Revisiting Doucet-Boudreau — Perspectives on Remedies in Section 23 Cases

The Honourable Mr. Justice Paul S. Rouleau,*
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Dans l’affaire Doucet-Boudreau, le juge LeBlanc conserve sa compétence afin de superviser les efforts de mise en œuvre par la province de la Nouvelle-Écosse de cinq ordonnances relatives à la construction ou la rénovation d’écoles. La Cour d’appel infirme cette partie de l’ordonnance, estimant que le juge LeBlanc est devenu functus officio. Par une majorité de cinq contre quatre, la Cour suprême du Canada maintient la décision du juge LeBlanc. À son avis, de telles ordonnances ne sont ni nouvelles ni malavisées. La doctrine et la jurisprudence confirment qu’elles sont conformes à l’objet de l’article 23 de la Charte.

I. INTRODUCTION

In Doucet-Boudreau v. Nova Scotia (Minister of Education),¹ the Supreme Court of Canada found itself faced with a narrow but extremely significant issue. Though the dispute between the Nova Scotia francophone and Acadian plaintiff parents and the Nova Scotia Department of Education broadly involved fulfilment of the plaintiffs’ rights under section 23 of the Charter,² the case heard by the Supreme Court of Canada turned on the issue of whether the trial judge, Mr. Justice

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LeBlanc of the Supreme Court of Nova Scotia, was correct in retaining jurisdiction to hear reports on the best efforts being deployed by the province of Nova Scotia to comply with section 23 by building homogenous French language secondary schools by the target dates. The majority of the Nova Scotia Court of Appeal found that he was not correct in doing so. By a 5-4 decision, the Supreme Court of Canada overturned the decision of the Nova Scotia Court of Appeal and endorsed the application of a positive remedial approach in a section 23 context. A provincial superior court facing a similar situation in the future will now be at liberty to add the retention of jurisdiction to monitor compliance with an order to its “toolbox” of Charter remedies. This paper seeks to demonstrate that the retention of jurisdiction to monitor compliance with an order upholding section 23 rights is not controversial, having regard to the content of previous section 23 cases as well as the general ability of courts to consider similar remedial measures in other contexts.

II. OVERVIEW — THE CASE

The dispute in Doucet-Boudreau arose from what section 23 francophone and Acadian parents in Nova Scotia felt was the provincial government’s delay in providing homogeneous French-language secondary schools in five Nova Scotia school districts. While the provincial Ministry of Education had announced the construction of the French-language school facilities, little progress was ultimately made in this regard, and the parents eventually brought an application for an order directing the province of Nova Scotia and the Conseil scolaire acadien provincial to provide these facilities and programs out of public funds.

In his reasons delivered with respect to the application, LeBlanc J. recognized that the right of parents to these facilities and programs was uncontested, since each of the five districts had sufficient children to meet the “numbers warrant” test. He then took into account the serious rate of assimilation occurring in Nova Scotia and the fact that the parents were being denied a constitutional right, and noted that “[i]t is beyond any doubt that it is time that homogeneous programs and facilities be provided to s. 23 students.” As a result, LeBlanc J. ruled in favour of the parents and issued an order to fulfill the right of five named districts by specifying “[t]he Court shall retain respondents respecting the Resq.

The Crown appealed the majority of the Nova Scotia Court of Appeal’s decision. LeBlanc J. had erred in retaining the facilities and programs of the common provisions of the Nova Scotian Charter, retaining jurisdiction on a more reasonable basis that the retention of jurisdiction in section 24(1) of the Charter was determinative of the case.

In a dissenting opinion, the Court of Appeal, the majority of the Nova Scotia Court of Appeal, held that application of principle of Act was determinative of the case.

The Nova Scotia francophone provincial Court of Appeal appealed the decision of the Supreme Court of Canada.

Writing for the majority of the Court, the Court of Appeal ordered the Superior Court to consider favourable application for funds.
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The Crown appealed on the issue of the retention of jurisdiction. On appeal, the majority of the Nova Scotia Court of Appeal concluded that LeBlanc J. had erred in retaining jurisdiction to monitor the implementation of the facilities and programs. Speaking for the majority, Flinn J.A. stated that the common law principle of functus officio and the provisions of the Nova Scotia Judicature Act prevented a judge from retaining jurisdiction on a matter in which he had already ruled. The fact that the retention of jurisdiction had been issued as a remedy under section 24(1) of the Charter was not persuasive to the majority, which held that application of principle of functus officio and the Judicature Act was determinative of the issue under appeal.

In a dissenting opinion, Freeman J.A. rejected the majority’s approach. In Freeman J.A.’s view, the judgment could not be final and the principle of functus officio could not apply until LeBlanc J. fulfilled the requirement of continuing supervision that he had set out in his order. By retaining jurisdiction in his order, LeBlanc J. had prevented the decision from becoming final. Justice Freeman referred to the order issued by the trial judge as “of the very essence of the kind of remedy courts are encouraged to seek pursuant to s. 24(1) to give life to Charter rights.”

The Nova Scotia francophone and Acadian parents subsequently appealed the decision of the Nova Scotia Court of Appeal to the Supreme Court of Canada.

Writing for the majority of the Supreme Court, Iacobucci and Arbour JJ. emphasized the importance of section 23 of the Charter, as well

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4 Order (December 14, 2000), (N.S.S.C.), LeBlanc J.
6 R.S.N.S. 1989, c. 240. See ss. 33, 34(d), 38.
7 Kent Roach has described the majority’s position in the Nova Scotia Court of Appeal as “a disturbingly narrow and technical approach to the jurisdiction of trial judges of the provincial Superior Courts.” See Constitutional Remedies in Canada, looseleaf (Aurora, Ont.: Canada Law Book, 1994), at 13.854.
8 Doucet-Boudreau (C.A.), supra, note 5, at para. 70.
as the remedial nature of section 24. The majority emphasized that these two provisions, as provisions of the Charter, were meant to be interpreted broadly. Moreover, the Court brought into focus the remedial nature of section 23. The Court pointed out that section 23 was “designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by actively promoting their flourishing.” Section 23 was meant to fight against assimilation, and if delay were tolerated, “governments could potentially avoid the duties imposed upon them by s. 23 through their own failure to implement the rights vigilanty.” The Court also noted that the power to create remedies per section 24(1) could not be limited by statutes or by the common law.

The Supreme Court then listed four general principles that judges should consider in determining the meaning of “appropriate and just in the circumstances,” suggesting that a remedy “appropriate and just in the circumstances of a Charter claim” would be one that:

1. meaningfully vindicates the rights and freedoms of the claimants;
2. must employ means that are legitimate within the framework of Canada’s constitutional democracy;
3. vindicates the right while invoking the function and powers of a court; and
4. is also fair to the party against whom the order is made.

In applying the test to LeBlanc J.’s remedy, the Court determined that the retention of jurisdiction was appropriate and just in the circumstances. The remedy, the Court observed, had to be examined against the backdrop of critical assimilation and the history of inaction on the part of the Nova Scotia government in the provision of French-language education. The retention of jurisdiction was meant to prevent further delays by the government that could prove critical to the French language in Nova Scotia, and thus sought to uphold the section 23 rights of the parents while leaving the choice of logistics to the government. The Court concluded that a court maintaining jurisdiction in this way was not extraordinary, and recognized severance in section 23 cases. In the context of blending of remedies and order to give life to the right.

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III. RETAINING JURISDICTION

As a preliminary note, the Canada is consistent with the elected in previous Supreme (ence re Public Schools Act (I Cameron v. Prince Edward I stand for the following principle)

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tion 23 rights of the parents government. The Court concluded in this way was not extraor-
dinary, and recognized several past examples where courts had done so in section 23 cases. In the Court’s view, LeBlanc J.’s order was “a creative blending of remedies and processes already known to the courts in order to give life to the right in s. 23.”

The Court addressed the application of functus officio and the Nova Scotia Judicature Act, which formed the basis of the majority decision of the Nova Scotia Court of Appeal. With respect to functus officio, the Court reiterated that the common law could not pre-empt the power to issue remedies under section 24(1). The Court also stated that the principle of functus officio existed to “allow finality of judgments from courts which are subject to appeal.” In this case, the ability of the government to launch an appeal could not be affected by the decision of LeBlanc J. to retain jurisdiction because the retention of jurisdiction did not include any power to alter the disposition of the case. With respect to the Judicature Act, the Supreme Court stated that even if the Act could have the effect of limiting section 24(1), there was nothing in the Act that prevented LeBlanc J. from hearing reports on the implementation of his order.

III. RETAINING JURISDICTION — A PRINCIPLED AND MODERATE SOLUTION

As a preliminary note, the approach taken by the Supreme Court of Canada is consistent with the general interpretation of section 23, as reflected in previous Supreme Court decisions in Mahe v. Alberta, Reference re Public Schools Act (Man.) s. 79(3), (4) and (7) and Arsenault-Cameron v. Prince Edward Island. These cases, in our view, generally stand for the following principles:

1. The general purpose of section 23 is to “preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in prov-

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12 Id., at para. 61.
13 Id., at para. 79 (footnote omitted).
inces where it is not spoken by the majority of the population.”\(^{17}\) Section 23 is to be interpreted in the manner that most effectively encourages the flourishing and preservation of the minority language in the province.

2. Section 23 is a remedial provision. It was designed to remedy an existing problem in Canada and to alter the status quo, correcting “on a national scale … the progressive erosion of minority official language groups and to give effect to the concept of the ‘equal partnership’ of the two official language groups in the context of education.”\(^{18}\) A remedial reading of section 23 is to be made in recognition of previous injustices that have not been redressed and that have required the entrenchment in the Charter of protection of minority language rights.

3. Section 23 is to be accorded a liberal and purposive interpretation in a manner consistent with the preservation and development of official language communities in Canada.\(^{19}\) The view that a restrictive interpretation of language rights is permissible in certain circumstances has been expressly rejected by the Supreme Court of Canada.\(^{20}\)

In considering these general principles, LeBlanc J. was therefore correct in seeking to order a remedy that was directed at halting the erosion of the French language as well as helping it to flourish in Nova Scotia. As Kent Roach has noted:

The situation was complex and dynamic: the Minister of Education for a new government would not commit to build new schools; there was a long history of delay and neglect of the section 23 rights; [and] the declaration applied to five separate regions of the province.\(^{21}\)

The remedy upheld by the Supreme Court of Canada reflected and responded to some very basic concerns facing the trial judge, including the urgency of the situation due to and Acadians, the history of greater assimilation of the minority. Indeed, LeBlanc J. found language facilities contributed.

Second, LeBlanc J. was action on the part of the goveLeBlanc J. was not whether those communities had a right already been conceded by the date on which the program given the inactivity of the pr again have declared the right. Yet, the rights had already by 1982, had been defined and ceded by the government went before. The obligations were to create programs and allocate the parents, not being done. minority language communities meaningful remedy, in our vi

Finally, LeBlanc J. had potentially constructing the schity would occupy the new schools, the comparability which the target dates could issues. Other than stating the specify in his order whether and Acadians would be English and French schools ties and a host of other logistical decisions in the go

\(^{17}\) Mahe, supra, note 14, at 362. Also see Manitoba Reference, supra, note 15, at 850.

\(^{18}\) Mahe, id., at 364. Also see Manitoba Reference, id.; Arsenault-Cameron, supra, note 16, at para. 26.

\(^{19}\) Manitoba Reference, id.


\(^{22}\) Doucet-Boudreau (T.D.), sup
majority of the population." The manner that most effectively protected the rights of the minority language population was designed to remedy an imbalance in the status quo, correcting the erosion of minority official language rights concept of the equal participation of the language groups in the educational system. Section 23 is to be made in force not been redressed and the Charter of protection of d purposeful interpretation in on and development of official languages. The view that a restrictive interpretation is only acceptable in certain circumstances is reflected in the Court of Canada. LeBlanc J. was therefore directed at halting the erosion of the rights to programs and facilities; this right had already been conceded by the Nova Scotia government. The issue was the date on which the programs and facilities would be made available, given the inactivity of the province. The trial judge could simply once again have declared the rights of the parents to programs and facilities. Yet, the rights had already existed since the adoption of the Charter in 1982, had been defined and clarified by the courts and had been conceded by the government with respect to these communities some time before. The obligations were relatively clear and unchallenged, namely to create programs and allocate facilities, but all this was, in the view of the parents, not being done. Declaring the uncontested rights of these minority language communities one more time would not have been a meaningful remedy, in our view.

Finally, LeBlanc J. had to consider the logistical complexities in potentially constructing the schools — the question of whether the minority would occupy the new schools or the former mixed-language schools, the comparability of locations and facilities, the ease with which the target dates could reasonably be achieved and other difficult issues. Other than stating that schools had to be built, LeBlanc J. did not specify in his order whether it was the anglophones or the francophones and Acadians who would be placed in the new schools, whether the English and French schools would have comparable locations and facilities and a host of other logistical decisions. Justice LeBlanc left all these logistical decisions in the government’s hands.

Reference, supra note 15, at 850. id.; Arsenaal-Cameron, supra, note 16, ¶ 768, at para. 25. Also see Arsenaal-Cameron under the Charter: General Declarations of Rights, supra, at 260-61.

Justice LeBlanc then took all these specific factors into account and devised, as Freeman J.A. put it in his dissenting opinion, a “creative blending of declaratory and injunctive relief”\(^{23}\) meant to solve the problems that he faced. This approach, in our view, was therefore consistent with the purpose of section 23.

Quite apart from the observation that LeBlanc J.’s chosen remedy reflected the content of the substantive Charter right, supervisory remedies are not unknown to provincial superior courts and have been a feature of a number of section 23 cases that preceded *Doucet-Boudreau*. Seen in this light, the Supreme Court of Canada has confirmed what some courts have been doing in other contexts.

It is commonly accepted in most, if not all, provinces that courts may act as monitors in bankruptcy proceedings and family law matters, and that courts may retain jurisdiction after granting an order in these and other contexts. As Sharpe J. has stated: “traditional formulations of the supervision rule overstate the case: courts have always been willing to issue decrees which carry the risk of continuing involvement where it is necessary to achieve remedial satisfaction.”\(^{24}\) Seen in this light, the relief upheld by the Supreme Court of Canada did not involve the court doing something that a provincial superior court could not regularly do elsewhere.

Moreover, there are a number of section 23 cases where courts (in Ontario and elsewhere) have elected to apply positive remedies, often of a supervisory nature, to ensure fulfilment of the Charter right. These cases further support the proposition that the result in *Doucet-Boudreau* was not extraordinary.

In *Assoc. française des conseils scolaires de l’Ontario v. Ontario*,\(^{25}\) the plaintiffs brought an application for a declaration that certain amendments to the *Education Act*\(^{26}\) were unconstitutional, namely, amendments leading to a reduction of francophone trustee electors and French representation on the various Ontario school boards. The trial judge pointed out the urgency of the matter. With a trustee election looming, the amendments would right to vote for francophone members or trustees represent year term. In some cases, the local school board would go Clearly, this would result in mined that the constitutional properly assessed. In the mean amendments impacting the n were unconstitutional.

The case was appealed. The trial judge had been correct i had been wrong in declaring the Court of Appeal searche and found one in the form of the issues referred to trial. Th certain school boards would ity for all matters that did n either the French or English majority method of voting imp upon six school boards that existed as a remedy in neither of the school boards. Instead ing down the law, which wo Appeal chose a less intrusive.

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\(^{23}\) *Doucet-Boudreau* (C.A.), supra, note 5, at para. 70.


\(^{26}\) R.S.O. 1980, c. 129.
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3. romance, 2d ed. (Toronto: Canada Law 
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 looming, the amendments would deny thousands of francophones the 
right to vote for francophone trustees and would reduce the number of 
members or trustees representing francophone ratepayers for the three-
year term. In some cases, the number of francophone trustees on the 
local school board would go from a majority to a minority of the board. 
Clearly, this would result in irreparable harm. The trial judge deter-
mined that the constitutional issues should be referred to trial to be 
properly assessed. In the meantime, however, as a result of the possible 
impact on the francophone community, the trial judge declared that the 
ampendments impacting the number of electors and their representation 
were unconstitutional.

The case was appealed. The Ontario Court of Appeal stated that the 
trial judge had been correct in referring the matter to trial. However, he 
had been wrong in declaring the amendments unconstitutional. Instead, 
the Court of Appeal searched for a remedy that would be less intrusive 
and found one in the form of interim relief pending final disposition of 
the issues referred to trial. The Court of Appeal issued an order whereby 
certain school boards would be forced to operate under a double major-
ity for all matters that did not fall within the exclusive jurisdiction of 
either the French or English components of the board. This double ma-
ajority method of voting imposed by the Court of Appeal was binding 
upon six school boards that were not even parties to the litigation and 
exists as a remedy in neither the Education Act nor any of the by-laws 
of the school boards. Instead of adopting the traditional remedy of strik-
down the law, which would have stopped the election, the Court of 
Appeal chose a less intrusive but positive remedy.

In the two Marchand v. Simcoe County Board of Education cases, 
Sirois J. was called upon to give meaning to the section 23 rights of the 
plaintiff. In Marchand I, Sirois J. made an order "requiring the Defen-
dant Board to provide the facilities and funding necessary," and a de-
claration that the government ensure adequate facilities and funding. 
A dispute then ensued between the board and the government as to the 
design and cost distribution. In Marchand II, the plaintiff returned to 
court, along with the newly created French-language Education Council 

No. 949, 44 D.L.R. (4th) 171 (H.C.J.) [hereinafter "Marchand II"].

24: Marchand I, id., at 621.
of the Simcoe County Board of Education, asking that the order be implemented. The council came forward before the court with a fully developed plan outlining a specific school to be built and suggesting that the government pay a specific share of the cost.

Justice Siros ruled in the plaintiffs’ favour, declaring that the council had the authority to prepare the plans for the school, that the plan prepared by the council was in compliance with the judgment that he had given and effectively ordering that the school be built according to the plan devised by the council. On the face of it, there was no section 24 remedy attributed in this case, since the construction of the school stemmed from the original judgment. It can equally be argued, however, that Siros J. stretched the meaning of “implementing an order” when he ordered the government to pay specific portions of the construction cost and ordered the board to build the school according to a specific plan submitted by a council that was created after he had rendered judgment on the merits in the original action. Justice Siros had not retained jurisdiction per se but, through the vehicle of implementing the order, the result was essentially the same. Moreover, the lack of freedom imposed by Siros J. upon the government and the board by requiring the construction according to a specific plan was arguably more interventionist than LeBlanc J.”s actions in Doucet-Boudreau. Justice Siros’s ruling is another example of how courts have been creative when attempting to give meaning to section 23 rights.

Assoc. des parents francophones de la Colombie-Britannique v. British Columbia29 is another example of a section 23 case where a judge chose to retain jurisdiction. As in Doucet-Boudreau, there was no doubt that the plaintiff francophone parents were holders of section 23 rights. The government had the obligation to enact legislation implementing this right, but failed to do so. After the francophone parents launched an action against the government, the two parties came to an agreement, whereby the government would commission a task force to determine the best way of implementing the broad section 23 rights guaranteed by the Charter and explained in Mahe. The task force devised a series of recommendations. After vowing to follow these recommendations, the government dropped them, proposing instead what the parents felt was a

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30 Conseil des écoles séparées (Ministre de l’éducation et de la formation, Treasury Board Private Employees (N.A.P.E.), [2004]: Canada considered the issue of the establishment of a school for francophone children.

substandard system. The system was rejected by the francophone parents who resumed their action against the government, approximately four years after believing that an agreement that their rights would finally be implemented had been reached.

Among several remedies awarded, Vickers J. retained jurisdiction, though the learned judge left the logistics of the implementation of the legislation to the government. The freedom granted by Vickers J. is similar to that granted by LeBlanc J. in *Doucet-Boudreau*, where the logistics of the implementation were also left to the government. Clearly, the objective of the judges in both cases was to limit the interference with government while ensuring that the government would implement the section 23 rights. *Assoc. des parents francophones* demonstrates that with a lack of incentive to implement section 23 rights, the government may well fall victim to inaction, for budgetary or other reasons. Yet, section 23 rights, and indeed rights in general, should not easily be pushed aside as a result of budgetary constraints.30

The cases discussed above suggest that judges can grant and have previously granted positive remedies, particularly in the context of section 23 cases. In *Assoc. française des conseils scolaires de l’Ontario*, the court recognized that a traditional remedy would have prevented the election from occurring. Instead of striking down the law, the court chose to grant a positive remedy with the goal of solving the problem. Likewise, in *Marchand I and Marchand II*, the court decided to grant a positive remedy by directing the government to follow a particular plan of action. While the court granted this remedy under the guise of implementing an order, it can be argued that the court effectively acted as if it had retained jurisdiction, much as was done in *Doucet-Boudreau*. Finally, in *Assoc. des parents francophones*, faced with governmental inaction, the court chose to retain jurisdiction in the matter with the aim of ensuring implementation of section 23 rights.

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IV. CONCLUSION

In the context of considering the availability of injunctions in Charter cases, Sharpe J. has suggested that simply drawing the line at declaratory relief may not be appropriate in a constitutional context. As he has stated:

... there is something offensive about a principle which would require a citizen to be satisfied with a less appropriate remedy for a constitutional wrong because an injunction is too costly or too risky. The injunction option may put the authority of the court on the line but this cannot be avoided. The authority of the court is on the line: it has found a constitutional violation and is required by the Constitution to provide a remedy. The court would surely lose more credit by pretending defeat on traditional grounds not geared to the demands of modern constitutional litigation than by doing its best to ensure constitutional guarantees are respected.31

The decision of the Supreme Court of Canada in Doucet-Boudreau should give provincial superior courts comfort that positive remedies are available to them to provide practical and effective relief to litigants in section 23 cases. Whether the retention of jurisdiction is categorized as a form of mandatory injunction or as some other form of positive relief, it is clear that the Supreme Court of Canada chose to adopt a principled remedial approach that breathed life into the constitutional guarantee in question and did not subjugate the fulfilment of the Charter right to the common law or the Judicature Act. Moreover, and as we have noted in this paper, positive remedies are ordered by courts in other contexts, and there is clear authority in the existing section 23 cases that is supportive of the potential application of positive remedies in such contexts. Positive remedies should not, therefore, be considered extraordinary in the context of fulfilling section 23 rights, and courts should not shrink from granting such relief in appropriate cases.

31 Sharpe, supra, note 24, at para. 3.1460.