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Enforcing the Charter: The Supervisory Role of Superior Courts and the Responsibility of Legislatures for Remedial Systems

Marilyn L. Pilkington^{*}

I. INTRODUCTION

Let us consider what a Canadian superior court will do if faced with a recalcitrant government which declines to respect constitutional rights in its delivery of programs and services. We know that, in appropriate circumstances, the Supreme Court of Canada is prepared to read words into legislation to correct an infringement of constitutional rights, thereby displacing legislative powers. Will it authorize superior court judges to take on a supervisory role where a government administers its programs in a manner that infringes constitutional rights? Federal court judges in the United States have taken on such a role. Should Canadian judges be more cautious in doing so? Is there something about executive or administrative powers that entitles them to more deference than is due to legislation? Is there something about the relationship of legislatures and courts in Canada that differs from that in the United States?

In its recent decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,¹ the Supreme Court of Canada provided its initial perspective on issues that will occupy courts in the exercise of supervisory

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¹ [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63, on appeal from the Nova Scotia Court of Appeal (2001), 194 N.S.R. (2d) 323, [2001] N.S.J. No. 240 (C.A.), (Flinn J.A. for the majority, Freeman J.A. dissenting); on appeal from the order of LeBlanc J. of the Supreme Court of Nova Scotia (2000), 185 N.S.R. (2d) 246 (S.C.) [hereinafter "*Doucet-Boudreau*"].

remedies for constitutional infringement. The majority judges² asserted that the appropriateness of supervisory remedies does not arise in this case, and assessed the remedy at issue in pragmatic terms, reflecting a willingness to tailor remedial powers as needed to provide effective enforcement of rights. The dissenting judges,³ however, were intent on erecting guardrails, and maybe roadblocks, on what they perceived to be the slippery slope of inappropriate judicial intervention in government administration. Even the dissenters concluded that supervisory remedies will be appropriate where other remedies have failed, and thus the Court unanimously affirmed the availability of supervisory remedies. What separated the majority judges and those in dissent appears to be a matter of degree — should supervisory remedies be available only as a matter of last resort, or should they constitute one of the choices among several options for remedying constitutional infringements? I will review their reasons and the factors they would consider in determining when supervisory remedies are appropriate.

Whether or not there is a hierarchy of remedies, it is evident that courts and tribunals with power to decide Charter issues will not be able to fulfill the purpose of section 24(1)⁴ of the Charter unless they have the capacity to tailor the remedy to the right and to the infringement. In *Doucet-Boudreau* the majority judges held that superior court judges have broad jurisdiction and discretion to select from the full range of appropriate and just remedies for Charter infringements, and that this jurisdiction cannot be limited by statute or common law. Accordingly, there will always be at least one court to which a claimant can resort to seek a remedy for a constitutional wrong. Nonetheless, the majority judges join with the dissenting judges in citing with approval earlier decisions of the Court that limit the broad language of section 24(1) by confining the constitutional jurisdiction of statutory and inferior courts

² The majority reasons are written jointly by Iacobucci and Arbour JJ., concurred in by McLachlin C.J., Gonthier and Bastarache JJ.

³ The dissenting reasons are written jointly by LeBel and Deschamps JJ., concurred in by Major and Binnie JJ.

⁴ The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 24(1):

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

and tribunals within their ordinary jurisdiction. I will argue that constitutional provisions should not be subordinated to the jurisdictional and procedural systems that were in place before the Charter was adopted; that courts are not able to revise these systems on a case-by-case basis; and that Parliament and legislatures have a constitutional responsibility to review and amend statutory jurisdiction and procedure to give effect to the broad remedial jurisdiction conferred in section 24(1). Since the enforcement of constitutional rights and freedoms depends on private prosecution, it is important that claimants who establish an unjustified infringement be entitled to an appropriate and just remedy. The entitlement should not be deflected by unnecessary jurisdictional and procedural hurdles, multiplicity of proceedings, potentially conflicting results, and attendant costs.

The majority decision of the Supreme Court of Canada in *Doucet-Boudreau v. Nova Scotia* indicates that the Court will continue to be cautious in developing appropriate and just remedies for constitutional wrongs under section 24(1) of the Charter, but that the majority is prepared to be flexible and pragmatic, to assess the appropriateness of a remedy in the context of the right and the nature of the infringement, and to respect the trial judge's exercise of discretionary judgment. It is difficult to predict whether the majority position will hold. Both of the co-authors of the majority position will soon retire from the Court, and new appointments could shift the balance toward the dissenting judges' narrower view of the court's role. The dissenting reasons, supported by four members of the Court, are argued in strong, even adversarial, terms, espousing a commitment to a constitutional doctrine of separation of powers that supports judicial restraint in the supervision of executive action.

In this paper, I will consider the reasons of the Supreme Court of Canada in *Doucet-Boudreau v. Nova Scotia*, the circumstances in which judicial supervision of government programs will constitute the appropriate and just remedy for constitutional infringement, and the responsibility of Parliament and the legislatures to review established jurisdictional and procedural systems to ensure that they provide effective frameworks for developing and enforcing remedies pursuant to section 24(1) of the Charter.

II. THE DECISION OF THE SUPREME COURT OF CANADA IN *DOUCET-BOUDREAU V. NOVA SCOTIA*

1. The Issues in *Doucet-Boudreau v. Nova Scotia*

Sixteen years after minority language education rights were guaranteed in the *Charter of Rights and Freedoms*, francophone parents applied to the Supreme Court of Nova Scotia for an order directing the province of Nova Scotia and the *Conseil Scolaire Acadien* to fund and provide facilities and programs in the French language at the secondary level. The provincial government did not dispute the parents' rights or their entitlement to facilities and programs, but delayed in complying with its obligations despite clear indications that assimilation was undercutting the constitutional entitlement. The trial judge ordered the province and the *Conseil* to provide the facilities and programs, and to use their best efforts to meet specified deadlines. In addition, he retained jurisdiction to hear progress reports. The nature and manner of the reports and the procedure for dealing with them were not explicitly defined in the initial order, but were clarified as the hearings proceeded.

By majority decision, the Nova Scotia Court of Appeal held that the retention of jurisdiction and reporting requirements exceeded the trial judge's jurisdiction under section 24(1) of the Charter. The dissenting judges in the Supreme Court of Canada would have upheld this result, on the basis that the trial judge's order failed to meet standards of procedural fairness, breached the *functus officio* doctrine, and exceeded the proper role of the judiciary. The majority judges upheld the remedy on the basis that it was effective to vindicate the rights of the claimants and employed remedial techniques appropriate to the judicial role.

2. Unanimous Support for Effective and Imaginative Charter Remedies

At the outset, it is important to note that, although the dissenting judges rejected the appropriateness of the reporting remedy ordered by the trial judge, they did confirm their support for "effectively enforcing constitutional rights"⁵ and recognized "the need for efficacy and

⁵ *Doucet-Boudreau*, *supra*, note 1, at para. 91 [S.C.R.].

imagination in the development of constitutional remedies.”⁶ In addition, they acknowledged that “superior courts’ powers to craft *Charter* remedies may not be constrained by statutory or common law limits.”⁷ They set out alternative means by which, in their view, the Court could have appropriately achieved its remedial objective in the *Doucet-Boudreau* case.⁸ Furthermore, they recognized that “in the appropriate factual circumstances, injunctive relief may become necessary”⁹ and may be appropriate “where it is the only way that a claimant’s rights can be vindicated.”¹⁰ The dissenters also affirm that

[courts] must be assertive in enforcing constitutional rights. At times, they have to grant such relief as will be required to safeguard basic constitutional rights and the rule of law, despite the sensitivity of certain issues or circumstances and the reverberations of their decisions in their societal environment.¹¹

Accordingly, the objections of the dissenters to supervisory remedies are not absolute, but are objections of degree. In the dissenters’ view, the supervisory remedy is one of last resort. They asserted that, unless it is established that the executive defies a directly applicable judicial order, “increased judicial intervention in public administration will rarely be appropriate,”¹² and, further, that “[c]ourts should not unduly encroach on areas which should remain the responsibility of public administration and should avoid turning themselves into managers of the public service.”¹³ Accordingly, despite some general statements to the contrary,¹⁴ it appears that the dissenters did contemplate circumstances in which a superior court will properly order supervisory remedies in order to enforce constitutional rights.

The majority judges asserted the importance of a purposive approach to the interpretation of remedies provisions, requiring that the

⁶ *Id.*, at para. 94.

⁷ *Id.*, at para. 105.

⁸ *Id.*, at para. 142.

⁹ *Id.*, at para. 134.

¹⁰ *Id.*, at para. 135.

¹¹ *Id.*, at para. 106.

¹² *Id.*, at para. 140.

¹³ *Id.*, at para. 91.

¹⁴ See, for example, statements, *id.*, at paras. 117 and 120, referred to *infra*, in the text at notes 28 and 35.

remedy be responsive to the right and effective to vindicate the right. They affirmed earlier decisions of the Court that the remedies provision must be “construed generously,”¹⁵ to provide effective, responsive remedies that guarantee full, effective and meaningful remedy for Charter violations since “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach.”¹⁶ The majority charged the dissenting judges with “severely undervalu[ing] the importance and the urgency of the language rights in the context [of this case].”¹⁷ They focused on the impact of government delay in complying with clear obligations under section 23 of the Charter, which itself was designed to correct past injustices.¹⁸ The majority emphasized the critical need for timely compliance with minority language education rights since delay leads to assimilation and erosion of the numbers that warrant the right. In the view of the majority, the case presented circumstances of necessity and urgency that justify affirmative remedies.

3. Different Views on the Appropriate Role of the Judiciary

In defining limits on a superior court’s remedial powers, the dissenters held that a remedy under section 24(1) will not be appropriate and just unless it has “the requisite legitimacy and certainty.”¹⁹ In their view, the reporting remedy in *Doucet-Boudreau* failed to comply with section 24(1) because it failed to meet standards of procedural fairness and exceeded the appropriate role of the judiciary.

(a) Procedural Fairness

The dissenters considered that the reporting order was seriously flawed in that it failed to provide clear notice of the obligations of the parties. They chided the trial judge for failing to observe “basic rules of

¹⁵ *Supra*, note 1, at para. 24 [S.C.R.], citing McLachlin C.J., for the Court, in *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 75, at para. 18, [2001] S.C.J. No. 79 [hereinafter “*Dunedin Construction*”].

¹⁶ *Doucet-Boudreau*, *id.*, at para. 25, quoting McLachlin C.J. in “*Dunedin Construction*,” *supra*, note 15, at paras. 19-20.

¹⁷ *Doucet-Boudreau*, *id.*, at para. 23.

¹⁸ *Id.*, at paras. 26-28.

¹⁹ *Id.*, at para. 147.

legal writing,”²⁰ “canons of good legal drafting,”²¹ and the fundamental importance of procedural fairness.²² They asserted that the remedial order failed to specify the form and content of the required reports and the procedure, purpose, and nature of reporting hearings. Without identifying any actual prejudice to the responding province resulting from the lack of definition, the dissenting judges concluded that the reporting order breached the parties’ interest in procedural fairness and was inappropriate and void on that basis alone.

The majority judges acknowledged that “future orders of this type could be more explicit and detailed with respect to the ... procedure at reporting hearings,”²³ but concluded that the order was not “incomprehensible, ... impossible to follow ... [or] unclear in a way that would render it invalid.”²⁴ They noted that, while there was some uncertainty in the procedure to be followed, matters were clarified as they proceeded, and the process, together with the guidance of appellate courts, will be instructive to counsel and judges in future cases.

(b) The Role of the Judiciary in Remedying Government Inaction

The dissenting judges considered that the trial judge breached the common law principle of *functus officio*, as well as a constitutional principle of separation of powers, by retaining jurisdiction to order the province to make progress reports and thereby encroached on the executive’s responsibility for public administration. The majority judges rejected this approach, holding that the court’s constitutionally defined remedial role is not restricted by concepts of judicial restraint, or by principles derived from statutory or common law. Rather, the court’s remedial role is to be determined on the basis of what remedy is appropriate and just to vindicate the infringement of a constitutional right.

²⁰ *Id.*, at para. 91.

²¹ *Id.*, at para. 94.

²² *Id.*, at paras. 97-104.

²³ *Id.*, at para. 84.

²⁴ *Id.*, at para. 83.

(i) Retaining Jurisdiction and the Doctrine of *Functus Officio*

The dissenting judges relied on the doctrine of *functus officio* to conclude that the trial judge could not retain jurisdiction to hear reports on the province's progress toward compliance with the terms of his order. They asserted the need for finality of decisions in order to facilitate appeals. The majority judges rejected the primacy of the *functus officio* argument in that a common law principle cannot limit the broad grant of remedial jurisdiction in section 24(1).²⁵ The majority recognized that the policy reflected in the principle may be relevant in determining whether the trial judge's remedial order was appropriate. The majority concluded, however, that the *functus officio* doctrine did not apply in that instance since the trial judge did not retain power to alter his disposition of the case. He had made a final disposition with respect to the scope of section 23, the finding of infringement, and the action to be taken by the province by way of remedy, and thus provided a stable basis for appeal.²⁶ The majority concluded that, having come to a final disposition, the trial judge acted appropriately in including, as part of his order, the requirement of progress reports: "[t]he change announced by s. 24 of the *Charter* is that the flexibility inherent in an equitable remedial jurisdiction may be applied to orders addressed to government to vindicate constitutionally entrenched rights."²⁷

(ii) Separation of Powers

The dissenting members of the Court considered that

if a court intervenes ... in matters of administration properly entrusted to the executive, it exceeds its proper sphere and thereby breaches the separation of powers. By crossing the boundary between judicial acts and administrative oversight, it acts illegitimately and without jurisdiction. Such a crossing of the boundary cannot be characterized as relief that is "appropriate and just in the circumstances" within the meaning of s. 24(1) of the *Charter*.²⁸

²⁵ *Id.*, at para. 75.

²⁶ *Id.*, at paras. 79-80.

²⁷ *Id.*, at para. 73.

²⁸ *Id.*, at para. 117.

Thus, the dissenting judges appear to negate any possibility of superior courts issuing remedies that require supervision of executive action. The language is inconsistent with their acknowledgment, noted above,²⁹ that supervisory remedies may be appropriate in some cases. There also appears to be a contradiction in the fact that the dissenting judges considered it appropriate for courts to intrude on the executive function to the extent of ordering the provision of facilities and programs in accordance with a specified timetable, but unacceptable to require the government to report on its progress in doing so, even in the face of a history of delay in fulfilling its well-defined constitutional responsibility.

The dissenters relied on the separation of powers which, they alleged, is now “entrenched as a cornerstone of our constitutional regime.”³⁰ However, it is not entirely clear what this separation of powers entails. For instance, later in the reasons, the dissenting judges referred to the “balance that has been struck between our three branches of government”³¹ but still later, they referred to the fact that “in [Canada], the executive is inextricably tied to the legislative branch.”³²

These statements contradict each other and the assertion of a doctrine of separation of powers is inconsistent with Canada’s historical, legal, and political organization. As stated in the Preamble to the *Constitution Act, 1867*,³³ Canada’s Constitution is similar in principle to that of the United Kingdom, and thus predicated on a fusion of executive and legislative powers with an independent judiciary. In asserting a strict separation of powers between executive, legislative, and judicial branches of government, the dissenters are appropriating a concept based on the American constitution and using it to limit the scope of judicial remedies, as advocated by some Charter critics who argue that courts are usurping government’s ability to govern.³⁴

To the dissenting judges, judicial supervision of governmental functions breaches the principle of separation of powers in three ways. First, the court acts beyond its capacities since the judiciary is “ill equipped to

²⁹ See the text at notes 6-11.

³⁰ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, *supra*, note 1, at para. 107.

³¹ *Id.*, at para. 111.

³² *Id.*, at para. 123.

³³ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 50.

³⁴ See, for example, Morton & Knopff, *The Charter Revolution and The Court Party* (2000), at 153.

make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation.”³⁵ Accordingly, as in *Eldridge v. British Columbia (Attorney General)*,³⁶ the court should recognize that it is up to government to choose from among the various options to rectify the constitutional infringement.³⁷

Second, the dissenting judges asserted that the supervisory remedies infringe the separation of powers by undermining the co-operation and mutual respect that characterizes the relationships between branches of government in Canada.³⁸ They referred to the well-established requirement that legislatures and governments respect the independence and impartiality of the judiciary³⁹ and turned the proposition around to argue that courts should avoid, as a general rule, interfering in the management of public administration except as necessary to supervise administrative tribunals, and guard constitutional rights and the rule of law.⁴⁰ In fact, however, the independence of courts from the legislative and executive branches is based on their need to be independent and impartial in order to meet the requirements of the rule of law. By contrast, the legislative and executive branches are subject to judicial review. Judicial intrusion in the work of the legislative and executive branches is implicitly required in our constitutional arrangements and explicitly authorized by section 24(1) of the Charter. Thus, a constitutional doctrine of the separation of powers does not provide a basis for distinguishing between acceptable and unacceptable judicial intervention. When the court decides an issue of constitutional entitlement and enforcement, as between a claimant and the state, the court must be even-handed in determining the appropriate and just remedy. It should not defer to government on the basis of an obligation of mutual co-operation and respect that prevails over the claimants’ constitutional entitlement.

Third, the dissenting judges asserted that, by requiring government to report, the trial judge exerted political pressure on government and thereby infringed the separation of powers. The dissenters concluded that, since courts are entitled to protection from political pressure exercised by

³⁵ *Doucet-Boudreau*, *supra*, note 1, at para. 120. See also para. 124.

³⁶ [1997] 3 S.C.R. 624, at para. 96, [1997] S.C.J. No. 86.

³⁷ *Doucet-Boudreau*, *supra*, note 1, at para. 124.

³⁸ *Id.*, at para. 121.

³⁹ *Id.*, at para 109.

⁴⁰ *Id.*, at para. 110.

government, government should also be protected from political pressure exerted by courts.⁴¹ By characterizing measures to ensure timely compliance with Charter rights as the application of political pressure, the dissenting judges called into question the fundamental capacity of courts to enforce Charter guarantees in any circumstances.

As the majority judges recognized, there are limits on the degree to which it is appropriate for courts to micro-manage the means by which governments comply with Charter remedies. These appropriate limits are not determined by a doctrine of separation of powers, but rather are based on the respective institutional capacities of courts and governments: “in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiter and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited.”⁴² On the facts of *Doucet-Boudreau*, however, the majority judges considered that the remedial orders made by the trial judge, including the progress reports, were well-within judicial competence:

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.⁴³

4. Assessing Whether a Remedy is “Appropriate and Just in the Circumstances”

The majority judges were not prepared to read limits into the broad wording of section 24(1) on the basis of concepts like judicial restraint and separation of powers, procedural principles like *functus officio*, or remedial law developed in other, non-Charter, contexts.⁴⁴ Instead, they

⁴¹ *Id.*, at paras. 130-32.

⁴² *Id.*, at para. 34.

⁴³ *Id.*, at para. 74.

⁴⁴ *Id.*, at paras. 53-54.

set forth “broad considerations that judges should bear in mind when evaluating the appropriateness and justice of a potential remedy”.⁴⁵

The remedy must meaningfully vindicate “the rights and freedoms of the claimants ... [taking into account] the nature of the right that has been violated and the situation of the claimant.”⁴⁶

The remedy must “employ means that are legitimate within the framework of our constitutional democracy... [thus courts] must not ... depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.”⁴⁷

The remedy must be “judicial ... invoking the function and powers of a court ... inferred, in part, from the tasks with which [courts] are normally charged and for which they have developed procedures and precedent.”⁴⁸

The remedy should be “fair to the party against whom the order is made... and not impose substantial hardships that are unrelated to securing the right.”⁴⁹

The majority judges emphasized that “the judicial approach to remedies must remain flexible and responsive” and that section 24(1) should be allowed to evolve, free of the restrictions of traditional and historical remedial practice.⁵⁰

5. The Majority Judges’ Application of the Remedial Factors in this Case

The majority judges applied the four factors for assessing whether a remedy is appropriate and just in the circumstances, and affirmed the trial judge’s order requiring the province to report on progress in complying with the terms of the remedy.

⁴⁵ *Id.*, at para. 54.

⁴⁶ *Id.*, at para. 55.

⁴⁷ *Id.*, at para. 56.

⁴⁸ *Id.*, at para. 57.

⁴⁹ *Id.*, at para. 58.

⁵⁰ *Id.*, at para. 59.

First, the majority concluded that the reporting order vindicated undisputed minority language education rights by providing an expedited procedure for identifying problems with timely implementation of the rights in the context of a history of delay and serious rates of assimilation of those who speak French.

Second, the majority held that the reporting order was consistent with the role of the courts in Canada's constitutional order, and appropriately utilized the court's jurisdiction not only to declare constitutional rights but to enforce them with injunctions against the executive.⁵¹

Third, the majority determined that the reporting order was appropriately judicial in nature, utilizing "functions and powers known to courts."⁵² The majority judges provided examples, from non-Charter litigation, of courts exercising "active and even managerial roles in the exercise of their traditional equitable powers":⁵³ in bankruptcy and receivership matters, in trusts and estates, and in family law. Thus, for example, in bankruptcy and receivership matters, the presiding judge supervised the company's operations during its restructuring process. While some have questioned the overall workability of the current creditor-protection legislative scheme, others note that a presiding bankruptcy judge has a wide-range of remedial powers.⁵⁴ To illustrate, during Air Canada's current restructuring, James Farley J. has: 1) ordered parties to negotiate,⁵⁵ 2) determined who can bid for Air Canada's Aeroplan,⁵⁶ 3) appointed a facilitator to assist during the ordered negotiations between various unions and Air Canada management⁵⁷ and 4) decided which bid would be accepted to purchase a stake in Air Canada.⁵⁸ The remedial actions demonstrate the extent to which a judge may be required to undertake a supervisory, and even a managerial, role in legal processes unrelated to constitutional litigation. In these instances the

⁵¹ *Id.*, at para. 70.

⁵² *Id.*, at para. 71.

⁵³ *Id.*, at para. 71, quoting Roach, *Constitutional Remedies in Canada* (looseleaf), at para. 13.60.

⁵⁴ Susan Pigg, "Law's flaws threaten airline" *Toronto Star* (April 22, 2003) D1.

⁵⁵ Susan Pigg & Rick Westhead, "Airline in holding pattern" *Toronto Star* (April 23, 2003) E1.

⁵⁶ Susan Pigg, "Judge opens bidding for Aeroplan deal" *Toronto Star* (May 2, 2003) E1.

⁵⁷ Susan Pigg, "5 unions, Air Canada ordered into talks" *Toronto Star* (May 10, 2003)

C1.

⁵⁸ Rick Westhead, "Bid expected for Air Canada" *Toronto Star* (December 9, 2003) D1.

judicial supervisory powers are being exercised within the private, rather than the public, sector, but they do establish precedents to rebut the argument that the supervisory role is beyond the experience and competence of courts.

In *Doucet-Boudreau*, the majority judges concluded that requiring government to report on its progress in complying with the court's order was consistent with the judicial function, and with the normal capacities of courts to hear evidence and supervise cross-examinations. They specifically noted that the court did not "improperly take over the detailed management and co-ordination of the construction projects."⁵⁹

As the American experience demonstrates, there could presumably be circumstances, far beyond the facts of this case, in which a court, facing a recalcitrant government institution, might be required to engage in detailed supervision of institutional processes in order to enforce compliance with Charter norms. It still seems unlikely that Canadian governments will refuse or fail to comply with court orders declaring constitutional rights. The continuation of the tradition of respect and compliance will depend on the public's perception of the legitimacy of judicial review, its support for judicial elaborations of constitutional guarantees,⁶⁰ and the extent to which the costs of constitutional compliance compete for and claim priority in the allocation of scarce public resources. Even though Canadian courts could become involved in detailed supervision of non-complying government programs, there was no risk of such involvement in the *Doucet-Boudreau* case.

Fourth, the majority determined that the reporting order was sufficiently fair to the respondent government, in that it was not overly vague, incomprehensible, or impossible to follow. The majority acknowledged that the order could have been more explicit and detailed, and that there were alternatives to a reporting order that a trial judge might consider, but they concluded that the reporting order was within the range of appropriate remedies open to the trial judge in his exercise of discretion.

⁵⁹ *Doucet-Boudreau*, *supra*, note 1, at para. 74.

⁶⁰ A changing attitude on the part of government may be perceived in the title of the Ontario statute amending the *Family Law Act* in response to the Supreme Court of Canada decision in *M. v. H.*, [1999] 2 S.C.R. 3, [1999] S.C.J. No. 23: *Amendment Because of the Supreme Court of Canada Decision in M. v. H. Act*, S.O. 1999, c. 6.

Accordingly, the majority judges concluded that the reporting order was an appropriate and just remedy in all the circumstances.

6. Standard of Appellate Review of Remedial Orders Under Section 24(1)

The majority judges emphasized that a superior court judge has a wide and unfettered discretion under section 24(1) to design the remedy that is appropriate and just in the circumstances, and that the exercise of that discretion should be treated with deference by appellate courts. They affirm that “[t]he trial judge is not required to identify the single best remedy, even if that were possible.”⁶¹ They did suggest an alternative approach to remedies in situations of this kind: “[i]t may be more helpful in some cases for the trial judge to seek submissions on whether to specify a timetable with a right of the government to seek variation where just and appropriate to do so,”⁶² but they confirmed that the trial judge’s remedy was “clearly appropriate and just in the circumstances.”⁶³

The dissenters agreed that deference was the appropriate standard of appellate review as to remedy, but asserted that deference does not apply where “fundamental legal principles are threatened.”⁶⁴ In their view, respect for the executive branch of government requires that supervisory orders be made only where government has failed or refused to comply with prior judicial orders rendered in the same matter. In the dissenters’ view, the failure of the province to give effect to well-defined minority language education rights, in circumstances where time was of the essence and delay would undermine entitlement to the rights, was insufficient to warrant the supervisory role of the Court. The dissenters would thus encourage those whose rights are delayed to resort to litigation early, building a record of their constitutional claims and of government non-compliance, not only in public forums but also in the courts. Strategic decisions to pursue public lobbying rather than resort to litigation early in the process could delay entitlement to an effective judicial

⁶¹ *Doucet-Boudreau*, *supra*, note 1, at para. 86.

⁶² *Id.*, at para. 85.

⁶³ *Id.*, at para. 86.

⁶⁴ *Id.*, at para. 145.

remedy. The majority properly rejected this approach in favour of a broader assessment of the manner in which government has sought to fulfill, or avoid, its clearly defined constitutional obligations. Resort to litigation, with its attendant costs to private individuals and organizations, may properly be a last resort after other avenues of persuasion have been pursued, but recalcitrance in the face of a prior court order is not a condition precedent to a supervisory remedy. Accordingly, the majority declined to fetter the broad remedial discretion of the trial judge or to substitute what it might consider to be a more appropriate process for administering a constitutional remedy.

Since the dissenting judges considered that the trial judge's reporting order failed to respect fundamental principles, they would have been prepared to displace his discretion with their preferred disposition. In their view, the trial judge should have issued a final order, with no reporting requirement, on the assumption that government would comply. In the event of non-compliance, it would then be open to the claimants to seek an order of contempt.

The majority judges rejected this alternative as being less appropriate, in the circumstances, than the reporting order in that it requires initiating a new proceeding, on the basis of new material, before a new judge, with significant attendant delay and cost. Even if the proposed remedy were an appropriate and just alternative, it should not, in the majority's view, displace the proper exercise of the trial judge's discretion.

III. LEARNING FROM AMERICAN EXPERIENCE WITH SUPERVISORY REMEDIES

Neither the majority judges nor the dissenting judges referred to the experience of American courts with supervisory remedies for constitutional violations. The most far-reaching and intrusive of these remedies in terms of impact on governmental or institutional action is the structural injunction, in which a court requires an institution to implement an action plan to ensure future compliance with constitutional norms.⁶⁵ The

⁶⁵ See Horowitz, "Decreeing Organizational Change: Judicial Supervision of Public Institutions" (1983) Duke L.J. 1265, at 1281; Widdig, "*Board of Education of Oklahoma v. Dowell*: A solution to Perpetual Judicial Supervision" (1991) 27 Tulsa L.J. 85; Notes, "Judicial

remedy is extraordinary and intrusive, and is ordered only where an institution remains in violation of a previous ruling on constitutional rights. The court may require the institution to file periodic progress reports, and may appoint a special master under Rule 53 of the U.S. *Federal Rules of Civil Procedure*⁶⁶ with responsibility to formulate an appropriate action plan, and, if necessary, to oversee its implementation. In the face of institutional intransigence, the presiding federal judge may take direct jurisdiction over the management of the institution. The supervisory jurisdiction continues until the institution demonstrates that it has reached full compliance with the remedial order or that, on the basis of its continual good faith compliance, it will reach full compliance.

Federal judges in the United States have decreed and supervised structural injunctions to remedy segregation in schools and the failure to comply with minimum constitutional standards in prisons and mental hospitals. In these instances, resistance to constitutional rights leaves the court with only two options: abandon the constitutional right or enforce it by modifying institutional norms and practices. The dissenting judges in *Doucet-Boudreau v. Nova Scotia* are right to emphasize the importance in Canada of the well-established tradition that governments respect and comply with decisions of the court on matters of constitutional law. On the other hand, as both majority and dissenting judges recognized, extraordinary circumstances may warrant extraordinary remedies.

One extraordinary circumstance that may warrant the remedy of judicial supervision is the resolution of Native land claims. Land claims can involve protracted periods of litigation and inordinate expenses for all parties. However, a judicially supervised process where a judge retains jurisdiction to resolve impasses between the parties over the specific applications of generally defined rights might assist in expediting the process. In *Delgamuukw v. British Columbia*,⁶⁷ both parties sought a remedy whereby the Court of Appeal would retain jurisdiction for two years in order to enable the parties to negotiate.⁶⁸ The Court of Appeal refused to grant the remedy, holding that “the role of the Court of Appeal

Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy” (1980) 89 Yale L.J. 513, at 526-27.

⁶⁶ U.S. *Federal Rules of Civil Procedure*, 2003 (28 U.S.C.A.).

⁶⁷ [1993] 5 W.W.R. 97, [1993] B.C.J. No. 1395 (C.A.).

⁶⁸ *Id.*, at para. 34.

is not one of tailoring its judgment so as to facilitate settlement.”⁶⁹ In the Supreme Court of Canada, Lamer C.J. agreed that a court of appeal must make legal declarations based on the trial record.⁷⁰ The Court ordered a new trial, but encouraged the parties to negotiate rather than proceed with litigation. Chief Justice Lamer concluded that:

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra* ... to be a basic purpose of s. 35(1) – “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.⁷¹

A role for superior court judges in supervising Native land claims negotiations could help to expedite the process, provided that it can be managed in such a way as to protect any rights of appeal from judicial determinations. The potential advantages of judicial supervision of aboriginal claims are reinforced by the Supreme Court of Canada’s decision in *R. v. Powley*.⁷² The Court approved the Ontario Court of Appeal’s staying of its decision to allow for what the Court characterized as “foster[ing] cooperative solutions.”⁷³ The Supreme Court approved a broad framework of rights within which the parties could negotiate, without providing for judicial supervision. The problem with this solution is that, if one of the parties will not negotiate or negotiates in bad faith, the other must commence a new court proceeding, leading to greater delay, duplication, and expense. In Native claims, retaining jurisdiction and providing for judicial supervision of negotiation between the parties might constitute the more appropriate and just remedy.

⁶⁹ *Id.*, at para. 514.

⁷⁰ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 47, [1997] S.C.J. No. 108.

⁷¹ *Id.*, at para. 186.

⁷² [2003] 2 S.C.R. 207, [2003] S.C.J. No. 43.

⁷³ *Id.*, at para. 51.

IV. THE RESPONSIBILITY OF PARLIAMENT AND THE LEGISLATURES FOR REVISING JURISDICTIONAL AND PROCEDURAL SYSTEMS TO IMPLEMENT SECTION 24(1)

The majority judges in *Doucet-Boudreau* properly concluded that section 24(1) provides broad discretion to develop Charter remedies that are responsive and effective in vindicating Charter rights. The broad and flexible remedial jurisdiction, may require “novel and creative features” unrestricted by “traditional and historical remedial practice” which “cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand.”⁷⁴ The confirmation that the remedies available under section 24(1) will be determined on the basis of a purposive and broad interpretation is encouraging, but its promise is undermined by the fact that it is restricted to superior court judges. The combined effect of legislative inaction and court acquiescence has limited the remedial role of statutory and inferior courts and tribunals and thus undermines access to effective Charter remedies.

The majority judges concluded that “superior courts retain ‘constant, complete, and concurrent jurisdiction’ to issue remedies under s. 24(1)”⁷⁵ and that there are no fetters on their jurisdiction.⁷⁶ Nonetheless, they accepted the explanation advanced in *R. v. Mills*⁷⁷ that “s. 24(1) did not confer new jurisdiction on statutory and inferior tribunals beyond that which was intended by the legislator as reflected in the tribunal’s function and the practical limits imposed by its structure.”⁷⁸ In other words, access to remedies may be dependent on “traditional and historical” systems of jurisdiction and procedure that were designed for the adjudication of non-Charter issues and have not been reconsidered in light of section 24(1) of the Charter.

Parliament and the legislatures have not reviewed their laws in relation to the jurisdiction and procedure of courts and tribunals to give effect to the constitutional purpose set forth in section 24(1). By default, only the superior courts of inherent jurisdiction have the capacity to accept the full mandate of section 24(1). Even though the judges in

⁷⁴ *Doucet-Boudreau*, *supra*, note 1, at para. 59.

⁷⁵ *Id.*, at para. 49.

⁷⁶ *Id.*, at para. 53.

⁷⁷ [1986] 1 S.C.R. 863, [1986] S.C.J. No. 39.

⁷⁸ *Doucet-Boudreau*, *supra*, note 1, at para. 49.

majority⁷⁹ and the judges in dissent⁸⁰ agree that Charter rights and remedies cannot be limited by statute or by the common law, they continue to approve the position advanced by McIntyre J. in *Mills* that “the Charter was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure.”⁸¹

Even if the intentions of the drafters of the Charter could be ascertained, it is well-established that the interpretation of a provision of the Charter is not governed by original intentions but must give effect to the purpose of the provision, generously construed.⁸² Where existing laws do not comply with the constitution, purposively construed, they will be of no force and effect.⁸³ Why is it, then, that the remedies available for Charter infringement vary depending upon the pre-existing jurisdiction and procedure of the particular court or tribunal in the particular proceeding in which the issue arises?

Do existing jurisdictional and procedural systems, designed for non-constitutional matters, provide an effective framework for remedying constitutional wrongs? If not, what are courts and legislatures to do?

In its unanimous decision in *Dunedin Construction*,⁸⁴ the Supreme Court of Canada confirmed its intent to interpret section 24(1) of the Charter to

achieve a broad, purposive interpretation that facilitates direct access to appropriate and just Charter remedies..., while respecting the structure and practice of the existing court system and the exclusive role of Parliament and the legislatures in prescribing the jurisdiction of courts and tribunals.⁸⁵

The Court affirmed that “it remains the role of Parliament and the legislatures, and not the judiciary, to assign jurisdiction to the various

⁷⁹ *Id.*, at para. 51.

⁸⁰ *Id.*, at para. 105.

⁸¹ *Id.*, cited by the majority at paras. 9, 45-51, 146.

⁸² See *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, at 509, [1985] S.C.J. No. 73.

⁸³ *Constitution Act, 1982*, s. 52.

⁸⁴ *Supra*, note 15.

⁸⁵ *Id.*, per McLachlin C.J.C. for the Court, at para. 24.

courts and tribunals comprising our legal system.”⁸⁶ Nonetheless, since most courts and tribunals were established prior to enactment of the Charter, their enabling legislation does not address their jurisdiction to award remedies for Charter infringements. Accordingly, courts must determine whether the jurisdiction can be inferred. In *Dunedin Construction*, the Court adopted a “functional and structural” approach: “[w]here the *Charter*’s enactment implicated a court or tribunal in new constitutional issues, it should be presumed that the legislature intended the court or tribunal to resolve these issues where it is suited to do so by virtue of its function and structure.”⁸⁷ Accordingly, a court or tribunal may now have jurisdiction to award remedies under section 24(1) even in the absence of express jurisdiction to award the type of remedy that is sought. The Court will examine the enabling legislation, the history, and accepted practice of the court or tribunal, and determine whether it has “the tools necessary to fashion the remedy sought ... in a just, fair and consistent manner without impeding its ability to perform its intended function.”⁸⁸ The Court has thus signalled its willingness to determine the jurisdiction of courts and tribunals to award Charter remedies on a case-by-case basis, subject to explicit legislative intention.

In at least one other instance where a procedural system was found to be inadequate, the Court declined to redesign it through the vehicle of case-by-case analysis, and called on legislatures to step up to the plate. Thus, in *General Motors of Canada Ltd. v. Naken*⁸⁹ the Supreme Court of Canada declined to approve a class action, and identified “the need for a comprehensive legislative scheme for the institution and conduct of class actions.”⁹⁰ Some legislatures eventually responded, leading to the enactment of class action legislation,⁹¹ which has enabled the use of class actions. It thus remains puzzling that the Supreme Court of Canada accepts as inevitable that existing jurisdictional and procedural frameworks must be utilized in Charter litigation whether or not they are

⁸⁶ *Id.*, at para. 26.

⁸⁷ *Id.*, at para. 42.

⁸⁸ *Id.*, at para. 45.

⁸⁹ [1983] 1 S.C.R. 72, *per* Estey J.

⁹⁰ *Id.*, at 93.

⁹¹ For example, in Ontario, the Law Reform Commission studied the issues and made recommendations (*Report on Class Actions* (3 vols., 1982)), and 10 years later the Ontario Legislature enacted the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

appropriate to the determination of constitutional claims, and refrains from calling on Parliament and the legislatures to address the issues in a manner that will facilitate effective remedies for constitutional infringements. The Court's willingness to infer remedial jurisdiction on the basis of the tribunal's function and structure opens up remedial potential, but generates uncertainty, requires expensive litigation on jurisdictional issues, and will be ineffective in the face of express statutory provisions or in the absence of appropriate "tools" or procedures. The Court's conservative approach to remedies, as I have argued elsewhere,⁹² is unsatisfactory in that:

- 1) It may limit inferior courts and tribunals to awarding the most appropriate and just of the remedies that happen to be available in the particular court or tribunal through the procedure utilized to initiate the proceeding, and thus may defeat the purpose of section 24(1).
- 2) To obtain an effective remedy, it may be necessary to launch a multiplicity of proceedings with the attendant duplication and expense and the possibility of inconsistent results.
- 3) Courts and tribunals may try to fit constitutional wrongs within traditional remedies rather than fashioning remedies appropriate to redress constitutional wrongs.
- 4) In effect, Charter remedies are subjected to legislative control. Moreover, the control is divided in accordance with the division of powers, with no encouragement to co-operative action between the two levels of government⁹³ to make available an appropriate array of remedial procedures and powers, drawing on criminal and civil jurisdiction.

In the absence of judicial encouragement, it is unlikely that Parliament and the legislatures will undertake a review of jurisdictional and procedural requirements for the purpose of developing wider accessibility to more effective Charter remedies against governments. The expansive

⁹² Pilkington, "Monetary Redress for Charter Infringement" in Sharpe (ed.), *Charter Litigation* (1987) Chapter 11, at 323; "Legislative Responsibility for the Jurisdiction of Tribunals to Adjudicate Constitutional Rights and Remedies" in *Special Lectures of the Law Society of Upper Canada* (1992) at 181.

⁹³ In light of the division of powers, such co-operative action would likely be necessary in order to confer a full range of remedial options: *R. v. Zelensky*, [1978] 2 S.C.R. 940.

and flexible approach demonstrated by the majority judges in *Doucet-Boudreau* in addressing the remedial powers of superior court judges should also be reflected in the design of jurisdictional and procedural systems that equip other courts and tribunals to provide appropriate and just remedies for Charter infringements.

V. CONCLUSION

In *Doucet-Boudreau v. Nova Scotia*, the majority judges addressed the need to ensure that there is at least one forum, the superior court, in which a claimant has access to a full range of Charter remedies, established and novel, from which the judge can tailor the remedy that is most appropriate and just in the circumstances. The challenge, now, is twofold: first, to hold the ground against those who urge judicial restraint in remedying unjustified infringements of guaranteed constitutional rights, and, second, to expand the application of section 24(1) beyond the superior courts to those courts and tribunals with jurisdiction to determine constitutional issues.

