

Constitutional Remedies in Administrative Proceedings: Supervision, striking sections, policing discretions, standards of review and prospects for the future

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This is a brief summary of some recent developments in the law of remedies for the purposes of this conference.

My fellow panel members will be examining certain particular areas of interest in the law of remedies, such as the ambit of s. 52 of the *Constitution Act, 1982* in administrative proceedings, the remedy of interim costs, damages claims and the remedy of delayed injunctions.

In this paper, I examine issues of supervision of remedies, when the court will police administrative discretions rather than striking down sections, interesting issues concerning the standard of review and prospects for the law of remedies in the future. I hope to highlight some of the major developments, flag issues for future consideration by the courts, and offer some practical tips for counsel prosecuting or defending *Charter* claims.

The supervision of remedies

In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*,¹ a 5-4 majority of the Supreme Court of Canada held that in certain circumstances, it will be “appropriate and just” for a court to remain seized of a matter under subsection 24(1) of the *Charter* in order to oversee the implementation of a remedy.

A major question for consideration is whether *Doucet-Boudreau* is a signal that the courts will be asserting a power of supervision over *Charter* remedies in a wide variety of cases. I think not. In my view, the facts of *Doucet-Boudreau* are very important and demonstrate that it will be only in rare cases that courts will exercise their newfound power to supervise s. 24 *Charter* remedies.

The Supreme Court in *Doucet-Boudreau* was concerned with the implementation of the right to minority-language instruction under s. 23 of the *Charter*. In this case, there was a long history of delays on the part of the Nova Scotia government in providing French-language secondary instruction and facilities in five communities in Nova Scotia. Combined with this was a significant assimilation rate for the French-language minority

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¹ 2003 SCC 62.

in those communities. In other words, the need for the remedy was pressing and it was necessary that the remedy quickly be made effective.

The trial judge, LeBlanc J. of the Nova Scotia Supreme Court, found that the claim for a remedy under s. 23 of the Charter was made out. There was a sufficient number of children to justify the establishment of homogeneous French-language secondary instruction and facilities. He ordered the government to use its best efforts to establish such programs and facilities by specified dates in each of the five areas.

LeBlanc J. went further. He decided to retain jurisdiction to hear reports from the province respecting its compliance with his order. He conducted compliance hearings in furtherance of that order. Only this aspect of his order was in issue on appeal.

The majority of the Nova Scotia Court of Appeal allowed the appeal and found that once the trial judge had decided the issues between the parties, he had no further jurisdiction under subsection 24(1) to oversee his order.

The majority of the Supreme Court of Canada allowed the appeal. Iacobucci and Arbour JJ., writing for the narrow 5-4 majority, found that the “appropriate and just in the circumstances” language found in ss. 24(1) of the *Charter* gives the court a wide discretion to fashion a remedy that works.

Traditionally, courts have been reluctant to supervise remedies. For example, this has been a traditional bar to specific performance in the law of contract. However, in the view of the majority of the Supreme Court, on occasion *Charter* remedies “may require novel and creative features when compared to traditional and historical remedial practice” because “tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand”.²

The majority upheld the supervision order made by LeBlanc J. It was aimed at vindicating the rights of the *Charter* complainants. The order took into account the role of the courts in our constitutional democracy by leaving the decisions concerning the means to implement the order to the executive branch of the government. The order did not take the court beyond the functions and powers commonly exercised by courts.³ Nor did it undermine the ability of a party to launch an appeal and thus, did not violate the doctrine of *functus officio*. Finally, in the circumstances of this case, the remedy was clear enough to allow the government the ability to participate fairly in the proceedings.

² *Ibid.*, at para. 59.

³ For example, the Supreme Court analogized to bankruptcy proceedings, where courts exercise a high degree of supervision.

In my view, this type of supervisory remedy will be granted very rarely. The need for a supervisory remedy is likely only where the court has made an order that government perform some positive steps to implement *Charter* rights. Such mandatory orders have been quite rare. Even in the rare case where a mandatory order is made, it is clear that a supervision order does not have to be made.⁴

The Supreme Court was not explicit about when supervisory orders should be made. Given the emphasis on vindicating the right at stake, it would seem that a supervisory order should only be made when it is absolutely necessary, such as where the discretion of the government regarding how to carry out a mandatory order should be carefully guided either because that discretion deals with certain important matters that go to the heart of the right involved or because the particular government has shown that it has been quite recalcitrant on the matter.⁵

Arguably, both factors were present in *Doucet-Boudreau*. The discretion of the government regarding how to carry out the order that French language schools be set up arguably must be guided carefully in order to ensure that the concerns about assimilation are adequately and promptly met. Section 23 rights are also quite nuanced and detailed, involving such matters central to the s. 23 right such as the facilities that must be built and the management systems that must be put in place, and so there is a good case for guiding the government's discretion. Finally, and perhaps most important in the case of *Doucet-Boudreau*, the government in question had neglected its constitutional obligations over a period of several years, with assimilative pressures threatening the community – it was necessary to impose a supervision regime in order to ensure that the government implements the s. 23 right completely. Without a supervision regime, there would be risk that the s. 23 right would not be fully implemented in a prompt way, with the irreparable harm of assimilation eventuating. Therefore, in the relatively unique circumstances of *Doucet-Boudreau*, a supervisory remedy was required.

The Supreme Court also emphasized the remedial nature of the s. 23 right, the fragile nature of the s. 23 right (if it is not vindicated quickly, the minority language community will disappear), the fact that the s. 23 right is “unique”, and the positive nature of the remedy.⁶

⁴ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Auton v. British Columbia (Attorney General)*, 2002 BCCA 538.

⁵ Compare *Vriend v. Alberta*, [1998] 1 S.C.R. 493, where the Court adopted the relatively intrusive remedy of “reading in” in a case involving a recalcitrant government.

⁶ *Supra*, n. 1, at paras. 26-29.

What we are seeing in *Doucet-Boudreau* is a constellation comprised of extreme circumstances and an unusual right, a constellation which made a supervisory remedy palatable to the Supreme Court.

In my view, rare will be the case where supervisory regimes are warranted and most lower courts would be reluctant to take on the burden of supervision unless it were absolutely necessary on the facts of the case.

However, *Doucet-Boudreau* may signal a liberalizing of the law of remedies in two respects. At the end of this paper, I discuss one possible area of liberalization – the provision of a “recipe” for the granting of s. 24(1) *Charter* remedies. Another possible area of liberalization may be in the area of mandatory remedies or so-called “structural remedies” against government under s. 24(1) of the *Charter*. With the concern about enforceability of such remedies lessened as a result of the recognition of a judicial power to supervise remedies perhaps such remedies will be more forthcoming, with the result that certain of the “positive” aspects of *Charter* rights will be more readily asserted by *Charter* claimants.

Striking sections and the policing of discretions

A key question in the law of *Charter* remedies is how courts should deal with an administrative regime that causes constitutional violations. Should courts deal with exercises of administrative discretions that violate constitutional rights on a case by case basis? Or should courts find the statutory scheme constitutionally deficient and strike down one or more sections in the administrative regime?

Very little guidance has been given on this issue. It is the purpose of this paper to highlight this issue in order to encourage counsel prosecuting or defending *Charter* claims to be aware of it and to make submissions on it. Many do not seem to address their minds to it and, in fact, many never address the issue at the outset in their notices of application or in their factums.

The approaches of the Supreme Court on this issue have been somewhat inconsistent. In the area of the criminal law, the Supreme Court had to deal with this issue fairly early on in the life of the *Charter* when considering a deficient search provision⁷ and minimum sentence provisions in the *Criminal Code* – should it strike the sentencing provision or leave it to prosecutors to conduct themselves so the minimum sentence provision would

⁷ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

never be relied upon in circumstances where it would constitute cruel and unusual punishment?⁸ The Supreme Court, those cases, answered it with a resounding “no”.

In a relatively recent decision in the criminal context, the Supreme Court found a legislative regime for law office searches deficient and held that it was appropriate to strike it down rather than to rely upon the actors within the regime to obey *Charter* principles.⁹

However, it seems that outside of criminal contexts, courts will occasionally rely upon the discretion of administrative officials in order to ensure that *Charter* breaches are not present and will not strike down regimes that are arguably deficient.

Perhaps the most noteworthy example of this occurred in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*.¹⁰ The *Charter* complainant in that case, a lesbian and gay bookstore that imported materials from the United States, found that much of its material failed to reach it due to an unpredictable and, in its view, arbitrary regime for the inspection and review of imported material by Canada Customs personnel. It alleged breaches of ss. 2(b) and 15 of the *Charter*.

Although finding *Charter* violations, the majority of the Supreme Court did not strike down any of the legislative regime, and instead considered it appropriate merely to set out a number of principles by which Canada Customs should operate in the future. The Supreme Court did not grant any form of supervision remedy similar to what was granted in *Doucet-Boudreau*, but such a remedy does not appear to have been sought.

Another recent example is found in *R. v. Jarvis*¹¹ and *R. v. Ling*¹² in which the Supreme Court considered the constitutionality of income tax requirements and demands under ss. 231.1 and 231.2 of the *Income Tax Act*. The Supreme Court held that regulatory and spot-check searches, such as income tax audits, under these provisions were constitutional but that such searches would not be constitutional if they were used for the purpose of acquiring evidence (without satisfying the *Hunter v. Southam* reasonable and probable grounds) for criminal proceedings during a criminal investigation.

Therefore, these sections under the *Income Tax Act* authorize both constitutional and unconstitutional behaviour. It seems, however, from the Court’s rulings in *Jarvis* and *Ling* that that does not open up the possibility of an attack. Instead, one is to examine the procedures taken under the sections and assess the constitutionality of the

⁸ *R v. Smith*, [1987] 1 S.C.R. 1045.

⁹ *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, [2003] 3 S.C.R. 209.

¹⁰ [2000] 2 S.C.R. 1120.

¹¹ [2002] 3 S.C.R. 757.

¹² [2002] 3 S.C.R. 814.

procedures themselves. Just because a section can be used in an unconstitutional way does not mean that the section itself is unconstitutional.

What are the criteria for determining whether to attack the particular exercise of the administrative discretion under the section or the section itself? This is unknown and, as can be seen, the Supreme Court seems to be on different sides of the issue, offering little guidance on it. Although statements against leaving the issue of *Charter* compliance to the discretion of criminal prosecutors can be contrasted with what the Supreme Court did in *Little Sisters* – perhaps leading us to conclude that there is a criminal-civil distinction in this area – the Supreme Court has not confirmed this as yet.

As a practical matter, attacking the administrative discretion in a particular case is more attractive to a *Charter* challenger. Most judges are judicial minimalists and do not like to decide cases in ways that have broad ramifications. Striking down a particular section has potential ramifications for many more cases than striking down an individual discretion in a particular case. *Charter* challengers are well-advised to attack individual exercises of discretion under a statutory regime rather than the regime itself. Often asking for less accomplishes more.

Standards of review concerning constitutional questions

There has been a plethora of cases concerning the standard of judicial review of decisions of administrative tribunals. Some clarity has emerged, though there are critics of this jurisprudence, even in the Supreme Court of Canada.

Alongside of this development is the recent decision of the Supreme Court in *Housen v. Nikolaisen*¹³ concerning how trial judgments are to be reviewed. *Housen v. Nikolaisen* has been applied in judicial review proceedings in support of holdings that findings of fact and findings of mixed fact and law by administrative tribunals should receive substantial deference.¹⁴

What about decisions of administrative tribunals that have constitutional content? What about first instance decisions of trial courts that have constitutional content? What is the standard of review?

In this area, it would seem that there is some confusion and uncertainty and some clarification from the Supreme Court of Canada would be helpful.

¹³ [2002] 2 S.C.R. 235.

¹⁴ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2002] 4 F.C. 3 (C.A.).

In *Canada (Attorney General) v. Misquadis*,¹⁵ Human Resources Development Canada refused to enter into Aboriginal Human Resources Development Agreements with organizations mandated by certain aboriginal communities. The Federal Court Trial Division held that the refusal constituted a violation of s. 15 of the *Charter*. The Federal Court of Appeal, however, held, applying *Housen v. Nikolaisen*, that the standard of review of that decision, a decision of mixed law and fact, was a matter on which the Federal Court of Appeal should defer.¹⁶ The Court stated that *Housen v. Nikolaisen* “applies to Charter cases in the same way as to other cases”.¹⁷

The Federal Court of Appeal is not alone in this view. Two other Courts of Appeal support its decision and both of those decisions are cited by the Federal Court of Appeal in *Misquadis*. In both *R v. Coates*¹⁸ and in *R. v. Chang*,¹⁹ the Ontario Court of Appeal and the Alberta Court of Appeal respectively adopted deferential approaches to questions of mixed fact and law.

In another remedial area of the Charter, namely the exclusion of evidence under s. 24(2) of the Charter, the Supreme Court of Canada has long held the view that decisions by trial judges on questions of mixed fact and law (*i.e.*, whether evidence should be excluded or not) are subject to high levels of deference²⁰, though in some cases the standard is expressed at different levels.²¹ The Court has made similar statements concerning other classic mixed fact and law questions with constitutional

¹⁵ 2003 FCA 473.

¹⁶ *Ibid.*, at para. 16.

¹⁷ *Ibid.*

¹⁸ [2003] O.J. No. 2295, at para. 20 (C.A.): “The decision in *Housen*, *supra*, stressed very strongly the need for great caution and deference on the part of appellate courts when they review the assessment of facts by a trial court. The rule in *Housen*, *supra*, does not, however, preclude an appellate court from identifying errors in the findings of fact where those errors are sufficiently palpable and important and have a sufficiently decisive effect that they would justify intervention and review on appeal: *Prudhomme v. Prudhomme*, [2002] S.C.C. No. 85.”

¹⁹ 2003 ABCA 293, at para. 7: “An appeal against a determination of whether a private citizen was acting as an agent of the state or whether s. 8 of the *Charter* was violated involves the application of a legal standard to a set of facts, which raises a question of mixed fact and law for which the standard of review lies along a spectrum: *Housen v. Nikolaisen* (2002), 286 N.R. 1, 211 D.L.R. (4th) 577, 2002 SCC 33 at para. 36.”

²⁰ *R. v. Buhay*, [2003] 1 S.C.R. 631, at paras. 44-45. The appreciation of whether the admission of evidence would bring the administration of justice into disrepute “is a question of mixed fact and law as it involves the application of a legal standard to a set of facts” and “[t]his question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law”.

²¹ Compare the standard discussed in *Buhay*, *ibid.*, with the standard expressed in *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 68 (adopted later in *R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 35): “some apparent error as to the applicable principles or rules of law or has made an unreasonable finding”.

content, such as whether a confession is voluntary and thus compliant with s. 7,²² whether a press ban or sealing order should be made,²³ whether a prosecution constitutes an abuse of process under s. 7²⁴ and whether reasonable and probable grounds are present.²⁵

However, there are authorities that seem to the contrary.

How do we reconcile the language of deference in these cases involving decisions with constitutional content with the statement of the majority of the Supreme Court in *Doucet-Boudreau* that “[d]eference ends, however, where the constitutional rights that the courts are charged with protecting begin”?²⁶

There have been suggestions that review of “social” or “legislative” facts should be subject to a standard lower than palpable and overriding error.²⁷ In the words of the Supreme Court, “an appellate court may interfere with a finding of a trial judge respecting a legislative or social fact in issue in a determination of constitutionality whenever it finds that the trial judge erred in the consideration or appreciation of the matter.”²⁸ This makes sense: the rigid application of that rule would deny appellate courts their proper role in developing legal principles of general application.²⁹

For example, determinations concerning the scope of a Charter right, which are often part and parcel of the question of the application of Charter to a set of facts (i.e. a question of mixed fact and law) are subject to a standard of correctness.³⁰

In *Westcoast Energy Inc. v. Canada (National Energy Board)*,³¹ the majority of the Court ruled that questions of mixed law and fact are to be accorded some measure of deference, but not in every case. The majority held that it would be particularly inappropriate to defer to a tribunal whose expertise lies completely outside the realm of

²² *R. v. Oickle*, [2000] 2 S.C.R. 3, para 22.

²³ *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, paras. 188-189.

²⁴ *Semle, R. v. Regan*, [2002] 1 S.C.R. 297. The Supreme Court held that appellate courts were entitled to intervene with the trial judge's finding of facts because of fundamental errors of principle and some palpable and overriding errors, though one could fairly state that a less deferential standard of review was in fact applied.

²⁵ *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 30.

²⁶ *Doucet-Boudreau*, supra, n. 1, para. 36, citing McLachlin J. in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136.

²⁷ *RJR*, *ibid.*, at para. 80, *per* La Forest J. dissenting.

²⁸ *Ibid.*, at para. 81.

²⁹ *Ibid.*, at para. 80. See also *Dunagin v. City of Oxford, Mississippi*, 718 F.2d 738 (1983) (*en banc*), cert. denied, 467 U.S. 1259 (1984), cited in *RJR*.

³⁰ *R. v. Ngo*, (2003) 175 C.C.C. (3d) 290, 2003 ABCA 121.

³¹ [1998] 1 S.C.R. 322.

legal analysis on a question of constitutional interpretation. In its view, questions of this type must be answered correctly and are subject to being overridden by the courts. In the case before it, the National Energy Board's assessment regarding whether a set of pipelines constituted an interprovincial work or undertaking, normally a question of characterization or of mixed fact and law, was not entitled to deference. It was an opinion as to the constitutional significance of facts and, as such, was not entitled to deference.

The Supreme Court of Canada in *R. v. Jarvis*³² held that the question of whether a particular investigation was a criminal investigation (and thus subject to stringent s. 8 *Charter* standards) or a regulatory investigation (and thus not subject to stringent s. 8 *Charter* standards) was a question of mixed fact and law which was "not immune from judicial review", suggesting perhaps that a measure of deference is warranted.³³ It then proceeded to examine the issue without much deference³⁴ and it did the same in the companion case of *Ling*.³⁵

Finally, in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, the Supreme Court recently held that administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard.³⁶ An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court. This seems consistent with earlier decisions.³⁷

How are the remedial choices of administrative tribunals or lower courts to be characterized? Are they issues of fundamental constitutional law inviting a correctness standard, or are they issues of fact and law, based on a substantial factual appreciation to which appellate or reviewing courts should defer? The Supreme Court in *Doucet-Boudreau* held that its analysis "does not preclude review on appeal of a superior court's choice of remedy under s. 24(1)", but it was silent as to the standard of review.

³² *Supra*, n. 11.

³³ *Ibid.*, at para. 100.

³⁴ *Ibid.*, at paras. 100-105.

³⁵ *Supra*, n. 12.

³⁶ 2003 SCC 54, applying *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at p. 17. The Court added that "an error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court", perhaps leaving open the status of errors on questions of mixed fact and law".

³⁷ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 (*Semble*, a standard of correctness was applied when considering whether a school board's decision was consistent with s. 15. Arbour J.A. in the Court of Appeal ((1995), 22 O.R. (3d) 1 at 7) specifically noted that the school board was normally entitled to deference but on constitutional questions the standard was correctness.)

What is the standard of review of an interpretation of a statute on the basis of *Charter* values? Normally, tribunals seem to enjoy “reasonableness” standard of review for questions of interpretation of their own legislation³⁸ but does this change when questions of interpretation are imbued with issues of constitutional law? This has not been tested.

Many of these decisions seem to be at odds with each other or at least inconsistent at the conceptual level or, when taken together, quite fuzzy in concept. Why should a lower court’s decision on a question of mixed fact and law involving a constitutional issue receive deference and an administrative tribunal’s decision on the same point not receive deference?

Westcoast provides a particular answer: “courts are in a better position than administrative tribunals to adjudicate constitutional questions” but this is not always the case, particularly where the administrative tribunal is comprised of legally trained individuals and the assessment of the issue of mixed fact and law is better placed with the tribunal because of its particular expertise on the factual elements of the question of mixed fact and law.³⁹ And in the end, “[d]eference ends, however, where the constitutional rights that the courts are charged with protecting begin”,⁴⁰ so what role should deference play when constitutional issues are a key part of a question of mixed fact and law before a court or a tribunal?

Prospects for the future

Many find the ruling in *Doucet-Boudreau* surprising because of the Court’s willingness to grant a supervision remedy. While this is somewhat revolutionary, as I have stated above I believe that this will be a remedy that is granted only in exceptional or unusual circumstances.

In my view, the most noteworthy aspect of the *Doucet-Boudreau* case is the “recipe” that the Supreme Court sets out for the fashioning of s. 24(1) remedies, for what is “just and appropriate within the meaning of s. 24(1). Here is the recipe:

55 First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and

³⁸ *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661.

³⁹ *Supra*, n. 31, at para 40.

⁴⁰ *Doucet-Boudreau*, *supra*, n. 1, para. 36, citing McLachlin J. in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136.

must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore not appropriate and just (see *Dunedin, supra*, at para. 20, McLachlin C.J. citing *Mills, supra*, at p. 882, *per* Lamer J. (as he then was)).

56 Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.

57 Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.

58 Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.

59 Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24 because of its broad language and the myriad of roles it may play in cases should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

What the Supreme Court is telling us is that a substantial part of our factums should now be devoted to a consideration of this recipe. Our task is now to measure up the remedy sought against these standards. Remedies can no longer be discussed in a line or two in the "relief sought" portion of the factum.

The Supreme Court is also encouraging *Charter* complainants to be creative in the remedies they seek. Remedies may be "made to measure" for the particular case – in the words of the Supreme Court, "the judicial approach to remedies must remain flexible and responsive to the needs of a given case" – in order to vindicate the interests at

stake but must not cause courts to overstep their proper role.⁴¹ In a judicial review application involving the *Charter*, we must consider articulating our clients' relief not only in terms of the prerogative writs but also in terms of the creative "recipe" under s. 24(1) which the majority in *Doucet-Boudreau* has given to us.

⁴¹ *Supra*, n. 1, at para. 59.