Constitutional Litigation against Institutions: Remedies

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Since its founding, the *Ottawa Law Review* has been devoted to excellence in legal scholarship and to the promotion of a diversity of opinion on current legal issues. In keeping with this tradition, in 2009 we launched our annual Speakers Series wherein the *Review* hosts a lunch lecture by a recently published author to discuss his or her article. Following the lecture, commentary is provided by a guest speaker and a question and answer session with the audience is held.

On November 17, 2010 the *Review* hosted The Honourable Paul Rouleau, who presented his article, "*Doucet-Boudreau*, Dialogue and Judicial Activism: Tempest in a Teapot?"† Following Justice Rouleau's lecture, Professor Joseph Magnet provided commentary. Professor Magnet's commentary focused on the inherent value of supervisory remedial orders of the type in *Doucet-Boudreau* as well as the importance of engaging unrepresented stakeholder communities in the process of achieving long-term institutional change. The following Comment is an expanded and adapted version of Professor Magnet's commentary exploring these themes.

Depuis sa création, la *Revue de droit d'Ottawa* vise l'excellence dans la recherche et l'érudition en droit en plus de promouvoir la diversité des opinions sur des questions d'actualité juridique. Dans cette optique, nous avons lancé en 2009 notre série de conférences annuelle dans le cadre de laquelle la *Revue* organise un déjeuner-causerie mettant en vedette un auteur qui vient discuter d'un article qu'il ou elle a publié dans la *Revue*. À l'issue de cet exposé, un conférencier invité donne son point de vue sur le sujet abordé, après quoi une période de questions et de réponses a lieu avec l'auditoire.

Le 17 novembre 2010, la *Revue* a invité l'honorable Paul Rouleau à présenter son article « *Doucet-Boudreau*, Dialogue and Judicial Activism: Tempest in a Teapot? »‡. À l'issue de l'exposé offert par Monsieur le juge Rouleau, c'est le professeur Joseph Magnet qui s'est chargé d'en faire le commentaire. Les propos du professeur Magnet portaient sur la valeur inhérente des ordonnances correctives en matière de surveillance du type de celle imposée dans *Doucet-Boudreau* de même que sur l'importance d'impliquer des communautés d'intervenants non représentés dans le processus de réforme institutionnelle à long terme. Dans le commentaire qui suit, on peut lire une version allongée et adaptée de la présentation du professeur Magnet sur ces thèmes.

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† The Honourable Paul S Rouleau and Linsey Sherman, "*Doucet-Boudreau*, Dialogue and Judicial Activism: Tempest in a Teapot" (2009-10) 41:2 Ottawa L Rev 171.

‡ L'honorable Paul S Rouleau et Linsey Sherman, « *Doucet-Boudreau*, Dialogue and Judicial Activism: Tempest in a Teapot » (2009-10) 41:2 RD Ottawa 171.

I

Justice Paul Rouleau's article, "Doucet-Boudreau, Dialogue and Judicial Activism: Tempest in a Teapot?"[1] concerns judicial activism. It is perhaps worth remarking that, as a lawyer, Paul Rouleau was the epitome of an activist—meaning that Paul Rouleau was a disturber of the status quo. He has been an activist in the best traditions Canada has produced: strategic, daring, disciplined, thoughtful and, most importantly, an effective agent of change.

Paul Rouleau is the activist lawyer who, a generation ago, brought to the courts the first successful constitutional case seeking a mandatory injunction against a governmental institution.[2] In 1986, he won a court order forcing a school board to fund and build school facilities for the Franco-Ontarian minority—a first victory of this kind.

The order Paul Rouleau won was one with detail and muscle. The Court required not only that equal facilities be built for the Franco-Ontarian minority but also that the school board create industrial arts and shop programmes.[3] At the time—and still today—it was a startling order to make against the public sector: it was startling in its mandatory force, magnitude and detail. In all of these aspects, it was a first in Canadian minority rights cases.[4]

Paul Rouleau's 1986 case is also something of a peculiarity. Few like it succeeded thereafter. A second school board case to be found among the exceptional subsequent cases, where similar orders were given, came ten years later—another case argued by Paul Rouleau.

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1 The Honourable Paul S Rouleau and Linsey Sherman, "*Doucet-Boudreau*, Dialogue and Judicial Activism: Tempest in a Teapot" (2009-2010) 41:2 Ottawa L Rev 171.

2 *Marchand v Simcoe County Board of Education* (1986), 55 OR (2d) 638 (Ont H Ct J), 29 DLR (4th) 596 [*Marchand No 1* cited to OR]; *Marchand v Simcoe County Board of Education (No 2)* (1987), 61 OR (2d) 651 (Ont H Ct J), 44 DLR (4th) 171 [*Marchand No 2* cited to OR].

3 *Marchand No 1*, *ibid* at 663 Sirois J. stated:

> (3) As against the Defendant Board:
>
> (a) a mandatory order requiring the defendant Board to provide the facilities and funding necessary to achieve at L'école Secondaire Le Caron the provision of instruction and facilities equivalent to those provided to English language secondary schools by the defendant Board in the County of Simcoe;
>
> (b) a mandatory order requiring the defendant Board to establish at the site of L'école Secondaire Le Caron facilities for industrial arts and shop programmes equivalent to those provided by the Defendant Board in the English language secondary schools in the County of Simcoe[.]

4 *Conseil des écoles séparées catholiques romaines de Dufferin et Peel v Ontario (Ministre de l'éducation et de la formation)* (1996), 30 OR (3d) 681 at 685 (Ont Div Ct), 136 DLR (4th) 704 [*Conseil des écoles* cited to OR]. Hawkins J preferred the following form of order:

> (b) an order that the Ministry of Education and Training, in accordance with its Capital Grant Process, and notwithstanding the moratorium imposed by the Minister, issue the final approval for the Sainte-Famille project, and that upon receipt of the required documentation verifying the expenditures made, disburse the appropriate grant amount to the Dufferin-Peel Roman Catholic Separate School Board, up to the total of $10,182,752.

Importantly, both cases were referred to with approval by the Supreme Court of Canada in *Doucet-Boudreau v Nova Scotia (Minister of Education)*.[5] Paul Rouleau's cases provided the Supreme Court of Canada with concrete examples of what could be accomplished for minorities in the courts. They stimulated a search for deep theoretical justification for what seemed to herald a new approach to remedial orders in minority rights cases against institutions of government.

A majority of the Supreme Court of Canada approved a new approach to remedial orders in *Doucet-Boudreau*. The Supreme Court went on to expound the jurisprudential underpinnings for this development.

II

Paul Rouleau's 1986 case was *Marchand v Simcoe County Board of Education*.[6] *Marchand* and *Doucet-Boudreau* are very different with respect to the remedial orders granted by the courts. *Marchand* concluded with a "hard" mandatory order (an order that commands: "Do it. Do it now. Build. Spend."). By contrast, *Doucet-Boudreau* concluded with a "soft" mandatory order.[7] The order was an invitation to dialogue in the form of a command ("Do it, but come back after you've tried and tell me how it's going, and if there are some difficulties, we'll have to work them out.").

Because the order in *Doucet-Boudreau* was a soft invitation to discuss, behind which lies a hard understanding that things are going to change, the order required real dialogue. This is dialogue quite different than the well-known dialogue between court and government that Professor Hogg and his followers described in the 1990s.[8] The order in *Doucet-Boudreau* implied that a dialogue would take place between the plaintiff and the defendant; more specifically, it implied that a dialogue would take place between the plaintiff *communities* and the defendant *communities*.

I will address the concept of plaintiff and defendant communities shortly. For now I will simply stress that the *Doucet-Boudreau* order invites, anticipates and impliedly requires discussion between the plaintiff, defendant and their various supporters to determine what is necessary and possible to bring the institution affected into conformity with the constitutional requirements specified in the court's liability ruling.

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5 2003 SCC 62 at para 29, [2003] 3 SCR 3 [*Doucet-Boudreau*].

6 *Marchand No 1* and *Marchand No 2*, *supra* note 2.

7 *Doucet-Boudreau*, *supra* note 5 at para 7. The Supreme Court approved an order that contained the following requirements:

> 6. The Respondents shall use their best efforts to comply with this Order.
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> 7. The Court shall retain jurisdiction to hear reports from the Respondents respecting the Respondents' compliance with this Order. The Respondents shall report to this Court on March 23, 2001 at 9:30 a.m., or on such other date as the Court may determine.

8 Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75. See also Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited—Or 'Much Ado About Metaphors'" (2007) 45:1 Osgoode Hall LJ 1.

The commonality between Paul Rouleau's school board cases and *Doucet-Boudreau* is a plaintiffs' attack on institutions. In each case, the plaintiffs wanted to reform large institutions of government. In some of these cases, the plaintiffs seek large-scale and disruptive institutional reform. If the court agrees with the plaintiffs in these cases, tens of thousands of people will be affected, hundreds of millions of dollars will be re-allocated and social change will follow.

This is why some minority rights cases tend to be so controversial. The court has found that, measured against constitutional norms, the way things are is illegitimate. The cases unsettle expectations of many people and groups about the way thing are going to be. These expectations have been formed on the basis of how things have been for a long time. People have become used to the way things are. This is going to have to change. Inertia is a real headwind to change. Some people involved in the institution will do little, nothing or they will simply resist change.

Moreover, many people's interests are entrenched in the *status quo* of the affected institution. Inertia becomes allied with significant social consensuses about how things should work and also with entrenched interests in how they have been working.

III

Typically, institutional reform cases are multi-party cases. Interestingly and importantly, not all stakeholders who will be affected by the court's rulings are represented before the court. For example, the school board cases involved not only the minority language community, the school board and the province—all of whom were before the court; they also affected the municipality and its zoning commissions, asset corporations, planning commissions and other municipal emanations. Nevertheless, neither the city nor any of its governmental structures were before the court. The cases profoundly affected janitorial, teacher, administrative, support and managerial jobs. Notwithstanding, none of the unions' representatives of these interests were before the court. The cases affected the structuring of the Department of Education and the jobs of its officials. Still, the public sector unions were not represented in the court.

These examples of unrepresented affected interests can be multiplied as befits the reality of reorganizing a large institution, and the impact this will inevitably have on the surrounding environment, economy and society.

In Paul Rouleau's cases in the 1980s and 1990s, most of the interests just mentioned were not represented before the court. That was true even though the interests of those parties were affected in important ways by the court orders Paul Rouleau obtained.

The point I am making here about court orders affecting interests that are unrepresented is relevant to the fairness and legitimacy of the court orders. That is quite obvious. While important, this aspect of the point is not overriding. This is because procedural innovations in institutional litigation should be able to overcome any fairness or legitimacy deficits that may have been occurring to date.

There *are* procedural deficits, and they should be overcome. This implies that, as the logic of *Doucet-Boudreau* is explored in subsequent jurisprudence, counsel and courts should experiment with novel forms of notice, the appointment of representative parties, or innovations in class proceedings. Other procedural reforms would be warranted as well. Counsel and courts should experiment and innovate to ensure that, from all points of view, the proceedings and resulting orders are perceived as fair and legitimate.

I presume that this innovation, which is now in its infancy, will gather strength. I hope this will be sooner rather than later. I expect that when it does, and is refined, it will drain off the appeal of many complaints about judicial activism.

Procedural deficits of the kind I have described give a certain cachet of truth to the backlash against what conservative critics call "judicial activism." While the critics do not limit themselves to the procedural dimension, preferring to cast their attack in more general democratic terms, considered from the perspective of procedural deficits, the conservative critics have perched their complaints about judicial activism on a foundation that supports some of what Morton and other conservative commentators have written.[9]

IV

The point I have made—that some interests affected by constitutional litigation against institutions have been unrepresented before the courts—has significance beyond drawing attention to procedural deficits in institutional reform cases and the importance of innovating to correct them. The larger significance highlights the behaviour of the same stakeholders who are not represented. In many minority rights cases, the reason why a rights violation occurred—the reason why minorities resorted to litigation in the first place—originates with the lack of concern, foot-dragging and resistance from the very stakeholders who are not represented before the court.

The behaviour of those stakeholders is a central concern that litigation hopes to change significantly. The hard truth is that for institutional change to be as rapid

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9 FL Morton, "Dialogue or Monologue?" in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 111 at 117; Christopher P Manfredi & James B Kelly, "Misrepresenting the Supreme Court's Record? A Comment on Sujit Choudhry and Claire E Hunter, 'Measuring Judicial Activism on the Supreme Court of Canada'" (2004) 49:3 McGill LJ 741 at 762-63; Rainer Knopff, "How Democratic is the Charter? And Does it Matter?" in Joseph Eliot Magnet et al, eds, *The Canadian Charter of Rights and Freedoms: Reflections on the Charter After Twenty Years* (Markham: LexisNexis Butterworths, 2003) 199; Mark Rush & Christopher Manfredi, "From Deference and Democracy to Dialogue and Distrust: The Evolution of the Court's View of the Franchise and Its Impact on the Judicial Activism Debate" in Joseph Eliot Magnet & Bernard Adell, eds, *The Canadian Charter of Rights and Freedoms after Twenty-Five Years* (Markham: LexisNexis, 2009) 19; Rainer Knopff & Andrew C Banfield, "'It's the Charter, Stupid!': The Charter and the Courts in Federal Partisan Politics" in Joseph Eliot Magnet & Bernard Adell, eds, *The Canadian Charter of Rights and Freedoms After Twenty-Five Years* (Markham: LexisNexis, 2009) 37.

and as widespread as possible, the attitudes and behaviours of recalcitrant stakeholders need to change. It the behaviour of those stakeholders that is at issue, and they are not even before the court!

To illustrate, it is one thing for courts to order religious schools to admit gay and lesbian students. It is another matter to make those schools a welcoming environment for gay and lesbian students—a place where gays and lesbians will not face unnecessary obstacles to full participation or experience forms of social ostracism; where they will have as satisfying an educational experience as possible; and where they will learn as much as possible. For this to happen, the attitudes and behaviours of teachers and managers have to change. That is something that command-and-control orders from a court cannot accomplish—at least not quickly or precisely, or perhaps not at all.

For remedial outcomes to be widespread and for change to be effective, *recalcitrant stakeholders have to play a role.* The people who will do the heavy lifting and who will ultimately operate the reformed institution must buy into the agenda for change.

The best way for this to happen is for those stakeholders to embrace changes ordered by the court because they see it as in their interests. If this can be brought about, it will motivate the people who will operate the institutional environment to take ownership of constitutionally required changes, and to accelerate them.

For this to happen, dialogue must take place in a manner that brings the resistant and unrepresented stakeholders into the conversation. These people normally are, or will become, allied with the plaintiffs or defendants. This is what I mean when I refer to the concept of the plaintiff and defendant *communities*. The plaintiff and defendant communities include a wide range of allied interests that will be affected by the outcome of the litigation—many of which are not represented before the court.

Moreover, the plaintiff and defendant communities are built from a heterogeneous set of interests. The dissident stakeholders have a unique set of interests peculiar to them—their jobs, careers, opportunities for advancement and so forth. They have their own representative institutions including unions, associations, corporate and governmental structures, and more. They have their own long-standing positions on aspects of the change that the court is asked to order. Their interests in their jobs and careers and their associations' positions concerning these may be peripheral to the central dynamic of change, which is to bring about constitutionally compliant institutional reform. Nevertheless, their participation and support are necessary if rapid, widespread and effective change is to occur.

To illustrate, litigation that tries to force a wider range of bilingual services from a governmental institution is unlikely to bring public sector unions before the court. Yet it is probable that, if successful, such litigation will profoundly affect public sector unions, union members' jobs and opportunities for advancement. The reason for this is because bilingualism requirements for hiring and advancement are likely to be required and this will profoundly affect the careers of existing unionized stakeholders.

Participants of institutions that are the subject of court-ordered reform will always find ways and means to resist change. For change to be as rapid, widespread and effective as possible, these individuals and their representative unions or other institutions must buy into the new regime, which the court's liability rulings and remedial orders try to bring about. Without their active buy-in and support, change will be less rapid, less extensive and less effective than it might otherwise be. In some cases, their lack of support or their active resistance may frustrate change.

The goal of remedial innovation of the kind foreseen by *Doucet-Boudreau* and its progeny is to have remedial orders that produce effective change in line with the Court's liability ruling.[10] The hard truth is that in constitutional litigation against institutions, the court can lead the parties and their allied interests to water, but it cannot make them drink. The issue therefore becomes: how best to shape remedial orders so that the change ordered is seen as in the interests of the former recalcitrant stakeholders.

V

Institutional reform cases generally involve plaintiff and defendant communities that are of significant size. This is especially true if their allied unrepresented stakeholders are conceived to be part of the community of interest.

As with all large communities, the plaintiff and defendant communities will contain a diversity of views and agendas. Large communities tend to be riven with factionalism. Power struggles will be existent in each community.

The court's liability ruling means that things cannot continue as they have. The finding of constitutional violation disrupts the status quo in both plaintiff and defendant communities. The court's finding of constitutional violation means that the structure of power in both plaintiff and defendant communities is going to change. This means that new opportunities and new risks will appear for people in both communities.

An example may help to clarify. The context surrounding the first significant school case in Ontario, *Reference re Education Act of Ontario and Minority Language Education Rights*,[11] provides useful perspective. The Court's liability ruling was a declaration that Ontario's *Education Act* violated minority language education rights guaranteed by s. 23 of the *Charter of Rights* in that the *Act* did not accord to the French linguistic minority in Ontario the right to manage and control its own French-language classes of instruction and French-language educational facilities.

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10 This is what the Supreme Court was getting at when it wrote in *Doucet-Boudreau*, *supra* note 5 at para 25 that "a purposive approach to remedies requires 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" [emphasis in the original].

11 (1984), 47 OR (2d) 1, 10 DLR (4th) 491 (Ont CA).

In the wake of this ruling, existing school boards across Ontario were dismembered and reconfigured—a huge enterprise considering that education is the second largest item in the gross general expenditure of the province.[12] In Ottawa, for example, four new structures were created as replacements for the then extant public and Catholic boards of education. Thousands of existing administrators, directors of education, school principals, teachers and others had their settled career expectations disrupted. Hundreds of exciting new administrative, executive and bureaucratic opportunities opened up. Some existing positions were put at risk. Millions of dollars were reallocated within the new structures. There was widespread institutional disruption, destruction and creation.

With this large scale enterprise came many new opportunities for many people in the plaintiff and defendant communities, and many new risks for others. The opportunities and risks related to employment, advancement and career were quite beside the point of the Court's liability ruling. The career opportunities and risks that appeared were tangential to the purpose for which the plaintiffs brought their constitutional challenge and irrelevant to the ends that they were seeking to achieve with it.

The Court's liability ruling created uncertainty. This is the paradigmatic situation in institutional reform cases. The disruption, destruction and creation that will have to happen in the wake of the court's ruling require a great deal of dialogue, discussion, and debate within, between and beyond the plaintiff and defendant communities. The stakeholders do not know what remedies will ultimately emerge or be acceptable to the court.

The stakeholders have to negotiate through the uncertainties created by the court's liability ruling. They will be searching for solutions responsive to the court's liability ruling about how the existing situation does not comport with constitutional standards. Some of these solutions will not emerge until the power of discussion and negotiation is unleashed. Some of the solutions devised might not be before the court in the sense that the plaintiffs might not have developed them in the remedial phase of the trial.

Factions within the defendant community may discover that they have more in common with the elements of the plaintiff community than with each other. For example, bureaucrats in the Department of Education may have proposed plans to build or enhance a minority school system that were not considered by the plaintiff or the court, but that provide a very attractive solution to both. Minority activists within the defendant communities may have been blocked from advancing those plans, given the intransigence of the Ministry, or sections within it, prior to the court's finding of a constitutional violation. Although these officials are part of the defendant communities, they may find more natural allies within the plaintiff's communities, where like-minded minority activists are to be found.

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12 Ontario Ministry of Finance, Public Accounts of Ontario 2009-10, online: <http://www.fin.gov.on.ca/en/budget/paccts/2010/ 10_cfs.html#cfs6>.

As well, other elements in the defendant communities will be motivated by the opportunities for advancement which always appear when large organizations are restructured. Whether or not they care about achieving the purposes of the court's liability ruling and whether or not they were former foot-draggers, they will now see an opportunity to advance their own personal and corporate interests. This gives them a personal stake in participating in the discussions and dialogue that must take place. Given their new opportunities to advance and the new risks to their former status, they may become enthusiastic architects of the emerging new regime.

If these elements in the defendant communities are given effective voice in designing opportunities and risks in which they are personally invested, they may become motivated to embrace or to take ownership of the coming change. This is extremely important for making the coming change required by the court's liability ruling as widespread, rapid and effective as it can be. Interests can be harnessed to propel change forward, even though some of these interests may be motivated by forces that are by-products of and peripheral to the main thrust of the purposes behind institutional reform.

The significant point here is that the forces of resistance can be transformed into agents of change by manipulating the dialogue process. Manipulation or control of the dialogue process is squarely within the court's power when it issues a soft mandatory order of the *Doucet-Boudreau* variety. This implies that the court has a form of soft power to achieve constitutional ends not hitherto realized or fully exploited. It is a form of power that can be used to counteract the expected headwinds from inertia and recalcitrant stakeholders.

This point becomes doubly important in view of the reality that the desired, constitutionally mandated changes are unlikely to occur as rapidly, or to be implemented as widely and effectively as they might otherwise be, unless they are embraced by the people who will have to operate the reformed institutions. If the court is able to motivate these people to embrace and take ownership of the desired change, more effective remedial outcomes are likely to occur.

VI

I previously stated that the court's liability ruling creates uncertainty. Uncertainty can be very creative. Uncertainty is one of the greatest potential contributors to an effective remedial outcome that inhabits the supervisory remedies Justice Rouleau describes in his article.

Things are going to change; the court's liability ruling makes this clear. What remains uncertain is how they are going to change: how fast, how broadly and with what kind of detail. Within the uncertain environment lurks plenty of risk and opportunity capable of motivating individuals and factions. There is enough risk and opportunity to motivate people to build new coalitions across plaintiff and defendant lines.

The beauty of the soft supervisory remedy of the *Doucet-Boudreau* type is that it allows all the potential creativity inherent in the fluidity of the situation to mature.

It allows for new coalitions to form within and between plaintiff and defendant communities. It allows for the designing of solutions responsive to the court's liability ruling that the plaintiff may not have considered. It allows for new coalitions to emerge that will implement the solutions chosen. It allows for peripheral factions within the plaintiff and defendant communities to identify new career and other opportunities and risks before them, and to ally their interests with others in new coalitions for change, motivated by the happenstance opportunities for advancement that will occur.

Importantly, the dialogue that must take place is court-supervised. The court will have resources to stimulate productive forms of dialogue and coalition building. This implies that courts should experiment with novel forms of supervision and intervention to see what works best to wring from the fluidity of uncertainty all the creative potential inherent in the situation. The court is likely to discover innovations that help it bring about constitutionally required large-scale institutional change.

This is a resource that is more powerful than command-and-control orders to build something. It is more powerful because control of a supervised discussion in the shadow of a hard liability ruling for change contains the potential to motivate the individuals who will ultimately implement the change to want to do so. It contains power to adapt to the coming change so that the implementers of change will see constitutionally required change as in their interest and to their advantage. As the outlines of institutional reform take shape in the discussions, people will rise up to seize the opportunities to make change happen because they see it as advantageous. Others will join in because they realize that failing to seize the opportunity is simply too risky.

In his article, Paul Rouleau is gently critical of his own major achievement in the *Marchand* cases. He says that the mandatory order did not exploit all the remedial possibilities.

I believe Paul Rouleau is correct to assert that a *Doucet-Boudreau* type of supervisory order—an order that prolongs the moment of uncertainty by imposing a requirement of structured dialogue—might have been more creative and productive in bringing about institutional change than the hard command-and-control injunction the subsequent cases ultimately delivered. Uncertainty and dialogue in a changing environment are loaded with potential to achieve buy-in from hitherto recalcitrant elements in the institution that is the subject of an order to reform. This is itself sufficient to make supervised dialogue against the backdrop of a hard liability ruling the preferred remedy.

This is a lesson that has been learned by other constitutional systems that have tried to achieve change through constitutionally based command-and-control court injunctions. The United States, for example, has witnessed "a shift away from *command-and-control* injunctive regulation toward *experimentalist* intervention"[13] and process-focused remedies.

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13 Charles F Sabel & William H Simon, "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117:4 Harv L Rev 1015 at 1019 [emphasis in the original].

An implication of this conclusion is that counsel and courts should innovate with new forms of structured dialogue. They should try to exploit all opportunities to motivate the people who will have to operate the reformed institution to see that institutional change is in their interests.

A second implication of this observation is that counsel and courts must find ways of bringing all affected stakeholders before the court. Structured dialogue remedies should try to mix these stakeholders into the dialogue between plaintiff and defendant communities, which will necessarily occur in the remedial phase. This will create more opportunity and incentive for these stakeholders to take ownership of the solutions that emerge from the dialogue. If they do, better implementation is more likely to occur.

VII

The developments that Paul Rouleau describes in his article imply a sea change in Canadian constitutional theory and in the remedial practice of the courts in constitutional litigation against governmental institutions. All of this is deeply controversial. It has drawn fire from respectable conservative critics. As Paul Rouleau has described, those critics have had an impact to date.

There are very real procedural deficits involved in constitutional litigation against governmental institutions. The procedural deficits are easily classified as democratic deficits. The conservative critics, many of whom are good writers, have done this effectively.

This debate is unlikely to remain static or continue in its present form. The more court orders intrude into institutional design and practice, the more controversial this form of constitutional litigation will become. Constitutional litigation of this type will inevitably produce constituencies that will lose power, status and opportunity as a result of the cases, and these constituencies are likely to be, or become, disaffected. Proponents of constitutional litigation will have to be sensitive to the opportunities the process creates for losers to complain about the legitimacy of the process.

Morton and like-minded critics seize on the democratic deficit inherent in court-imposed solutions. Their points seem plausible to certain audiences and they do contain varieties of truth, albeit stated at a very general level, which can be misleading for that reason. The soft, innovative and expanded *Doucet-Boudreau* supervisory remedies of the type discussed in this paper should cut deeply into the underpinnings of the criticism. This is likely to be especially so if the supervisory remedies are improved by procedural innovations, as I have described.

Public law has long understood that democracy is a broader process than the deposit of ballots into the ballot box.[14] The most effective forms of democracy

14 *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at 252-57, 161 DLR (4th) 385.

occur in structured dialogues within institutional settings. Administrative law has been working this insight out for the past two hundred years.

Remedies of the type I have discussed unfreeze opportunities for dialogue that have become frozen within immobile institutions. The remedial process sets in motion a structured dialogue among the stakeholders. The court's liability ruling establishes a new constitutional baseline that the reformed institution must respect. The dialogue will determine the form and the details of the institution above that baseline. The dialogue will also determine how, by whom, and on what timeline the institution will be reformed. A soft remedy of this type leaves much room for negotiation as well as many risks and opportunities for the stakeholders.

This is democracy in action. It is set in motion by the court. It is stimulated by the court's forbearance when the court gives a gentler, longer-lasting supervisory remedy that implies or requires structured dialogue. This is enhanced democracy by which the court supplies a remedy for a democratic deficit built up in an ossified institution where democracy failed. Courts that act with these remedial principles in mind should be able to blanket the wind from their critics' sails.

Paul Rouleau has given us a masterful tour of developments in his article, as well as a penetrating look into the potential futures to which they could lead. We are grateful to him as a thinker—an activist thinker and an intellectual leader—for his important contribution to these emerging developments in minority rights cases and constitutional remedies.