidence amply supported this conclusion.
>
> The remedy in *Doucet-Boudreau* was supervising an order, while the remedy granted here is similar to a series of mandatory injunctions. Such a remedy may be granted by a superior court and, for the reasons already outlined, was appropriate.[74]

Marchand v. Simcoe County Board of Education is an interesting hybrid case.[75] In that case, the parent applicant sought to have French language education facilities provided out of public funds in the Penetanguishene area. Following the first hearing, the trial judge ordered the school board to: (1) ensure that the French language education facilities were equivalent to the English language facilities; (2) provide the necessary funding and facilities to achieve instruction in French equivalent to that provided in the English schools; and (3) establish facilities for industrial arts and shop programmes equivalent to those provided in English language schools.

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[74] *Supra* note 72 at paras. 104–106.

[75] (1986), 55 O.R. (2d) 638 (*Marchand I*) (S.C.), and (1987), 61 O.R. (2d) 651 (S.C.) [*Marchand II*].

Following *Marchand I*, a law was passed establishing the French-language Education Council (the "Council"). The Council was given authority for the planning, establishment and administration of French language schools. In keeping with its mandate, the Council submitted a proposal for construction of a school. The proposal was challenged by the school board, and a dispute arose as to what was necessary for proper implementation of the order in *Marchand I*. The school board thus moved before the same judge seeking instructions on the nature and extent of the facilities that must be built to comply with the trial judge's original order. In the result, the trial judge ordered the school board to build the school according to the detailed proposal submitted by the Council and ordered the government to fund its construction according to the usual funding formula for French secondary schools.

Although the trial judge did not actually retain jurisdiction to supervise his order in *Marchand I*, the parties acted as though he had when they appeared before him on the same matter in *Marchand II*. Arguably, a supervisory order would have been helpful in this case because, although the mandatory order in *Marchand I* made the school board responsible for providing the school facilities, both the government and the Council were essential actors in the implementation process. Had the trial judge retained jurisdiction, he might have been able to manage the process and secure a timely and fair outcome acceptable to all stakeholders. Instead, in *Marchand II*, the trial judge found himself faced with the opposing positions of the school board and the Council, and was forced to choose between them. The government that was responsible for the bulk of the funding was, in a sense, caught in the middle.

B. FLEXIBLE MANDATORY ORDERS WITH SUPERVISORY JURISDICTION

Prior to the decision in *Doucet-Boudreau*, trial courts had made supervisory orders in two s. 23 cases. First, in *Lavoie v. Nova Scotia (Attorney General)*, the plaintiffs sought to compel the government to provide French language education for their children in Sydney, Nova Scotia.[76] Because it was unclear on the evidence whether there were sufficient numbers to warrant French language school facilities, the trial judge ordered the province and school board to advertise and conduct a registration to determine the likely enrolment if a French program was

[76] (1988), 84 N.S.R. (2d) 387 (S.C) (*Lavoie*).

offered. In the meantime, the province and school board were also ordered to design a French language education program and to designate a suitable facility. As part of the same order, the parties were required to report back to the trial judge on or before April 30, 1988, with the results of the registration. On the basis of the new evidence, the trial judge would hear arguments on whether the numbers warranted the continued implementation of the order.

In explaining his order, the trial judge noted the balance the court must strike in enforcing constitutional rights on the one hand while maintaining respect for the role of the executive on the other. On this point, he stated as follows:

> The issues raised in this case cannot be decided within the strict confines of the traditional law suit; the problems simply do not lend themselves to resolution by such a structure without modification. This is implicitly recognized by the scope of the remedies given to the Court by s. 24 of the *Charter*. There is no reason not to interpret that Section liberally to achieve the purpose of seeing that guaranteed rights, if infringed, are remedied, while at the same time acting in a responsible manner. [emphasis added][77]

Although the particulars of the order in *Doucet-Boudreau* have already been reviewed, it is perhaps worth noting again that in that case, although he retained supervisory jurisdiction over the matter, the trial judge's order provided flexibility to the government and school board by asking that they make "best efforts" to open the new schools by the specified dates. Indeed, it is the flexibility of this order that prompted Justice Iacobucci and Arbour to state that: "it was appropriate for LeBlanc J. to craft the remedy so that it vindicated the rights of the parents while leaving the detailed choices of means largely to the executive."[78]

Although it involved a declaratory remedy, *L'Association des Parents Francophones de la Colombie-Britannique v. British Columbia* is another example in which a long history of government delay informed the trial judge's decision to retain jurisdiction over his order.[79] In 1989, francophone parents in B.C. launched an action against the government

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[77] *Ibid.* at p. 393.

[78] *Supra* note 1 at para. 69.

[79] (1996), 27 B.C.L.R. (3d) 83 (S.C.) [*L'Association des Parents Francophones de la Colombie-Britannique*].

for failing to enact legislation that would implement their s. 23 *Charter* rights. After the action was filed, the parents and government came to an agreement which provided that a task force would be struck to determine the best way to ensure that minority language education rights were respected in the province. In 1993, after vowing to comply with the recommendations of the task force, the government announced its intention to implement its own system. In 1994, the parents recommenced their action. In particular, they challenged the constitutionality of a new regulation which created a francophone education authority but failed to provide it with funding.

The trial judge declared the regulation unconstitutional and that the government was required to implement legislation that complied with its obligations under s. 23 of the *Charter*. He further retained jurisdiction to deal with any difficulties arising from the implementation of the order. In determining the appropriate remedy, the trial judge noted both the special nature of language rights and the importance of respect for the role of the legislature.

> Language rights are rights of a fundamentally different nature. Their realization may require creative or innovative measures.
>
> [...]
>
> I believe the court must fashion a remedy that leaves the Legislative Assembly with the freedom it must have to create a comprehensive legislative scheme to meet the obligations imposed upon it by s. 23. Accordingly, the declarations I make are intended to leave that freedom.[80]

Arguably, issuing a detailed mandatory order in *Lavoie*, *Doucet-Boudreau* or *L'Association des Parents Francophones de la Colombie-Britannique* would have been impractical, unwise, or both. In each of these cases, there were a variety of steps that needed to be taken before the parents could realize their s. 23 rights. In *Lavoie*, for instance, the first step of the process was to determine whether the "numbers warrant" test was met—only then could the court order the government to provide the necessary programs and facilities. Had the trial judge made a detailed order requiring the government to investigate the "numbers warrant" test issue but not retained jurisdiction, the parents would be forced to bring a new application even if the government promptly complied. For example,

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[80] *Ibid.* at paras. 49 and 53.

if the government complied with the order in a timely fashion, arguments on whether the "numbers warrant" test was met would be heard by a new judge unfamiliar with the case. If the government was slow in complying, the parents would be forced to commence contempt proceedings. Either way, the underlying substance of the original proceeding—the realization of s. 23 rights—could be derailed by a series of orders scheduled before several different judges. In this sense, issuing a detailed mandatory order at each step of a complex proceeding could have the effect of making the process unwieldy and further delaying effective implementation of the *Charter* rights at issue.

In other cases, such as *Doucet-Boudreau* and *L'Association des Parents Francophones de la Colombie-Britannique*, retaining jurisdiction allows the court to refrain from making decisions on the basis of incomplete information and on matters in which it has little expertise. For instance, while the trial judge in *Doucet-Boudreau* could have ordered the Department of Education and the school boards to engage in various construction projects or, alternatively, school-sharing arrangements, it was arguably not his role to do so in the face of several policy options. The same considerations apply to the trial judge's declaration in *L'Association des Parents Francophones de la Colombie-Britannique* that the government had to enact new legislation to properly implement its constitutional obligations. As Kent Roach has commented, the criticism of supervisory jurisdiction

> sits uneasily with the concern about preserving a proper relationship between courts and governments. As the majority [in *Doucet-Boudreau*] notes, the alternative remedy relied upon by the minority, the contempt citation, is in tension with the traditional relationship between Canadian courts and governments. Reliance on contempt citations could cause greater harm to the relationship between courts and government than the retention of jurisdiction and the conduct of reporting sessions.[81]

It is worth noting that the proceedings in *Lavoie*, *Doucet-Boudreau* and *L'Association des Parents Francophones de la Colombie-Britannique* were initiated by parents taking it upon themselves to realize their s. 23 rights. In *Doucet-Boudreau*, the French language school board was in fact a defendant. However, in several of the cases in which detailed mandatory orders were issued, a French language school board

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[81] *Supra* note 65 at p. 123.

was in place and was working in concert with the parents in petitioning the government to provide the necessary resources to fulfill its constitutional obligations. When deciding whether a detailed mandatory order is more appropriate than a supervisory order the court might consider whether or not the democratic institution responsible for implementing the remedy, such as the school board, is advocating for the remedy on behalf of the rights holders. Where the rights holders have no democratic institution "on their side," it may be more appropriate to make a supervisory order that allows for the continued involvement of the parents while leaving discretion as to the implementation choices to the government (and if appropriate, the relevant school board).

Of course, this raises the question: what is the right case for retaining jurisdiction? And further, does the remedy in *Doucet-Boudreau* only apply to rights provided under s. 23 of the *Charter*? Although this paper does not purport to answer these questions definitively, Part IV of this paper will consider some possible answers.

C. DETAILED INTERLOCUTORY ORDERS

On occasion, the court will be called upon to issue an interlocutory order pending litigation of language rights. These orders are interesting in two respects. First, courts appear to be less trepid in making precise and detailed orders about what particular services are to be provided and how. Second, an interlocutory injunction by its very nature provides the court with the kind of supervisory jurisdiction that LeBlanc J. sought to maintain in a final order in *Doucet-Boudreau*, without engendering the same level of controversy. Nonetheless, such orders are limited in that courts will likely be reticent to compel long-term investments or the construction of new schools at an interlocutory stage.

The decision of *Commission scolaire francophone, Territoires du Nord-Ouest c. Procureur Général des Territoires du Nord Ouest* is an interesting is an example of the court treading into the details of a dispute between a French school board and the Government of the Northwest Territories.[82] In that case, the applicants applied for an interlocutory injunction to ensure that adequate gym, laboratory and classroom facilities would be available to francophone students in the coming school year. The judge carried out a detailed analysis of the available resources

[82] [2008] N.W.T.J. No. 55.

including a review of previous correspondence between the parties that examined the options available to them including resources of neighbouring schools. The judge then ordered that a local English school was to share specific facilities with the French school board.[83] Less than a month later, the parties reappeared before the same judge. The judge agreed to modify his order, having found that his original order would have caused undue prejudice to the local English school.[84] The revised order allowed the classrooms of a different school to be used.[85]

That analysis and the detailed order that resulted from it do not appear to have been challenged on the basis that the judge had overstepped his judicial function. This may be based in part on the judge's recognition that his order was not a permanent solution to the problem, but simply a means to limit further prejudice to the applicants during what promised to be a lengthy litigation.[86]

However, the case of *Conseil Scolaire Fransaskois de Zenon Park v. Saskatchewan* provides a different perspective.[87] The facts were very similar to those in *Commission scolaire francophone, Territoires du Nord-Ouest*, with the applicants seeking an interlocutory injunction requiring the province and the local English school board to share school facilities with the *Conseil*. The application judge held that "constitutional rights have been violated (through deprivation of equal facilities with the immersion school) and soon may be further violated if action is not taken immediately."[88] As a result, he ordered that the English school board share gymnasium, laboratory and library facilities with the Conseil Scolaire "on a basis proportionate to numbers or similar criteria," as well as specified classrooms outlined in red and attached as an annex to the order.[89] The province was ordered to pay an appropriate share of common operating and capital expenses. In contrast to the *Commission scolaire francophone, Territoires du Nord-Ouest* case, the application judge in *Zenon Park* appears to have intended that the interlocutory order lead the parties to a settlement, stating that "it is to be hoped that

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83 *Ibid.* at paras.79–83.

84 [2008] N.W.T.J. No. 64, at para. 13.

85 *Ibid.* at para. 39. *See also* [2009] N.W.T.S. No. 44 wherein a second request to modify the injunction was rejected.

86 [2008] N.W.T.J. No. 55, at paras. 58–69.

87 (1998), 170 Sask. R. 103 (S.C.); var'd (1998), 172 Sask. R. 257 (C.A.).

88 *Ibid*. at para. 19.

89 *Ibid*. at para. 20.

compliance with the order will obviate the necessity for further proceedings."[90]

Interestingly, the many controversies surrounding the *Doucet-Boudreau* decision do not appear to arise when the relief granted is an interlocutory injunction. Although an interlocutory injunction does not raise the same concerns regarding the doctrine of *functus officio*, these orders would seem, in principle to engage the more principled criticisms of the *Doucet-Boudreau* decision. The orders were both very detailed, raising issues of judicial micromanagement in their implementation. Each was mandatory and non-compliance could have led to the government being found in contempt. Because they were interlocutory, the court retained jurisdiction if implementation or other issues of concern arose.

It may be argued that the lack of controversy is due to the temporary nature of an interlocutory injunction. However, as noted earlier, the trial judge in *Zenon Park* was clear that he intended his order to lead to a final settlement. It can be argued therefore that controversy surrounding final orders that maintain jurisdiction do not arise from the fact that the court is maintaining jurisdiction or involving itself in what would normally be an administrative process. Rather, the controversy may arise from the novel way in which supervisory orders allow a court to perform such functions. If one accepts that thesis, the resistance to *Doucet-Boudreau* may be rooted more in discomfort with a novel form than in principled objection to the substance of the order.

PART IV: THE 'RIGHT CASE' FOR RETAINING JURISDICTION

The Supreme Court's decision in *Doucet-Boudreau* has ignited two great debates in the Canadian legal community. The central issue of the first debate is, as this paper has discussed above, whether a trial judge who retains jurisdiction to ensure the government's compliance with its constitutional obligations represents an improper incursion into the realm of the executive. The second debate focuses on the practical implications of the first; that is, in what circumstances is it legitimate to retain jurisdiction over the implementation of an order under s. 24(1)?

A review of both the majority and dissenting opinions in *Doucet-Boudreau*, as well as other decisions and commentary, suggest several

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[90] *Ibid*. at para. 24.

factors that may be relevant in determining whether continuing supervision will be appropriate. First, the facts of the case should demonstrate some degree of recalcitrance on the part of public bodies to comply with their constitutional obligations. Second, there should be some urgency in the need for the remedy, for example, where an applicant is in danger of suffering irreparable harm. Third, supervision may be appropriate where ensuring respect for a right will require a prolonged implementation process as opposed to a simple, discreet act such as releasing a prisoner or disclosing documents. However, the supervision process should be avoided when it risks becoming overly politicized. This will occur when there is substantial disagreement as to the manner in which a right should be respected or where the court would be called upon to supervise a legislative process. Finally, there exists a great deal of uncertainty as to whether such remedies will be limited to s. 23 rights or can be applied to remedy violations of other *Charter* rights.

A. RETICENCE

Supervisory orders necessarily imply that the court is concerned that absent its supervision, the executive may not abide by or implement its decision in a timely and effective manner. However, courts generally operate under the assumption that the government will carry out their decisions in good faith.[91] Thus, in order to justify continued supervision, this presumption of timely government compliance should be rebutted. Roach and Budlender suggest that in choosing a remedy under s. 24(1) of the *Charter*, "it may be helpful to explore the underlying reasons why governments have failed to respect constitutional rights."[92] Relying on analytic work by Chris Hansen, in which constitutional breaches are described as a product of government inattention, incompetence or intransigence, the authors develop broad guidelines for assessing the appropriateness of a constitutional remedy.[93] They suggest that where a government is unaware of a constitutional breach, a declaratory remedy or a reporting order to the public may be sufficient to rouse the government into action. Such was the case in *Mahe v. Alberta*.[94] *Mahe* was the first

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[91] *Doucet-Boudreau*, at paras. 62 (majority) and 111 (dissent).

[92] *Supra* note 40 at p. 351.

[93] *Ibid*. at pp. 327 and 345, citing Chris Hansen, "Inattentive, intransigent and incompetent" in S. R. Humm et al, eds., *Child, Parent and State*: *Law and Policy Reader* (Philadelphia: Temple University Press: 2004).

[94] [1990] 1 S.C.R. 342.

case in which the Supreme Court began defining the specific contours of s. 23. Thus, in disposing of the case, the Court was content to simply issue a declaratory order, on the presumption that with the government's obligations now clearly defined, they would take the steps necessary to comply with the Court's decision. However, where the rights in question are well-defined and government inaction results from a lack of capacity, a mandatory order with reporting requirements to the court may be more appropriate. Similarly, where the breach is the result of intransigence, a detailed mandatory order enforceable through contempt proceedings may be necessary, albeit extreme.

The majority and dissenting opinions in *Doucet-Boudreau* seem to agree on this basic premise, although its application was a point of contention. For the majority, the trial judge's finding that the government had continued to delay taking measures to respect its well-understood obligations under s. 23 was sufficient to demonstrate its recalcitrance.[95] The dissenting judges, however, emphasized that the government had never refused to comply with a prior remedial order or declaration and it was therefore inappropriate to presume that they would.[96] Although the requisite degree of (in) action was a subject of dispute, the Court appeared to be unanimous that supervisory orders should only be imposed on a government that has demonstrated some degree of recalcitrance, giving the court reason to believe that they will not promptly comply with a more traditional order or declaration. This is consistent with the jurisprudence from various common law jurisdictions cited above.[97] In all of those cases, governments showed themselves unwilling or unable to respect the rights of certain groups, and in some cases were openly hostile to the idea. Under such circumstances, the court is justified in maintaining supervisory jurisdiction to ensure that the government complies with its constitutional obligations.

B. URGENCY

A second factor to consider is the degree of urgency. Where government delay could result in irreparable harm to the complainants, the courts may be justified in resorting to supervisory orders to ensure timely compliance and avoid such harm. In determining whether a case

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[95] Para. 63. See also paras. 4, 38, 39, 66.

[96] Para. 139.

[97] See *Sibiya*, *supra* note 61.

presents such an urgent need, care should be taken to consider what other processes are available to monitor progress, and how difficult or time-consuming it would be for the applicants to bring the issue back to the court in the event of non-compliance. Again, the majority and dissenting opinions in *Doucet-Boudreau* both seem to recognize the importance of this factor. The majority stresses in several passages the immediate risk to the francophone population if schools were not built, noting that "[i]t is in this urgent context of ongoing cultural erosion that LeBlanc J. crafted his remedy."[98] In contrast, the dissent judges find that a more traditional order followed by contempt proceedings in the event of further government inaction would have been equally effective.[99] This seems to imply that no irreparable harm would have resulted from the additional delay inherent in such proceedings.

In the context of language rights, government delay and recalcitrance interact with the degree of urgency. Where a government has a history of delay, the risk of irreparable harm from non-compliance with a declaratory order will inevitably seem greater. This is a common theme in cases decided under s. 23, and was certainly the case in *Doucet-Boudreau*. Delay was also a factor that influenced the trial judge's decision in *L'Association des Parents Francophones de la Colombie-Britannique*, where he noted that "[a] declaration that the Regulation is *ultra vires* would be sufficient were it not for the long history of this litigation."[100]

C. ONE-STOP SHOP REMEDIES

Third, retaining jurisdiction may also be appropriate where the *Charter* breach cannot be cured by a "one-stop shop" remedy but instead requires the implementation of several steps along a continuum of progress. In other words, a more generally-worded order with continuing jurisdiction will be appropriate where the implementation process is so complex and involves so many variables that it would be unrealistic to expect that a judge could craft a single, detailed mandatory order. *Lavoie* is such a case, where the first step required determination of the "numbers warrant" test. Once this was met, subsequent steps required decisions about the availability and adequacy of facilities. Additionally,

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98 *Ibid*. at para. 40. See also paras. 39, 60, 66.

99 Para. 136.

100 *Supra* note 79 at para. 18.

supervisory jurisdiction may be particularly helpful where there are multiple stakeholders, including French and English school boards, Departments of Education and parents, all of which would benefit from being included in the "dialogue." Further, where the court suspects that meaningful and timely implementation of the order lies not only with the defendant but with other actors as well, as in *Marchand*, it may be more efficient to retain supervisory jurisdiction. In such cases, allowing the parties to file and rebut evidence throughout the process, as in *Doucet-Boudreau*, may facilitate a fair outcome, while leaving some decision-making authority with the executive.

D. POLICY CONSENSUS

The dissenting judges in *Doucet-Boudreau* expressed their concern that maintaining jurisdiction over implementation risks drawing the judiciary into processes that are political in nature and with which the courts are not well-equipped to deal.[101] Situations which give rise to such concerns may include those where there is disagreement as to means and ends. Where various methods of implementation are possible or the general contours of the policy that will be necessary to ensure respect for the right remain uncertain, the interests of various groups will have to be weighed against available resources. Not only is the judiciary ill-equipped to supervise such a process, but it is difficult to imagine how judicial supervision would make the process faster or more effective.

This concern was expressed by the Court in *Eldridge*, where the majority stated that because there were myriad options available to the government in ensuring access to sign language where medically necessary, it would not be appropriate for the Court to "dictate" which path was chosen.[102] However, *Doucet-Boudreau* was unique in that the content of the right and the necessary steps to ensure respect for it were not in dispute. There was no question that the applicants had the right to send their children to French language schools, and that the only way to ensure respect for that right was providing the community with the required schools. The government simply asserted that given budgetary constraints, it should be entitled to continue delaying implementation. In such circumstances, the court was not being called upon to referee a policy debate. Thus, the majority found that since the order simply

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[101] Paras. 127–132.

[102] Para. 96.

required the government to submit periodic reports that could be reviewed by stakeholders, such a process was well within the function of the judiciary.[103]

E. SUPERVISION OF LEGISLATIVE PROCESSES

Related to the concern over drawing the judiciary into policy debates is the intriguing possibility that a supervisory order could be imposed on the legislature as opposed to the executive. This was proposed in the recent case of *Sfetkopoulos v. Canada (Attorney General)*.[104] Having struck down regulations constraining the availability of medical marijuana, Strayer D.J. was then asked by the applicant to use an order akin to that granted in *Doucet-Boudreau* to supervise the drafting of new regulations. The case had some of the hallmarks cited above, including past reticence on the part of the federal government to make medical marijuana easily available to patients, and urgency for the applicants who were being denied necessary medication. However, Strayer D.J. declined to grant the order. In so doing, he noted first that his order had rendered the current regulations of no force or effect pursuant to s. 52(1) and in that sense was self-executing. Second, he noted his concern that granting such an order would require him to supervise a legislative process.[105]

Why should a court be more comfortable supervising the work of the executive than that of the legislature? The case law frequently notes the need for all three branches to respect each others' roles. Indeed, the dissenting judges in *Doucet-Boudreau* cite the case of *Vriend v. Alberta* for the proposition that, "the respect by the courts for the legislature *and* executive role is as important as ensuring that the other branches respect each others' role and the role of the courts" (emphasis added).[106] They go on to argue that because there is such a degree of overlap between members of the executive and legislature under the Canadian parliamentary system, respect for the executive is as important as respect for the legislature.[107] In their description of the relationship between the

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[103] Paras. 71–74.

[104] [2008] F.C.J. No. 6.

[105] *Ibid.* at para 27.

[106] [1998] 1 S.C.R. 493, at para. 136.

[107] *Doucet-Boudreau* at paras. 123–124.

three branches of government, the dissenting judges sought to establish that the judiciary should not exercise supervisory jurisdiction over the executive where it would not do so over the legislature. Yet, if one accepts that the legislature and executive are entitled to equal respect, one might draw the inverse assumption—that where the court is comfortable supervising the executive, it should be comfortable supervising the legislature.

However, even if one accepts that the legislature and executive are equally entitled to respect, there is good reason for courts to be more reticent to supervise the former than the latter. The legislature has a different function than the other branches. It formulates policy, and in so doing weighs different options and interests, eventually arriving at decisions as to means and ends. The executive interprets and applies the legislation which has been crafted and implements these policies. This latter function is much more akin to the judicial function of interpreting and applying legislation. This suggests that the judiciary can more comfortably supervise the executive without surpassing its traditional judicial function. A second reason is that it will generally be unnecessary to oversee the legislature.[108] As noted in *Sfetkopolous*, a declaration of invalidity under s. 52(1) is self-executing. The same will be true of reading in or reading down provisions of offending legislation. In each case, respect for the rights will follow immediately from the court's decision, thus making the appropriate remedy a "one-stop shop."

F. NATURE OF THE RIGHT

The debate over when a supervisory order is appropriate raises an additional issue not directly addressed by the Supreme Court in *Doucet-Boudreau*—can the court retain supervisory jurisdiction in the context of other *Charter* rights, or does the decision in *Doucet-Boudreau* only apply to minority language education rights? Although the majority does emphasize the unique nature of language rights at various points, their decision seems to deliberately avoid providing a definitive answer.[109]

Subsequent jurisprudence from the Supreme Court has not clarified the issue. In *Pro-Swing Inc. v. Elta Golf Inc.*, the court

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[108] Contra *Mahe*, supra note 95, where the Court ordered the government of Alberta to pass legislation creating a French school board but did not supervise the process.

[109] *Doucet-Boudreau*, at para. 28.

suggested that the burden on the judicial system of retaining jurisdiction may be justifiable in the context of protecting linguistic minorities, "but may not be warranted when the cost is not proportionate to the importance of the order."[110]

In *Language Rights in Canada*, Power and Braën question whether the boundaries of the court's proper role depend on the classification of the *Charter* right at issue as either positive or negative:

> The reasons of the majority in *Doucet-Boudreau* set out a definitive framework for the determination of appropriate and just remedies in litigation concerning any *Charter* right. At issue in that case, however, was the non-implementation of section 23, which imposes positive obligations upon governments to act. It is still to be determined to what extent an appropriate and just *Charter* remedy, to the extent it includes determining boundaries of the court's proper role, will be a function of the nature of the right at issue. [footnotes omitted][111]

However, even rights traditionally considered to be "negative," such as the right to be free from discrimination in s. 15, may still result in positive obligations on the government in order to cure a *Charter* breach. An interesting example is the trial judgment in *Auton v. British Columbia*.[112] In that case, the trial judge found that the applicants' s. 15 rights had been breached when the government refused to provide them with behavioural therapy for their autism. Because the government had already begun to provide a proposed treatment program by the time of trial, the trial judge refused to make an order of *mandamus* requiring the government to implement a specific program. However, he retained jurisdiction to hear a renewed application if the government did not implement the program in a timely and effective way. The trial judge reasoned as follows:

> While the Court is not an appropriate referee between the claims of the petitioners and the defences of the Government, I propose to maintain a limited supervisory role. If the Government does not implement a timely effective programme of Early IBI, the

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[110] [2006] 2 S.C.R. 612, at para. 24.

[111] *Supra* note 39 at p. 560.

[112] (2001), 84 B.C.L.R. (3d) 259 (S.C.), var'd (2002), 220 D.L.R. (4th) 411 (CA), rev'd [2004] 3 S.C.R. 657.

> petitioners have leave to renew their application for a mandatory order.[113]

Because *Auton* was overturned by the Supreme Court on the s. 15 question, the trial judge's remedial order was not considered by the court. The appropriateness of a supervisory order to ensure government compliance with its obligations under s. 15 remains an open question.

In *Abdelrazik v. Canada (Minister of Foreign Affairs)*, the Federal Court of Canada chose to retain jurisdiction to ensure government compliance with Mr. Abdelrazik's s. 6 *Charter* rights.[114] Mr. Abdelrazik, a citizen of both Canada and Sudan, was arrested and detained by Sudanese authorities for almost two years. After being released, he was unable to return to Canada because his passport had lapsed and he had been listed by both the United States and the United Nations as having ties to the Al-Qaeda terrorist network. Fearing for his safety, Mr. Abdelrazik was granted safe haven at the Canadian Embassy in Khartoum, and Passport Canada indicated that it would issue him an emergency passport to facilitate his return to Canada. No passport was ever issued, and Mr. Abdelrazik applied for an order that he be granted an emergency passport in accordance with his s. 6(1) *Charter* right to enter Canada. The application judge held that Mr. Abdelrazik's s. 6(1) right had been violated and ordered the government to arrange transportation, in consultation with Mr. Abdelrazik, for him to return to Canada within 30 days. The application judge further ordered that he would retain jurisdiction over the matter and that:

> Should such travel arrangements not be in place within 15 days of the date hereof, the parties shall advise the Court and an immediate hearing shall be held at which time the Court reserves the right to issue such further Orders as are deemed necessary in order to ensure the transportation to and safe arrival of the applicant in Canada."[115]

On this point, he noted as follows:

> The applicant has asked that the respondents return him to Canada "by any safe means at its disposal." In my view, the manner of returning Mr. Abdelrazik, at this time, is best left to the

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[113] Trial judgment, *ibid*. at para. 47.

[114] 2009 FC 580.

[115] *Ibid*. at para. 169.

> respondents in consultation with the applicant, subject to the Court's oversight, and subject to it being done promptly.[116]

Mr. Abdelrazik was also ordered to appear before the application judge upon his return to Canada. He returned on June 27, 2009 and the parties appeared in court on July 7, 2009.

Much like the order in *Doucet-Boudreau*, the application judge's order in this case left the detailed choices of transportation arrangements open to the executive branch but sought to ensure compliance by its supervisory nature. Although the application judge did not require several reporting hearings, at least one was scheduled to ensure implementation of the order. However, as *Abdelrazik* was not appealed, the availability of a supervisory order as a constitutional remedy outside the limited scope of s. 23 *Charter* rights has yet to be affirmed by an appellate court.

G. APPLICATION

In summary, there are several factors that courts may wish to consider before employing the supervisory jurisdiction described in the *Doucet-Boudreau* decision. First, evidence that the government has shown itself reticent or unwilling to implement the rights in question will generally lend support to the exercise of judicial supervision. Second, urgency in the sense that further government delay will risk irreparable harm to the applicants will also weigh in favour of judicial supervision. Third, supervision will be more useful where implementation of the right requires a continuing process but less so where a single discrete act by the courts or government will suffice. However, where the contours of the ideal policy to ensure respect for the right continue to be subject to debate, the legislature or executive may be able to provide a more appropriate forum for this process than the judiciary. Finally, it remains uncertain whether supervisory orders will be available only in the context of s. 23 rights, more broadly to "positive rights" requiring government action to ensure their respect, or generally to ensure the protection of all *Charter* rights.

Interestingly, although the trial judge in *Fédération Franco-Ténoise* chose not to make a supervisory order, this appears to be the type of case in which such an order may have been warranted. In that case, the

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[116] *Ibid*. at para. 161.

trial judge noted that numerous requests to various government departments over the span of many years had gone unaddressed, and that recommendations made by consultants for implementing the government's obligations were never acted upon. The applicants presented uncontradicted evidence of the real dangers of assimilation, which the trial judge accepted. A substantial portion of funding from the federal government to assist in the implementation of French language rights was returned to Ottawa, and there had been no overall implementation plan for the OLA since its enactment in 1988. As in the other language rights cases, there was no question as to the existence of the right, or what had to be done to ensure respect for it. Although, as the Northwest Territories Court of Appeal stated, the mandatory injunctions ordered by the trial judge were appropriate, a supervisory order might also have been an appropriate remedy in those circumstances. The fact that the trial judge chose not to assert continuing jurisdiction demonstrates the reticence of trial judges to exercise such authority and the likelihood that such cases will continue to be rare.

CONCLUSION

Doucet-Boudreau was a landmark decision in Canadian constitutional jurisprudence, in large part because it recognized the value of supervisory orders in crafting meaningful *Charter* remedies under s. 24(1). Some have argued that this type of order is unnecessarily activist and strains the dialogic relationship between the court and the executive. However, many others suggest that, in some cases, supervisory jurisdiction is the best option for preserving the separation of powers, maintaining an environment of mutual respect between the branches, and furthering the dialogue. A comparison between the detailed mandatory orders issued in some language rights cases and the flexible mandatory orders with supervisory jurisdiction issued in *Lavoie*, *Doucet-Boudreau* and *L'Association des Parents Francophones de la Colombie-Britannique* supports this view, and highlights the extent to which the court may become involved in the details where a supervisory jurisdiction order is not issued.

The practices in other common law jurisdictions, such as the United States, India and South Africa, suggest that supervisory orders may be applied to a myriad of constitutional rights and may be particularly appropriate where democratic institutions are not responding effectively to the needs of the rights holders. In the Canadian context, the

minority language rights jurisprudence tells us that supervisory jurisdiction may be appropriate where: there is proof of recalcitrance on the part of the government to implement its obligations; rights holders have been subjected to long delays in realizing their rights; full realization of the rights at issue requires implementation of a series of steps; and the method of implementation is certain enough that maintaining jurisdiction over the process will not draw the judiciary into a policy debate that the legislature is better equipped to handle. Even where these factors are all present, the jurisprudence suggests that judges will nonetheless be reticent to impose such orders.

Myriad debates have sprung up around these orders, spanning from their constitutionality to where they will be appropriate. Despite the considerable controversy, two things seem almost certain—further guidance from the Supreme Court of Canada on when and how these orders are employed will likely be necessary, and, when the Court revisits these issues, questions of judicial activism, dialogue and mutual respect will be vigorously argued by all sides.