

*MANDATORY RELIEF AND SUPERVISORY
JURISDICTION: WHEN IS IT APPROPRIATE,
JUST AND EQUITABLE?*

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Both the Constitutional Court of South Africa and the Supreme Court of Canada have affirmed the ability of judges to issue complex and mandatory relief and to retain supervisory jurisdiction in constitutional cases. In *Minister of Health v Treatment Action Campaign (No 2)*,¹ the Constitutional Court indicated that ‘a mandamus and the exercise of supervisory jurisdiction’ may be necessary to ensure an effective remedy for a breach of any constitutional right, including a socio-economic right. A year later, the Supreme Court of Canada held in *Doucet-Boudreau v Nova Scotia (Minister of Education)*² that a trial judge could, after ordering that a government build minority language schools, retain jurisdiction over the case and require the government to report back to the judge with affidavits on its progress in complying with the order. These two important decisions make clear that both South African and Canadian judges are not limited to declaratory or one-shot remedies.

The decisions of both courts are a welcome affirmation of the wide powers of courts to fashion effective remedies, but were not without controversy. In *TAC (No 2)*, the Constitutional Court refused to follow the structural interdict or injunction ordered by the High Court, on the basis that ‘the government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case’.³ In a related case, the Court rejected submissions that an order to provide a drug where medically indicated was impermissibly vague and violated the principles of the separation of powers.⁴ The Supreme Court of Canada was very closely

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¹ 2002 (5) SA 721 (CC). See also *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).

² [2003] 3 SCR 3.

³ *TAC (No 2)* para 129.

⁴ *Minister of Health v Treatment Action Campaign (No 1)* 2002 (5) SA 703 (CC).

divided over similar issues in *Doucet-Boudreau*. Five of the nine judges rejected allegations that the trial judge had issued an impermissibly vague and procedurally unfair order that the government make 'best efforts' to build the schools in set periods and report back to the judge on its progress. The five judges in the majority relied upon appellate court deference to the trial judge's exercise of remedial discretion while expressing the view that the remedy was not perfect. The four judges in the minority issued a strongly worded dissent arguing that the trial judge's order was impermissibly vague and procedurally unfair, and violated the separation of powers. They even went so far as to characterize it as a 'political' remedy that was inappropriate for a judge to make.⁵ Although it is now clear that judges can issue structural injunctions and retain supervisory jurisdiction, it is not clear when it will be appropriate and just for judges to do so and how such relief should be fashioned.

In this paper, we hope to provide some guidance and principles for determining when mandatory and on-going structural relief will be appropriate and just. We recognize that complex remedial issues raise difficult questions implicating the separation of powers and the appropriate role of the judiciary, the executive and the legislature. Relief that requires the state to take positive actions, like providing drugs and building schools, raises polycentric issues that affect multiple parties and budgetary priorities. Yet we believe that it is significant that both the South African and Canadian courts have decided that on-going structural relief is appropriate in some instances, a conclusion that has also been reached by other courts, most notably in India and the United States.⁶ The convergence of South African and Canadian law on this issue is significant given the influence of the Canadian Charter on the drafting of the South African Bill of Rights. Both constitutions contemplate wide remedial powers for courts,⁷ and temper traditional supremacy clauses declaring laws inconsistent with the Constitution to be of no force and effect, with the ability of courts to suspend declarations of invalidity.⁸ A suspended

⁵ *Doucet-Boudreau* supra note 2 para 128.

⁶ American courts, stressing their traditional equitable powers, have issued detailed injunctions and retained jurisdiction in order to desegregate school systems through busing and other remedies and to reform prison conditions. The American courts have stressed that 'remedial judicial authority does not put judges automatically in the shoes of school authorities . . . judicial authority enters only when local authority defaults', and that courts should not order remedies that exceed the violations and that they should balance the competing interests: *Swann v Charlotte-Mecklenburg Board of Education* 402 US 1 (1971) at 16. American courts have often retained jurisdiction over many years. The Supreme Court of India has embraced a similar approach and explained: 'As the relief is positive and implies affirmative action, the decisions are not "one-shot" determinations but have on-going implications.' *Sheela Barse v Union of India* (1988) AIR 2211 (SC) at 2215. The courts in both countries have required specific reports on compliance back to the court or to a court-appointed assistant.

⁷ Section 24(1) of the Canadian Charter of Rights and Freedoms contemplates that courts of competent jurisdiction can grant whatever remedy is appropriate and just in the circumstances. The analogues to s 24(1) are ss 38 and 172(1)(b) of the Constitution of the Republic of South Africa Act 108 of 1996 which contemplate the award of appropriate, just and equitable relief.

⁸ Section 52(1) of Canada's Constitution Act, 1982 provides that laws are of no force and effect to the extent of their inconsistency with the Constitution. Since 1985 the Supreme Court has asserted a judicial power to delay or suspend the declaration of invalidity for a finite period of time to provide the government an opportunity to select among constitutional options and enact new laws that will displace the legal

or delayed declaration of invalidity under either constitution may also involve the court retaining jurisdiction over a matter, if only to consider requests that the period of suspension be extended or curtailed. Both bills of rights contain positive rights and recognize that simply to strike down state actions and state laws will not be enough to secure constitutional justice. Indeed, the idea that on-going and positive judicial relief is possible is built into the structure of both bills of rights and the promise made in both countries that the people will enjoy the benefits of many rights. Nevertheless, litigators and judges in both countries continue to struggle with determining when complex relief is appropriate and just, and how it should be structured.

In the first part of this paper, we outline South African law on mandatory relief and supervisory jurisdiction both before and after the landmark *TAC (No 2)* case. In the second part of this paper, we outline Canadian law on mandatory relief and supervisory jurisdiction both before and after the landmark *Doucet-Boudreau* case. In both cases, we examine not only the precedents for on-going and mandatory relief, but the relevance of cases in which courts have suspended declarations of invalidity. The third part of the paper proposes some guidelines and principles for when mandatory relief and supervisory jurisdiction may be appropriate in constitutional cases. In this section we rely on some analytic work that distinguishes between whether a constitutional violation is the product of a government being inattentive to the relevant constitutional right, incompetent or intransigent.⁹ We suggest that, while declarations and requirements that governments report to the public will often be sufficient in those cases in which governments are merely inattentive to rights, stronger remedies involving mandatory relief and requirements of governmental reporting to the courts may be necessary in some cases, and particularly where governments are incompetent or intransigent with respect to the implementation of rights.

vacuum created by an immediate declaration of invalidity. *Reference re language rights under the Manitoba Act* [1985] 1 SCR 721, supp reasons [1985] 2 SCR 347, supp reasons [1990] 3 SCR 1417, supp reasons [1992] 1 SCR 212. Section 172 of the South African Constitution also requires a mandatory declaration that law is invalid to the extent of its inconsistency with the Constitution, but, following Canadian practice, explicitly contemplates a discretionary order 'suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect': s 172 (2)(b)(ii).

⁹ Chris Hansen 'Inattentive, intransigent and incompetent' in S R Humm (ed) *Child, Parent and State* (1994).

SOUTH AFRICAN LAW ON MANDATORY RELIEF AND SUPERVISORY JURISDICTION

Mandatory relief and supervisory jurisdiction before TAC (No 2)

South African law in the pre-constitutional era did not limit the power of courts to make mandatory orders on government. Such orders were, however, not common. They were most frequently used as a remedy in administrative law, where they were known as mandatory interdicts.¹⁰

The Constitution placed a wide range of positive obligations on government, and it was therefore inevitable that mandatory orders would become more common. The Constitutional Court has for example made mandatory orders requiring a provincial government to resume payments of subsidies to certain schools;¹¹ directing the Electoral Commission to make the necessary arrangements to enable prisoners to vote;¹² and ordering immigration officials to exercise their discretion in a manner that takes account of the constitutional rights involved.¹³

Supervisory orders or structural interdicts are, however, a recent development, arising out of the situation created by a new and transformative constitutional order. The need for novel remedies in this new situation has been emphasized by the Constitutional Court. In *Fose v Minister of Safety and Security* Ackermann J, writing for the majority, said the following:

‘Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights. . . .

Particularly in a country where so few have the means to enforce their legal rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.’¹⁴

The possibility of the use of structural interdicts was foreshadowed in *Pretoria City Council v Walker*, where Langa DP for the majority said:

‘(T)he respondent could . . . have applied to an appropriate court for a declaration of rights and a *mandamus* in order to vindicate the breach of his s 8 right. By means of such an order the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair discrimination and to report to the Court in question. The Court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order.’¹⁵

With this encouragement from the highest court, it was inevitable that it

¹⁰ The case-law is discussed in Lawrence Baxter *Administrative Law* (1984) 696–8.

¹¹ *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC).

¹² *August v Electoral Commission* 1999 (3) SA 1 (CC).

¹³ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC).

¹⁴ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 19 and 69. The reference to the obligation to ‘forge new tools’ is derived from the judgment of the Supreme Court of India in *Nilabati Behera v State of Orissa* [1993] AIR 1960 (SC) para 19 at 1969.

¹⁵ *Pretoria City Council v Walker* supra note 1 para 96.

would not be long before the first structural interdict was ordered. The first such order was made by the High Court in *Grootboom*.¹⁶ In that case, the High Court found that the government was under an obligation to provide shelter to children who, together with their parents, had been left homeless. The obligation was held to extend to the provision of shelter to their parents. The court made an order declaring the obligations of the respondents, and ordering them within three months to report to the court on the implementation of the order. After an exchange of commentary and replies by the parties, a date was to be set for 'consideration and determination' of the report, commentary and replies. Somewhat curiously, the court did not make any specific order on the government to do anything in relation to shelter. Rather, it declared the nature of the right and the obligation. In this sense the order is not a typical mandatory order. This formulation appears to have arisen from a concern for the separation of powers, and a desire to leave space for the government to determine exactly how it would carry out the obligations which it declared. The order was, however, linked to a typical supervisory order, thus creating a structural interdict.

The government appealed to the Constitutional Court. On the day of the hearing of the appeal, the government made an offer of alternative accommodation to ameliorate the immediate crisis situation. The applicants accepted this offer. When judgment was ultimately handed down, the Constitutional Court made a declaratory order which described the nature of the state's obligations arising from the right to housing, and held that the state was in breach of those obligations.¹⁷ No mandatory order was made. As a result of the offer and acceptance of the alternative accommodation, there was no longer any reason for the Court to consider doing so. It was therefore not necessary for the Court to decide whether a mandatory order or a supervisory order was appropriate, given the nature of the right and breach in question.¹⁸

TAC and its sequels

In *TAC*, the High Court made a mandatory order which was linked to a structural interdict or supervisory order.¹⁹ On appeal to the Constitutional Court, the government contended that the High Court had erred in making a mandatory order and in not limiting itself to a declaratory order. The Constitutional Court referred to various occasions on which it had made mandatory orders, analysed the practice in other countries, and held that

¹⁶ *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C).

¹⁷ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁸ While judgment was pending in the appeal, the government failed to comply with the undertaking which it had given at the time of the hearing. The applicants then made an urgent application directly to the Constitutional Court for an order directing the government to do what it had undertaken to do. The government did not oppose the application, and on the day set for that hearing the court 'crafted an order putting the government on terms to provide certain rudimentary services': *Grootboom* supra note 17 para 5. It was a conventional mandatory order.

¹⁹ *Treatment Action Campaign v Minister of Health* 2002 (4) BCLR 356 (T).

'there is no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government'.²⁰ The court similarly had no difficulty with the principle of ordering a structural interdict. Referring to its own decision in *Pretoria City Council v Walker* that South African courts have that power, the court stated that '[i]n appropriate cases they should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a Court in a particular case.'²¹ Having confirmed the principle, the court continued:

'We do not consider, however, that orders should be made in such terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.'²²

The outcome was that the Constitutional Court made a mandatory order setting out in some detail what the government was required to do. The order required the government to permit and facilitate the public health sector use of a particular drug (Nevirapine) for the purposes of reducing the risk of mother-to-child transmission of HIV. The court recognized one of the problems potentially created by mandatory orders, namely that they can prevent government from exercising the necessary flexibility as circumstances change. Because of the need for flexibility, the order also specified that it would not prevent government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods became available to it for the prevention of mother-to-child transmission of HIV.²³

The question of the appropriate use of a structural interdict next arose in the context of the right to housing and the right to property. Homeless people took up occupation of part of a piece of privately owned land. The landowner successfully applied to court for an eviction order. By this time, however, some 40 000 homeless people were living on the land. The cost to the landowner of carrying out the eviction order had become prohibitive. The landowner then went back to court, this time asking for an order that the government carry out the eviction order. The upshot was a declaration by the High Court that the government was in breach of its constitutional duty to the landowner to protect its property rights, and its constitutional duty to the occupiers to provide access to adequate housing. The court ordered the government to remedy both breaches, and made a supervisory order requiring the government to place before the court a plan on how it proposed to do so.²⁴

The government appealed to the Supreme Court of Appeal. The SCA

²⁰ *TAC (No 2)* supra note 1 paras 99–123.

²¹ *TAC (No 2)* supra note 1 para 129.

²² *Ibid.*

²³ This demonstrates that mandatory orders are not 'necessarily procrustean' in the standards which they impose, as suggested by Dickson CJ in *Mahe v Alberta* (1990) 68 DLR (4th) 69 at 106 (SCC).

²⁴ *Modderklip Boerdery (Edms) Bpk v President van die RSA* 2003 (6) BCLR 638 (T). The eviction order was originally granted in *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 (4) SA 385 (W).

referred to the problems which structural interdicts can create, and found that this particular structural interdict suffered from many of those defects.²⁵ It rejected the use of a structural interdict in this case, and set aside the High Court order. Instead, it declared that the occupiers were entitled to occupy the land until alternative accommodation had been made available to them, and that the landowner was entitled to the payment by government of compensation, as constitutional damages, for loss which it suffered through being deprived of the use of its land.

The government then appealed further, to the Constitutional Court. That court also held against the government, but this time the basis of the decision was that the state had infringed the landowner's right to the rule of law and to access to justice in terms of s 34 of the Constitution, by failing to provide an appropriate mechanism to give effect to the eviction order of the High Court. The Constitutional Court rejected the submission on behalf of the government that only a declaratory order should be made. It held that having regard to the long history of the landowner's attempts to relieve its property from unlawful occupation, something more effective was required than the clarification of rights which would be achieved by a declaratory order. The Constitutional Court referred to the SCA's discussion of the advantages of various forms of relief, and held that the relief ordered by the SCA had been the most appropriate in the circumstances.²⁶

In *S v Z and 23 similar cases*,²⁷ a Full Bench of the Eastern Cape Division of the High Court dealt with cases which demonstrated systemic breach of the Constitution through the failure to provide mechanisms for the proper and prompt implementation of sentences for the detention of juvenile offenders in a reform school. The result was that juveniles were held for inordinately lengthy periods in places of safety, prisons or police cells. Counsel acting as *amicus curiae* proposed that an order should be made requiring two government departments to make detailed reports to the court on what had been and would be done to remedy the situation. Counsel for the government indicated that his clients would submit such reports if so requested by the court. It was therefore not necessary for the court to make such an order. However, Plasket J for the court explicitly recognized the utility of such an order:

'I would venture to suggest that, as a remedy, the structural interdict is particularly suited to a society committed, as ours is, to the values of "accountability, responsiveness and openness" in a system of democratic governance. In this case it would be appropriate because the subject matter of this litigation is the "core business" of the courts, the effective implementation of the sentences imposed on juvenile

²⁵ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) paras 39–40.

²⁶ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (Constitutional Court) Case CCT 20/04, judgment delivered 13 May 2005. The question of appropriate relief is discussed at paras 53 to 66.

²⁷ *S v Z and 23 similar cases* 2004 (4) BCLR 410 (E).

offenders. In addition, the superior courts are the upper guardians of minors. That too would serve as strong justification for the assumption of a supervisory jurisdiction in a case such as this.²⁸

The court therefore recorded that the parties had agreed that reports would be filed by the government, made orders in respect of certain of the juveniles, and postponed the matter for the consideration of the reports to be filed by the government. The result was the exercise of supervisory jurisdiction without an order to report.

In a recent sequel to *Grootboom*,²⁹ a structural interdict was granted in circumstances which the Constitutional Court had recognized in *TAC (No 2)*³⁰ as suitable for the making of such an order. The City of Cape Town brought eviction proceedings against a group of people who had occupied vacant publicly-owned land. The occupiers successfully opposed the application on the basis that the City had not met the statutory requirements for the granting of an eviction order. They also counter-claimed against the City, contending that the City was in breach of its constitutional obligations as described by the Constitutional Court some three years earlier in *Grootboom*. The High Court agreed. After referring to the discussion of structural interdicts in *TAC*, the Court held as follows:

‘I do not believe that a declaration, standing on its own, will suffice. There has already been such a declaration, made by the Constitutional Court. It has not induced applicant to comply with its constitutional obligations. Something more is therefore necessary. The circumstances and, in particular, the attitude of denial expressed by applicant in failing to recognize the plight of respondents as also its failure to have heeded the order in *Grootboom* makes this an appropriate situation in which an order, which is sometimes referred to as a structural interdict, is ‘necessary’, ‘appropriate’ and ‘just and equitable.’³¹

The court therefore declared in detail how the City was in breach of the Constitution, ordered it to remedy those breaches, and ordered it to report back to the court on what steps it had taken to comply with its constitutional and statutory obligations, what future steps it would take in that regard, and when such future steps would be taken. After the exchange of commentary by the parties, the matter would be set down again for ‘consideration and determination’ of the report, commentary and reply.

Most recently, the Constitutional Court has ordered a structural interdict in *Sibiya v Director of Public Prosecutions (Johannesburg High Court)*.³² This case flowed from the fact when the Constitutional Court about ten years ago declared the death penalty inconsistent with the Constitution,³³ a number of prisoners were on death row awaiting execution. There had been a considerable delay in implementation of the statutory procedure for substituting the death sentences. The court held that the process had been

²⁸ Paragraph 39.

²⁹ *Supra* note 17.

³⁰ *Supra* note 1.

³¹ *City of Cape Town v Rudolph* 2004 (5) SA 39 (C) at 88. The court has since heard argument on the report, commentary and reply. The applicants contended that the City had not complied with the terms of the previous order. Judgment was reserved, and at the time of writing had not been delivered.

³² (Constitutional Court) Case CCT 45/04, judgment delivered 25 May 2005. The question of relief is discussed at paras 60 to 62.

³³ *S v Makwanyane* 1995 (3) SA 391 (CC).

unsatisfactory, and had taken far too long. It was important that all outstanding death sentences be substituted as soon as possible. The court pointed out (referring to *TAC (No2)*) that it had ‘the jurisdiction to issue a mandamus in appropriate circumstances and to exercise supervisory jurisdiction over the process of the execution of its order’. The court accordingly ordered that the necessary steps to achieve the substitution of the death sentences must be taken ‘as soon as possible’, and that the respondents were to report to the court within the following twelve weeks concerning all the steps taken to comply with that order, and setting out in full the reasons why any death sentence had not yet been aside by that date. Detailed reporting requirements were spelt out in the order of the court.

When will a structural interdict be ordered?

In *TAC (No 2)* the Constitutional Court said that a structural interdict should be granted where ‘it is necessary to secure compliance with a court order’, and identified one such circumstance, namely ‘a failure to heed declaratory orders or other relief granted by a Court in a particular case’.³⁴ This was the circumstance which arose in *City of Cape Town v Rudolph*.³⁵ *Sibiya* makes it clear that it is not only an anticipated complete failure to comply with an order which may trigger a structural interdict. A supervisory order will also be appropriate where the facts indicate that it is ‘inadvisable for the court to assume’ that the order will be carried out promptly.³⁶ A past failure to comply with court orders or some other reason to believe that the government may not comply promptly, are not the only such circumstances. It is not difficult to identify further circumstances in which a structural interdict may be ‘be necessary to secure compliance with a court order’, although it is not possible to identify with confidence all such circumstances in advance. In general, courts should focus on the broad principles that guide the exercise of remedial discretion, and not attempt to construct rigid rules or categories for the exercise of such discretion.³⁷

A second circumstance in which a structural interdict is warranted is where the consequences of even a good-faith failure to comply with a court order are so serious that the court should be at pains to ensure effective compliance. There are cases where remedial action after a failure to comply with the order will not be adequate. With the benefit of hindsight, *TAC (No 2)* was such a case. After the Constitutional Court had made its order, the Treatment Action Campaign made large efforts to ensure that the provincial governments complied fully with the order. In at least one case, Mpuma-

³⁴ Supra note 21.

³⁵ Supra note 31.

³⁶ *Sibiya* supra note 32 para 61.

³⁷ For an argument that principled remedial discretion is preferable to strong discretion that is not guided by law or rule-based discretion that depends on self-executing categories, see Kent Roach ‘Principled remedial discretion under the Charter’ (2004) 25 *Supreme Court L R Second Series* 101. See infra the final part of this paper where we attempt to identify broad principles that can help determine when structural interdicts are appropriate.

langa, there was at best only token compliance. There was evidence that the responsible Member of the Executive Committee either did not understand, or was pretending that she did not understand, what she was required to do. It took a further application to the High Court for a contempt order before the province complied even materially with the order which had been made the Constitutional Court.³⁸ Meanwhile, six months had passed. It is not over-dramatic to suggest that as a result of the failure by the province to comply effectively with the order of the Constitutional Court, a significant number of babies may have been infected with HIV where this was avoidable, with probably fatal consequences. This is plainly another sort of case in which a structural interdict 'is necessary to secure compliance with a court order'. The consequences of non-compliance are irremediable, and so serious that it is necessary to go beyond the mandatory order and do whatever is reasonably possible to ensure effective compliance.

A third type of case arises where the mandatory order is so general in its terms that it is not possible to define with any precision what the government is required to do. General orders may be made either because of the nature of the duty involved (for example, a duty to act reasonably), or because the court is anxious to leave the government with as much latitude as possible to decide precisely how it will comply with its constitutional obligations. In such a situation, it is in the interests of all that the government is required to place its plan before the court or at least to make its plan known to the public within a certain time period. The applicant is then in a position to analyze the government's plan and place its contentions before the court or, if no reporting back to the court is required, raise such concerns in the political process and civil society, and if necessary through further litigation. This approach to structural relief has some benefits to governments. It may provide governments with a timeline to follow. The approval of a plan by the court can allow the government to move forward with the implementation of its plan secure in the knowledge that implementation will constitute compliance with its obligations. The court can make an order which is as non-intrusive as possible on the choices which the elected government makes, because it can be secure in the knowledge that this will not be an invitation to non-compliance but rather an invitation to the government to formulate a plan in order to achieve compliance with the Constitution.

We note that there are interesting parallels between the ability to suspend declarations of invalidity (which is recognized in s 172 of the South African Constitution) and the use of structural interdicts. In both cases courts are concerned about providing government some flexibility in order to select the precise means to achieve compliance with the Constitution, while also ensuring that compliance is indeed achieved within a finite and reasonable period of time. The suspension of a declaration of invalidity is a commonly

³⁸ *Treatment Action Campaign v MEC for Health, Mpumalanga & Minister of Health* (Transvaal Provincial Division) Case No 35272/02.

used mechanism, but has thus far been used only in cases of invalidity of legislation. It can be used to avoid the vacuum which may arise from the invalidity of a statute, or to create an opportunity for the legislature to decide how to correct the inconsistency with the Constitution. For our purposes, the most striking feature of the delayed declaration of invalidity is that this form of order sometimes creates a limited form of supervisory jurisdiction. This arises for example where the Court provides in its order that the government may, before the expiry of the period of suspension, apply directly to the Court for an order extending the period of suspension.³⁹

The Constitutional Court has recently made use of a form of supervisory jurisdiction when suspending an order of invalidity.⁴⁰ An Ordinance which dealt with the impounding of trespassing animals in rural areas was declared inconsistent with the Constitution. The court found that neither reading-in nor severance would be an appropriate remedy. The only appropriate remedy was to strike down the offending provisions, which were an integral part of the scheme of the Ordinance. The question was what should happen in the interim, while the legislature was attending to the matter. On the one hand, the infringement of constitutional rights could not be allowed to continue. The usual form of suspension of the order of invalidity would therefore not be appropriate. On the other hand, there was a need to protect landowners against trespassing animals. The solution arrived at by the court was to declare the relevant sections of the Ordinance invalid, to suspend the order of invalidity for a period of twelve months, and to provide that pending the enactment of remedial legislation the Ordinance was to be applied in a specified manner which would protect the rights of the owners of allegedly trespassing animals. The court ordered further that if the legislature failed to remedy the unconstitutionality within the twelve months, 'any interested person or organisation' could apply directly to the Court for a further suspension of the declaration of invalidity, or for other appropriate relief. The Court thus retained jurisdiction, which is a key element of supervisory jurisdiction.

³⁹ *S v Steyn* 2001 (1) SA 1146 (CC). This is a device used to avoid the debate over whether the Court has the power to extend the period of suspension previously fixed in a final order: see *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) paras 21 to 30.

⁴⁰ *Zondi v MEC for Traditional and Local Government Affairs* 2005 (4) BCLR 347 (CC).

CANADIAN LAW ON MANDATORY RELIEF AND SUPERVISORY JURISDICTION

Mandatory relief and supervisory jurisdiction before Doucet-Boudreau

A threshold issue in Canada is whether the Crown is immune from mandatory relief. Most Crown immunity acts provide that the Crown is immune from injunctive relief and that a declaration should be issued instead of an injunction.⁴¹ Even before the 1982 enactment of the Canadian Charter of Rights and Freedoms, however, courts found ways around this apparent limitation by issuing injunctions against Crown servants instead of the Crown itself. After the Charter, commentators and a number of lower courts agreed that where a Charter violation had been established, the Crown could be subject to mandatory relief.⁴² If there was any doubt about this conclusion, all nine judges in *Doucet-Boudreau* contemplate that injunctions can be issued in constitutional cases and, if need be, enforced by contempt proceedings.⁴³

In the 1980's there were some experiments by lower Canadian courts with structural injunctions. In one early case under s 23 of the Charter, which provides a right to minority language school instruction and facilities out of public funds where the numbers of the anglophone or francophone minority warrant, a trial judge ordered an injunction against a school board to provide equal educational facilities to the French language minority. Following the plaintiff's request, the judge also highlighted the particular need for equality in providing vocational training in the industrial arts part of the school. He only made this injunctive order after noting a long history of delay and resistance by the board and concluded:

'It is not just nor equitable in the meantime to force the plaintiff and those he represents to have to depend upon the Defendant Board which continues to demonstrate the same negative attitude. . . . [T]he minority language education rights of the plaintiff should not be left to the unfettered and undirected discretion of that local school board.'⁴⁴

At the same time as the trial judge issued injunctive relief against the local school board, he granted declaratory relief against the provincial government. In that case, the plaintiffs did not even request injunctive relief against the provincial government. The case returned to the same judge the next year. He noted that there had not been compliance with his original order, but that he 'need not intervene under s 24(1) of the Charter' because the province had provided for a French language education council that had devised a different plan and that this plan 'meets the requirements of the judgment'.⁴⁵ This case demonstrates a willingness to use mandatory relief

⁴¹ See for example *Proceedings against the Crown Act* RSO chap P27, s 14.

⁴² *Van Mulligan v Saskatchewan Housing Corp.* (1982) 23 Sask. R. 66 (QB); *Levesque v Canada (Attorney General)* (1985) 25 DLR (4th) 184 (FCTD). See also Peter Hogg *Constitutional Law of Canada* 3 ed (1992) 37.2(f); Peter Hogg & Patrick Monahan *Liability of the Crown* 3 ed (2001) 36; R J Sharpe *Injunctions and Specific Performance* 3 ed (2000) at 3.1030; Kent Roach *Constitutional Remedies in Canada* (1994) 13.90

⁴³ *Doucet-Boudreau* supra note 2.

⁴⁴ *Marchand v Simcoe Country Board of Education* (1986) 29 DLR (4th) 596 (Ont HC) at 619.

⁴⁵ *Marchand v Simcoe Country Board of Education (no2)* (1987) 44 DLR (4th) 171 (Ont HC) at 173-4.

against local authorities, but also a willingness by the judge to be flexible and to recognize that different plans may satisfy the requirements of the court's order and the constitution.

In another minority language school case in the 1980's, the trial judge ordered that Nova Scotia should design a program of French language instruction and that the school board designate a site for a French language school, advertise its plans and conduct a registration of parents who would be willing to send their children to the school. The trial judge stressed his 'broad remedial powers' to award appropriate and just remedies under s 24(1) of the Charter and the need in this context to make orders 'out of keeping with the type of orders one makes in a conventional law suit'.⁴⁶ The judge had to intervene when the local school board refused to designate a reasonably accessible site for the school. He was critical of the Board of Education stating that:

'[I]t is as if the Board was not conscious that the Charter of Rights had been passed and is the law of Canada. . . . Pursuant to s.24 of the Charter, the court has a duty, where it is just under the circumstances, to grant a remedy if Charter rights have been infringed or denied. The Charter of Rights to be meaningful must be capable of enforcement. While I do not welcome the role of judging the reasonableness of the actions of the School Board, I have no choice in this matter. The Charter has imposed on the Canadian judiciary the duty to see that Charter rights are not infringed.'⁴⁷

Despite this strong affirmation of remedial power, the judge refused the plaintiff's request that the particular site for the proposed school be established by judicial order, noting that 'such an Order would eliminate the consideration of any other reasonably accessible site'.⁴⁸ Instead the judge issued a declaration that the two sites selected by the school board were not reasonably accessible given the time it would take small children to be bused to such sites. Another site was designated but only after the school board was threatened by the plaintiff with a contempt proceeding on the original order. Unfortunately, the controversy and delay may have made parents reluctant to register their children and only fifty of four hundred eligible students registered. The trial judge then held that the Minister of Education had acted reasonably in concluding that the numbers were not sufficient.⁴⁹ This decision was subsequently overturned on appeal, with the Court of Appeal stressing that there were enough children to justify French language instruction, but not a French language school. The Court of Appeal stressed that it was not its role 'to specify in exact detail how and where instruction will be provided', but that the plaintiffs could return to court, presumably by fresh proceedings, should there not be compliance with the Court of Appeal's declaration concerning constitutional entitlement.⁵⁰ Thus the case ended with the Court of Appeal expressing a preference for declaratory as

⁴⁶ *Lavoie v Nova Scotia* (1988) 47 DLR (4th) 586 (NS SC) at 590, 594–5.

⁴⁷ *Lavoie v Nova Scotia* (1988) 84 NSR (2d) 393 (NS SC) at 400, 403.

⁴⁸ At 403–4.

⁴⁹ *Lavoie v Nova Scotia* (1988) 90 NSR (2d) 16 (NS SC).

⁵⁰ *Lavoie v Nova Scotia* (1990) 58 DLR (4th) 293 (NS CA) at 307.

opposed to mandatory relief. As will be seen, the Supreme Court of Canada in the 1990's would encourage this trend.

The Supreme Court of Canada decided its first minority language education rights case in 1990. It stressed the advantages of general declarations as opposed to injunctive relief and expressed faith that Canadian governments would comply in good faith with general declarations of constitutional entitlement. Chief Justice Dickson explained:

'I think it best if the court restricts itself in this appeal to making a declaration in respect of the concrete rights which are due to the minority language parents in Edmonton under s.23. Such a declaration will ensure that the appellants' rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response which is suited to the circumstances. As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means by which its s.23 obligations are to be met; the courts should be loathe to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right. . . . Once the court has declared what is required in Edmonton, then the government can and must do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under s.23.'⁵¹

The Supreme Court's fullest statement of its preference for declaratory as opposed to injunctive relief came in *Eldridge v British Columbia*⁵² involving the rights of people who are deaf or hearing impaired to sign-language interpretation services in hospitals. Justice La Forest stated for an unanimous court that a 'declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished.' This declaration did not take effect for six months. In sanctioning this delay, the Supreme Court of Canada borrowed from its expanding jurisprudence on suspended declarations of invalidity, albeit with the important exception that the court in *Eldridge* did not retain supervisory jurisdiction after it had issued its declaration. The British Columbia government complied with the judgment, introducing some sign-language interpreters within six months and other services a few months later. Unfortunately, there is some evidence that some provinces other than British Columbia failed to provide translation services.⁵³ This lack of compliance suggests that it may not be safe to assume that governments who are not direct parties to a dispute will promptly, voluntarily and in good faith comply with the Supreme Court's declarations in Charter cases. It is not clear, however, that the problem would have been solved by stronger injunctive relief. An injunction would still likely only have bound British Columbia, the defendant in the case, and not other provinces. At the same time, it may have been helpful for the court to have indicated that it expected each province and not simply the defendant province to announce within six months how it proposed to provide

⁵¹ *Mahe v Alberta* (1990) 68 DLR (4th) 69 (SCC) at 106.

⁵² (1997) 151 DLR (4th) 577 (SCC) para 96.

⁵³ See generally Kent Roach 'Remedial consensus and dialogue under the Charter: General declarations and delayed declarations of invalidity' (2002) 35 *University of British Columbia LR* 211 on which this section is based.

translation services for the hearing impaired. As will be discussed in the next part of this paper, democracy and compliance may be enhanced by governments presenting compliance plans to the public even if courts do not require the government to submit their plan to the court for approval.

The limits of declaratory relief have also been exposed in another Canadian case involving the practice of customs officials in seizing material imported by a gay and lesbian book store. The majority of the Supreme Court relied upon a declaration that the authorities had breached freedom of expression and equality rights in the past by unfairly targeting imports destined for the book store. Justice Binnie concluded 'with some hesitation, that it is not practicable' to order 'a more structured s.24(1) remedy',⁵⁴ in part because of an absence of information about the steps taken by the officials to comply with the Constitution since the trial judgment. He also expressed concern that to be enforceable, any injunction would have to be clear and relatively precise. After the court's declaration, the book store commenced new litigation because of continued dissatisfaction with its treatment by customs officials. Justice Iacobucci in his dissent anticipated this shortcoming of declaratory relief. In a helpful analysis that was not explicitly rejected by the majority of the court, he stated that 'declarations are often preferable to injunctive relief because they are more flexible, require less supervision, and are more deferential to the other branches of government'. At the same time, he added that 'declarations can suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance'. He stressed that a declaration will be inadequate and place an unfair burden on successful litigants in cases of grave systemic problems and when administrators 'have proven themselves unworthy of trust'.⁵⁵ In the particular case, however, Justice Iacobucci would not have ordered a structural injunction, but rather would have struck down the entire regulatory scheme as inconsistent with the Charter. He would have suspended the declaration of invalidity for eighteen months in order to give the government a full opportunity to reformulate its policies and procedures concerning the import of material that might be obscene. He stressed that systemic flaws required systemic remedies.

As suggested above, the suspended declaration of invalidity is a novel remedy that recognizes the need for positive government action to enforce rights and can involve the court in the exercise of a form of supervisory jurisdiction. A delayed or suspended declaration of invalidity was first used in Canada to prevent the threat to the rule of law and the emergency that might have followed the invalidation of most of Manitoba's laws because they were enacted in only English and not French.⁵⁶ The Court retained jurisdiction

⁵⁴ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120 para 157.

⁵⁵ Paragraphs 258–261.

⁵⁶ *Reference re language rights under the Manitoba Act* [1985] 1 SCR 721. Note that the Supreme Court has indicated that suspended declarations of invalidity will be appropriate in cases where, 1) the rule of law is threatened, 2) public safety is threatened, and 3) under-inclusive benefits are struck down: *Schachter v*

over the case for close to a decade and issued several follow-up judgments in response to new information about the translation process. These judgments related both to the timing and the extent of the translation process.⁵⁷ Suspended declarations of invalidity were also used in several cases dealing with electoral boundaries. The courts declared that the existing boundaries violated constitutional standards of equal representation, but the suspension allowed the legislature to take positive steps to select among the various options that would satisfy constitutional standards.⁵⁸ McLachlin CJC sat on one of these cases as a trial judge and she later commented that the suspended declaration allowed her 'to defer the really difficult question. . . . Could the Court issue a mandatory injunction to the Legislature to pass the required law? Could the Court substitute a law of its own devising, openly entering into the legislative arena.'⁵⁹ Although another trial judge in a follow up to that case answered the question in the negative,⁶⁰ the better view after *Doucet-Boudreau*, is that the court should assume responsibility for ensuring compliance with the constitution.

As with general declarations, the delayed declaration of invalidity is often seen as a means to provide governments with space and time to select the precise means with which to comply with the Constitution. In sanctioning an 18-month suspended declaration of invalidity in a case involving the rights of Aboriginal people who live off-reserve to vote in their band's election, Justice L'Heureux-Dube also recognized that delay can give governments time to consult with those who are supposed to benefit from the right.⁶¹ Commentators are divided on whether this is a positive development, with some arguing that delayed declarations can allow legislatures to engage in more comprehensive reform, provided courts retain jurisdiction and enforce the declaration of invalidity as the ultimate default remedy,⁶² and others arguing that it is inappropriate to suspend constitutional rights without some very important reason such as those originally contemplated by the Supreme Court.⁶³

The willingness to delay declarations of invalidity has created in Canada a certain judicial tolerance for delay in providing remedies. This raises the tricky issue of establishing deadlines. Deadlines can be an effective impetus for governmental action. If the deadline is unrealistically short, there is a danger that the government will introduce a less than adequate program simply to meet the deadline. If the deadline is too long, this will aggravate the

Canada [1992] 2 SCR 679. For criticisms of this categorical approach and a catalogue of many cases which do not fit into these categories see Kent Roach op cit note 42 chap 14.

⁵⁷ See the various cases cited in note 8 supra.

⁵⁸ *Dixon v British Columbia* (1989) 59 DLR (4th) 247 (BC SC); *Mackinnon v Prince Edward Island* (1993) 101 DLR (4th) 362 (PEI SC).

⁵⁹ Beverley McLachlin 'The Charter: A new role for the judiciary?' (1991) 29 *Alberta LR* 540 at 557.

⁶⁰ *Dixon v British Columbia* supra note 58. This case is examined and criticized in Roach op cit note 42 at 13.570-13.590.

⁶¹ *Corbiere v Canada* [1999] 2 SCR 203.

⁶² Sujit Choudhry & Kent Roach 'Putting the past behind us? Prospective judicial and legislative constitutional remedies' (2003) 21 *Supreme Court Law Review Second Series* 205.

⁶³ Bruce Ryder 'Suspending the Charter' (2003) 21 *Supreme Court Law Review Second Series* 267.

violation of rights and may not ensure that governments make every effort to comply with the constitution. It may be best for courts to lean towards a shorter period of delay such as the six months time period in *Eldridge*⁶⁴ rather than the periods of twelve and eighteen months that have been used in other cases. The government can always, as has occurred in several cases, bring a motion to the court to extend a period of delay that has turned out to be too short. This procedure allows the court to be informed by both the government and the parties about the progress to date in implementing the court's judgment and is itself a form of supervisory jurisdiction.

What happens during the period of delay? In some cases, the Supreme Court has indicated that the relevant Charter right is not suspended and that courts could intervene in appropriate cases to prevent irreparable damage to Charter rights.⁶⁵ The Supreme Court has also frequently exempted the successful litigant from the period of delay. At the same time, the Supreme Court has recently indicated that it is reluctant to combine remedies for individuals under s 24(1) of the Charter with a suspended declaration of invalidity under s 52(1) of the Constitution Act, 1982.⁶⁶ This could result in the unfortunate situation where a person is detained under an unconstitutional law for the entire period of a suspended declaration of invalidity.⁶⁷ In our view, courts should address whether delay is truly necessary and take responsibility for minimizing harms during the period of court sanctioned delay. In *Eldridge*, this would have required consideration of the position of those people who are deaf or hearing impaired who would require interpretation services for medically essential services during the six months of delay and the retention of supervisory jurisdiction to protect such people from harm during the period of court sanctioned delay. Such requests for remedies could be decided under the same tests that apply to interim relief where the focus is often on preventing irreparable harm.

Doucet-Boudreau v Nova Scotia

In this case the trial judge concluded that Nova Scotia had violated its requirement to provide minority language facilities in five regions of the province. The evidence suggested that between 1982 and 1997 the Department of Education had not accorded a priority to s 23 of the Charter or the assimilation of the francophone minority when assessing priorities for

⁶⁴ *Supra* note 52.

⁶⁵ The Court has indicated that some judicial intervention during the period of a delayed or suspended declaration of invalidity may be appropriate in two criminal cases. See *R v Swain* (1991) 63 CCC (3d) 481 (SCC) at 542 and *R v Bain* (1992) 69 CCC (3d) 481 (SCC). See also *Nova Scotia v Martin* [2003] 2 SCR 504 para 120, exempting successful Charter applicant from a six-month suspension of a declaration of invalidity.

⁶⁶ *R v Demers* 2004 SCC 46.

⁶⁷ Kent Roach 'New and problematic restrictions on constitutional remedies: *R v Demers*' (2004) 49 CLQ 253. The Constitutional Court has recognized that it is 'an important principle of constitutional adjudication that successful litigants should be awarded relief' — *S v Bhulwana*; *S v Gwadsiso* 1996 (1) SA 388 (CC) para 32 — and that even where a suspension of invalidity was ordered, the court 'should ensure that appropriate relief is provided to the successful litigants in this case and to those who are situated similarly in the mean time': *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 66.

new schools. The trial judge required that the respondents use their 'best efforts' to comply with various deadlines in each of the regions and indicated that 'the Court shall retain jurisdiction to hear reports from the Respondents respecting the Respondent's compliance with this order. The Respondents shall report to this Court on March 23, 2001 at 9.30 am, or on such other date as the Court may determine.'⁶⁸ Several such reporting sessions were held in which the Department of Education submitted affidavits detailing progress in school construction and the other parties were also given an opportunity to adduce evidence.

The Crown appealed only the retention of jurisdiction in the case. In a 2:1 decision, the Nova Scotia Court of Appeal held that the trial judge had erred in retaining jurisdiction after he was *functus officio*. Flinn JA for the majority distinguished the *Manitoba Language Reference* case⁶⁹ on the basis that the trial judge in this case had not left any issues, such as the deadlines for compliance, outstanding. He also stressed that there was no specific statutory authorization for the retention of jurisdiction and expressed concerns that the trial judge acted as an administrator as opposed to a judge at the reporting sessions and that this may strain 'harmonious relations'⁷⁰ between the judicial and other branches of government. Freeman JA in dissent would have upheld the trial judge's exercise of remedial discretion, concluding that it was 'a creative blending of declaratory and injunctive relief with a means of mediation'.⁷¹ In his view, the trial judge's remedy had the practical benefit of allowing a judge familiar with the issues to 'expedite the implementation of the order in a variety of ways, not least of which being provision of a means of mediating disputes inevitable in carrying out the complex requirements of the order'.⁷²

The Supreme Court decided 5:4 to uphold the trial judge's remedy. The majority stressed the need for effective and responsive remedies and the breadth of the trial judge's remedial discretion under s 24(1) of the Charter. Iacobucci and Arbour JJ for the majority stated that remedies 'may require novel and creative features . . . tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach must remain flexible and responsive to the needs of a given case.'⁷³ They characterized the reporting requirements as a legitimate response to concerns about delay by the government and the assimilation of the francophone minority and one 'that reduced the risk that the minority language rights would be smothered in additional procedural delay'.⁷⁴ They characterized the trial judge's remedy as one that

⁶⁸ *Doucet-Boudreau v Nova Scotia (Minister of Education)* supra note 2 para 7. This account of the case is drawn from Roach op cit note 37.

⁶⁹ Supra note 8.

⁷⁰ Paragraphs 50, 52.

⁷¹ Paragraph 70.

⁷² Paragraph 62. On the important role of mediation in cases of on-going structural relief see Abram Chayes 'The role of the judge in public law litigation' (1976) 89 *Harvard LR* 1281.

⁷³ Paragraph 59.

⁷⁴ Paragraph 67.

‘vindicated the rights of the parents while leaving the detailed choices of means largely to the executive’.⁷⁵

Iacobucci and Arbour JJ stressed the important role of provincial superior courts and their inherent jurisdiction to award remedies and their wide remedial discretion. This remedial power was not, however, absolute or unreviewable because it ‘must be read in harmony with the rest of our Constitution’.⁷⁶ To this end, a remedy should be effective and meaningful having regard to the right and its violation; it ‘must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary’,⁷⁷ it must call on ‘the function and powers of the court’,⁷⁸ and finally, it must also ‘be fair to the party against whom the order is made’.⁷⁹ For the majority, the principle with the greatest weight was the need to provide a remedy that was effective and meaningful for the applicants. They advocated a purposive approach to remedies that:

‘[R]equires at least two things. First, the purpose of the right being protected must be promoted: courts must craft *responsive* remedies. Second, the purpose of the remedies provision must be promoted: courts must craft *effective* remedies.’⁸⁰

The court signaled that the principle of effective and responsive remedies will have greater weight than the principle of respecting institutional roles when it made the evocative statement that ‘deference ends . . . where the constitutional rights that the courts are charged with protecting begin’.⁸¹

The majority took a flexible and non-absolutist approach to the separation of powers issues. It warned that there was no ‘bright line’ separating judicial, executive and legislative ‘functions in all cases’.⁸² The restraint of requiring a judicial remedy meant not that courts may never exercise a legislative or administrative function, but rather that ‘it will not be appropriate for a court to leap into the kind of decisions and functions for which its design and expertise are manifestly unsuited’.⁸³ The remedy devised by the trial judge respected the role of the different institutions because it left the ‘detailed choices of means largely to the executive’.⁸⁴ Although more precision may have been desirable, the remedy was not fundamentally unfair to the government because it was not unduly vague and it could be appealed. Finally, the majority stressed that appellate courts

‘must show considerable deference to trial judges’ choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle.’⁸⁵

⁷⁵ Paragraph 69.

⁷⁶ Paragraph 50.

⁷⁷ Paragraph 56.

⁷⁸ Paragraph 57.

⁷⁹ Paragraph 58.

⁸⁰ Paragraph 25.

⁸¹ Paragraph 36.

⁸² Paragraph 56.

⁸³ Paragraph 57.

⁸⁴ Paragraph 69.

⁸⁵ Paragraph 87.

In a judgment by Lebel and Deschamps JJ, the minority of the Supreme Court concluded that the trial judge had erred by breaching the separation of powers; by retaining jurisdiction after he was *functus officio*; and by making an order that was so vague as to be procedurally unfair. Specifically, the minority held that if the trial judge was prepared to make further orders at the reporting session, he violated the separation of powers by entering into the realm of 'administrative supervision and decision making'.⁸⁶ In the minority's view, such a managerial role did not accord with the institutional capabilities of the judiciary or with 'the Canadian tradition of mutual respect between the judiciary and the institutions that are the repository of a democratic will'.⁸⁷ If anything, the minority was even more critical of what the trial judge did if, as accepted by the majority of the Court, he was only holding reporting sessions and not contemplating additions or amendments to his original order. In that case, Lebel and Deschamps JJ asserted, the trial judge was acting in a 'political'⁸⁸ manner akin to the pressure that an opposition party places on a government. Instead of the reporting sessions, which they argued contemplated 'an inappropriate, ongoing supervisory and investigative role',⁸⁹ the trial judge should have waited for the applicants to have commenced an application for contempt of court for violating his remedial order. The availability of the contempt sanction in the minority's view ensured that trial judge's remedy would have been effective without the retention of jurisdiction or the reporting requirement.

The minority came very close to creating an absolute rule against structural injunctions.⁹⁰ An absolute rule against structural injunctions would not fit with the Canadian remedial experience in both public and private law or that of other democracies such as South Africa. A particular problem with the minority judgment was its assumption that the threat of prosecution for contempt of court will be sufficient to ensure government compliance with any court order. The minority assumes that failure to comply with a court order will only result from deliberate disobedience, which can be cured by fining the government or jailing the responsible officials for contempt, as opposed to potentially resulting from wide range of factors including incompetence and unforeseen circumstances. For example, what would have happened to the deadlines in the trial judge's order if there had been a major public sector or construction strike in Nova Scotia? In such circumstances it would have been unfair to have fined the government or its officials for factors outside their control. It would, however, have been appropriate and just for the trial judge to re-visit the order in light of the changed circumstances and to have issued revised and supplementary orders. The Supreme Court has itself issued such supplementary orders in response

⁸⁶ Paragraph 125.

⁸⁷ *Ibid.*

⁸⁸ Paragraph 128.

⁸⁹ Paragraph 136.

⁹⁰ Paragraphs 117, 120 and 125.

to new information about the difficulties of translating Manitoba's laws.⁹¹ It has also extended transition periods or periods of a suspended declaration of invalidity in light of changed circumstances.⁹² The minority does not deal adequately with this experience and ignores the analogous supervisory jurisdiction exercised by the court in a range of private law matters.⁹³ The minority's decision is based on a narrow and absolutist understanding of the separation of powers that does not fit either previous constitutional cases or the traditional role of courts of equity and assumes that a failure to comply with the Constitution can only be the product of governmental defiance as opposed to governmental incompetence.

GUIDELINES FOR WHEN MANDATORY RELIEF AND SUPERVISORY JURISDICTION IS APPROPRIATE, JUST AND EQUITABLE

Although both *TAC (No 2)* and *Doucet-Boudreau* affirm that mandatory relief and the retention of supervisory jurisdiction are within the powers of courts in constitutional cases, the experience in South Africa and Canada suggests that judges may be cautious in using these strong remedies. In what follows, we hope to outline some guidelines and principles for determining when such remedies may be appropriate, just and equitable.

In an interesting but little noticed paper on the American experience with structural injunctions, Chris Hansen has helpfully articulated three reasons for governmental non-compliance with constitutional standards. They are 'incompetence, inattentiveness and intransigence. Each calls for different responsive techniques.'⁹⁴ For Hansen, what works with a government that is simply inattentive to constitutional standards may not work with a government that is incompetent. Even stronger remedies, including ultimately the threat and use of contempt proceedings, may be necessary to deal with governmental actors that are simply opposed or intransigent to constitutional standards. Hansen was writing in the American context where governments had at times been intransigent to constitutional standards with respect to desegregation and conditions of confinement in custodial institutions. In the South African context, the problem of governmental incompetence, or more charitably, lack of capacity, may be more frequent and as important and difficult as the problem of governmental intransigence.

⁹¹ See supra note 8.

⁹² *Reference re Provincial Court Act* [1997] 3 SCR 3 supp reasons [1998] 1 SCR 3 supp reasons [1998] 2 SCR 443; *R v Feeney* [1997] 2 SCR 13 supp reasons [1997] 2 SCR 117 supp reasons [1997] 3 SCR 1008; *R v Cobham* [1994] 3 SCR 360.

⁹³ As Iacobucci and Arbour JJ noted, in various contexts including bankruptcy, trusts and estates, and family law, 'courts order remedies that involve their continuing involvement in the relations between the parties. Superior courts, which under the Judicature Acts, possess the powers of common law courts and courts of equity, have assumed active and even managerial roles in the exercise of their traditional equitable powers': *Doucet-Boudreau* supra note 2 para 71 (citations omitted). For a recent case where a trial judge issued detailed directions under s 24(1) of the Charter concerning the care of children after having found that the province's policy of not allowing children to be adopted without the approval of their Aboriginal band violated the children's Charter rights, see *Re TL* (2005) 248 DLR (4th) 303 (Sask QB).

⁹⁴ Hansen op cit note 9 at 232.

Hansen's typology also fits well with influential work done by John Braithwaite. Braithwaite has in a variety of contexts constructed regulatory pyramids as a principled means to guide and justify escalating state responses. He starts from a premise that people and organizations generally want to do the right thing and that reform works best when it is developed and implemented by the relevant actors and not imposed from above through the threat of punishment. Thus the base of his regulatory pyramid is devoted to attempts at persuasion and assumptions that the regulator is dealing with a virtuous actor. This maps on remarkably well to Hansen's insight that many constitutional violations are the product of inattention.⁹⁵ If the softer strategies do not work or are manifestly inappropriate, however, Braithwaite counsels a move to a deterrence framework that is premised on the assumption that the actor is rational but not virtuous. Finally at the apex of the pyramid is a move from a threat of punishment to the imposition of punishment. Here the relevant actor must be assumed to be 'incompetent or irrational'.⁹⁶ Hansen and Braithwaite's insights can assist in constructing escalating levels of remedies. We hasten to add that these are broad guidelines and in some cases it may be apparent that the judge should intervene even initially at a higher level.

Level 1: General declarations with possible reporting to the public for inattentive governments

Hansen comments that problems in complex systems 'often . . . can be traced to the inattentiveness of high state officials and/or the legislature'. Those who are most in need of constitutional protections often do not have 'powerful political constituencies'⁹⁷ and their problems are often ignored by the government. In such circumstances, declarations may be sufficient to make the problem visible and to have the government no longer ignore the need to comply with the constitution.

Declarations proceed on the assumption that governments will take prompt and competent steps to comply and that continued judicial supervision and intervention will not be necessary to ensure compliance with the constitution. Owen Fiss has observed that the main difference between a declaration and an injunction is that an injunction 'gives the defendant one more chance' because disobedience can result in prosecution for contempt citation, while a declaratory judgment 'gives the defendant two more chances' because 'the plaintiff cannot get a contempt order, but only an injunction to prevent another act of disobedience'.⁹⁸

⁹⁵ By 'inattention' we do not limit ourselves to unintentional oversights. We are, after all, dealing with cases which have been contested and have come to a court for a decision. An unintentional oversight would usually have been remedied by that stage. The 'inattention' will more frequently be a failure to appreciate the nature of the government's constitutional obligations.

⁹⁶ Braithwaite *Restorative Justice and Responsive Regulation* (2002) 32.

⁹⁷ Hansen *op cit* note 9 at 232. See also Ely *Democracy and Distrust* (1980).

⁹⁸ Owen Fiss 'Dombroski' (1977) 86 *Yale Lj* 1103 at 1122-24.

Before the *Doucet-Boudreau* case,⁹⁹ declarations were the public law remedy preferred by the Supreme Court of Canada. In cases such as *Eldridge v British Columbia*¹⁰⁰ the court stressed the need for flexibility to allow governments to decide how exactly to comply with the constitution, and the court's assumptions that governments would act promptly and in good faith to comply with the Constitution. The failure of some provinces to comply with *Eldridge*, by providing new translation services, however, calls these assumptions into question, at least in cases where the relief required from governments is complex and programmatic and the provinces are not direct parties to the case. Similarly, the failure of some public authorities to act promptly on the Court's declarations in *Grootboom*¹⁰¹ or even its mandatory orders in *TAC (No 2)*¹⁰² also raises questions about whether compliance with these decisions was a simple matter of the need for governments to be more attentive to constitutional rights.

One possible means to respond to such compliance problems is for courts to require governments to report to *the public* on the content of complex and on-going programs that are required to comply with the constitution. Such reports make it possible for civil society and political organizations to monitor compliance, and to take steps if there is not effective compliance. In the sequel to *TAC (No 2)*,¹⁰³ the result of an order for public reporting would have been earlier and more effective monitoring, which in turn would have enabled much earlier steps to ensure compliance in Mpumalanga, with a likely saving of lives. Transparency is a core element of accountable government. Public communication and transparency are also elements of reasonableness. In *TAC (No 2)* the Constitutional Court held as follows:

'Three of the nine provinces have publicly announced programmes to realise progressively the rights of pregnant women and their newborn babies to have access to Nevirapine treatment. As for the rest, no programme has been disclosed by either the Minister or any of the other six MECs, this notwithstanding the pertinent request from the TAC in July 2001 and the subsequent lodging of hundreds of pages of affidavits and written legal argument. This is regrettable. The magnitude of the HIV/AIDS challenge facing the country calls for a concerted, co-ordinated and co-operative national effort in which government in each of its three spheres and the panoply of resources and skills of civil society are marshalled, inspired and led. This can be achieved only if there is proper communication, especially by government. In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned, down to the district nurse and patients. Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be made known appropriately. . . .

It is necessary that the government programme, as supplemented to comply with the requirements of this judgment, be communicated to health caregivers in all public facilities and to the beneficiaries of the programme. Having regard to the nature of the problem, the steps that have to be taken to comply with the order that we make should be taken without delay.¹⁰⁴

A court that requires an elected government to communicate with its citizens about important matters of governance and steps taken to comply

⁹⁹ Supra note 2.

¹⁰⁰ Supra note 52.

¹⁰¹ Supra note 17.

¹⁰² Supra note 2.

¹⁰³ See note 38 supra.

¹⁰⁴ Supra note 1 paras 123, 133.

with constitutional rights cannot reasonably be criticized for being undemocratic or infringing the separation of powers.

To justify an order for disclosure and public reporting, it is not necessary that intransigence or incompetence be found. At least in cases requiring a systemic or programmatic response by government, reporting to the public is simply a reasonable and democratic means of ensuring proper compliance with the Constitution. This was recognized by the Constitutional Court in *August*.¹⁰⁵ In that case, the Electoral Commission was ordered to make all reasonable arrangements to enable prisoners to register and vote in the forthcoming elections:

‘The determination of what arrangements should be made remains a matter pre-eminently for the Commission. It is important that there should be certainty as to what these arrangements will be. In the light of the fact that this Court is not in a position in the circumstances of this case to give specific direction as to what is to be done, it is appropriate that the Commission be required to indicate how it will comply with the order that has been made.’¹⁰⁶

The court therefore ordered the Commission within two weeks to furnish an affidavit setting out the manner in which the order would be complied with. This affidavit was to be served on the parties and lodged with the court, where it would form part of the public record and any member of the public would be entitled to inspect it.

Directing governments to report to the public is a softer remedy than court orders requiring that government reports back to the court and that the court approve the government’s plan. In Fiss’s terms, the requirement of reporting to the public gives the government at least two more chances.

Level 2: Mandatory relief with reporting to the court for incompetent governments

Hansen, whose paper was primarily concerned with complex relief concerning conditions in custodial institutions, comments that ‘probably the most common reason for noncompliance is incompetence’. He contemplated that if the management ‘is sincerely interested in reform, technical assistance and personnel changes can have a dramatic effect’.¹⁰⁷ This is an important insight that is even more important in the context of developing democracies such as South Africa’s. In our view, it would be a mistake to limit the use of mandatory relief and supervisory jurisdiction to cases where government has made a more or less deliberate decision to defy the court and is intransigently opposed to constitutional rights. To be sure, such cases have occurred, particularly in the context of initial efforts to desegregate American public schools, but they are not the norm even in complex remedy cases in North America. As Hansen observes, unconstitutional conditions in custodial institutions are often not the result of a deliberate decision by a single official to defy constitutional norms, but rather the product of decades of neglect, inadequate budgets and inadequate training of public officials.

¹⁰⁵ *August v Electoral Commission* 1999 (3) SA 1 (CC).

¹⁰⁶ Paragraph 39.

¹⁰⁷ Hansen op cit note 9 at 232.

Even 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. The trial judge exercised supervisory jurisdiction not so much because he believed that the government was intransigent, but because he recognized that it would be difficult for the government to comply with the deadlines and he believed that supervisory jurisdiction and reporting requirements could assist the government in achieving the difficult goal. In this context, the emphasis placed by the minority judges in *Doucet-Boudreau* on the possibility of contempt citations in ensuring compliance misses the point. The general orders in *Doucet-Boudreau* most likely could not have been enforced through a contempt citation. They lacked the precision that the majority of the court in *Little Sisters*¹⁰⁸ recognized was necessary if a court order was to be enforced through contempt. Indeed, there was some ambiguity about whether the orders were declarations or injunctions.

The greater the degree of the government's incompetence or lack of capacity to provide for rights, the stronger the case for supervisory jurisdiction including requirements that the government submit a plan and progress reports for the court's approval. As the trial judge did in *Doucet-Boudreau*, all of the parties can be invited to provide comments on the report and to cross-examine the government's witnesses. In some cases, it may also be necessary for the judge to invite interveners with experience to participate or, as has been done in some American cases, for the judge to appoint experts as masters or auxiliary officials to assist both the courts and the parties in implementing the required rights. All of this may be novel compared to one-shot remedies such as damages, and it may be seen as impinging on the separation of powers. Nevertheless remedial activism is set in a different light when it is recognized as an attempt to remedy a lack of capacity that prevents the government from complying with the constitution. Supervisory jurisdiction with reports back to the court should not be seen as a punishment of government for defiance of the Constitution. Rather, it is simply a means of ensuring effective compliance with the Constitution, which must be the core concern of the courts.

Level 3: Detailed mandatory interdicts enforced by contempt proceedings for intransigent governments

Government intransigence towards constitutional rights and courts may, unfortunately, be a factor in some cases. Hansen comments that 'by far the most difficult problem in implementation of [structural] decrees is executive branch officials who are simply intransigent'. In such cases compliance will

¹⁰⁸ *Supra* note 54.

not occur 'in the absence of an active and determined judge'¹⁰⁹ who can credibly threaten and deliver punishment in the form of punishment for contempt. Attempts at persuasion and assistance have ended and the focus is on deterrence, punishment and the incapacitation of actors that have proven themselves to be thoroughly incompetent and/or intransigent or, in the words of Justice Iacobucci, 'have proven themselves unworthy of trust'.¹¹⁰ We agree with Hansen that the strongest measures must be reserved for the intransigent, but we disagree with any suggestion that the intransigent government is the only case for when supervisory jurisdiction and structural interdicts may be appropriate. As suggested above, the incompetent government is both a more likely problem and one that is more likely to benefit from the relatively gentle guidance provided by supervisory jurisdiction.

The main difference between remedies directed at an intransigent as opposed to an incompetent government relates to the need to ensure that the court's order is detailed and specific enough to ensure that prosecution for contempt is a viable option should the government not obey the court. The majority of the Supreme Court in *Little Sisters* stressed the need for injunctions to be clear and specific. In *Doucet-Boudreau*, the majority added that remedies had to be fair to the government. In order to achieve these goals, a judge who believes that the government may willfully disobey his or her order should be very specific and clear about what is required by the government. At this final stage of enforcement, issues of giving the government the flexibility to select the precise means to comply with the constitution and the options of having governments report to the public or even to the judge on their compliance or progress plans become much less important. At this stage, enforcement depends more on the parties bringing an application to determine if the government is in contempt of the order. It is at this final stage that the view of the minority in *Doucet-Boudreau*, that the contempt citation can be relied upon to ensure effective and meaningful remedies, becomes relevant. Nevertheless, the contempt threat will be illusory if the judge has not been able to get to a point where he or she has enough information both to make detailed orders and to know that non-compliance is the result of defiance that should be punished as opposed to incompetence.

CONCLUSION

The *TAC (No 2)* and *Doucet-Boudreau* cases affirm the legitimacy of structural interdicts and the retention of supervisory jurisdiction by the courts when necessary to ensure effective and meaningful constitutional remedies. There are some interesting parallels in both South Africa and Canada between the use of suspended declarations of invalidity and the maintenance of

¹⁰⁹ Hansen op cit note 9 at 233

¹¹⁰ *Little Sisters v Canada* supra note 54 para 257.

supervisory jurisdiction in complex remedial cases. Both devices recognize that constitutional justice in the modern world cannot always be achieved by a simple declaration of invalidity, that courts often want to give governments an opportunity to select the precise means to achieve constitutional compliance, and that judicially managed delay will sometimes be a necessity. In both instances, however, courts are obliged to ensure that there is eventual constitutional compliance and to minimize irreparable harm during any delay.

We have also suggested that when one is thinking about what remedy is appropriate, it may be helpful to explore the underlying reasons why governments have failed to respect constitutional rights. A remedy that may be appropriate in order to prompt an inattentive government to respect rights may not be appropriate if the government is not competent to deliver those rights. An intermediate device that may often be appropriate in cases where complex action is required to achieve constitutional compliance is for courts to require governments to report their compliance plans (and sometimes progress in implementation) to the public. We have also suggested that supervisory jurisdiction including the submission of compliance and progress reports to the courts may be an appropriate response to a lack of governmental competence or capacity to respect rights. Finally, the appropriate mix of remedies may change yet again in those hopefully rare cases when a government is prepared to defy rights. In such cases, the time will have passed for plans to be submitted either to the public or the court or for giving the government flexibility in deciding how exactly to comply. The focus will rather be on crafting detailed remedies that can fairly be enforced through the contempt sanction.

Different remedial routes may be appropriate in different circumstances, but the ultimate destination that the courts should insist upon is compliance with the Constitution. In the final analysis, the test is one of effectiveness. Court orders that are not effective undermine respect for the courts, for the rule of law, and for the Constitution itself.