

Reflections of a Supervisory Order Sceptic: Ten Years after *Doucet-Boudreau*

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I. INTRODUCTION

Ten years after *Doucet-Boudreau*¹ was decided, we remain supervisory order skeptics, for both policy and practical reasons. As a matter of policy, we adopt the view that recourse to supervisory orders threatens the mutually respectful paradigm of “dialogue” between courts and legislatures.² As a matter of practice, we believe these kinds of orders are fundamentally unnecessary in Canada; that they do not reflect the institutional competence of our courts and executives and legislatures; and that they threaten to waste valuable resources on the part of applicants (whose rights will be vindicated, as experience suggests, regardless of the court’s supervision) as well as governments and the courts.

In our view, all of this was true when the case was decided. Canadian governments have always complied with court orders. (It appears to remain true: in the ten years since the Court was so firmly divided on these issues, the remedy has not been used again in the manner that was upheld in *Doucet-Boudreau*.) The superior alternative to the supervisory order remains the “*Eldridge*-type order”:³ a suspended declaration of invalidity effectively requiring the government to remedy a constitutional defect in its policies or legislation by a particular date, according to its own best judgment. These kinds of orders are made on

¹ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 [“*Doucet-Boudreau*”], allowing an appeal from the Nova Scotia Court of Appeal (2001), 203 D.L.R. (4th) 128 [“C.A. decision”] setting aside a decision of the Nova Scotia Supreme Court (2000), 185 N.S.R. (2d) 246 [“Trial decision”].

² See: 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, and Peter Hogg, Allison Bushell Thornton and Wade Wright, “*Charter* Dialogue Revisited – Or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall L.J. 1 (discussing, *inter alia*, reception of the dialogue theory in the Supreme Court, at pp. 7-25) [“*Charter* Dialogue Revisited”]. See further, Paul S. Rouleau and Linsey Sherman, “*Doucet-Boudreau*, Dialogue and Judicial Activism: Tempest in a Teapot?” *infra*.

³ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [“*Eldridge*”].

the understanding that either party may return to the Court to seek to vary the order, bearing the onus of proof that a variance is merited. The remedy has proven to be effective where vindicating *Charter* rights requires complex decisions to be made among competing policy choices.⁴

II. BACKGROUND

Doucet-Boudreau was a case in which the trial judge retained jurisdiction to supervise compliance with an order. The order declared that the Government of Nova Scotia had breached section 23 the *Charter* (Minority Language Education Rights)⁵ and enjoined the government to use “best efforts,” by certain deadlines, to provide French language facilities and programs to parents of schoolchildren who were thus entitled to them.⁶ The subject matter of the judge’s supervision—a declaration and an injunction—was not controversial. The case was controversial because of the confusion surrounding what the trial judge actually purported to accomplish by supervising compliance with his order. In practical terms, the judge scheduled a series of hearings at which the government was required to report on its progress by way of affidavit and cross-examination. But to what end? At first, the judge appeared to think that he had retained jurisdiction to make further orders, based on the evidence; later, he seemed to suggest that the sole purpose of these further hearings was informational, and this confusion of purpose was not resolved on appeal (nor, of course, could it be: as a matter of law, principle and logic, for an order to be valid and enforceable, it has to be comprehensible at the time it is made).⁷

⁴ See, generally, Kent Roach, “Remedial Consensus and Dialogue Under the Charter: General Declarations and Delayed Declarations of Invalidity” (2002) 35 U.B.C. L. Rev. 211, at para. 83 [“Remedial Consensus and Dialogue”].

⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 s. 23 [“Charter”]. See, generally: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (loose-leaf) (Scarborough: Carswell, 2007), at c. 56.

⁶ Trial decision, *supra* note 1, at paras. 232–244, and *Doucet-Boudreau*, *ibid.* at paras. 7–8, *per* Iacobucci and Arbour JJ. (reproducing the final order).

⁷ The Court of Appeal and the Supreme Court divided on whether *inter alia* the judge had retained jurisdiction to make further orders during the reporting hearings (or had purported to do so), and the corresponding purpose of the reporting hearings.

In the Court of Appeal, Flinn J.A. (writing for the majority) found that the judge’s declaration and injunction constituted a final order and that the supervisory process

Nonetheless, by purporting (at least initially) to retain jurisdiction to make further orders, the trial judge had raised the possibility of fully managing the building of schools, etc., raising the spectre in Canada of U.S.-style structural remedies.⁸ By upholding the judge's order, while at

was adopted by the judge as an afterthought on the basis of the appellant's revised submissions. More to the point, Flinn J.A. concluded that the trial judge was confused as to whether he had retained jurisdiction to make further orders. In any case, Flinn J.A. concluded that in the hearings themselves the judge was "acting more in the capacity of an administrator than as a judge" over issues extending to "minute details." In contrast, Freeman J.A. (dissenting), concluded that judge had not made a final order. Instead, the judge's order, which combined a declaration with a "gently-phrased mandatory injunction" ("best efforts"), "*suggests a requirement for a degree of continuing supervision*" (emphasis added) such that "the judgment cannot be said to be final, nor the judge *functus*, until that requirement has been fulfilled." In any case, the judge "was entitled to keep his judgment from becoming final, and to remain seized with jurisdiction, by the simple expedient of declaring that he was doing so." Nonetheless, Freeman J.A. noted that the judge made no further orders and he characterized the hearings as a mediation. (With respect to the hearings themselves, Freeman J.A. conceded that the "process seemed formless and unfocused, without clearly defined issues," at least "[c]ompared with a well-conducted court proceeding on an application.")

In the Supreme Court, Iacobucci and Arbour JJ. (writing for the majority), adopted something like Freeman J.A.'s view, concluding that "the best efforts order and the retention of jurisdiction were conceived by the trial judge as two complementary parts of a whole", but that the reporting hearings were nonetheless convened for informational purposes only: the hearings "were aimed at identifying difficulties with the timely implementation of the trial judge's order as they arose"; "[t]here was never any suggestion ... that the court would ... improperly take over the detailed management and co-ordination of the construction projects"; and the "written order ... clearly communicates that the obligation on government was simply to report." In particular, "[t]here was no indication that the retention of jurisdiction included any power to alter the disposition of the case." Justices LeBel and Deschamps (dissenting), agreed with Flinn J.A. that the judge was confused as to what he had done, and concluded that the judge's supervisory order was invalid whether or not he purported to have retained jurisdiction to make further orders. The hearings "appeared to become a cross between a mini-trial, an informal meeting with the judge and some kind of mediation session" in which, at least initially, the judge "seemed to believe, and certainly gave the impression, that he had the power to make further orders.... In the result, the parties found themselves before a trial judge who purported to exercise judicial functions and powers, and who provided almost nothing by way of procedural guidelines." Contrast: C.A. decision, *supra* note 1 at paras. 4, 11–19, *per* Flinn J.A., and 70, 74, 78, 84, *per* Freeman J.A. (dissenting), *Doucet-Boudreau*, *ibid.* at paras. 13, 60–61, 74, 76, 84, *per* Iacobucci and Arbour JJ., and 100–104, 119–133, *per* LeBel and Deschamps JJ. (dissenting).

⁸ Owen Fiss describes the structural injunction in the U.S. context as a "declaration that henceforth the court will direct or manage the reconstruction of the social institution, in order to bring it in conformity with the Constitution." The U.S. form of structural injunction evolved as a response to the intense resistance of state governments to the Supreme Court's constitutional pronouncements. In Canada, a "structural injunction"

the same time reframing it *ex post* as a kind of mediation order,⁹ the Supreme Court provides what amounts to, in our view, an essentially symbolic defence of the prerogative of the courts to hold governments to account for breaches of the *Charter*. In doing so, the majority developed a test for whether a remedy is “appropriate and just” within the meaning of s. 24 of the *Charter*. These “*Doucet-Boudreau* factors” have been widely used even though supervisory remedies are now rarely discussed. Nonetheless, for its discussion of supervisory orders in particular, the case fascinates for good reason and still raises issues that merit attention.

III. THE POLICY AND PRACTICAL REASONS TO BE SKEPTICAL

A. THE POLICY CASE AGAINST SUPERVISORY ORDERS

The effect of the case on the status of the “dialogue” between courts and legislatures has been discussed by Mr. Justice Rouleau and Linsey Sherman in this volume,¹⁰ so we will just briefly amplify some of what has been said elsewhere. The fundamental concern underlying our objections to supervisory orders is that of maintaining a relationship between the courts and governments in Canada that is founded on mutual respect. The majority in *Doucet-Boudreau* states this succinctly:

Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government. That history of compliance has become a fundamentally cherished value of our constitutional democracy we must never take it for

appears to refer to an injunction with very specific terms, where implementation is left to the government. Rouleau and Sherman discuss a number of examples in the minority language education context, *supra* note 2; we discuss these examples in brief, *infra*, at note 21. See: Robert J. Sharpe, *Injunctions and Specific Performance*, 2nd ed. (loose-leaf) (Toronto: Canada Law Book, 1992), at paras. 3.1340–1530, especially at 3.1360, citing Own Fiss, *The Civil Rights Injunction*, (Bloomington: Indiana Univ. Press, 1978), at p. 8, and 3.1510–1525, discussing the Canadian experience. See, further, Beverly J. McLachlin, “The Charter: A New Role for the Judiciary?” (1991) 29 *Alta. L. Rev.* 540, at pp. 550–559 (contrasting the U.S. and Canadian experience) [“The Charter: A New Role for the Judiciary”] and Rouleau and Sherman, *ibid.* (providing a further gloss on how these kinds of remedies have been used in other countries).

⁹ *Supra* note 7.

¹⁰ Rouleau and Sherman, *supra* note 2.

granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root.¹¹

It is surprising that the majority in *Doucet-Boudreau* takes this vision of tyranny, rather than our cherished history of compliance, as its starting point.¹² Putting this another way, if judges are different from mediators or administrators, then a supervisory order to ensure compliance has to be premised on a degree of mistrust. As Prof. Hogg and his co-authors have argued, “the only possible reason” for making the supervisory order in *Doucet-Boudreau* “was a fear that the province would refuse to comply with the section 24 order—something that had never yet occurred in Canada.”¹³ Below we will explain why, in this case, there was no reason to expect non-compliance; and why we have no reason to expect non-compliance generally; and when we look at the cases that have been cited in support of the proposition that courts have proposed this kind of supervision before, we find that judges’ expectations of compliance have been met.

Stepping back, we might say that the majority in this case was endorsing a solution in search of a problem. But we think it is fairer to say that the Court was stating an important principle rather than promoting a new direction for remedial discretion. Indeed, the majority famously purports to disdain the principle of dialogue as a constraint on remedial discretion, writing that, “[i]n our view, judicial restraint and

¹¹ *Doucet-Boudreau*, *supra* note 1 at para. 32, *per* Iacobucci and Arbour JJ. See, further, McLachlin, “The Charter: A New Role for the Judiciary,” *supra* note 8, at pp. 550–559. Contrast: Beverley McLachlin, “The Role of Judges in Modern Society” (Remarks to the Fourth Worldwide Common Law Judiciary Conference, May 5, 2001), online: Supreme Court of Canada <<http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm01-05-05-eng.asp>>.

¹² See, further, *ibid.* at paras. 62–63, *per* Iacobucci and Arbour JJ. (The trial judge “could have limited the remedy to a declaration of the rights of the parties,” as in past s. 23 cases, *but* the “assumption underlying this choice of remedy is that governments will comply with the declaration promptly and fully”; “litigation to vindicate minority language education rights has entered a new phase. The general content of s. 23 in many cases is now largely settled.... In the present case, for example, it was clear to and accepted by the parties from the start that the government was required to provide the homogeneous French-language facilities at issue. The entitled parents sought the assistance of the court in enforcing the *full and prompt* vindication of their rights after a lengthy history of government inaction.” [Emphasis in original; citations omitted.]

¹³ Hogg et al., “Charter Dialogue Revisited,” *supra* note 2 at p. 19. Indeed, this is how the minority in the Court of Appeal and the majority in the Supreme Court characterized the basis of the order, from the perspective of the trial judge: see notes 29 and 30, *infra*, and corresponding discussion.

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”;¹⁴ nonetheless, the *Doucet-Boudreau* factors for determining whether a remedy is appropriate and just do reflect the principle of dialogue as a constraint.¹⁵ In any case, our view is that the order that was upheld in *Doucet-Boudreau* offends this principle.

B. THE PRACTICAL CASE AGAINST SUPERVISORY ORDERS

In practical terms, in our view, supervisory orders are unnecessary; they confuse the institutional roles of courts and legislatures and threaten to waste valuable resources.

The *Doucet-Boudreau* model of supervision requires representatives of the government to attend in Court and report on its decisions and progress by way of cross-examination on affidavits. This is an adversarial process, not a policy implementation process.¹⁶ It may even be a political process, as the minority demonstrates.¹⁷ However we

¹⁴ *Doucet-Boudreau*, *supra* note 1 at para. 53, *per* Iacobucci and Arbour JJ.

¹⁵ See, in particular, the Court’s discussion of the second and third considerations (i.e. “an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy”; “an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court”): “[A] court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary.... [T]he courts must not ... depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes”; “It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.” See: *Doucet-Boudreau*, *ibid.* at paras. 56–57, *per* Iacobucci and Arbour JJ. See, further, Hogg et al., “*Charter* Dialogue Revisited,” *supra* note 2 at pp. 7–25 (describing the Supreme Court’s reception of the dialogue theory in other contexts).

¹⁶ See Donald L. Horowitz, “Decreeing Organizational Change: Judicial Supervision of Public Institutions” [1983] *Duke L.J.* 1265, at p. 1304 (“[D]espite the willingness of courts to innovate in handling this litigation, they are still very much courts, bound for the most part by a process devised for the adjudication of individual disputes and not especially apt for coping with large questions of policy and administration”). The Supreme Court has traditionally promoted this view. See, e.g., *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at pp. 376, 392–393 and *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, at pp. 860–861, 864.

¹⁷ *Doucet-Boudreau*, *supra* note 1 at paras. 127–128, *per* LeBel and Deschamps JJ. (dissenting) (“According to the appellants’ characterization, a primary purpose of the hearings was to put public pressure on the government to act. This kind of pressure is

describe it, this process confuses the roles of courts and legislatures.¹⁸ As a general rule, the government is responsible to its electorate as well as the individuals whose rights are being vindicated, and as long as these rights are indeed vindicated, the government needs room to implement its policies in whatever manner it deems best, as complex choices and tradeoffs arise in the policy development and implementation process.¹⁹ This is why court supervision in the private law context should be distinguished from supervision in the public law context.²⁰ As a practical matter, this process is complex and may not resolve into status reports that

paradigmatically associated with political actors. Indeed, the practice of publicly questioning a government on its performance, without having any legal power to compel it to alter its behaviour, is precisely that undertaken by an opposition party in the legislature during question period.”). See, further, Horowitz, *ibid.* at pp. 1303–1304 (“Because of [the] altered focus and also simply because of the drawn-out, time-consuming, frustrating character of the litigation, a good many judges have become invested in the outcome of the litigation. They want the bureaucracy to change, and they are inclined to regard a failure to change as an indication of defiance for which a response is required.... Since enforcement is a key process in institutional reform litigation, and the judge plays a major role in it, compromises in judicial neutrality must be expected.”) and Robert F. Nagel, “Controlling the Structural Injunction” (1984) 7 *Harvard J. L. & Public Policy* 395, at p. 404 (“Judicial management almost inevitably leads to conflict with the bureaucracy, whose decisions have been overruled by the Court, thus placing judges in an adversarial relationship with one of the parties before the Court”).

¹⁸ Prof. Nagel proposes, in the U.S. context, that “the central issue is not whether judges are better able than others to make the trains run on time. The issue is whether the role that federal judges are assuming is consistent with elementary principles of self-government and their duties as judges”: *ibid.* at p. 398.

¹⁹ Prof. Roach allows that “[s]ome dissatisfaction by Charter applicants with the eventual governmental response to the court’s decision may ultimately be the price that is paid for a democratic and dialogic approach to remedies.” (He goes on to argue that, “[n]evertheless, given the importance of ensuring effective and meaningful remedies for successful Charter applicants and ensuring that constitutional remedies are formulated to take into account the interests and views of minorities, courts should pay attention to such signs of dissatisfaction with the ultimate results of general declarations and delayed declarations of invalidity.” [Citations omitted.]) See: Roach, “Remedial Consensus and Dialogue,” *supra* note 4, at para. 83.

²⁰ This parallel is proposed by the majority in *Doucet-Boudreau*, at para. 71, *per* Iacobucci and Arbour JJ. (noting that “[i]n several different contexts, courts order remedies that involve their continuing involvement in the relations between the parties” and that “[a] panoply of equitable remedies are now available to courts in support of the litigation process and the final adjudication of disputes,” citing pre-judgment remedies in civil litigation, supervision in bankruptcy and receivership matters and the administration of trusts and estates, as well as ongoing jurisdiction in family law cases). See, further: Sharpe, *supra* note 8 at paras. 1.260–1.490, Kent Roach, *Constitutional Remedies in Canada*, 2nd ed. (loose-leaf) (Toronto: Canada Law Book, 1993), at para. 13.60 (both cited in *ibid.*).

can be effectively evaluated by a court, on a court's timeline. Regardless, the Court can get bogged down by unnecessary and inappropriate attention to details.²¹ For all of these reasons, it may well be the case that the supervisory remedy is plagued by a confusion of purpose and design (even the majority allows that the process in *Doucet-Boudreau* could have been more clearly defined).²² Finally, it is misleading to suggest that, as a rule, a supervisory process is more economical than the alternatives; this process involves considerable costs, not only for the government but also for the claimants, because it is an adversarial process.²³ None of this is to suggest that reporting sessions cannot have a therapeutic or informational value, but assuming that this is a proper consideration for the court, we are skeptical that the supervisory process that was upheld in *Doucet-Boudreau* is the best way to achieve these ends.

In any event, supervision is a fundamentally unnecessary process, not only because governments comply with orders in this country, but because orders, once they are final, can be varied at the request of one party (if variance is in fact required) or enforced by contempt by the other

²¹ Structural injunctions in the Canadian context may be detailed but in our view are categorically different in terms of attention to unnecessary logistical details, which a supervisory process facilitates. With respect to *Doucet-Boudreau*, contrast the Court of Appeal's characterization of the trial judge's supervision of the decision-making process (*supra* note 1 at para. 16: "extending to such minute detail as, for example, the type of ventilation system which would be included in the school facilities") with the detailed, but still general, orders made in the cases discussed in Rouleau and Sherman, *supra* note 2, which are generally limited to directions in respect of the use of facilities and general budgetary allotments (see: *Conseil des Écoles Séparées Catholiques Romaines de Dufferin et Peel v. Ontario (Ministre de l'Éducation et de la Formation)*, (1996), 30 O.R. (3d) 681 (Div. Ct.), stay not granted pending appeal (1996), 30 O.R. (3d) 686 (C.A.); *Association française des conseils scolaires de l'Ontario v. Ontario* (1988), 66 O.R. (2d) 599 (C.A.); *Conseil Scolaire Fransaskois de Zenon Park v. Saskatchewan* (1998), 170 Sask. R. 103 (S.C.); var'd (1998), 172 Sask. R. 257 (C.A.); *Marchand v. Simcoe County Board of Education* (1986), 55 O.R. (2d) 638 (Marchand I) (S.C.), and (1987), 61 O.R. (2d) 651 (S.C.) (Marchand II); *Fédération Franco-Ténoise v. Canada (Attorney General)* (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"). We acknowledge an exception in *Fédération Franco-Ténoise*, but we note that the order in that case involved a high degree of administrative rather than logistical complexity.

²² *Doucet-Boudreau*, *supra* note 1 at paras. 84–85, *per* Iacobucci and Arbour JJ.; contrast paras. 100–104, *per* LeBel and Deschamps JJ. (dissenting).

²³ *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612, at para. 24 ["Pro-Swing"]: "[S]upervision by the courts often means relitigation and the expenditure of judicial resources."

(as we will discuss below).²⁴ We expect that this is why these kinds of orders have not been used very much, in anything like the manner adopted in *Doucet-Boudreau*, either before that case was decided or since.

With respect to the need for supervision in this case, there are three periods of governmental inactivity that are given weight by the trial judge and the majority: (1) the government's inaction between the *Charter* coming into force and the mid-1990s, when it created an administrative scheme for the provision of minority language education programs and services; (2) from that point until the suit was initiated, during which time some programs and services were planned and delivered, but others were put on hold for budgetary and other reasons; and (3) the litigation process, in which the government explained its reasons for putting the programs and services in issue on hold.²⁵ The government's actions were weighed in order to determine the likelihood that it would respond to the court's declaration "fully and promptly."²⁶ Against this background, it bears emphasis that the government agreed that the plaintiffs had a right to minority language education and disagreed only as to the matter of what should be provided and when; indeed, the government appealed the trial judge's decision not on the merits but only on the issue of whether the supervisory process was merited. Indeed, in the view of the majority, "[t]he reason for the delay, broadly speaking, was the government's failure to give due priority to s. 23 rights in educational policy setting," but "the real issue between the parties by the time of trial was the date on which the programs ought to be implemented, rather than any question as to whether they were required in the first place."²⁷ Nonetheless, the judge and the majority weighed the government's history of inaction against it heavily, and concluded that a supervisory process was merited.²⁸

²⁴ See note 46, *infra*, and corresponding discussion.

²⁵ *Doucet-Boudreau*, *supra* note 1 at para. 39, *per* Iacobucci and Arbour JJ.: "The government cited a lack of consensus in the community, a consequent fear that enrollment would drop, and lack of funds as reasons for its decision to place the previously announced school construction projects on hold pending cost-benefit reviews. LeBlanc J. rightly concluded that none of these reasons justified the government's failure to fulfill its obligations under s. 23." See, further, Trial decision, *supra* note 1 at paras. 198–199, 202, 211–213, 216–217.

²⁶ *Ibid.* at para. 40, *per* Iacobucci and Arbour JJ.

²⁷ *Ibid.* at para. 39.

²⁸ *Ibid.* at para. 40.

We disagree with this conclusion. In our view, all that was required was the judge's declaration of entitlement and a suspension until a specific date. In effect, what the judge and the majority did was to take the government's position against it, raising what (in the minds of legislators) might have been legitimate reasons for a wait-and-see approach in the circumstances and assuming that, in the face of the court's order, the government would be intransigent for these reasons. In the words of Freeman J.A., who would have upheld the judge's supervisory order in the Court of Appeal, "[i]f [the trial judge] had misread the degree of co-operation he could expect from the players, there was a risk of failure."²⁹ The majority framed the issue similarly, as a matter of risk: "[The trial judge] obviously considered that, given the Province's failure to give due priority to the s. 23 rights of its minority Francophone populations in the five districts despite being well aware of them, there was a significant risk that such a declaration would be an ineffective remedy."³⁰ This strikes us as unfair in light of the government's *bona fides*.³¹ Finally, as a matter of logic as well as principle, as the minority points out, it is impossible to say that the supervisory process had any effect on the outcome of this case and it does not make sense, regardless, to justify the order, *ex post*, on this basis.³²

A presumption of good faith on the part of governments generally is supported on the historical record; there are no cases that we have found in which a judge has purported to make a *Doucet-Boudreau*-type supervisory order, either before the case was decided or since then, and the handful of cases in which this type of order might have been considered actually support our view that governments are and ought to be trusted to comply with court orders.³³ Rouleau and Sherman suggest that courts have made supervisory orders on two occasions before

²⁹ C.A. decision, *supra* note 1 at para. 84, *per* Freeman J.A. (dissenting).

³⁰ *Doucet-Boudreau*, *supra* note 1 at para. 66, *per* Iacobucci and Arbour JJ.

³¹ See further, note 53, *infra*.

³² *Doucet-Boudreau*, *supra* note 1 at para. 139, *per* LeBel and Deschamps JJ. (dissenting).

³³ We distinguish *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790 (Ont. C.A), on the basis that, in that case, the trial judge asked the Attorney General to report back to the court and the public in relation to a matter of the court's inherent jurisdiction (criminal contempt) that had been referred to the Attorney General for carriage. We also note that the Court of Appeal cited *Doucet-Boudreau* in support of the proposition only that "modern judges have assumed an active, managerial role over many different kinds of cases." See *ibid.* at paras. 98, 105–109.

Doucet-Boudreau was decided, in *Lavoie* (1988) and *B.C. Parents* (1996).³⁴ The majority in *Doucet-Boudreau* echoes this view,³⁵ noting that in the past the Supreme Court had “remained seized of a matter so as to facilitate the implementation of constitutional language rights,” citing the Manitoba language references,³⁶ and that “lower courts have also retained jurisdiction in s. 23 cases,” citing (but not discussing) *Lavoie* and *B.C. Parents* as well as a third case, *Société des Acadiens du N.-B.* (1983).³⁷ In the Court of Appeal, the majority distinguishes all three of these cases. In our view, none of them involve supervision as such.

The Manitoba language references involved a declaration that Manitoba’s laws had to be translated into French.³⁸ The Supreme Court suspended a declaration of invalidity of the English-only laws but also required the government to report back to the Court on the issue of how long the suspension should be in force; in that case the government actually returned to court seeking more time to comply with the order. This is not a case of supervision as such.³⁹ Similarly, in *Lavoie*, the evidence was inconclusive as to whether the numbers warranted an education facility, so the judge ordered the school board to hold a registration before making a further order.⁴⁰ In *Doucet-Boudreau*, the Court of Appeal stated that *Lavoie* has “no application” to the supervision issue;⁴¹ we agree. In our view, *Lavoie* is plainly similar to the Manitoba

³⁴ *Lavoie v. Nova Scotia (Attorney General)* (1988), 84 N.S.R. (2d) 387 (S.C.) [“*Lavoie*”], *L’Association des Parents Francophones de la Colombie-Britannique v. British Columbia* (1996), 27 B.C.L.R. (3d) 83 (S.C.) [“*B.C. Parents*”].

³⁵ *Doucet-Boudreau*, *supra* note 1 at para. 71, *per* Iacobucci and Arbour JJ.

³⁶ *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Re Manitoba Language Rights Order*, [1985] 2 S.C.R. 347; *Re Manitoba Language Rights Order*, [1990] 3 S.C.R. 1417; *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212 [“Manitoba language references”].

³⁷ *Société des Acadiens du Nouveau-Brunswick Inc. v. Minority Language School Board No. 50* (1983), 48 N.B.R. (2d) 361 (Q.B.) [“*Société des Acadiens du N.-B.*”]. The majority in *Doucet-Boudreau*, *supra* note 1, also cites *Lavoie*, at para. 31, in support of the proposition that “[t]he affirmative promise contained in s. 23 of the *Charter* and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected.”

³⁸ Manitoba language references, *supra* note 36.

³⁹ The Court of Appeal in *Doucet-Boudreau* reached the same conclusion: C.A. decision, *supra* note 1 at para. 31, *per* Flinn J.A.

⁴⁰ *Lavoie*, *supra* note 34 at p. 593.

⁴¹ C.A. decision, *supra* note 1 at paras. 34–35, *per* Flinn J.A.

language references, in which the court simply needed more information before making a sensible order; the court asked the parties to provide further information, and made an order accordingly. In *B.C. Parents*, the judge suspended a declaration of invalidity of a regulation. He also stated, in the final paragraph of the judgment, that “[w]hile I express confidence that matters will be resolved at an early date, I will retain jurisdiction in this matter should difficulties arise in that regard” (emphasis added).⁴² In *Doucet-Boudreau*, the Court of Appeal observes that “[t]here is no record of the parties to this application ever appearing before the trial judge on that application, for any purpose,” and that two years later a second action was initiated in relation to the government’s legislative response to the first judgment; it was heard by the same judge, who called it “the second action brought by the plaintiffs” in the matter (it was denied).⁴³ The plaintiffs in the third case, *Société des Acadiens du N.-B.*, were successful, but the judge reserved judgment, expressing confidence that the government would comply with his declaration:⁴⁴

Given the success, although minimal, of the plaintiffs, it would appear compulsory, at first sight, to consider the request of the Society and the Association for a permanent and mandatory injunction against the defendant. After much thought, and keeping in mind the impression given off by the character of the defendant’s general director throughout the trial, and in the light of all the testimony, the court is not convinced of the necessity to go that far. Put simply, *the court is confident that this decision will be respected by the defendant* and, consequently, the court will refrain from deciding this issue for a period of six months. The beginning of the school year in August-September 1983 will undoubtedly determine the need to consider such a measure. [Emphasis added.]

In *Doucet-Boudreau*, the Court of Appeal distinguishes this case on the basis that the judge refrained from making an order rather than making an order and supervising compliance with it.

We respectfully agree with the Nova Scotia Court of Appeal that none of these judgments involve supervision. Rather, they reflect the informal manner in which judges may allow themselves to be spoken to

⁴² *B.C. Parents*, *supra* note 34 at para. 54.

⁴³ C.A. decision, *supra* note 1 at paras. 36–37, *per* Flinn J.A.

⁴⁴ *Société des Acadiens du N.-B.*, *supra* note 37 at para. 109.

where circumstances justify varying an order. In *Lavoie*, the judge asked the government for more information before making an order. In the other two cases, the judges expressed confidence that their declarations were going to be respected but left open the possibility that one of the parties would need to return to the court for directions. In our view, all three of these cases support the proposition that, at the end of the day, courts do (and should) have confidence that governments will respect their declarations, and that supervision of compliance with orders is fundamentally unnecessary.⁴⁵

C. WHY ELDRIDGE-TYPE ORDERS ARE SUPERIOR

Our final count against supervisory orders is that the Court already has the tools it needs to vindicate the rights of applicants without stepping outside of its traditional role. These kinds of alternatives are acknowledged in both the majority and dissenting judgments in the Supreme Court.⁴⁶ In the past, as we have seen, courts have reserved judgment to give the parties a chance to remedy a matter without resorting to an order, or reserved judgment while asking the parties to take steps or provide information as a basis for an order. After making an order, the court has varied it at the request of a party. Indeed, the most common and flexible approach to the issue of implementing constitutional remedies is the “*Eldridge*-type order,” which takes the form of a suspended declaration of invalidity.⁴⁷ The terms of such an order are straightforward and specific, the hallmarks of an effective order,⁴⁸ because in essence they combine a basic task and a deadline, but they also preserve the flexibility

⁴⁵ See also: *Conseil Scolaire Fransaskois de Zenon Park v. Saskatchewan* (1998), 170 Sask. R. 103 (S.C.); var’d (1998), 172 Sask. R. 257 (C.A.), discussed in Rouleau and Sherman *supra* note 2.

⁴⁶ *Doucet-Boudreau*, *supra* note 1 at paras. 81, *per* Iacobucci and Arbour JJ., and 136–137, *per* LeBel and Deschamps JJ. (dissenting).

⁴⁷ This remedy is widely used but under-theorized. See: Roach, “Principled Remedial Discretion Under the Charter” (2004) 25 S.C.L.R. (2d) 101, at pp. 134–148 [“Principled Remedial Discretion”] (published after the Supreme Court’s decision in *Doucet-Boudreau*) and “Remedial Consensus and Dialogue,” *supra* note 4 (published after the Court of Appeal’s decision in *Doucet-Boudreau*). We note that Rouleau and Sherman, *supra* note 2, ask whether a supervisory order might be appropriate outside of the s. 23 context; in our view, *Eldridge*-type orders certainly are, because of their flexibility. Nonetheless, we agree with Roach that the remedy might be developed to take into account, *inter alia*, the interests of parties whose rights are affected during the suspension: “Principled Remedial Discretion,” *ibid.* at pp. 143–148.

⁴⁸ *Pro-Swing* *supra* note 23 at para. 24.

in execution that the government requires. Where the task needs to be clarified before an order can be made, this can be accomplished on the basis of submissions.⁴⁹ Where the government can demonstrate why it needs more time, the court can vary the order as required.

In their evaluation of supervisory orders, Rouleau and Sherman set up a dichotomy between detailed mandatory orders and flexible supervisory orders.⁵⁰ This seems to limit the choice. In particular, Rouleau and Sherman suggest that supervision may be appropriate in three instances: where the government has been recalcitrant prior to litigation, when the rights in issue would erode quickly, and when several steps are required or other actors involved in the vindication of the applicants' rights. In each of these cases, however, a suspended declaration can achieve the same results. First, we disagree that a government's recalcitrance prior to litigation should imply that the government will not comply with a court order. There are many reasons why, *ex ante*, a government may have a different view of the law (indeed, the law changes) or the rights in issue and how they should be vindicated, and it is open to the government to contest the applicants' view of their entitlements in court where the matter cannot be resolved in the usual course of governance. In any case, in the Canadian experience, governments comply with court orders after they have contested the scope and content of claimants' rights; a declaration is all that has been required.⁵¹ Second, when the rights in issue would erode quickly, the period of suspension of the kind of order used in *Eldridge* can be brief. The same is true for any variation on this kind of order: the court can set whatever deadlines are appropriate in terms of requiring steps to be taken,

⁴⁹ See e.g., Manitoba language references, *supra* note 36, and discussion corresponding to note 38.

⁵⁰ Rouleau and Sherman, *supra* note 2.

⁵¹ We acknowledge, without discussing, the possible counter-example of *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, in which the Supreme Court made a general declaration that legislation had been administered in a manner that constituted a *Charter* breach but declined to order a more structured remedy. The applicants returned to the Court in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38. See: Roach, "Remedial Consensus and Dialogue," *supra* note 4 at paras. 31–36 ("The majority's faith that its declaration that Charter rights had been violated in the past would provide 'a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary' belies the considerable difficulties and expense that would have to be incurred by Charter applicants to commence fresh litigation and to develop a new trial record before a new judge").

etc., before an order may be finalized. As for the third set of circumstances, where several steps are required in order to vindicate a right, or other parties may be involved, we do not see why supervision as such is superior to a requirement that those steps simply be completed before the order is finalized, and we do not see the logic of a supervisory process where non-parties are involved, because the court has no authority over those parties. Indeed, where non-parties are involved this suggests that the court is not the appropriate forum for resolving issues among these parties.

Roach and Budlender propose that a supervisory process could be adopted where governments are *ex ante* incompetent or lack capacity to comply with an order, or intransigent.⁵² Where a matter is complex, however, we are not necessarily convinced that a supervisory process can correct for a lack of competence or capacity or even (for the reasons set out above) that *ex ante* inaction implies that a government will be unresponsive to a declaration.⁵³ The case of *Fédération Franco-Ténoise* provides an interesting example of some of these tensions in operation.⁵⁴ That case involved a range of structural and non-structural remedies devised by a trial judge to require the Northwest Territories (NWT) to meet its obligations under the *Official Languages Act*.⁵⁵ The Court of Appeal agreed with the trial judge that in issue was “long-standing, multi-faceted inaction on the part of the government.”⁵⁶ While the substance of the judge’s order was upheld, the Court of Appeal held that the judge had failed to give due consideration to the complexity of the policy environment in the NWT in requiring the government to vindicate the rights of the applicants in specific ways (“there are few places in Canada

⁵² Kent Roach and Geoff Budlender, “Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate and Just?” (2005), 122 S. African L.J. 325, at pp. 349–351, adopting (at pp. 345–351) a taxonomy proposed by Chris Hansen which attributes governmental inaction to inattention, incompetence or intransigence. See: 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).

⁵³ Indeed, Roach and Budlender allow that “in *Doucet-Boudreau*, it would be wrong to characterize Nova Scotia as a renegade province that was intransigently opposed to French-language schools. The more mundane truth may be that it was a province that, because of a complex range of circumstances including inertia, had simply not given minority-language constitutional rights their deserved priority.” *Ibid.* at p. 349.

⁵⁴ *Fédération Franco-Ténoise*, *supra* note 21.

⁵⁵ R.S.N.W.T. 1998, c. 0–1.

⁵⁶ *Fédération Franco-Ténoise*, *supra* note 21 at para. 97.

outside the northern areas where the task of providing services to the public presents so many challenges”);⁵⁷ the Court also noted that the order reflected, in some of its particulars, the legislature’s own goals as well undertakings at the time the order was made.⁵⁸ If a case like *Federation Franco-Ténoise* suggests that lack of capacity may be in issue in some jurisdictions in Canada, and that supervisory orders may be appropriate in these circumstances in theory, then it also reminds us that governments will meet their obligations in good faith when those obligations are defined by the courts, but that the courts may in fact lack the necessary perspective to particularize those obligations.

Having considered where more than declaratory relief might be appropriate in order to vindicate constitutional rights, Roach and Budlender conclude that, “[i]n the final analysis, the test is one of effectiveness.”⁵⁹ In our view, given the Canadian experience, *Eldridge*-type orders are generally sufficiently effective so as to preclude recourse to supervisory orders of the kind upheld in *Doucet-Boudreau*.

IV. CONCLUSION

In closing we observe that the Supreme Court itself appears to have downplayed the significance of its holding in *Doucet-Boudreau*. In *Pro-Swing* (2006),⁶⁰ the Court reaffirmed that Canadian courts do not usually supervise compliance with orders, in part because of the cost of what effectively amounts to continuing the litigation, for the parties as well as the courts.⁶¹ The Court also surmises that its holding in *Doucet-Boudreau* might be limited to the minority language education context as well as by considerations of cost. This invocation of a form of cost-benefit analysis is sharply at odds with the terms of the decision itself (“[d]eference ends ... where the constitutional rights that the courts are charged with protecting begin”).⁶² Indeed, the Court describes supervision as a “burden on the judicial system” and the case as a

⁵⁷ *Ibid.* at paras. 132–138.

⁵⁸ *Ibid.* at paras. 52–53, 108.

⁵⁹ Roach and Budlender, *supra* note 52 at p. 351.

⁶⁰ *Pro Swing*, *supra* note 23.

⁶¹ *Ibid.*

⁶² *Doucet-Boudreau*, *supra* note 1 at para. 36, *per* Iacobucci and Arbour JJ.

demonstration only of “the possible extent of judicial involvement where injunctive relief is ordered.”⁶³ In particular:

This burden on the judicial system may be justified in the context of the constitutional protection afforded to linguistic minorities, but may not be warranted when the cost is not proportionate to the importance of the order. The Latin maxim *de minimis non curat praetor* conveys the long-established rule that claims will be entertained only if they are important enough to warrant the expenditure of public resources.⁶⁴

We read *Pro-Swing* (perhaps too eagerly) as an indication that the majority judgment may remain a statement of principle rather than an endorsement of supervision as a matter of common practice. Indeed, there is no reason why the majority could not have struck down the order in *Doucet-Boudreau* while upholding the principle at stake. In any event, it seems fair to conclude that in *Doucet-Boudreau* the majority took the opportunity that presented itself to plant a “stake in the ground”: stating that it would invoke whatever means it had to in order to defend the liberty of those protected by the *Charter* from tyranny or the threat of tyranny. It is reassuring to know that the courts will act to maintain the rule of law and the rights of Canadian citizens against governments who would flout the courts. But it will be a sad day in Canada when these kinds of orders are truly necessary to that end.

⁶³ *Pro-Swing*, *supra* note 23 at para. 24.

⁶⁴ *Ibid.*

