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## Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?

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William H. Charles\*     Inherent Jurisdiction and its Application by  
Nova Scotia Courts: Metaphysical,  
Historical or Pragmatic?

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*The author explores the concept of inherent jurisdiction in the context of its use and application by the courts of Nova Scotia. A general in-depth discussion of the nature and source(s) of the concept is followed by an examination of three recent Court of Appeal decisions in an effort to determine that court's understanding of inherent jurisdiction. The Court of Appeal's understanding and sense of the concept is then contrasted with its use and application by the trial courts of Nova Scotia over a period of 150 years. The approach of the two levels of court to inherent jurisdiction is compared and the limits of the concept examined. A review of the use of inherent jurisdiction by Nova Scotia courts in arbitration matters is undertaken to show the common law as a source of the concept of inherent jurisdiction, at least in this one area of law. The inherent jurisdiction of inferior courts, such as the Small Claims Court and others is discussed, as is the inherent jurisdiction of the Court of Appeal.*

*L'auteur examine le concept de «compétence inhérente», ou «compétence propre» dans le contexte de son utilisation et de son application par les tribunaux de la Nouvelle-Écosse. Une discussion en profondeur de la nature et des sources du concept est suivie d'un examen de trois décisions récentes de la Cour d'appel afin de déterminer la compréhension qu'a la Cour de la compétence inhérente. La compréhension de la Cour d'appel et son interprétation du concept sont ensuite comparées à son utilisation et à son application par les tribunaux de première instance de la Nouvelle-Écosse sur une période de 150 années. Les façons respectives de chaque tribunal d'aborder la compétence inhérente sont comparées, et les limites du concept sont examinées. Un examen de l'utilisation de la compétence inhérente par les tribunaux de la Nouvelle-Écosse en matière d'arbitrage montre que la common law est à l'origine du concept de compétence inhérente, au moins dans ce domaine du droit. La compétence inhérente des tribunaux inférieurs, par exemple celle de la Cour des petites créances, est discutée tout comme la compétence inhérente de la Cour d'appel.*

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*Introduction*

Literally speaking, the phrase “inherent jurisdiction” means a power or authority possessed by a person or institution that is not derived or supplied from an outside source.<sup>1</sup> “Inherent jurisdiction” is, then, a self-generating intrinsic source of power. The terms “jurisdiction” and “power” are frequently used together or interchangeably. It might be, perhaps, more accurate to think of the term “jurisdiction” as the source of powers but this distinction is not often made.

This paper attempts to determine how, and to what extent, Nova Scotia courts at all levels have relied on their so-called “inherent jurisdiction.” An exploration of its use and application should provide a clearer sense of understanding of the concept and the circumstances in which it will be used. For example, is inherent jurisdiction some sort of metaphysical

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1. *Black's Law Dictionary*, 6th ed, *sub verbo* “inherent jurisdiction.”

primordial power or immanent attribute with which Superior Courts are endowed and which is essential to their task, or is inherent jurisdiction something else?

The paper consists of seven sections. In Part I the historical evolution of inherent jurisdiction is presented as well as the explanations and analysis of the concept by a number of legal commentators. The material should provide the reader with a glimpse of the many faces of inherent jurisdiction.

In Part II the approach to and understanding of inherent jurisdiction by the Nova Scotia Court of Appeal as reflected in a trilogy of cases decided during a nine year period covering 2000 to 2009 is canvassed.

Part III discusses an extensive survey and analysis of Nova Scotia trial court decisions on inherent jurisdiction covering the period 1853 to 2009. The survey was undertaken to obtain a better understanding of the approach of trial courts in Nova Scotia to the question of inherent jurisdiction. The results of this survey are examined more fully in Appendix A.

Part IV of the paper explores the limits of inherent jurisdiction in the context of three suggested factors; namely, procedure; statutes; and rules of court.

Because arbitration cases were revealed by the survey discussed in Part III to comprise one of the more numerically significant group of cases, wherein inherent jurisdiction was invoked by the trial courts, Part V examines them in some detail, with a view to determining the source of inherent jurisdiction in this particular area of the law.

Finally, the question of the specific inherent jurisdiction of “inferior courts” in Nova Scotia is examined in Part VI and that of the inherent jurisdiction of the Nova Scotia Court of Appeal in Part VII.

### *I. The concept of inherent jurisdiction*

The concept or doctrine has been the subject of discussion by only a handful of legal commentators.<sup>2</sup> Those who have discussed the concept all agree about the uncertainty that surrounds the idea of “inherent jurisdiction,” both with regard to its source and the scope of its application. As one English commentator has lamented, “[i]t is a difficult idea to pin down. There is no agreement on what it is, where it came from, which courts and

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2. See IH Jacob, “The Inherent Jurisdiction of the Court” (1970) 23 *Current Legal Problems* 23; Keith Mason, “The Inherent Jurisdiction of the Court” (1983) 57 *Australian LJ* 449; Martin Dockray, “The Inherent Jurisdiction to Regulate Civil Proceedings” (1997) 113 *Law Q Rev* 120; Keith Yamauchi, “The Courts’ Inherent Jurisdiction and the CCAA: A Beneficent or Bad Doctrine?” (2004) 40 *Canadian Business LJ* 250; and Jerold Taitz, *The Inherent Jurisdiction of the Supreme Court* (Cape Town: Juta & Co Ltd, 1985).

tribunals have it and what it can be used for.”<sup>3</sup> In the same vein, and in the words of the most-quoted English commentator, Master Jacob has stated:

The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways. This peculiar concept is indeed so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits.<sup>4</sup>

In spite of this uncertainty, Jacob still considers this concept as the “very life-blood” of a superior court, and its “immanent attribute.”<sup>5</sup>

This “peculiar concept” has been described by another legal scholar as “[a]n almost primordial power with which [Supreme Courts are] endowed to give effect to the demands of justice and, at the same time, to maintain [their] pivotal position as an independent arbiter within the structures of the modern democratic state.”<sup>6</sup>

With such a mysterious and unruly concept one might have thought that to attempt a definition would involve a “mission impossible.” However, Master Jacob was equal to the task and offered the following definition which appears to have been generally accepted with great gratitude by Canadian and other courts, including the Nova Scotia Court of Appeal:

The inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.<sup>7</sup>

The first question that might be raised by this definition is “residual” to what? Presumably Master Jacob was referring to the other legal authority or power conferred on a Superior Court by the common law, statutes, or the rules of court. When the powers conferred by these sources are inadequate, the court can turn to this other source of power (inherent jurisdiction) and do what is “just and equitable” in the circumstances.

Reference to this phrase with its judicial discretion and equity attributes conjures up visions of the chancellor’s foot. The other more specific references to “doing justice between the parties” and securing a

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3. Dockray, *supra* note 2 at 120.

4. Jacob, *supra* note 2 at 23.

5. *Ibid* at 27.

6. Marimous Wieslers, “Foreword” in Taitz, *supra* note 2.

7. Jacob, *supra* note 2 at 51, as quoted by Saunders JA in *Halifax (Regional Municipality) v Ofume*, 2003 NSCA 110, 218 NSR (2d) 234.

fair trial further support the emphasis upon a chancery like discretion and jurisdiction as a characteristic of inherent jurisdiction. But the definition also makes reference to controlling the court process by preventing abuse of that process with sanctions like “contempt” orders to assure control. Judicial efficiency is, therefore, also an aspect of inherent jurisdiction, and, historically, a very important one. According to Master Jacob, “it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice.”<sup>8</sup>

Former Chief Justice of the Supreme Court of Canada, the Honourable Brian Dickson, has noted that the English doctrine is reflected in most if not all common law jurisdictions, though not as extensively as the United States.<sup>9</sup> The historical evolution of the term “inherent jurisdiction” and its use by English courts has been documented by Martin S. Dockray who notes that the term was infrequently used prior to 1875 and then only in reference to cases involving contempt of court and abuse of court process.<sup>10</sup> Its use broadened after 1880 and its frequency increased with the courts using the phrase to justify actions in relation to procedural matters more generally, the awarding of costs, and control over solicitors. It was not until 1945 that, apparently, this concept began to be used in relation to trusts and children.<sup>11</sup>

It is only relatively recently that the term inherent jurisdiction has been recognized and discussed by the legal community and the judiciary. This recognition and interest was sparked by the seminal article by Master Jacob in 1970 which has been subsequently referred to and relied upon by courts in England, Canada, and the United States.<sup>12</sup>

#### *Sources of Inherent Jurisdiction*

Various efforts have been made to trace the source of “inherent jurisdiction.” For Master Jacob it is found in the very nature of a court and a superior court of law. It is inherent jurisdiction that allows the superior court to fulfill itself as a court.<sup>13</sup> There are other theories however. One suggests that inherent powers to control procedure are incidents of substantive procedure rather than features which are part of the character of the court. They arise not out of the substantive jurisdiction but “at common law as the legal incidents of that jurisdiction.”<sup>14</sup>

8. Jacob, *supra* note 2 at 52.

9. *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214, [1988] SCJ no 76.

10. Dockray, *supra* note 2 at 121.

11. *Ibid.*

12. *Supra* note 2.

13. *Ibid* at 27.

14. Dockray, *supra* note 2 at 126-27.

Support for this theory can be found in the decision of the Court of Queen's Bench, Divisional Court in *R. v. Norwich Crown Court*.<sup>15</sup> In this case it was argued that the jurisdiction of the Crown Court was derived from statutes and that any powers which were inherent in its jurisdiction had to have their origins in the statute. In an unanimous decision, the Divisional Court explained that it preferred the theory that inherent powers arise from common law, independently of the statutes which create the jurisdiction of the court. To arise at common law, presumably means as declared to exist by the judiciary rather than parliament.

In an earlier decision in 1964, Lord Morris had declared:

There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process.<sup>16</sup>

As one legal commentator has observed, this approach or theory "avoids metaphysical debate about the immanent attributes of superior courts and concentrates attention instead on what is necessary and appropriate if a particular court is to be able to undertake its work effectively."<sup>17</sup>

Several judges of the Supreme Court of Canada have expressed the opinion that the common law is the source of inherent jurisdiction.<sup>18</sup> However, there are several legal commentators from the Commonwealth who agree with Jacob that inherent jurisdiction is either "a somewhat metaphysical concept"<sup>19</sup> or totally metaphysical.<sup>20</sup> But, being metaphysical, it is nevertheless very real.<sup>21</sup> While generally agreeing upon its nature, these commentators see the function of inherent jurisdiction quite differently. Mason, for example, sees inherent jurisdiction as representing "a judicial power of last resort that will be invoked to block certain types of conduct which are not regulated by statutes or rules of court or, may be expressly permitted by them."<sup>22</sup> While this suggests a certain defensive function, the same author suggests that "inherent jurisdiction is also used by some

15. *R v Norwich Crown Court*, [1992] 1 WLR 54 (QB).

16. *Connelly v Director of Public Prosecutions*, [1964] AC 1254 at 1301 (HL).

17. Dockray, *supra* note 2 at 127.

18. See e.g. *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v Canadian Pacific Ltd*, [1996] 2 SCR 495, [1996] SCJ no 42; and Bastarache J (dissenting) in *Vaughan v Canada*, 2005 SCC 11, [2005] 1 SCR 146 at paras 71-72.

19. Mason, *supra* note 2 at 458.

20. Taitz, *supra* note 2 at 2.

21. *Ibid.*

22. *Supra* note 2 at 458.

judges to promote higher standards of litigation.”<sup>23</sup> Taitz on the other hand agrees with Dockray that:

The inherent jurisdiction of the Court...consists of those unwritten powers possessed by the Court without which it would be unable to act in the exercise of its judicial function with justice and reasonableness, and which includes, though not necessarily exclusively, powers to:

- (a) regulate its proceedings and prevent an abuse of its process...;
- (b) impose sanctions for the impairment of its dignity or for failure to comply with its lawful order [contempt];
- (c) control and supervise its officers...;
- (d) restrain irregularities in the proceedings of lower or inferior courts...; and
- (e) restrain irregularities in the proceedings of administrative [tribunals].<sup>24</sup>

All of the above mentioned authors have been referred to and in many cases quoted with approval by Canadian courts, but the article by Master Jacob is by far the most often quoted and considered the most influential.<sup>25</sup> Because of this, it might be argued that, by implication, Canadian courts have accepted the more metaphysical explanation as to the source of “inherent jurisdiction” or powers.

Another explanation for the use of the term “inherent jurisdiction” by English courts is that it was a way of referring to the old general jurisdiction that English courts had enjoyed prior to the abolition of those courts by the *Judicature Acts* of 1873 to 1875, when a new Supreme Court was created.<sup>26</sup> At this time, a new set of mandatory court rules of procedure were developed in the form of a *Code of Procedure*. The *Code*, however, was not exhaustive, and the legislation provided that existing powers, procedures and forms were to be preserved to the extent that they were not incompatible with the new provisions. During the 1880s some English courts held that features of the old general jurisdiction of superior courts had survived because they were inherent in the notion of what it was to be a superior court, in contrast to very specific statutory provisions. This explanation still promotes the idea that inherent jurisdiction is something intrinsic and flows from the nature of a superior court itself.

23. Mason, *supra* note 2 at 458.

24. Taitz, *supra* note 2 at 4-5.

25. *Ibid.*

26. Dockray, *supra* note 2 at 122.



Later references to inherent jurisdiction by English courts in the latter half of the twentieth century do not see inherent powers as survivors from a previous time but represent examples of a broad general jurisdiction that can be used whenever the need arises.<sup>27</sup>

The extent of this broad jurisdiction can be appreciated when it is realized that from the somewhat narrow limits of punishing contempt and controlling abuse of court process the concept of inherent jurisdiction has been used to justify, among other things, the variation of trusts, the safeguarding of children, the provision of remedies in situations where the statutory provisions do not, and to supervise as well as protect and assist inferior courts and tribunals and the filling of gaps in statutes. This ever-expanding jurisdiction is bound to create concern among legal observers that courts may think they have *carte blanche*. An examination of the language used by some courts to describe their inherent jurisdiction could easily give this impression and could evoke memories of the chancellor's discretion. The House of Lords has rejected such an open-ended approach and suggested that the concept of inherent jurisdiction be narrowed considerably. In the words of Lord Diplock:

It would, I think be conducive to legal clarity if the use of these two expressions [inherent power and inherent jurisdiction] were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice.<sup>28</sup>

This is still pretty general but at least restricts the exercise of inherent jurisdiction to the litigation process and the administration of justice in a more procedural sense.

Part of the reason for what appears to be an ever-broadening scope of the concept of inherent jurisdiction is the tendency of some courts to fail to realize the difference between inherent jurisdiction and the general jurisdiction of a superior court as a court of common law and equity; the exercise of the Crown prerogative vis-à-vis inferior courts and tribunals as well as *parens patriae* regarding children; and the maxim "where there is a right there is a remedy" (*ubi ius ibi remedium*).

In Nova Scotia, the general jurisdiction of the Nova Scotia Supreme Court has been traced by MacKeigan C.J. in *Midland Doherty v. Roher and Central Trust Company*,<sup>29</sup> who notes that the jurisdiction of the Supreme

27. Dockray, *supra* note 2 at 129 referring to *The Siskina*, [1979] AC 210 at 262 per Lord Hailsham.

28. *Bremer Vulkan v Schiffbau und Maschinefabrik v South India Shipping Corporation*, [1981] 1 AC 909, [1981] 2 WLR 141 (HL).

29. *Midland Doherty v Rohrer and Central Trust Company* (1985), 70 NSR (2d) 234 (SC (AD)).

Court of Nova Scotia is that of the Supreme Court as originally established long before the *Judicature Act* of 1884. This jurisdiction included the same powers as were formerly exercised by the English Courts of Queen's Bench, Common Pleas, or Chancery and Exchequer and with the same powers as were exercised by the Supreme Court of Judicature in England as they were on the 19th of April 1884.

The notion of an unlimited jurisdiction in a superior court may have evolved from the ancient English legal principle that was expressed in *Peacock v. Bell* to the effect that "the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of the superior court but that which specifically appears to be so."<sup>30</sup> In proceedings before a superior court it was unnecessary to allege that the court was possessed of jurisdiction—unlike an inferior court proceeding. It was up to the court itself to decide judicially whether it was acting within its jurisdiction. This led to the idea that the jurisdiction of a superior court was unlimited. But, as one legal commentator has observed, this notion of unlimited jurisdiction is separate and distinct from the doctrine of inherent jurisdiction, although an unknowing mixing of the two ideas could lead to the belief that there is no limit to inherent jurisdiction and could account for its broad application.<sup>31</sup>

Similarly, the inherent jurisdiction of the Court of Chancery over children and trusts or estates as well as the general notion of the Chancellor relieving the rigours of the common law, contributed to the use of the doctrine of inherent jurisdiction by courts in these areas.<sup>32</sup> But again, equity jurisdiction and inherent jurisdiction are not the same thing. However, it should be noted that in his testimony before the Nova Scotia Supreme Court in *Re Killam Estate*,<sup>33</sup> Professor Donovan Waters seemed to point to the assumption of jurisdiction by the English Chancery Court over charitable trusts as an example of the exercise of inherent jurisdiction. In the course of explaining that the present Nova Scotia Supreme Court does have the power with respect to the administration of charitable trusts, Professor

30. *Peacock v Bell* (1667), 1 Wms Saund 73; 85 ER 84 at 87-88.

31. Taitz, *supra* note 2 at 56.

32. For cases where this may have occurred see: *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, 85 DLR (4th) 129; *Deruelle v Children's Aid Society of Cape Breton* (1978) 86 DLR (3d) 687, 26 NSR (2d) 125 (SC (AD)); *Société des Acadiens v Association of Parents*, [1986] 1 SCR 549, 27 DLR (4th) 406; *Bast v Bast* (1975), 72 DLR (3d) 548, 20 NSR (2d) 604 (SC (TD)); *Re Estate of William P Spencer* (1969), 9 DLR (3d) 74, 1 NSR (2d) 282 (SC (TD)) [*Re Spencer*]; *O'Neill v O'Neill* (1971), 4 NSR (2d) 64 (SC); *Glasgow v Glasgow* (1983), 57 NSR (2d) 355 (SC (AD)); *Mintz v Mintz* (1979), 33 NSR (2d) 585 (SC (TD)); *Re Murphy, Margaret* (1970), 3 NSR (2d) 293 (SC (TD)); *Warner v Warner* (1996), 150 NSR (2d) 38 (SC); and *Re Killam Estate* (1999), 185 NSR (2d) 201 (SC).

33. *Ibid.*

Waters traced the devolution of that authority from the old English Court of Chancery in these words:

The jurisdiction assumed by the one-time Court of Chancery to sustain and further charitable trusts was implicitly taken over by the High Court of England after the fusion by the *Judicature Act, 1873*, of the Royal Courts, and the same assumption (or inherent) jurisdiction passed to the courts of the colonies overseas. It remained when the colonies of the Empire became the Dominions of the Commonwealth and, finally, totally independent nations.<sup>34</sup>

Inherent jurisdiction, in the form of judicial review of inferior courts and tribunals, really has its source in the powers the superior courts have historically had to exercise the Crown's prerogative and to issue prerogative writs. It does not arise from the special nature of a superior court. This distinction is recognized by both Jacob<sup>35</sup> and Taitz<sup>36</sup> but not by many courts. Even Lord Denning, in the course of commenting upon the supervisory role of the Court of Kings Bench, referred to the fact that the court "has an inherent jurisdiction to control all inferior tribunals"<sup>37</sup> as part of its supervisory role. In some instances, this approach has led to the supervising court assisting inferior tribunals, administrative boards and boards of arbitration by not only correcting or overturning their decisions but also providing needed remedies, not otherwise available.<sup>38</sup>

The belief that a superior court can provide a remedy if one is required to prevent an injustice and to justify this on the basis of inherent jurisdiction may flow from and be confused with the court's application of the ancient maxim *ubi ius ibi remedium*. This theory has been recognized and acted upon by English courts since the fourteenth century. By the seventeenth century the maxim appears to have been recognized as an established principle of law<sup>39</sup> and is still applied by English and Canadian courts.<sup>40</sup>

The difference between the maxim and inherent jurisdiction is explained by Taitz in his book as follows:

The reason for the maxim is the fact that it fulfills an obligation of the court to the aggrieved party who has come to the court for relief and has

34. *Re Killam Estate*, *supra* note 32 at 208.

35. *Supra* note 2.

36. *Supra* note 2 at 34.

37. *R v Northumberland Compensation Appeal Tribunal*, [1952] 1 All ER 122 at 127 (CA).

38. See the Nova Scotia case of *Haines, Miller & Associates v Foss* (1996), 153 NSR (2d) 53 (SC).

39. The case of *Ashby v White* (1703), 2 Ld Raym 938, is just an example from the time period.

40. For more recent cases see: *Constantine v Imperial Hotels*, [1944] 2 All ER 171; *Best v Samuel Fox & Co*, [1950] 2 All ER 798; and *Pleau v Canada (Attorney General)*, 1999 NSCA 159, 182 DLR (4th) 373 at 391 per Cromwell JA (as he then was).

not taken the law into his own hands. Where the aggrieved party has a substantial right, the court owes him a duty to find a remedy.<sup>41</sup>

By comparison, “[t]he inherent power of the Court is concerned with justice and expediency while the principle *ubi ius ibi flows* from an ancient unwritten custom or form of social contract between the Court and the parties to any cause [of action] before the Court.”<sup>42</sup> The court may have to create or modify a remedy using its inherent powers if it is to function as a superior court with justice and good reason.

In all of the foregoing situations, it is suggested that courts may invoke inherent jurisdiction as the justification or basis for their activities whereas, in actual fact, the basis for their actions may indeed be more properly attributed to other sources that have nothing to do with the nature and attributes of a superior court.

With these general comments in mind it is relevant to ask how the superior courts of Nova Scotia have approached the issue of inherent jurisdiction. Have they recognized and exercised this amorphous jurisdiction? If so, to what extent, and, in what kind of situations and within what limits? How often is it invoked?

## II. *The Nova Scotia Court of Appeal and inherent jurisdiction: a trilogy*

It is significant that in the last nine years the Nova Scotia Court of Appeal has had the opportunity to consider the concept of inherent jurisdiction in three separate cases.<sup>43</sup> This trilogy offers a useful and unique opportunity to better understand issues of inherent jurisdiction. In Part III, the decisions of Nova Scotia trial courts from 1853 to 2009, by comparison, provide some additional insights into the approach of the Nova Scotia judiciary.

### 1. *Goodwin v. Rodgerson (2002)*

In the first case, *Goodwin v. Rodgerson*,<sup>44</sup> failure by a lawyer to file a notice of intention to proceed with an action led to the prothonotary issuing an order dismissing the action for failure to proceed in a timely matter pursuant to Rule 28.11 of the *Civil Procedure Rules* of Nova Scotia (1972). The trial judge held that Rule 28.11 clearly covered the situation and required the prothonotary to issue the order to dismiss. Unfortunately, this type of dismissal order was omitted from a list of orders that enabled the court

41. *Supra* note 2 at 66.

42. *Ibid* at 93.

43. *Goodwin v Rodgerson*, 2002 NSCA 137, 210 NSR (2d) 42; *Halifax (Regional Municipality) v Ofume*, 2003 NSCA 110, 218 NSR (2d) 234 [*Ofume* cited to NSR]; and *Ocean v Economical Mutual Insurance Co*, 2009 NSCA 81, 281 NSR (2d) 201 [*Ocean*].

44. *Ibid*.

to intervene in certain circumstances.<sup>45</sup> Satisfied that the omission was a legislative oversight, the Court of Appeal declared that the order of the deputy prothonotary should be set aside on the basis of the court's inherent jurisdiction to control its own process and prevent an injustice. The Court of Appeal noted that inherent jurisdiction was a power which a superior trial court enjoys "to be used when it is just and equitable to do so,"<sup>46</sup> as long as it was not used to effect changes in the substantive law. The Court also noted that setting aside the order to correct the non-compliance with procedural requirements did no injustice to the defendants.

It is important to note that in this case, the Court of Appeal justified the exercise of inherent jurisdiction by the trial court on two grounds: firstly, it was using inherent jurisdiction to control its own process which, in this case, meant preventing an injustice. Secondly, the Court of Appeal appeared to decide that a trial court could use its inherent jurisdiction when it was just and equitable to do so. This latter basis of jurisdiction finds its origin in the definition of inherent jurisdiction proposed by Master Jacob and referred to in an earlier decision of Justice Hallett of the Court of Appeal in *Golden Forest Holdings v. Bank of Nova Scotia*.<sup>47</sup> In this case, Justice Hallett referred to *Halsbury's Laws of England* for a description and definition of the inherent jurisdiction of the court.<sup>48</sup> A close examination of the particular excerpt from *Halsbury's* reveals that it repeats the definition of inherent jurisdiction offered by Jacob in his seminal article.<sup>49</sup> It is also instructive to note that the Jacob's definition of inherent jurisdiction and reference to "just or equitable" is also found in the decision of the Manitoba Court of Appeal in *Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd.*<sup>50</sup> which was subsequently approved by the Supreme Court of Canada.<sup>51</sup> Two points are worth noting: first, the important influence the Jacob article has had upon critical Canadian precedents, and secondly, the considerable overlap shown by the two grounds referred to by Hallett J. as justifying the exercise of inherent jurisdiction, that overlap being the fact that justice is a large factor in both.

45. This list is contained in Rule 59.05 of the 1972 Rules.

46. *Goodwin*, *supra* note 43 at para 12 quoting Justice Hallett in *Golden Forest Holding v Bank of Nova Scotia* (1990), 98 NSR (2d) 429 (SC (AD)).

47. *Ibid.*

48. *Halsbury's Laws of England*, vol 37, 4th ed (London, UK: Butterworths, 1982).

49. *Supra* note 2.

50. *Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd* (1971), 21 DLR (3d) 75.

51. *Baxter Student Housing Ltd v College Housing Co-operative Ltd*, [1976] 2 SCR 475.

## 2. HRM v. Ofume (2003)

In the second case, *Halifax (Regional Municipality) v. Ofume*<sup>52</sup> the issue confronting the Court of Appeal was whether the plaintiff's husband, as a non-lawyer, could represent her in a civil action before the Supreme Court. Rule 9.08 specifically allowed a person to be represented by a solicitor or represent themselves but made no provision for non-lawyer representation. In this case, a Supreme Court Justice in chambers had exercised judicial discretion and allowed the husband to represent his wife. It was this decision that was appealed to the Nova Scotia Court of Appeal.

Justice Saunders, for the Court, framed the question in terms of whether a rule that purports to limit representation to a party or a solicitor is sufficient to override the court's inherent jurisdiction. In addressing this question, Justice Saunders first established that Canadian superior courts do possess the inherent jurisdiction to control their own procedures by making reference to and quoting from the Manitoba Court of Appeal decision in *Montreal Trust*.<sup>53</sup> He also noted that the Nova Scotia Court of Appeal had itself previously affirmed the principle of inherent jurisdiction as it applies to the Supreme Court of the province in the following words:

The inherent jurisdiction of the court has been described as a vague concept and one difficult to pin down. It is a doctrine which has received little by way of analysis but there is no question it is a power which a superior trial court enjoys to be used when it is just and equitable to do so. It is a procedural concept and courts must be cautious in exercising the power which should not be used to effect changes in substantive law.<sup>54</sup>

Justice Saunders also observed that the Supreme Court of Canada in *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* had declared that *Montreal Trust* "may well be cited as a paradigm of the exercise of judicial discretion."<sup>55</sup> Referring to the rules of procedure, Justice Saunders expressed the view that "[o]ur Civil Procedure Rules do not oust or temper the court's inherent jurisdiction; rather they reflect its authority and countenance its application."<sup>56</sup> More specifically, he found that Rule 9.08 did not clearly or unambiguously bar non-lawyers from representing parties before the court.<sup>57</sup>

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52. *Supra* note 43.

53. *Supra* note 49.

54. *Ofume*, *supra* note 43 at para 22, citing *Goodwin*, *supra* note 43 at para 17.

55. *Supra* note 50 at para 480.

56. *Ofume*, *supra* note 43 at para 39.

57. *Ibid* at para 34.

As for the court's inherent jurisdiction to control its own proceedings, Justice Saunders saw the control as fundamental to a court that derives its power and existence not from statute but from the constitution. In his view, this kind of jurisdiction gives rise to the "powers which are necessary to enable [courts] to act effectively."<sup>58</sup> Justice Saunders then listed the number of factors that should be considered by a superior court when exercising discretion with respect to the question of whether or not to allow lay persons to represent others before the courts of Nova Scotia. He then concluded: "allowing judges to decide who may appear before them on a case by case basis, rather than instituting an outright prohibition, will better serve the interests of justice."<sup>59</sup>

We should note that the basis for the exercise of inherent jurisdiction in this case was not the one declared in *Goodwin*, namely, when it is just and equitable to do so. Instead, the emphasis in *Ofume* was on the ability of the court to act effectively as a court, a power Justice Saunders described as fundamental.

### 3. *Ocean v. Economical Mutual Insurance Co. (2009)*

The third case in our trilogy and the most recent, *Ocean v. Economical Mutual Insurance Co.*<sup>60</sup> involves a situation where the provisions of the *Civil Procedure Rules* and other statutory provisions did not specifically cover the situation before the court. The circumstances in question involved the mental capacity of a self-representing litigant to adequately represent herself. The question was whether the court had jurisdiction to order a mental assessment of the litigant when mental capacity was not an issue to be determined on the merits of the case. The case presents a striking example of the complexities involved in the decision of a court to exercise inherent jurisdiction.

In *Ocean*, a self-represented litigant brought an action against her insurer and the driver of the other vehicle. The insurer declined to respond to Ms. Ocean's motor vehicle accident claim. The insurer brought a motion for an order which required the insured to be assessed by an independent medical expert to determine her competency to represent herself in the proceeding. The trial judge concluded that the evidence presented to the court had satisfied the court that it was appropriate to order a psychiatric examination of Ms. Ocean to determine the issue.<sup>61</sup>

58. *Ofume*, *supra* note 43 at para 40.

59. *Ibid* at para 41.

60. *Supra* note 43.

61. *Ocean v Economical Mutual Insurance Co*, 2008 NSSC 282, 274 NSR (2d) 80 [*Ocean SC*].

With reference to the issue whether the court had the necessary jurisdiction or authority to make such an order, the trial judge noted that Counsel for the insurance company had relied on Rules 22 and 23 of the *Civil Procedure Rules* (1972) or, in the alternative on the inherent jurisdiction of the court to make such an order. Adopting a liberal interpretation, the trial judge found that Rule 23 allowed for the issuance of such an order but declared that if she were in error in this regard she was fully satisfied that it was appropriate to use the Court's inherent jurisdiction to issue such an order. Inherent jurisdiction thus became a back-up authority if such were needed for the court to make the order. The trial judge further explained that her reason for making the order was because, in her words:

I have an obligation as a trial judge to help to [e]nsure that the parties to this action receive a fair trial. In order to [e]nsure that the plaintiff receives a fair trial, I must be satisfied that she is competent to represent herself in these proceedings.<sup>62</sup>

The trial judge also specifically stated that she was not in any way finding that Ms. Ocean was incompetent (to manage her own affairs generally).

In response to this decision, Ms. Ocean contended that the judge was without jurisdiction to order the assessment and, even if the court did have such authority, it should not have been issued in these circumstances. Ms. Ocean therefore asked the Court of Appeal for permission to appeal the decision and this request was granted.

On appeal, the Court of Appeal found that neither Rule 22 nor 23 authorized the court to order a psychiatric assessment of a litigant's mental competency in these circumstances. The Court first noted the lack of case law in Nova Scotia to support such an order and, secondly, that the equivalent rule had been most commonly interpreted in other provinces as being used only to assist the court in interpreting evidence and not to create evidence in order to prove a fact in issue. As a result, the Court of Appeal concluded that Rule 23 could not be used to appoint a medical practitioner to ascertain the mental competency of a party to litigation where competency was not a fact in issue in the proceedings.<sup>63</sup> The Court had also, earlier in its decision, pointed out that the Nova Scotia *Civil Procedure Rules* did not contain a procedure for determining the competency of a person, nor did they contemplate a status between competence and full incompetence.

Without either a statutory or rule basis for jurisdiction, the only other possible basis upon which the court could rest its decision to

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62. *Ocean SC*, *supra* note 61 at 84.

63. *Supra* note 43 at 221.



order the psychiatric assessment was for the court to rely on its inherent jurisdiction.

Addressing the issue of inherent jurisdiction, the Nova Scotia Court of Appeal observed that this particular issue had never been dealt with or the inherent jurisdiction of the court used to issue such an order in the past. There were no precedents. Nevertheless, in spite of the lack of clear precedent, the Court of Appeal was prepared to assume in exceptional circumstances that inherent jurisdiction could be invoked for this purpose. At this point in the judgement, the Court of Appeal does not explain what exceptional circumstances might involve nor the basis for the invocation of inherent jurisdiction as a basis for action. As we shall see, Justice Bateman, later in her judgement, does give examples of exceptional circumstances which, if presenting themselves, would justify the court using its inherent jurisdiction. Additionally, however, by assuming the fact and availability of inherent jurisdiction, the question that then arises is should that jurisdiction be exercised? In this sense, inherent jurisdiction is optional rather than mandatory and involves the exercise of judicial discretion upon the question of its use.

The importance of this question is emphasized by Justice Bateman who also notes that it must be exercised judicially.<sup>64</sup> On this point Justice Bateman appears to have adopted the approach outlined by Jenkins L.J. in the English case of *Grimshaw v. Dunbar*.<sup>65</sup> The exercise of judicial discretion according to this approach seems to involve an exercise whereby the judge takes into consideration all relevant circumstances and excludes all irrelevant considerations from the determination whether to exercise inherent jurisdiction and take action or not and outlines these considerations in the court's decision. With this definition as a guide, Justice Bateman then lists all the relevant considerations that the trial judge should have taken into account when making her decision to order a mental assessment of Ms. Ocean.<sup>66</sup> These include the following:

- (1) A fundamental precept is that an adult person is presumed to be competent to manager her own affairs.
- (2) A competent adult is entitled to access justice, either personally or be represented by a lawyer.
- (3) *Civil Procedure Rules* do not outline a procedure for having a person declared mentally incompetent.

64. *Ocean*, *supra* note 43 at 225.

65. *Grimshaw v Dunbar*, [1953] 1 All ER 350 at 353.

66. *Ocean*, *supra* note 43 at para 89ff.

- (4) The statutory vehicle to address issues of competency is the *Incompetent Persons Act*.<sup>67</sup>
- (5) The *Incompetent Persons Act* provides an all-or-nothing approach to incompetence. Only where a person is, by reason of mental infirmity, incapable of managing her own affairs, both real and personal property, is a guardian appointed. There is no category of partial incompetence such as litigation incompetence, which was the focus in this case. There was no suggestion that Ms. Ocean was incapacitated in this way. None of Ms. Ocean's extended family and friends have indicated that she was not capable of managing her own affairs.
- (6) The Supreme Court of Canada in *R. v. Swain*<sup>68</sup> has confirmed that respect for the autonomy and intrinsic value of all individuals is a basic principle underlying our legal system. This includes respect for individual decision making in matters of fundamental importance.
- (7) There is no suggestion that this is a vexatious action or that Ms. Ocean is abusing the process of the court. Although Ms. Ocean may have difficulty confining her oral or written submissions to material which the Judge and opposing counsel view as clearly relevant to her case, she is able to provide a rational explanation that connects her reference to her writings and discoveries to the matters at issue in the litigation.
- (8) The transcripts of the proceedings reveal that Ms. Ocean is articulate, coherent, respectful in court and responsive to directions from the Judge.
- (9) The court's inherent jurisdiction is an extraordinary power rooted in controlling contempt of court or abuse of the court's process and should not be used except in the clearest cases.
- (10) Ms. Ocean's family doctor provided a note attesting to her capacity.
- (11) The report prepared by the psychologist who treated Ms. Ocean for post-traumatic stress disorder in 2005, and available to the psychiatrist who testified at the hearing did not raise any concern about her competence.

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67. *Incompetent Persons Act*, RSNS 1989, c 218.

68. *R v Swain*, [1991] 1 SCR 933.

- (12) Permitting an opposing counsel to raise the question of a party's mental capacity in a proceeding sets a dangerous precedent.
- (13) The limited cognitive capacity test applied in criminal proceedings does not require that an accused, even one whose liberty may be at risk, has the ability to make choices about the conduct of the litigation which are in her best interests.

Justice Bateman concluded that since the trial judge failed to take into account such relevant circumstances, she was in error in issuing a mental assessment.

A close examination of the trial judge's reasons for judgment indicate that she did in fact consider the family doctor's note but was of the opinion that it was too brief to be useful and did not adequately deal with Ms. Ocean's situation.<sup>69</sup> The trial judge also had the report of a psychiatrist who described Ms. Ocean as delusional, but was not prepared to declare her incompetent. As already noted, the trial judge was very concerned that Ms. Ocean receive a fair trial. In order for this to be accomplished, the trial judge said that she needed to be satisfied that Ms. Ocean was competent to conduct the litigation. This concern for a fair trial and the duty of any trial judge in this regard was not mentioned by the Court of Appeal as a relevant consideration. Perhaps it was considered to be irrelevant. Being an oral decision, it is not surprising that the trial judge mentioned fewer relevant considerations than did the Court of Appeal.

It is also interesting to note that Ms. Ocean did undergo a psychiatric assessment to determine her fitness to conduct litigation on her own behalf but the report had not been delivered to the Court prior to the appeal. Had it been available, we can only wonder whether a Court of Appeal would have considered it a relevant consideration.

Although Justice Bateman's ultimate decision was that the order for mental assessment should not have been issued because all of the relevant considerations had not been taken into account by the trial judge, she did suggest that a court could exercise its inherent jurisdiction and issue such an order in exceptional circumstances. Fortunately, Justice Bateman provided guidance on this matter by suggesting that exceptional circumstances could involve the following:

- (1) A situation where the litigant poses a threat to the personal safety of the judge.

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69. *Supra* note 43 at para 83.

- (2) The litigant's conduct otherwise amounted to an abuse of the court's process such as causing unacceptable delay and vexatious or frivolous claims.
- (3) Where there were no statutory provisions to cover this situation or address the issue.<sup>70</sup>

In this case, according to the Court of Appeal, Ms. Ocean's conduct did not fall within (1) above and did not involve (2); however, (3) was satisfied. It is not clear that proving or establishing any one of the three situations would meet the test of exceptional circumstances or whether all three are required. A review of Nova Scotia cases shows our courts having to deal fairly frequently with situations where conduct is considered to constitute an abuse of process or where there are no statutory provisions to cover the situation. In the past, such circumstances have not been considered exceptional and have resulted in the courts ordering a stay of proceedings or dismissing an action. Perhaps it is the type of action being ordered here, namely, an order to undergo a mental assessment, that is considered so intrusive as to warrant limiting its exercise to exceptional circumstances. On the other hand, denying a litigant the right to move forward with litigation is also an important restriction but Nova Scotia courts have not hesitated to use their inherent jurisdiction to restrict this right.

By assuming, without deciding, that the court had an inherent jurisdiction to order a mental assessment of a litigant in exceptional circumstances, the Court of Appeal appears to have accepted the reality of inherent jurisdiction whatever its source might be. The Court does so without any discussion of the basic nature or source of this inherent jurisdiction or of its limits beyond the observation that in Nova Scotia, courts have generally addressed what is not a proper exercise of the court's inherent jurisdiction on a case-by-case basis. Ironically, this is what the Court of Appeal did in this case after exercising its discretion judicially.

In the process of reaching a decision on the particular issue in *Ocean*, the Nova Scotia Court of Appeal made a number of observations about inherent jurisdiction and its attributes including the following:

- (1) In its earliest application, the concept was narrowly applied and limited to issues involving contempt of court or other situations that could be described as involving an abuse of the court's process. Even in this narrow ambit, inherent jurisdiction was to be exercised sparingly.<sup>71</sup>

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70. *Ocean*, *supra* note 43 at para 99.

71. *Supra* note 43 at para 72 quoting Jacobs, *supra* note 2.

- (2) Over the centuries, the concept's application was expanded to cover, among other things, the variation of trusts, safeguarding of children, the provision of remedies and situations where statutory provisions do not so provide, supervision, protection and assistance to inferior tribunals (including arbitrations) and filling of gaps in statutes.<sup>72</sup>
- (3) It is a vague concept difficult to pin down and has received little analysis. Rather than trying to determine the limits of inherent jurisdiction, Nova Scotia courts "have generally addressed what is *not* a proper exercise of the court's inherent jurisdiction on a case by case basis."<sup>73</sup>
- (4) It is apparently used by a superior court when it is just and equitable to do so.<sup>74</sup>
- (5) It is primarily a procedural concept which the courts must be cautious in exercising and should not be used to make changes in substantive law.<sup>75</sup>
- (6) Action taken pursuant to inherent jurisdiction requires an exercise of discretion. This discretion must always be exercised judicially.<sup>76</sup>
- (7) A judge does not have an unfettered right to do what is thought to be fair as between the parties. A court's resort to its inherent jurisdiction must be employed within a framework of principles relevant to the matters in issue.<sup>77</sup>

Of these observations, Justice Bateman seemed particularly concerned to emphasize that a judge does not have an unfettered right to do what is thought to be fair as between the parties but must employ the court's inherent jurisdiction within a framework of principles relevant to the matter in issue. In so doing, she appears to be drawing back from what the

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72. *Ibid* at para 73, quoting WH Charles, "Inherent Jurisdiction of Nova Scotia Courts" NS Law Reform Commission (2005) at 7-8.

73. *Ocean*, *supra* note 43 at para 74 [emphasis in original].

74. *Goodwin*, *supra* note 43 at para 17.

75. *Ibid*.

76. *Ward v James*, [1965] 1 All ER 563 (CA).

77. *ABN Amro Bank Canada v NsC Diesel Power Inc* (1991), 101 NSR (2d) 361 (SC); and *Golden Forest Holdings*, *supra* note 46.

Court of Appeal had stated in the earlier case of *Goodwin*<sup>78</sup> and verifying the earlier decisions in *ABN Amro Bank*<sup>79</sup> and *Golden Forest Holdings*.<sup>80</sup>

Secondly, her discussion of the judicial exercise of discretion provides a second caution or braking action within the exercise of inherent jurisdiction. It will be interesting to see what effect this has on the future use of this power by the courts. Will the need to develop a framework of principles or an outline of relevant considerations that underlie a decision to use inherent jurisdiction dampen the use of such jurisdiction by the Nova Scotia courts?

It is also interesting to note that some of the principles outlined by Justice Bateman as applicable to the exercise of inherent jurisdiction are also considered relevant considerations with regard to the exercise of discretion judicially. For example, a competent adult is entitled to access justice, either personally or represented by a lawyer. It is not clear whether the requirement for the application and discussion of relevant principles in relation to the issue of inherent jurisdiction and the need for considered relevant factors regarding the exercise of discretion are two separate and different requirements or just different ways of expressing a single requirement.

The *Ocean* decision is disappointing in one respect, that being the lack of any discussion of the nature or source of this judicial power. It is instructive to note that the first reaction of the Court of Appeal was to determine if there were any precedents to support the exercise of inherent jurisdiction in these particular circumstances. This is a typical approach of a common law court and probably not surprising in that regard. It is also the typical response of other Canadian courts as well. There is no discussion of the source of the court's inherent jurisdiction but it does appear that the court is looking for it in the common law.

#### 4. *Final observations*

In all three cases the court was asked to use its inherent jurisdiction to cover gaps or oversights in the rules. In order to do so, the Court of Appeal in *Goodwin*<sup>81</sup> appeared to use the just and equitable basis of jurisdiction to control its own process and to prevent an injustice. In the two remaining cases, *Ofume*<sup>82</sup> and *Ocean*,<sup>83</sup> the Court relied only on the control of the

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78. *Supra* note 43.

79. *Supra* note 77.

80. *Supra* note 46.

81. *Supra* note 43.

82. *Supra* note 43.

83. *Ibid.*

court's process as a basis for inherent jurisdiction. Fairness or injustice was not a primary motive or at least was not expressed to be.

In *Goodwin* and *Ofume* the Court did in fact exercise its inherent jurisdiction but in *Ocean* it did not do so. In the latter case there was no exercise of inherent jurisdiction because it was questionable whether competence to carry forward litigation in these circumstances amounted to an abuse of the court process and there were other considerations weighing against an assessment. The other party to the litigation may have been frustrated by the actions of the self-representing party but not disadvantaged sufficiently to be considered abused. In *Ofume*, Justice Saunders made it clear that inherent jurisdiction actions involving court control of its process were of greater importance than the jurisdiction to correct substantive problems like attempting to plug a perceived statutory gap. This is so, he explained, because control of the court process is fundamental to a court that derives its powers and existence not from statute but from the constitution.<sup>84</sup> This suggests that vis-à-vis the court process, the court has more leeway in what it can do. This may affect the relationship between the inherent jurisdiction of the court and the rules of court. It also suggests a hierarchy of powers within inherent jurisdiction.

In *Ocean*, the Court of Appeal's most recent decision<sup>85</sup> the Court seemed concerned that exercising inherent jurisdiction on the basis of what the Court might think was just and equitable provided too much leeway for the exercise of judicial discretion and perhaps arbitrariness unless controlled in some way. The controlling mechanism that the Court adopted involves a requirement that the court set out both the relevant and irrelevant factors considered by the court in making a decision. In other words, the court is required to outline or explain the reasoning that led to the exercise of discretion to invoke its inherent jurisdiction.

### III. *Survey of reported decisions of the Supreme Court of Nova Scotia: 1853 to 2009*

It was the unsettled view of inherent jurisdiction described in Part II of this paper that prompted a survey of Nova Scotia trial court decisions to assess the frequency with which the concept was invoked by these courts; the specific situation in which it was invoked; judicial recognition of the limits of the concept (if any); and the nature and source of the concept as understood by the trial courts.

84. *Supra* note 43 at 245.

85. *Ocean*, *supra* note 43.

The survey of reported decisions of the Supreme Court of Nova Scotia covered the time period 1853 to 2009. During this period there were 15,693 reported cases but only 97 referred to inherent jurisdiction. This represents just a little more than one-half of one per cent of the cases.<sup>86</sup> The earliest reference to inherent jurisdiction occurred in 1899<sup>87</sup> although there had been judicial references to a similar type of jurisdiction such as “powers incident to every court”<sup>88</sup> or “inherent supervisory powers” prior to this time.<sup>89</sup>

Although Nova Scotia trial courts appear to have invoked their inherent jurisdiction sparingly, it was exercised by the court in 62 per cent of the cases when proposed by counsel or discussed by the court. In cases where it was not applied, the most prevalent reason was a conflict with statutory provisions or the *Civil Procedure Rules*.<sup>90</sup>

As far as subject matter is concerned, survey results show that inherent jurisdiction is most readily invoked when the issue involves the court process itself and in this sense is procedural.<sup>91</sup> But this is not the only area of activity where the courts feel comfortable applying inherent

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86. I am very much indebted to David Michels and Mark Lewis, staff members of the Sir James Dunn Law Library, for providing valuable statistical information about reported cases and specifically those cases in which inherent jurisdiction was an issue. For a more comprehensive and detailed analysis and discussion of the survey results see Appendix “A”.

87. See *Holme v Taylor* (1899), 32 NSR 791, in which counsel argued that the court had an inherent jurisdiction to strike out frivolous pleas.

88. As in *Re Hately* (1884), 17 NSR 375, to correct mistakes.

89. *Auchterlony v Palgrave Gold Mining Co* (1897), 29 NSR 41, over the court’s own powers.

90. These limits were imposed by the court in 15 cases, nine involving statutes: *Rex v O’Neil & Smith* (1931), 56 CCC 379 (NS Co Ct); *Re Wellington School Section and Trider* (1944), 18 MPR 102; *Geosam Investments Ltd v Keddy*, 2004 NSSC 153, 226 NSR (2d) 19; *Nova Scotia (Minister of Community Services) v NNM and RDM*, 2008 NSSC 72, 262 NSR (2d) 384; *Re Donald-Reagh*, 2008 NSSC 390, 272 NSR (2d) 282; *Re Charles Brown* (1928), 60 NSR 76 (SC); *Re Lipsett Holdings Ltd* (2000), 212 NSR (2d) 207 (CA); *Bast v Bast* (1975), 20 NSR (2d) 604 (SC (TD)); *R v Hardiman*, 2002 NSSC 208, 208 NSR (2d) 24; *Cameron v Excelsior Life Insurance Company* (1979), 32 NSR (2d) 668, 104 DLR (3d) 706 (CA); *Western Electric Ltd v International Brotherhood of Electrical Workers, Local 625*, 2004 NSSC 129, 225 NSR (2d) 54; *Melford Concerned Citizens Society v Nova Scotia (Minister of the Environment)* (1999), 181 NSR (2d) 52, 560 APR 52 (SC); *Lyn-Gor Development Inc v Canada (AG)*, 2004 NSSC 270, 233 NSR (2d) 325; *Re Mombroquette* (1928), 51 CCC 132, [1928] NSJ no 4 (NSSC); and *Francis v Haliburton* (1975) 19 NSR (2d) 621, 24 APR 621 (SC (TD)).

91. Procedural cases are listed in Appendix “B”. In 13 cases where the court exercised its inherent jurisdiction, the action taken by the court could be described as an aspect of the court controlling its own procedure: *Carson v Montreal Trust Co* (1915), 23 DLR 690 (NSSC); *Fenerty v The City of Halifax* (1920), 53 NSR 457 (SC); *The King v Verge* (1924-25), 57 NSR 235; *The King v Fraser* (1907-08), 42 NSR 202; *Re Wellington School Section*, *supra* note 90; *Lockwood v Brentwood Park Investments Ltd* (1970), 1 NSR (2d) 669 (SC); *Sharma v Dartmouth & County East Residential Tenancies Board* (1979), 59 NSR (2d) 339 (SC); *Widrig v Widrig* (1981), 48 NSR (2d) 269 (SC); *NsC Corp v ABN Amro Bank Canada* (1992), 116 NSR (2d) 97 (SC); *Snair v Halifax Insurance Nationale-Nederlanden North America Corp* (1994), 139 NSR (2d) 161 (SC); *Oakland/Indian Point Residents Assn v Seaview Properties Ltd*, 2008 NSSC 209, 266 NSR (2d) 256; *Miller v Staples (Estate)*, 2006 NSSC 183, 245 NSR (2d) 65; and *R v Pottier*, [1999] NSJ no 95 (CA).



jurisdiction. Their historic role as supervisor of inferior tribunals is reflected in the proportion of cases where either arbitrational awards are interfered with,<sup>92</sup> or inferior tribunals are controlled.<sup>93</sup> Given that historically, the royal courts exercised control over inferior tribunals by the issuance of prerogative writs, it is not surprising that the courts should also feel free to exercise some sort of inherent jurisdiction beyond the writs. These two groups of cases taken together constitute 21 cases, representing 21.6 per cent of the total 97 cases surveyed; a significant area of operation. Inherent jurisdiction also seems to be based on, and to include, remnants of the Court of Chancery jurisdiction, particularly in the *parens patriae* jurisdiction regarding children.<sup>94</sup>

The approach taken by the Nova Scotia courts to the question of inherent jurisdiction appears to be the typical approach of common law courts to any legal issue. The judge turns to precedent for guidance in making the decision as to whether the situation is an appropriate one in which to exercise the court's inherent jurisdiction. There is usually little independent discussion or inquiry into the nature and source of the concept itself. Instead, consideration is sometimes given to and reliance placed upon the seminal article on inherent jurisdiction by Master Jacob,<sup>95</sup> either directly or indirectly via *Halsbury's*. Jacob's definition of inherent jurisdiction is considered particularly helpful. The limits of inherent jurisdiction are not explored in any systematic way beyond noting potential or actual conflicts with statutory provisions and rules of court.

92. Fifteen such cases were found by the survey: *McAskill v Town of New Glasgow* (1895), 40 NSR 58; *New Glasgow v Milligan* (1933), 1 DLR 748; *Re Thomas Hackett* (1939), 2 DLR 332; *Re Wellington School Section*, *supra* note 90; *Canadian Gypsum Co v Nova Scotia Quarry Works Union, Local 294* (1960), 20 DLR (2d) 314; *Town of Middleton v Dowell* (1972), 3 NSR (2d) 880; *Canadian Keyes Fibre v United Paperworkers Intl Union* (1973), 8 NSR (2d) 89; *Canadian General Electric Co Ltd v Oil, Chemical & Atomic Workers* (1975), 11 NSR (2d) 550; *Centennial Properties Limited v Public Service Commission of Halifax* (1975), 21 NSR (2d) 66; *International Union v Volvo Canada Ltd* (1976), 18 NSR (2d) 615; *Dominion Bridge Company Limited v Allen* (1976), 23 NSR (2d) 135; *Bowater Mersey Paper Company Limited v Canadian Paper Workers Union, Salaried Workers, Local 243* (1977), 22 NSR (2d) 412; *Sharma v Dartmouth & County East Residential Tenancies Board and Pat King Investments Ltd* (1979), 59 NSR (2d) 339 (SC); *CUPE v School Board* (1979), 40 NSR (2d) 43; and *Dalhousie University v Embil* (1988), 86 NSR (2d) 154 (SC). The Court in *Canadian Gypsum*; *Canadian Keyes Fibre*; and *Embil* did not exercise its inherent jurisdiction because the Court found no error of law on the face of the record.

93. This survey revealed six such cases, including the following: *The King v Fraser* (1907), 42 NSR 202 (SC); *R v Halifax City Council* (1962), 34 DLR (2d) 45, [1962] NSJ no 14 (SC); *Canadian Automatic Sprinkler Association v Nova Scotia Labour Relations Board* (1974), 15 NSR (2d), [1974] NSJ no 330 (SC TD)); *Little Narrows Gypsum Co v LRB* (1977), 24 NSR (2d), 82 DLR (3d) 693 (SC (AD)); *Walker v Keating* (1973), 6 NSR (2d) 1, 42 DLR (3d) 105 (SC (AD)); and *Re Amiro*, [1940] 2 DLR 766, [1940] NSJ no 15 (SC). *Fraser* and *Re Amiro* are two cases in which the Court did not exercise its inherent jurisdiction.

94. See Appendix "C" for a list of these cases.

95. *Supra* note 2.

Court references to Jacob's article might be taken as evidence that Nova Scotia courts have also accepted the explanation or suggestion that inherent jurisdiction is in some way a metaphysical manifestation of the immanent qualities of a superior court. Our review of Nova Scotian cases does not support this conclusion. Quite the contrary, it suggests that history and necessity have been the source of the court's inherent jurisdiction.

The trilogy of Court of Appeal cases<sup>96</sup> provide a number of statements or observations about the nature of inherent jurisdiction and its use by the Nova Scotia trial courts. A comparison of such observations with the survey results, which reflect the actual application of inherent jurisdiction is instructive. In several instances the observations of Justice Bateman in *Ocean*<sup>97</sup> are confirmed by the action of trial court judges. For example, trial judgments corroborate the fact that Nova Scotia courts have, in the past, made no attempt to independently determine the nature and source of inherent jurisdiction. Similarly, the survey confirms the expansion of inherent jurisdiction from its historically narrow base in contempt of court. Additionally, the accepted characterization of inherent jurisdiction as primarily procedural is also confirmed.

On the other hand, the Court of Appeal's concern with the danger of trial courts using what is just and equitable or fair as a basis for invoking their inherent jurisdiction does not appear to be reflected in trial court decisions. Less than ten cases are documented.<sup>98</sup> As a potential source of arbitrary decisions, the just and equitable rationale suggested by Jacob<sup>99</sup> does not appear to be a significant threat. However, the Court of Appeal's other concern with the need for the trial courts to articulate the rationale behind any decision to exercise inherent jurisdiction is supported by the evidence of heavy reliance by Nova Scotia courts on case precedents to support their decisions. This is particularly problematic since most of the precedents relied upon do not provide an explanation or justification for the use of inherent jurisdiction. Also troubling is the fact that in 13.3 per cent of the cases, Nova Scotia courts applied inherent jurisdiction without reference to any precedent or other authority. Perhaps these courts thought their jurisdiction was self-evident.<sup>100</sup>

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96. *Supra* note 43.

97. *Ibid.*

98. In three cases the court made direct reference to Jacob's article. In six other cases the term "just and equitable" was used by the court but without direct reference to Jacob or to his definition of inherent jurisdiction: see e.g. *Nova Scotia (Minister of Community Services) v NNM and RDM*, *supra* note 90; and *Quigley v Willmore*, 2008 NSSC 353, 272 NSR (2d) 61.

99. *Supra* note 2.

100. *Supra* note 91.

The lack of any theoretical boundaries for the concept of inherent jurisdiction was noted by Justice Bateman in *Ocean*<sup>101</sup> and the fact that decisions are made on a case-by-case basis was also confirmed by the survey. Beyond suggesting that inherent jurisdiction is primarily a procedurally based concept, Nova Scotia trial courts have not tried to articulate a more general or theoretical explanation or definition of its limits. For a more comprehensive discussion of the results of the survey, see Appendix "A".

#### IV. *Superior courts: the limits of inherent jurisdiction*

As previously observed, neither courts nor legal commentators have tried very hard to define the limits of inherent jurisdiction with any degree of precision even though the issue of limits is one of the questions consistently asked and which deserves an answer.<sup>102</sup> No doubt the fact that the concept itself is amorphous, ubiquitous, and pervasive makes a determination of its limits extremely difficult. However, there are three elements that can be identified as placing some limits on inherent jurisdiction even though they do not provide answers as to limits with regard to specific situations. These three elements are procedural; statutes; and the rules of court. Each will be discussed in turn.

##### 1. *Procedural limitations*

Although Master Jacob notes the need for an answer to the question of inherent jurisdiction limits, he makes no effort to provide one. He does, however, describe inherent jurisdiction as part of procedural law and emphasizes that it is not part of substantive law. His examination of the features of inherent jurisdiction which reveal close connections with the rules of court, practice and procedure, as well as litigation, support the view that inherent jurisdiction has decided ties to procedural matters.

If we consider that procedure and procedural law has as its objective to give effect to substantive law, it can be looked upon as subordinate to substantive law and therefore of less importance and perhaps easier to change. Judicial creativity with procedural rules using inherent jurisdiction as a vehicle may be seen as less constitutional and objectionable than juridical reform of substantive law. However, a matter which may appear as procedural from one point of view may pose constitutional questions from another. Procedure can effect substantive rights under the guise of process. Just being able to label an action as procedural does not necessarily

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101. *Supra* note 43.

102. Jacob, *supra* note 2 at 23.

make the question of limits any easier to determine even though it may limit the inquiry to some degree.<sup>103</sup>

The Nova Scotia Court of Appeal has accepted the fact that inherent jurisdiction is a procedural concept and that courts must be cautious when exercising this power to make sure that it is not used to effect changes in the substantive law. The Court has also rejected the notion that inherent jurisdiction provides the courts with “an unfettered right to do what, in the judge’s opinion, is fair as between the parties.”<sup>104</sup> On the contrary, according to the Court of Appeal, when a court resorts to inherent jurisdiction it must do so within a framework of principles relevant to the matter in issue.<sup>105</sup>

As one legal commentator observed, any argument that a court has inherent jurisdiction to order anything it thinks necessary to do justice in pending proceedings is too vague and unpredictable to be treated as having the quality of law<sup>106</sup> and has been unequivocally rejected by English courts in several cases.<sup>107</sup>

On the other hand, and at the opposite end of the spectrum, is the suggestion that inherent jurisdiction be limited to circumstances only involving contempt issues or the abuse of process or both, such as might be caused by frivolous or vexatious activities.<sup>108</sup> As an additional restriction to the more general procedural limitation, this would appear to constitute a limit upon a limit and, as such, is too restrictive. It is an approach that has been rejected by the Nova Scotia Court of Appeal in *Ofume*.<sup>109</sup>

The House of Lords has proposed a somewhat broader scope for the exercise of inherent jurisdiction by suggesting that the terms inherent power and inherent jurisdiction be confined to “the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice.”<sup>110</sup> Even this limitation is subject to considerable interpretation and one legal commentator has suggested that Lord Diplock really did not intend to define and restrict the end of the court’s inherent powers in the way suggested and that “it is more likely in the context that the sentence in question was merely intended to discourage the use

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103. Dockray, *supra* note 2 at 131.

104. *Ocean*, *supra* note 43 at para 77.

105. *Ibid.*

106. Dockray, *supra* note 2 at 128-29.

107. See e.g. *The Siskina*, *supra* note 27; and Dockray, *supra* note 2 at 129.

108. See e.g. *Orpen v Ontario (AG)* (1925), 2 DLR 366 (SC).

109. *Supra* note 43. Justice Saunders expressed the view at para 25 that inherent jurisdiction was broader in scope and that Canadian courts maintain a general inherent jurisdiction which includes the discretion to confine their own powers.

110. Per Lord Diplock in *Bremer Vulkan*, *supra* note 28 at 909.

of ‘inherent jurisdiction’ to refer to the supervisory jurisdiction of the Court.”<sup>111</sup>

Dockray suggests that an examination of English cases during the period 1978 to 1985 in which the courts denied that they had inherent jurisdiction to make a procedural order of some kind provides evidence that even within the general area of procedure there were limits to the ability of inherent jurisdiction to fashion new powers. Some of these restrictions enumerated by Dockray include where there is no inherent jurisdiction to: recast the law of discovery; award security for costs against a defendant; give a defendant summary judgment against a co-defendant; detain a party or witness in order to coerce another to comply with a court order; make interim payment orders; order compensation to be paid to someone who has suffered by implementation of an order of the court; order the production of hospital records in terms that disclosure is not made to the applicant or his legal advisor; back date orders; and introduce a rateable allocation scheme to share a limited insurance fund among competing claimants.<sup>112</sup>

A study of Nova Scotia cases where the court has denied the right to apply its inherent jurisdiction include the following: *Francis v. Haliburton*—no authority to set aside the decision of another judge in chambers by a judge in chambers;<sup>113</sup> *Nova Scotia (Minister of Community Services) v. R. Petel*—the court cannot substitute its own decision for that of the Minister and the court cannot order a non-parent to pay maintenance;<sup>114</sup> *Lyn-Gor Development*—the court is unable to relax the rules regarding residency and security for costs;<sup>115</sup> *R. v. Hardiman*—the court cannot vary bail conditions under s. 527 of the *Criminal Code* unless the *Criminal Code* authorizes it;<sup>116</sup> *Re Donald-Reagh*—there is no power in the court to revise a consumer proposal which has been annulled or deemed annulled and there is no discretion to forgive a redeemed annulment;<sup>117</sup> *Excelsior Life Insurance Company*—no power to set aside a perverse jury verdict;<sup>118</sup> and *Bast v. Bast*—no power to reduce the amount of maintenance.<sup>119</sup>

A comparison of Dockray and the Nova Scotia cases shows little similarity between them. The Nova Scotia cases appear to involve more

111. Dockray, *supra* note 2 at 129.

112. *Ibid* at 130.

113. *Francis*, *supra* note 90.

114. *Nova Scotia (Minister of Community Services) v R Petel* (2007), 253 NSR 177 (SC).

115. *Lyn-Gor Development*, *supra* note 90.

116. *Hardiman*, *supra* note 90. *Criminal Code*, RSC 1985, c C-46.

117. *Re Donald-Reagh*, *supra* note 90.

118. *Excelsior Life Insurance Company*, *supra* note 90.

119. *Bast*, *supra* note 90.

issues that have a substantive law element to them and are less procedural in nature. The lists represent good examples of the difficulties involved in labeling a provision procedural or substantive. Overall, the comparison provides little clear guidance as to the limits of inherent jurisdiction, even within the confines of so-called “procedural law.”

## 2. *Legislative restrictions*

A court cannot exercise its inherent jurisdiction powers if to do so would produce a conflict with clear legislative provisions. Providing the legislative intention is clearly and unambiguously expressed, it cannot be overridden by the exercise of judicial inherent jurisdiction. Parliamentary supremacy prevails. Both the Supreme Court of Canada and the Nova Scotia Court of Appeal have made it clear that legislative provisions can place limits on the exercise of inherent jurisdiction by the courts.<sup>120</sup>

What is the situation where there is not a clear conflict between the statutory provisions and the exercise of inherent jurisdiction but both exercise power within the same area of law? Jacob offers the opinion that the court can exercise its inherent jurisdiction even about matters that are regulated by statute or rules of court so long as it can do so without contravening any statutory provision.<sup>121</sup>

Another commentator suggests: “The mere fact that some statute or rule of court enables the court to deal with a particular problem in a particular way will not usually exclude inherent powers to deal with it [the same problem] in other ways.”<sup>122</sup> This seems reasonable but Mason goes on to suggest that “indeed the jurisdiction may be asserted even though the conduct complained of may be in literal compliance with some statute or rule of court if it would prevent a party obtaining a collateral advantage which it would be unjust for him to obtain.”<sup>123</sup>

It is conceivable that statutory provisions could expressly exclude the judicial exercise of inherent jurisdiction but this would be a rare occurrence. If legislation is introduced into an area of law without such an exclusion, it may not be clear whether the legislative intention is to exclude or abolish the exercise of inherent jurisdiction or whether it is intended to provide a supplement or an alternative to the common law process. However, if the

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120. In *Baxter*, *supra* note 51 at 480, Dickson J declared: “In my opinion the inherent jurisdiction of the Court of Queen’s Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will.” The effect of this order made was to alter the statutory priorities which a court simply cannot do. To a similar effect, see the Nova Scotia Court of Appeal decision in *Re Lipssett Holdings Ltd*, *supra* note 90.

121. *Supra* note 2 at 24.

122. Mason, *supra* note 2 at 449.

123. *Ibid*, citing *Hunter v Chief Constable of West Midlands Police*, [1982] AC 529.

legislative provisions are sufficiently detailed, courts will usually defer and refrain from exercising their inherent jurisdiction. This does not, of course, prevent the courts from closing apparent gaps in the statutory provisions.

A review of Nova Scotia cases suggests a variety of approaches. There appears to be uniform agreement that if the words of the statute are clear and unambiguous and in conflict with the application of inherent jurisdiction, the latter cannot be exercised.<sup>124</sup> But of course that still leaves the court free to fill any gaps in the statutes that might exist. In the situation where the statute is not in conflict with the exercise of inherent jurisdiction but covers the same situation or area of the law, the Nova Scotia cases are not completely uniform in their approach. There is at least one case where the court has taken the position that, in such circumstances, the court cannot exercise its inherent jurisdiction.<sup>125</sup>

However, in *Dalhousie University v. Embil*, the Court held that although the legislature had enacted statutory provisions governing arbitrations, the inherent jurisdiction of the court was still alive and of a broader sweep than the legislative provisions such that the court had power to enjoin the arbitration proceedings.<sup>126</sup>

### 3. *Rules of court*

A third potential limitation upon the judicial exercise of inherent jurisdiction exists in the form of the rules of court. Because of the way the rules of court are created in Nova Scotia, a more detailed and comprehensive examination of the relationship between the rules and inherent jurisdiction is required.

In Nova Scotia, s. 46 of the *Judicature Act*<sup>127</sup> authorizes the judges of the Supreme Court, or a majority of them, to make rules for carrying the provisions of the *Judicature Act* into effect. More precisely, among other powers, the judges are authorized to “regulate the pleading, practice and procedure in the Court and the rules of law which are to prevail in relation to remedies in proceedings therein.”<sup>128</sup>

More generally, the *Judicature Act* states that judges are authorized to make rules:

[F]or regulating any matter relating to the practice and procedure of the Court, or to the duties of the officers thereof, or to the costs of the

124. See *supra* note 90 for a list of such cases.

125. *Wellington School Section*, *supra* note 90.

126. *Embil*, *supra* note 92.

127. *Judicature Act*, RSNS 1989, c 240.

128. *Ibid* at s 46(b).

proceedings therein and every other matter deemed expedient for better attaining the ends of justice, advancing the remedies of suitors and carrying into effect the provisions of this Act, and of all other statutes in force respecting the Court.<sup>129</sup>

It is clear that the *Judicature Act* provides broad powers to the court to control its own process, to provide remedies to litigants and to do justice. The question that arises is what effect do the rules of court have upon the court's inherent jurisdiction? The answer to this question may depend upon the legal status of the rules. Are they the equivalent of statutes (primary legislation), subordinate legislation (regulations) or just the equivalent of practice directions from the court?

In England, because the *Rules of the Supreme Court*<sup>130</sup> provide that the rules are to regulate and prescribe the practice and procedure of the court, it has been suggested that where there is a conflict between the rules and inherent jurisdiction, the rules will override.<sup>131</sup> This is presumably because they have legislative support and confirmation as to their purpose.

In South Africa, the rules of court are considered to be subordinate legislation and therefore according to South Africa law, can be overruled by the court's inherent jurisdiction in case of a conflict.<sup>132</sup>

In Ontario, the rules of court are created by a non-judicial rules committee. Judges have input into the formulation of the rules but it is the committee that determines their final content. The rules are then enacted as regulations under the authority of the *Courts of Justice Act*<sup>133</sup> and subject to the approval of the Lieutenant Governor.<sup>134</sup> Unlike Ontario, the Nova Scotia *Civil Procedure Rules* are created by the judges alone. Section 51 of the *Judicature Act* provides for the tabling of any new rules before the Nova Scotia legislature within 20 days of their formalization.<sup>135</sup> This section further stipulates that the Legislative Assembly can ask the Lieutenant Governor to cancel any new rules. In effect, the Legislative Assembly, while not required to confirm or ratify the judges rules, can veto them if they think they are inappropriate. This power has never been exercised but the fact of its existence means that the judiciary does not have complete or final rule-making power, at least theoretically. It might be argued that when the Legislative Assembly does not veto any new rules

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129. *Supra* note 127 at s 46(j).

130. *Rules of the Supreme Court (Amendment) 1990*.

131. Dockray, *supra* note 2 at 128.

132. According to Taitz, *supra* note 2 at 12.

133. *Courts of Justice Act*, RSO 1990, c 43, s 66.

134. The process is described by Saunders JA in *Ofume*, *supra* note 43 at para 36.

135. *Supra* note 127.



of court it is impliedly consenting to or ratifying them and thus raising them to the status of a legislative enactment rather than just the rules of the judges.

The Nova Scotia Court of Appeal in *Ofume* noted the different roles played by the legislature and the judiciary in the rule-making process in Ontario and Nova Scotia.<sup>136</sup> Justice Saunders noted that the Attorney General for Nova Scotia did not have a hand in the creative process nor were the rules subject to the approval of the Lieutenant Governor in Council.<sup>137</sup> However, having noted the difference between the two provinces and their processes, the Court did not go further and suggest or explain what was the legal impact of these differences.

A closer examination of Justice Saunders' decision in which he was attempting to distinguish the Nova Scotia process of rule-making from that in Ontario, shows that Justice Saunders emphasized a number of points that are relevant to the status of the Nova Scotia *Rules*. Firstly, Justice Saunders seems to suggest that the Nova Scotia *Rules* do not have the same legal effect as do the Ontario *Rules* because they are not as clearly a product of the legislative process. As such, they can be more easily or readily ignored in the case of a conflict with the court's inherent jurisdiction. Secondly, he also notes that the rules generally do not oust the inherent jurisdiction of the court and in fact countenance its use. Thirdly, by referring to the historical origins of the Nova Scotia Supreme Court, he appears to suggest that the inherent jurisdiction in Nova Scotia is stronger or has more legal impact than in other provinces. Fourthly, as a matter of policy, he expresses the opinion that in the case of a situation involving legal representation, inherent jurisdiction is best determined on a case-by-case basis. Finally, in the area of court process, Justice Saunders sees the role played by inherent jurisdiction as being particularly important.<sup>138</sup>

In *Ofume*, Justice Saunders was able to determine that the rule in question, Rule 9.08 was ambiguous and clearly did not deal with the situation in issue.<sup>139</sup> As a result, there was no conflict between the inherent jurisdiction and the rule. His other comments regarding the relationship between inherent jurisdiction and the rules of court were not necessary for his decision but are certainly instructive regarding the view that the Nova Scotia Court of Appeal has of the legal effect of the civil procedure

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136. *Supra* note 43 at paras 36 and 37.

137. *Ibid.*

138. *Supra* note 43 at para 34.

139. *Ibid* at para 30, where Justice Saunders explains: "that section on its face does not meet the *Baxter Housing and Montreal Trust Co.* tests of unambiguously removing the inherent jurisdiction of the court."

rules vis-à-vis inherent jurisdiction, at least as of the date of *Ofume*. In this narrower context of court process and the still narrower context of litigant representation, the role of inherent jurisdiction is particularly strong, according to the Court of Appeal, and in the event of a clear conflict may override the rule or rules.<sup>140</sup> Certainly the Court of Appeal in *Goodwin* seemed prepared to override a rule of court if this were necessary.

We must keep in mind the fact that Justice Saunders was doing his best to differentiate or distinguish the Nova Scotia *Rules* from the Ontario *Rules* in order to avoid the application of an Ontario case as a precedent. The differences noted by Justice Saunders might be somewhat overemphasized.

If we revisit the *Judicature Act*,<sup>141</sup> we see that it seems to give the rules at least the status of regulations passed pursuant to the authority of a parent statute. The process may not be identical to that of Ontario but it is roughly the equivalent or similar to the situation in the United Kingdom. In spite of the comments by Justice Saunders, which seemed to imply that in the case of a conflict involving litigant representation, inherent jurisdiction would override the rules of court, he nevertheless appeared to accept the general proposition that if a situation arose where there was a conflict between the *Civil Procedure Rules* and inherent jurisdiction, the *Rules* would override. This was apparent from the reference to the Manitoba Court of Appeal decision in *Montreal Trust*,<sup>142</sup> which was subsequently approved in general terms by the Supreme Court of Canada.<sup>143</sup> It would seem that the Nova Scotia Court of Appeal considers the *Civil Procedure Rules* more than just practice directions from the judiciary. If this were not the case and if the Nova Scotia *Rules* were not considered to have the status of a statutory provision, or at least that of a regulation, the Nova Scotia courts would find themselves in the awkward situation of having to reconcile a conflict between judicially created non-statutory practice directions (rules) and the judicial discretion embodied in the concept of inherent jurisdiction. In having to choose one over the other, the court could always say that it had changed its mind about the rules. For example, in *Ofume* the *Rules* had been enacted in 1972<sup>144</sup> and the decision took place some 30 years later. If, however, the rules of court are considered to have any statutory status at all then allowing inherent jurisdiction to override the rules of court would offend the principle of supremacy of Parliament and the position taken

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140. *Ibid* at paras 40 and 41.

141. *Supra* note 127.

142. *Montreal Trust*, *supra* note 50.

143. *Baxter*, *supra* note 51.

144. The latest version of *Civil Procedure Rules* was published in 2008.

by the Supreme Court of Canada in *Baxter*.<sup>145</sup> In light of the subsequent decision in *Ocean*,<sup>146</sup> the result implied by Justice Saunders in *Ofume*<sup>147</sup> may not actually occur in the case of a direct conflict between a rule and inherent jurisdiction in other situations. Although *Ofume* and *Ocean* have similarities in that both involved gaps and litigant representation in court, the Court of Appeal in *Ocean* appeared to be taking a more cautious approach to the use of inherent jurisdiction generally.<sup>148</sup>

If we accept for the moment that the *Rules* in Nova Scotia and elsewhere are a product of the legislature then what is the relationship between inherent jurisdiction and the rules of court? The trilogy results are indecisive and far from conclusive on this question. Master Jacob seems to be ambivalent because at one point he describes inherent jurisdiction powers as a most valuable adjunct to powers conferred by the rules which can be used to fill gaps in the rules.<sup>149</sup> By so doing he gives the impression that the rules are predominant, legally speaking. He further states that one set of powers supplements and reinforces the other, apparently referring to inherent jurisdiction as the re-enforcer.<sup>150</sup> However, he also states that the powers conferred by the rules of court are generally speaking additional to and not in substitution of the powers arising out of the inherent jurisdiction of the court, and in any given case the court can proceed under either or both heads of jurisdiction unless there is a conflict.<sup>151</sup> He also notes that inherent jurisdiction is broader in its reach than the rules.<sup>152</sup> However, he does not discuss the consequences of a possible conflict between the two sources of court jurisdiction.

Justice Saunders in *Ofume* acknowledges the decision of the Supreme Court of Canada in *Baxter* that inherent jurisdiction cannot be exercised so as to conflict with a statute or rule.<sup>153</sup> In case of a conflict, the rule prevails but the rule must be clear and unambiguous. Mason agrees and stresses that the rules of court cannot exclude inherent jurisdiction from a particular area by implication alone.<sup>154</sup> Another legal commentator, Jerold

145. *Supra* note 51.

146. *Supra* note 43.

147. *Ibid.*

148. *Ibid.* According to the Nova Scotia Court of Appeal, not only did the situation in which the court sought to exercise its inherent jurisdiction have to be exceptional, but the exercise of that jurisdiction had to be explained.

149. *Supra* note 2 at 50; the author discusses the relationship between inherent jurisdiction and the rules of court.

150. *Ibid.*

151. Jacob, *supra* note 2.

152. *Ibid.*

153. *Supra* note 43 at para 24.

154. Mason, *supra* note 2 at para 24.

Taitz, goes even further and suggests that subordinate legislation in the form of rules of court or like regulations does not bind the court.<sup>155</sup> While acknowledging that the court will usually follow the rules of court where these are applicable, in appropriate circumstances the court, according to Taitz, may act contrary to them.<sup>156</sup> This view clearly sees inherent jurisdiction being of a higher order than the rules of court.

If we compare inherent jurisdiction and the rules of court in terms of their nature and function, historically the inherent jurisdiction of the courts predates the normal creation of rules of court even though it might have operated in a rather narrow area involving contempt of court. Functionally, inherent jurisdiction casts a broader shadow than the rules and can permeate all procedures at all stages. Inherent jurisdiction can also fill in gaps left by the rules.<sup>157</sup> As far as individuals are concerned, inherent jurisdiction can be invoked with regard to persons not themselves actually litigants in pending proceedings.<sup>158</sup>

Rules, on the other hand, are more precise and can regulate with some precision circumstances in which the court can apply coercive measures for disobedience or non-compliance with the rules or orders (contempt).

Both inherent jurisdiction and the rules can impose sanctions such as costs. In some cases the apparent inherent jurisdiction rule becomes codified as is the case with vexatious or frivolous claims in Nova Scotia.<sup>159</sup>

In situations of conflict and assuming that the rules have legislative confirmation, the supremacy of Parliament and legislation and constitutional principle means that inherent jurisdiction gives way to the rules. However, it has been suggested that inherent powers are often asserted to prevent a party who strictly complies with the rule from obtaining a collateral advantage which would be unjust for that person to obtain.<sup>160</sup> Indeed in Nova Scotia we have examples where Nova Scotia courts have used their inherent jurisdiction to override court rules when justice requires this to be done.<sup>161</sup> Inherent jurisdiction seems to have a

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155. Taitz, *supra* note 2 at 12.

156. *Ibid.*

157. An important finding recognized by Jacob, *supra* note 2 at 51.

158. Jacob, *supra* note 2 at 51.

159. See e.g. Rule 14.25 of the *Civil Procedure Rules* (1972) and Rule 88 of the 2d ed (2008).

160. Mason, *supra* note 2 at 458.

161. *Hiscock v Pasher*, 2008 NSCA 101, 302 DLR (4th) 325 (failure to provide a notice of intention to proceed in a timely manner); *Van de Wiel v National Life Assurance Co of Canada*, 2002 NSSC 209, 208 NSR (2d) 221; and *Lyn-Gor*, *supra* note 90. In *Lyn-Gor* the Court, guided by *Ofume*, recognized the authority of the court to make its own rules and control its own process, and declared that the court had inherent jurisdiction to vary the rules if the situation warrants it (at para 24).

distinctly equitable aspect to it that the courts will not refrain from using when necessary.

If a rule is enacted with regard to a particular issue whether narrow and precise or broad in its coverage, the question becomes whether the fact that the area is now governed by a rule of court means that the court's ability to exercise inherent jurisdiction in the entire area is lost so that there can be no co-existence with the rule.

It has been argued (by counsel) that the mere enactment of rules of procedure as a total package means that the legislature has taken over procedural matters leaving the judges with no inherent jurisdiction to exercise with regard to court processes.<sup>162</sup> As we have already seen, Justice Saunders in Nova Scotia has declared that the Nova Scotia *Rules* do not oust or temper the court's inherent jurisdiction but rather reflect and countenance the court's authority.<sup>163</sup> As products of the judges themselves, we should not be too surprised by this assessment. But other jurisdictions, where it is clear that the rules are the product of the legislature, have not adopted this position or suggested that the rules as a package are intended to eliminate inherent jurisdiction completely. The result is that inherent jurisdiction can co-exist with the rules in the absence of conflict. The issue of which is subordinate is only really important when there is a conflict between them. However, it is also important if the question is one of implication, such as when a narrow rule is enacted within a larger area or when the courts have either exercised inherent jurisdiction in the past or have the potential to do so. If inherent jurisdiction is considered to be the predominant jurisdiction, supplemented by the rules, then the strength of any implied exclusion is lessened.

In the latest version of the *Civil Procedure Rules* we have several examples of situations that were formally dealt with by the courts using their inherent jurisdiction which are now covered by the new rules. Rule 88, entitled "Abuse of Process," begins by stating "these rules do not diminish the inherent authority of a judge to control an abuse of the court's processes."<sup>164</sup> It then goes on to outline pleadings for abuse of process and the process for dealing with pleadings that are not sufficient to establish a claim or raise a defense. This new Rule 88 is clearly intended to deal with the general situation of the vexatious litigant and so-called frivolous actions. The rule makes it clear that the court's inherent jurisdiction or authority has not been totally eliminated in this area.

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162. *Straka v Humber River Regional Hospital* (2000), 51 OR (3d) 1.

163. *Ofume*, *supra* note 43 at para 39.

164. Nova Scotia, *Civil Procedure Rules*.

In *Ofume*,<sup>165</sup> Rule 9.08 of the 1972 *Rules* dealt with some situations involving legal representation but not the issue that was before the Court. This case could be seen as an example of a gap in legislative provisions where inherent jurisdiction was put forward as the basis for filling that gap. No conflict with any rule was established.

Rule 89 of the new *Rules* has detailed provisions regarding contempt. These provisions primarily concern the procedure for starting and conducting a contempt action. Rule 89 does not specifically give the judge the power to issue a contempt order or establish under what circumstances this might be done. These issues are left to the judge presumably exercising inherent jurisdiction. This situation provides a good example of a sort of shared jurisdiction involving both inherent jurisdiction and the rules of court. Finally, in *Excelsior Life Insurance Company*, Justice Hart (dissenting) expressed the opinion that Rule 34.09(4) of the 1972 *Rules* took away the power to set aside a perverse jury finding from the court. In this case no co-existence was possible.<sup>166</sup>

A review of cases involving conflicts between inherent jurisdiction and the rules provides mixed results. In six cases, the rule prevailed or was upheld and in five cases, the court inferred or specifically stated that inherent jurisdiction could be exercised to vary the impact of a rule where it was necessary for the court to control its own process and to prevent an injustice.<sup>167</sup> The situations in which the court is prepared to do this are usually considered to be exceptional.

Given these results the following observation of a member of the legal community seems appropriate: "So long as judges are concerned about injustices caused by delays, expense or technicalities of legislation no rule relating to the administration of justice will remain sacrosanct or incapable of further refinement."<sup>168</sup> This observation would seem particularly appropriate in Nova Scotia where the rules are made by the judges.

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165. *Ofume*, *supra* note 43 at para 39.

166. *Supra* note 90 at paras 62-65.

167. The rule prevailed in the following: *Excelsior Life Insurance Company*; *Western Electric Ltd*; *Re Mombroquette*; *Francis*; *Melford Concerned Citizens Society*; and *Lyn-Gor Development*, *supra* note 90. The rule did not prevail against inherent jurisdiction in the following: *Harrison v Leopold No 1* (1950), 25 MPR 42 (NSCA) *en banc*; *Blue v Antigonish District School Board* (1990), 95 NSR (2d) 118 (SC(TD)); *Van de Weil*, *supra* note 161; *Hiscock*, *supra* note 161; and *Goodwin*, *supra* note 43.

168. *Mason*, *supra* note 2 at 459.

### V. *Inherent jurisdiction and arbitrations*

Superior courts exercise supervisory powers over inferior courts and tribunals on the basis of their ability to issue prerogative writs.<sup>169</sup> Arbitration tribunals, being a mechanism created by private consensual arrangements, are not subject in the majority of cases to prerogative writ control, but they are subject to the exercise of a superior court's so-called inherent jurisdiction.

Not surprisingly, any examination of Nova Scotia cases regarding jurisdiction over arbitration tribunals, particularly in the period 1853 to 1930, will inevitably lead us to English precedents as a basis for the decisions of the Nova Scotia courts. Initially, perhaps in the early sixteenth century, it appears that English courts considered themselves as being in the position of courts of appeal who could examine whether the conclusion reached was sound, both in point of law and in point of fact. However, in the late sixteenth century and early seventeenth century, English courts appear to have adopted a new position and taken a hands-off approach to private arbitrations.<sup>170</sup>

It soon became apparent, however, that there were situations such as misconduct on the part of the arbitrator, fraud, or misconduct in the procurement of the arbitration, that cried out for a judicial remedy. As a result, the Court of Chancery in particular was looked to and did provide a remedy. In the early seventeenth century, it seems that it was possible to have the awards of arbitrators reviewed in both the law courts and the Court of Equity on the grounds of fraud; partiality or bias; want of due notice; or wilful misconduct on the part of the parties or the arbitrator.<sup>171</sup>

On the other hand, the early history of court interference or intervention with arbitration awards on the basis of error on the face of the award is rather murky as the words of Lord Goddard in the case of *Racecourse Betting Control Board v. Secretary For Air* suggest:

When and how the courts at Westminster first began to examine awards and to set them aside for *manifest error* it is difficult to discover. They certainly did in the 17th century, as it appears from an anonymous case in 1698, and it seems that the court of chancery would entertain bills to relieve against awards that contained apparent errors of law.<sup>172</sup>

169. According to *Jowitt's Dictionary of English Law*, 2d ed, prerogative writs are processes issued upon extraordinary occasions on proper cause shown. *Black's Law Dictionary*, 9th ed, adds that they are issued by a court exercising unusual or discretionary power. Examples of such writs include certiorari, habeas corpus, mandamus, and prohibition.

170. *Adams v Great North of Scotland Railway*, [1891] AC 31 at 39 (HL).

171. *Brown v Brown* (1683), 1 Vern 157, 23 ER 384 at 385.

172. *Racecourse Betting Control Board v Secretary for Air*, [1944] Ch 114 at 127 [emphasis added].

Lord Goddard here refers to a *manifest error* in the arbitration award and not just an error in law on the face of the award. However, in the anonymous case referred to by Lord Goddard, Chief Justice Holt did not refer to a manifest error. Instead he declared that “[t]he Court will not at all enter into the merits of the matter referred to arbitration, but will only take into consideration such legal objections as appear upon the face of the award, and such objections as go to the behavior of the arbitrators.”<sup>173</sup> The term “manifest error” as used by Lord Goddard seems to suggest something more serious than legal objections but perhaps Lord Goddard was being cautious.

Thus, it would seem that the first legal authority by which a common law court could set aside an award of an arbitrator was provided in 1698 by the anonymous case and was limited to legal objections or errors that appeared upon the face of the award or objections that involved the behavior of the arbitrators.<sup>174</sup> The earlier case of *Brown v. Brown* in 1683 had concentrated upon the actions of the arbitrators rather than the legal accuracy of their award.<sup>175</sup> Whatever the position the United Kingdom courts were taking in the seventeenth and eighteenth centuries, and there seems to be some doubt about what that was, the case of *Kent v. Elstob* is now taken to be the case that created a new exception to the old rule that the arbitrator’s decision was considered conclusive upon the law and the facts. This case, decided in 1802, established that the courts could review an arbitrator’s decision if an error of law appeared on the face of the record or in accompanying documents.<sup>176</sup>

Up to the time of the *Kent* decision, courts had refused to set aside or interfere with the arbitrator’s award if the only ground for so doing was that the arbitrator had made an error in arriving at his award. This kind of error was not considered to fall within the accepted misconduct exception.<sup>177</sup> But now, as a result of *Kent*, if the error of law appeared on the face of the award or on accompanying documents the court could also intervene.

The creation of this new exception to the general rule was confirmed, with regret, by Williams J. in the case of *Hodgkinson v. Fernie*<sup>178</sup> some fifty years later. Subsequently, *Hodgkinson* was confirmed and approved by the House of Lords in 1912 in *British Westinghouse v. Underground Electric*

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173. *Anonymous* (1698), 1 Salk 71, 91 ER 66 at 66 (KB).

174. *Ibid.*

175. *Supra* note 171.

176. *Kent v Elstob* (1802), 3 East 18, 102 ER 502.

177. Misconduct started to become one of the bases for court intervention.

178. *Hodgkinson v Fernie* (1857), 140 ER 712.



*Railroad*.<sup>179</sup> In this case, Viscount Haldane declared that the exception was now “a well-established part of the law of the land.”<sup>180</sup> The Privy Council, some twenty-one years later, agreed in *Champsey Rhara and Company v. Jivray Balloo Spinning & Weaving*.<sup>181</sup> Interestingly enough, both the House of Lords and the Privy Council referred to *Hodgkinson*<sup>182</sup> rather than *Kent*<sup>183</sup> as the source of the new doctrine, in spite of the regret expressed by Williams J.

A definition or explanation of what constitutes “an error in law on the face of a record” was provided by Lord Dunedin in 1923 in *Champsey*. He described it as a situation where the court “can find in the award or a document actually incorporated thereto ... some legal proposition which is the basis of the award and which you can then say is erroneous ... and the award will stand unless, on the face of it, [the arbitrators] have tied themselves down to some special legal proposition which then, when examined, appears to be unsound.”<sup>184</sup>

Some of the different bases for judicial intervention in arbitration awards were eventually reflected in English statutes. For example, the *Arbitration Act* of 1698 only referred to arbitrations procured by corruption or undue means as a basis for judicial interference. The jurisdiction to set aside an award for misconduct (a more general term) was not added until the *Arbitration Act* of 1889 was passed.<sup>185</sup> The third exception, that of an error in law on the face of the award, was not included in the *Arbitration Act* of 1889 as a statutory provision and is still not included in either the English *Arbitration Acts* or those of Nova Scotia.<sup>186</sup>

Throughout the early part of the twentieth century, although counsel continued to argue that the courts had an inherent jurisdiction to set aside arbitration awards, the courts either did so without reference to any legal authority, or they exercised jurisdiction on the basis that such a power existed at common law or equity. Only the occasional judge, besides Lord Denning, actually referred to inherent jurisdiction as the legal basis for

179. *British Westinghouse Electric and Manufacturing v Underground Electric Railway Company of London*, [1912] AC 673. Their Lordships expressed a similar regret.

180. *Ibid* at 686.

181. *Champsey Rhara and Company v Jivray Balloo Spinning & Weaving*, [1923] AC 480.

182. *Supra* note 178.

183. *Supra* note 176.

184. *Supra* note 181 at 487-88.

185. Francis Russell & Anthony Walton, *Russell on the Law of Arbitration* 16th ed (London: Steven and Sons Ltd, 1957) at 289.

186. The latest version being the *Arbitration Act*, RSNS 1989, c 19.

the court's intervention.<sup>187</sup> As late as 1981, the House of Lords referred to this power to set aside the award of private arbitrators for errors in law on the face of the award as "a confessedly anomalous jurisdiction [that existed at common law]."<sup>188</sup> However, there was no reference to inherent jurisdiction as a source of this jurisdiction.<sup>189</sup>

In conclusion, in 1802, *Kent*<sup>190</sup> created a common law exception to the old rule that an arbitrator's decision was considered to be exclusive upon the law and the facts. This exception is still operating today and provides that a superior court can review an arbitrator's decision if an error of law appears on the face of the record or on accompanying documents. In subsequent centuries the common law rule in *Kent*<sup>191</sup> appears to have morphed into an aspect of the court's inherent jurisdiction. By 1981, the English courts seemed prepared to accept the fact that a court had some kind of jurisdiction to correct errors of law appearing on the face of the arbitrator's award. However, they refused to extend this jurisdiction to include general supervisory powers in spite of the best efforts of Lord Denning.<sup>192</sup>

This review of English decisions indicates that, apart from Lord Denning, there is hardly any enthusiastic endorsement by English courts of inherent jurisdiction as a power to be exercised broadly by the courts with regard to arbitration awards. It is, at best, a hesitant approach which recognizes court jurisdiction in a very limited area. Even in this limited area involving error of law on the face of the award, this jurisdiction is treated more like a common law rule of limited application that has been created out of necessity rather than some power or jurisdiction that resides inherently or immanently in the high courts.

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187. Lord Green in *Racecourse Betting*, *supra* note 172 at 121, made reference to the inherent power of the court to set aside an award on the grounds of error in law on its face; Lord Denning in *Northumberland*, *supra* note 37, impliedly recognized the inherent jurisdiction of courts to review arbitration awards for errors in law on the face of the award; in 1981, he went even further, arguing that the courts had an inherent jurisdiction to exercise a general supervisory jurisdiction and specifically to enjoin arbitration proceedings: *Bremer Vulkan*, *supra* note 28.

188. *Bremer Vulkan*, *ibid* at 978.

189. *Supra* note 176.

190. *Ibid*.

191. *Ibid*.

192. *Bremer Vulkan*, *supra* note 28.

The first clear reference to inherent jurisdiction<sup>193</sup> in a case involving arbitration awards in Nova Scotia occurs in 1939 in the case of *Re Thomas Hackett*.<sup>194</sup> In this case, the Court resorted to inherent jurisdiction in an effort to avoid an attempt by the parties in their arbitration submission to prevent court intervention. Judge Doull indicated that the court had inherent jurisdiction to intervene because parties had a common law right and an equitable right to make an application to the court in cases of fraud or other misdoing. No reference is made by Justice Doull to *Kent*<sup>195</sup> or *Hodgkinson*<sup>196</sup> in this regard and, therefore, he is probably referring to the situation in England which existed prior to these cases being decided which did not include a right to intervene on the basis of an error in law.

To further support the court's intervention, Justice Doull notes that a misinterpretation of a contract that was the basis of the court dispute is equated to an error of law on the face of the record. This reference to an error of law on the face of the record appears to be a reference to the rule in *Kent*<sup>197</sup> and *Hodgkinson*<sup>198</sup> but there is no specific reference made to these cases by Justice Doull. Interestingly enough, the Court notes that such an error of law involving the interpretation of a contract also constitutes misconduct on the part of the arbitrator under the *Arbitration*

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193. A review of reported cases in Nova Scotia reveals that the first case of judicial intervention with an arbitration award occurred in 1895. In *McAskill*, *supra* note 92, the Court pronounced an award bad on its face because the issue of damages had not been properly dealt with by the arbitrator. Counsel had argued that the Court of Chancery could only set aside an award when there had been misconduct on the part of the arbitrators or when there was some other equitable ground for interference. Apparently a failure to deal properly with the issue of damages was not considered to constitute misconduct of a type that would warrant equitable interference. Justice Graham brushed aside the argument and issued a declaration that the arbitrator's award was void. He cited no basis for his action and there was no reference to the well established rule in *Kent*, *supra* note 176, or to inherent jurisdiction. Justice Graham simply stated at 61, "I cannot see why an action to set aside such an award will not be open to the parties as a means of getting it out of the way, in order that the damages might be properly appraised by other arbitrators or by some tribunal." Thus, a pragmatic solution was reached but without any clear legal underpinning. Reference to the award being bad on its face may be taken as some evidence that counsel or the court were aware of the rule in *Kent* (an error in law in the face of the record or award) but counsel's reference to the Court of Chancery would suggest that any judicial interference would have to be based on equitable jurisdiction which did not include or cover the alleged defect in the award. Clearly, the concept of inherent jurisdiction was not in the mind of the Nova Scotia court or counsel at this time. A second case in Nova Scotia did not occur until 1933 and did not involve an error in law on the face of the record but instead, the qualifications of one of the arbitrators. An award was set aside on this basis but without any reference to inherent jurisdiction or any other authorities as the basis for the court's actions: *New Glasgow*, *supra* note 92.

194. *Re Thomas Hackett*, *supra* note 92.

195. *Supra* note 176.

196. *Supra* note 178.

197. *Supra* note 176.

198. *Supra* note 178.

*Act* of Nova Scotia.<sup>199</sup> Justice Doull concludes his decision by declaring that it would make no difference whether the application to set aside the award was made under the provisions of the *Arbitration Act* or on the basis of the court's inherent jurisdiction to intervene.<sup>200</sup> What is not clear is the legal basis for the exercise of the court's inherent jurisdiction by Justice Doull. Was it a common law and equitable right to make an application to the court to prevent this conduct, a ground that pre-dated *Kent*<sup>201</sup> and *Hodgkinson*,<sup>202</sup> or was the basis for jurisdiction based on an error of law on the face of the record? Either way, inherent jurisdiction as a concept for the Nova Scotia court did not arise as some immanent attribute of a superior court.

*Re Thomas Hackett*<sup>203</sup> is the first Nova Scotia case of several that will follow in subsequent years where the court suggests that a situation which qualifies as an error in law on the face of the record can also form the basis for setting aside the award as involving a breach of the provisions of the *Arbitration Act*<sup>204</sup> of Nova Scotia involving misconduct on the part of the arbitrator.<sup>205</sup>

In 1959, the Supreme Court of Nova Scotia *en banc* decided the case *Canadian Gypsum*,<sup>206</sup> which would prove to be a valuable guide for subsequent Nova Scotia courts as to the jurisdictional power of superior

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199. *Re Thomas Hackett*, *supra* note 92 at 337. In question was the *Arbitration Act*, RSNS 1923, c 227, s 14.

200. *Ibid* at 335.

201. *Supra* note 176.

202. *Supra* note 178.

203. *Supra* note 92.

204. *Supra* note 186.

205. The first consolidation of previously enacted legislative provisions governing arbitrations was enacted in 1895 (*An Act for amending and consolidating the Acts relating to Arbitration*, SNS 1895 (58 Vict), c 7). It is closely modeled after the *Arbitration Act*, 1889 (UK), 52 & 53 Vict, c 49. This Nova Scotia enactment contained two sections relevant to judicial intervention with arbitration awards. Section 11 provides: "In all cases of reference to arbitration the court or a judge may, from time to time, remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire." This provision obviously confers upon the court considerable discretion as to when it would be considered proper or desirable to remit a case to the arbitrators for consideration. Under such a provision, the court does not act as a court of appeal, substituting its own decision for that of the arbitrator, but merely sends the award back for a second look by the arbitrators. By contrast, section 12 provides that a court can remove an arbitrator who has misconducted himself and set aside the award. The award can also be set aside if it has been improperly procured.

It is important to note that these are the only two statutory grounds that justify a court setting aside an arbitrator's award and neither involve the arbitrator committing an error on the face of the award. In other words, the common law rule in *Kent*, *supra* note 176, was not codified in the *Arbitration Act* of 1923 in Nova Scotia, *supra* note 199, perhaps because of the misgivings stated some years earlier by Williams J in 1859 in *Hodgkinson*, *supra* note 178.

206. *Re Canadian Gypsum and Nova Scotia Quarryworkers Union, Local 294* (1959), 20 DLR (2d) 319.

courts in the province to intervene with arbitration awards. In *Canadian Gypsum*, which concerned a labour dispute, the union argued that an arbitration board was guilty of legal misconduct by committing an error of law on the face of the award. The error of law alleged was the failure of the board to recognize the legal right of employees to communicate information and to peacefully persuade people not to cross the picket lines. This appears to be a resort to the common law rule in *Kent*<sup>207</sup> and *Hodgkinson*<sup>208</sup> which, as we have seen, underpins the court's common law inherent jurisdiction.

After reviewing the findings of the arbitration board and the grounds for setting aside that award, Justice Parker of the Nova Scotia Supreme Court outlined the scope of the court's jurisdiction, in a statement that has been relied upon by a number of subsequent courts in Nova Scotia. He stated as follows:

By s. 13(2) of the *Arbitration Act*, this court has power to set aside an award by arbitrators:

1. When they have mis-conducted themselves; or
2. When the *arbitration* has been improperly procured; or
3. When the *award* has been improperly procured;

it also has power to set it aside under its inherent jurisdiction, for error in law appearing on the face of the award.<sup>209</sup>

In this statement it appears that Justice Parker was outlining the court's jurisdiction as authorized by the *Arbitration Act*<sup>210</sup> (items 1, 2, and 3) as well as the court's common law inherent jurisdiction. No authority is cited by the Judge for the court's inherent jurisdiction but reference to error in law appearing on the face of the record is quite certainly an indirect reference to the rule in *Kent*<sup>211</sup> and *Hodgkinson*.<sup>212</sup> Justice Parker concluded that the burden was on the applicant to show that the conclusions reached by the arbitrator had been achieved by the application of some wrong principle of law.<sup>213</sup> That burden, in his opinion, had not been discharged. As a result, it

207. *Supra* note 176.

208. *Supra* note 178.

209. *Canadian Gypsum*, *supra* note 218 at 323 [emphasis in original].

210. As it appears in RSNS 1954, c 13.

211. *Supra* note 176.

212. *Supra* note 178.

213. *Canadian Gypsum*, *supra* note 206 at 331.

is impossible to say upon which basis of jurisdiction Justice Parker would have relied to set aside the award had the burden been met.<sup>214</sup>

Shortly after Justice Parker's decision in *Canadian Gypsum*<sup>215</sup> was rendered, the Supreme Court of Canada reached the same conclusion: that lack of evidence to support an arbitration award could provide the basis for setting aside that award.<sup>216</sup> The Court could do so, said the Supreme Court of Canada, either on the basis of an error of law on the face of the record which supported the exercise of the court's inherent jurisdiction, or on the basis that such an error constituted misconduct under the statute. The Supreme Court explained that the jurisdiction to set aside the award on the basis of an error in law on the face of the record was a jurisdiction that existed at common-law independent of any statute.<sup>217</sup> It was a creation of the common law. This position was reaffirmed by the Supreme Court eight years later in *Port Arthur Shipbuilding*.<sup>218</sup>

In Nova Scotia, there were two cases decided between 1970 and 1990 where the court was asked to exercise its inherent jurisdiction in situations where there was neither an error in law on the face of the record nor any action by the arbitrators that could be described as "misconduct" under the statute.<sup>219</sup> The first of these cases occurred in 1979.<sup>220</sup> The court was asked to provide a remedy to a party who had missed a time deadline. The court responded, setting aside the arbitration award using its inherent jurisdiction and exercising its discretion to prevent an injustice being done.

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214. *Port Arthur Shipbuilding Co v Arthurs*, [1969] SCR 85. Justice Parker, for the majority, has been followed by a number of Nova Scotia courts in subsequent years: *Canadian Keyes Fibre Co Ltd v United Paperworkers International Union, Local 576* (1973), 8 NSR (2d) 89 (SC (TD)); *Canadian General Electric Co Ltd v Oil, Chemical & Atomic Workers International Union, Local 9-832* (1975), 11 NSR (2d) 550 (SC (AD)); *Dominion Bridge Company Ltd v Allen* (1976), 23 NSR (2d) 135 (SC (TD)); and *Canadian Union of Public Employees v Colchester East Hants Amalgamated School Board* (1979), 40 NSR (2d) 43 (SC (TD)).

During the 1970s there were nine cases involving judicial intervention in the arbitral process: *supra* note 92. The majority (six) involved labour matters and collective agreements: *Canadian Keyes*; *Centennial Properties*; *International Union*; *Bowater Mersey Paper*, and *Dominion Bridge*, *supra* note 92. Many involved the interpretation of the provisions of such agreements with allegations that there was either an error in law on the face of the award or that such error constituted misconduct under the provisions of the *Arbitration Act*, or both.

215. *Supra* note 206.

216. *Vancouver (City of) v Brandram-Henderson of British Columbia Ltd*, [1960] SCR 539 at 550.

217. *Ibid.*

218. *Port Arthur Shipbuilding*, *supra* note 214.

219. *Sharma*, *supra* note 91 and *Embil*, *supra* note 92.

220. *Sharma*, *ibid.*

The Court cited as its authority for this action a text entitled *Russell on Arbitration*.<sup>221</sup> Such an exercise of inherent jurisdiction goes far beyond the narrow confines of “an error on the face of the award” as provided by *Kent*.

A second case occurred in 1988 when the court was asked to enjoin arbitration proceedings.<sup>222</sup> This would involve, of course, the court not only setting aside the award after the arbitration process had concluded, but, in this case, intervening before a decision had been reached. The Nova Scotia Supreme Court signaled a willingness to enjoin proceedings and supported the decision by a reference to *Halsbury's*.<sup>223</sup>

An examination of this reference shows that it is basically a paraphrasing of Jacob's conclusion in his article that a superior court has a reserve, residual source of power or jurisdiction which it can draw on and use as necessary whenever it is just or equitable to do so.<sup>224</sup> Although apparently willing to assume jurisdiction on that basis to act, the Nova Scotia Supreme Court did not have to do so. The Court decided that this was not an appropriate situation in which to order an injunction. Thus the scope of inherent jurisdiction at least in arbitration cases, was not expanded.

In conclusion, what does the use of inherent jurisdiction by the courts of the United Kingdom, the courts of Nova Scotia and the Supreme Court of Canada in arbitration decisions tell us about the nature of this court power?

Firstly, the power of the court to intervene in arbitration decisions arose because of a right in both the common law and equity for a disgruntled litigant to make an application to the court for a review of the decision based upon fraud, bias or wilful misbehavior of the arbitrators.<sup>225</sup> Secondly, an additional ground for review is added by the decisions of the court in *Kent*<sup>226</sup> and *Hodgkinson*.<sup>227</sup> Both the right to make application and the common law rule in *Kent* and *Hodgkinson* appear to constitute the basis for the later claims of inherent jurisdiction by the courts to intervene

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221. Russell, *supra* note 185 at 350. The author cited as authority the English Court decision in *Compagnie Financière Pour Le Commerce v OY Vehna AB*, [1963] 2 Lloyd's Rep 178 QB. In this case the English Court remitted an arbitration award to an appeal committee, stating that it was in the interest of justice to do so. The Court made no reference to inherent jurisdiction.

222. *Embil*, *supra* note 92.

223. *Ibid* at para 12.

224. Jacob, *supra* note 2 at 51.

225. *Brown*, *supra* note 171; *Anonymous*, *supra* note 173.

226. *Supra* note 176.

227. *Supra* note 178.

in arbitration awards. Thirdly, both the Privy Council in England<sup>228</sup> and the Supreme Court of Canada<sup>229</sup> appear to believe that the source of this inherent jurisdiction is in the common law rather than in some immanent attribute of a superior court. Finally, any future attempts to extend the inherent jurisdiction of the court in arbitration matters to a general supervisory status seem doomed to failure. The decision of the House of Lords in *Vulkan*<sup>230</sup> as well as the cautious approach advocated by the Nova Scotia Court of Appeal in *Ocean*<sup>231</sup> seem to almost guarantee this.

VI. *Inherent jurisdiction of inferior courts in Nova Scotia*

Courts such as the Nova Scotia Family Court or Small Claims Court, created by statute as courts of record, are considered to be inferior courts without inherent jurisdiction. Unfortunately, they still suffer the effect of a politically motivated distinction created by Sir Edward Coke in the seventeenth century which was designed to give his royal or common law courts an advantage over other newly created courts like the Star Chamber and the Court of Equity. Coke declared that his royal courts were courts of record with the power to fine and imprison for contempt, powers that the other non-record courts did not have. As Sir William Holdsworth has explained, this distinction created by Coke still remains as a technical distinction which is of little practical importance today.<sup>232</sup> So, for example, although the Nova Scotia Family Court is a court of record it is still considered to be an inferior court in the judicial hierarchy.

Attempts have been made to rationalize the distinction between superior and inferior courts or courts of record and non-record on the basis that the inferior or non-record courts only had such powers as the creating statute gave them.<sup>233</sup> This explanation seems to accept a notion of immanent inherent jurisdiction. Another explanation explains that appeals from a court of record are triable by record only, (apparently being more reliable) whereas appeals from a non-record court are triable *de novo*. Neither of these explanations seem applicable today. Being a court of record only means that certain royal courts kept a formal record of proceedings before them and had the sovereign's guarantee that the records spoke the truth, that it was infallible and subject to correction only

228. *British Westinghouse*, *supra* note 179.

229. *Port Arthur Shipbuilding*, *supra* note 214.

230. *Supra* note 28.

231. *Supra* note 43.

232. Sir William Holdsworth, *A History of English Law*, vol 5 (Boston: Little, Brown & Company, 1924) at 160.

233. Shalin M Sugunasiri, "The Inherent Jurisdiction of Inferior Courts" (1990) 12:2 *Advocates' Q* 215 at 218.



by a higher court.<sup>234</sup> Since most so-called modern inferior courts can meet this standard, it would seem that the argument for inherent jurisdiction in the inferior courts is quite supportable.

### 1. *The Commonwealth*

In other parts of the Commonwealth and in the United Kingdom inferior courts are considered to have a limited inherent jurisdiction. For example, in England inferior courts such as the Court of Quarter Sessions and the County Court being courts of record, can punish for contempt committed in the face of the court.<sup>235</sup> Inferior courts that are not courts of record cannot punish for contempt, even in the face of the court, unless that power is conferred by statute.<sup>236</sup> County courts, on the other hand, have an inherent jurisdiction to stay an action or to dismiss an action that is frivolous or vexatious, both being considered an abuse of process. Jacob suggests that perhaps these powers are not original but flow from the powers of the high court that have been transferred to county courts by statute.<sup>237</sup>

Dockray suggests that inferior courts may possess at least some inherent powers and asserts that “today a substantial number of English cases recognise that inferior courts or tribunals may possess at least some inherent powers or jurisdiction.”<sup>238</sup> Examples include power to regulate their own procedure, to make practice directions, to control abusive process, to exclude the public if it becomes necessary for the administration of justice, and to refuse to hear advocates who misconduct themselves. The existence of such powers, Dockray suggests, is “inconsistent with the notion that inherent powers are the exclusive prerogative of superior courts and that they are the emanation of some unique characteristic of such courts.”<sup>239</sup>

The Privy Council has concluded that English Magistrates have the inherent authority to determine who can appear before them and who can represent a party’s interest.<sup>240</sup>

In Australia, inferior courts have the power to do a number of things including: devise procedures and make rules to ensure the proper determination of the issues before the Court; strike out pleadings; decline to hear proceedings on the ground that they are an abuse of the powers of the court or contravene the broad principles relating to double jeopardy or both; set aside a decision if a person affected by it has been denied actual

234. *Sugunasiri*, *supra* note 233 at 217.

235. Jacob, *supra* note 2 at 49.

236. *Ibid.*

237. *Ibid* at 50.

238. Dockray, *supra* note 2 at 125.

239. *Ibid* at 126.

240. *O’Toole v Scott*, [1965] AC 939 (PC).

justice; and control practices and procedures in the court. Inferior courts have also been recognized as having these powers because the judges of these courts, it is reasoned, should have the same concerns to prevent abuse, delays and injustices as judges of superior courts.<sup>241</sup>

In South Africa, however, inferior courts are not considered to have inherent jurisdiction and any cases that seem to suggest that magistrates have some aspect of inherent jurisdiction can be explained, according to Taitz, on the basis that these were powers that were considered incidental to or implied from the statutory powers conferred.<sup>242</sup>

## 2. *Nova Scotia*

In Nova Scotia, inferior courts include county courts, magistrates or provincial courts, family courts and small claims courts. County courts no longer exist but the survey of cases from 1853 to 2009 does involve several county court cases where inherent jurisdiction was an issue.<sup>243</sup> It is relevant to note that the county court had both a civil and criminal jurisdiction while the magistrate or provincial courts were limited to criminal jurisdiction alone.

The survey of cases shows that these decisions on the inherent jurisdiction of the County Court are mixed with some decisions stating that the County Court did have inherent jurisdiction, particularly in matters that fell within the old Chancery Court jurisdiction.<sup>244</sup> For example, it was held that although the County Court did not have complete Chancery jurisdiction, where a question of equity arises in a matter over which the County Court could have jurisdiction, the Court can proceed on the principle formerly administered by the Chancery Court.<sup>245</sup>

Similarly, it was decided that the County Court has power to set aside a consent order, based on historical Chancery jurisdiction.<sup>246</sup> To the contrary, however, a decision has held that the County Court has no power to provide a remedy in order to alleviate an injustice (historically, a power that lay within the jurisdiction of the Court of Chancery).<sup>247</sup> With regard to other powers, the cases indicate that the County Court may have the

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241. Mason, *supra* note 2 at 456-57.

242. *Supra* note 2 at 50.

243. These include: *Woodworth v Innis* (1883), 18 NSR 295 (Co Ct); *R v Mombroquette*, *supra* note 90; *White v Banks*, [1937] 1 DLR 446 (Co Ct); *Regina v Swift*, [1969] NSJ no 116 (Co Ct); *Lutz v Pyke* (1977), 36 NSR (2d) 420 (Co Ct); and *CIBC v Whites Lake Services Ltd* (1980), 56 NSR (2d) 236.

244. *CIBC*, *ibid*; and *White*, *ibid*.

245. *White*, *ibid*.

246. *CIBC*, *supra* note 243.

247. *Swift*, *supra* note 243.

power to stay an action but definitely does not have the power to set aside an order of another County Court judge.<sup>248</sup>

It has also been held that a County Court does not have the power to amend the appeal affidavit.<sup>249</sup> Counsel have argued that a County Court Judge has the power to strike out a frivolous or vexatious claim even though Rule 14.25 applied.<sup>250</sup> It would seem therefore that the County Court was thought to have some inherent jurisdiction, a large portion of which was based on the historical Chancery Court jurisdiction or powers.

All of the cases hold that the Magistrate or Provincial Courts do not have a variety of powers including specifically: no inherent jurisdiction to order separate criminal trials;<sup>251</sup> no inherent jurisdiction to award costs;<sup>252</sup> no power to order counsel to dress in a certain way;<sup>253</sup> and no inherent jurisdiction to make discretionary orders.<sup>254</sup> There are no cases which seem to suggest that the Magistrate or Provincial Courts have any type of inherent jurisdiction. In this sense, the position of the Magistrate or Provincial Court is clearer and the decisions more consistent. Dealing exclusively with criminal matters, the situation does not get complicated by carry over of jurisdiction from the courts of equity as was the case with the County Courts.

There is only one decision which emphasizes that the Small Claims Court is a statutory court with no vestige of inherent jurisdiction.<sup>255</sup>

Family matters are divided juristically between the Family Court (inferior court) and the Family Court Division of the Supreme Court. Once again, the historical jurisdiction of the Chancery Court has a role to play. Specifically, the paternal jurisdiction or *parens patriae* is conferred upon the Family Court Division of the Supreme Court as a result of the carry-over of the old Chancery jurisdiction. The paternal jurisdiction is a jurisdiction in virtue of which the Chancery Court acted on behalf of the Crown as a guardian of all infants in place of the parents and as if it were the parent of the child, thus superceding the natural guardianship of the child.<sup>256</sup>

248. *Mombroquette*, *supra* note 90.

249. *Woodworth*, *supra* note 243.

250. *Lutz*, *supra* note 243.

251. *Rex v O'Neil and Smith* (1931), 56 CCC 379 (NS Co Ct).

252. *R v Singh*, 2009 NSSC 306, 283 NSR (2d) 266.

253. *R v Samson* (1974), 14 NSR (2d) 592 (SC (TD)).

254. *Pottier*, *supra* note 91.

255. *Wexford Communications Ltd v Buildrite Centres Inc* (1996), 156 NSR (2d) 78 (SC).

256. *Re Murphy, Margaret*, *supra* note 32 at 302-03 quoting *The Queen v Gyngull*, [1893] 2 QBD 232 per Lord Esher MR.

The question that arises is whether this *parens patriae* jurisdiction or any part of it was transferred to the Family Court (inferior court). The cases appear to be unanimous in holding that it has not been transferred because the Family Court is a statutory court.<sup>257</sup>

In conclusion, whatever inherent jurisdiction inferior courts should theoretically have, it appears that the courts of Nova Scotia are consistent in their assertions that the Small Claims Court, the Family Court and the Magistrate or Provincial Courts do not have inherent jurisdiction of any sort since they are statutory courts. However, the County Court, which was also a statutory court before its abolition in 1992 is more problematic in that this Court was considered to have some inherent jurisdiction which found its source in the historical jurisdiction of the Court of Chancery. Since the County Court no longer exists, the issue is moot except to the extent that the County Court cases demonstrate the inter-relationship between inherent jurisdiction and the equitable jurisdiction of the Court of Chancery which still has an influence with regard to superior courts and the family division of the Supreme Court.

If the court of record distinction is no longer valid and the metaphysical concept of the source of inherent powers vesting solely in superior courts is also suspect, and if inherent powers exist because they are a necessary tool for our court to carry out its mandate, why should inferior courts not have some form of inherent jurisdiction? It may be that there is a fear that inferior court judges will not appropriately exercise the important summary powers provided by inherent jurisdiction. With an improved selection process and better salaries hopefully producing better qualified Magistrates and Provincial Court Judges, as well as other lower level judicial officers, it would seem to be preferable to recognize the need for some kind of inherent jurisdiction and to concentrate upon determining the areas of jurisdiction in which inherent powers can legitimately and effectively be exercised by inferior courts and the scope or breath of these inherent powers within particular jurisdictional areas.

#### VII. *The inherent jurisdiction of the Court of Appeal of Nova Scotia*

In a series of cases, the Supreme Court of Canada has declared that appellate courts are statutory courts and have no inherent appeal jurisdiction.<sup>258</sup> In one case in particular, *Kourtessis v. M.N.R.*, Justice La Forest emphasized the point with his observation that:

257. *VS v JS*, 2007 NSFC 34, 257 NSR (2d) 304; *Pottinger v Hann* (2003), 215 NSR (2d) 176; and *LLB v PBP* (2001), 190 NSR (2d) 370.

258. *Kourtessis v MNR*, [1993] 2 SCR 53; *R v Meltzer*, [1989] 1 SCR 1764; *R v Thomas*, [1998] 3 SCR 535; *R v W(G)*, [1999] 3 SCR 597; and *Société des Acadiens*, *supra* note 32.

Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established that there is a widespread expectation that there must be some way to appeal the decision of a court of first instance.<sup>259</sup>

In *Kourtessis*, the Supreme Court of Canada was dealing with a request for a declaration that search warrants had been illegally issued.

Several of the cases referred to above involved criminal matters. It might have been thought therefore that the comments by the Supreme Court of Canada related only to appeals in criminal matters. However, close reading of Justice La Forest's remarks makes it clear that he was making these remarks with reference to the nature of rights of appeal generally and not restricting himself to appeals in criminal matters.

By contrast, the English Court of Appeal in *Aviagents, Ltd. v. Balstravest Investments, Ltd.*<sup>260</sup> held that it had inherent power to control its own proceedings, in a situation where an appeal was clearly being inappropriately launched on a question of fact instead of law. The rules of court governing the Court of Appeal procedure had not specifically provided authority for the Court of Appeal to strike out a notice of appeal. The *Aviagents* case seems to be the only example of an English Court of Appeal exercising "inherent jurisdiction" and the House of Lords do not seem to have commented on this issue either.

In Nova Scotia, Chief Justice MacKeigan in 1986 announced that the Court of Appeal was not limited in jurisdiction as some statutory courts may be and, in so doing, traced the history of the Court.<sup>261</sup> That history includes appeals heard prior to 1972 by the Nova Scotia Supreme Court. In this configuration, trial court judges of the Supreme Court, when required, would sit in panels of three to hear appeals. After 1972 and until 1992 appeals were heard by a division of the Nova Scotia Supreme Court. From 1992 onwards appeals were heard by the newly-created Court of Appeal. In *Midland*, Chief Justice MacKeigan for the Court observed that the present Nova Scotia Supreme Court had the jurisdiction of the Supreme Court of Nova Scotia as originally established long before 1884. Presumably these powers included inherent power. This jurisdiction, he emphasized, included the same powers exercised by the English Court of Queen's Bench, Court of Common Pleas, Chancery and Exchequer Court as well as the same powers exercised by the Supreme Court of Judicature in the UK as they were on April 19, 1884. This position and explanation

259. *Kourtessis*, *supra* note 258 at 69-70.

260. *Aviagents, Ltd v Balstravest Investments, Ltd*, [1966] 1 All ER 450 (CA).

261. *Midland Doherty*, *supra* note 29 at 237.

was affirmed by the Nova Scotia Court of Appeal ten years later by Hallett J. for the Court in *Future Inns Canada v. Nova Scotia (Labour Relations Board)*.<sup>262</sup>

It is interesting to note that in *Midland*, Chief Justice MacKeigan made no reference to the Court of Appeal's "inherent jurisdiction" to take action. Instead, he used terms like "ancient powers" and "vestigial powers". Although different words, they would appear to be just another way of referring to the court's inherent powers. This is clear from the context in which these alternate phrases are used.

In *Midland*, the appellant wanted the Court of Appeal to reverse its earlier decision and order. The appellants invoked Rule 62.26(2) of the *Civil Procedure Rules* which gave the court considerable powers and authority to deal with appeals. Chief Justice MacKeigan rejected the submission and pointed out that Rule 62.26(2) only permitted the Court of Appeal to amend a former order but not to revoke it. As he explained:

Once a final order is issued on appeal this court has prima facie no jurisdiction to open the appeal to grant a new hearing of the appeal or to correct any substantive error made by it on the appeal; a party aggrieved by our error must *ordinarily* look for remedy to the Supreme Court of Canada, if appeal to that Court is available.<sup>263</sup>

It was in this context that the Chief Justice declared that although the Court had no authority under the *Rules* to reverse its earlier decision and order, it could under its "ancient powers" re-hear an appeal or part of an appeal "where justice manifestly requires and had done so in the past in *exceptional* cases."<sup>264</sup> However, Chief Justice MacKeigan concluded there was no reason to do so in this case.

A somewhat similar situation appears to prevail in New Brunswick and has been recognized by the Supreme Court of Canada. In 1986 the Supreme Court of Canada held that s. 8(2) of the New Brunswick *Judicature Act* and its history gave the New Brunswick Court of Appeal "inherent jurisdiction" to grant the Parents for Fairness in Education leave to add a party to an action on appeal.<sup>265</sup> A review of the history of s. 8(2) showed that it vested the power of the Court of Chancery in the New Brunswick Court of Appeal. The Acadian Society in this case had argued that the jurisdiction of the Court of Appeal to grant leave had to be found in the *Rules of Court*. Unfortunately, the *Rules* did not set up any procedure

262. *Future Inns Canada v. Nova Scotia (Labour Relations Board)* (1996), 154 NSR (2d) 358 (CA).

263. *Midland Doherty*, *supra* note 29 at para 5 [emphasis added].

264. *Ibid* at para 16 [emphasis added].

265. *Société des Acadiens*, *supra* note 32 at 550-51. *Judicature Act*, RSNB 1973, c J-2.

with respect to leave applications. In addition, it appears that in this case neither of the parties had appealed and the time for appeal had expired.

Section 8(2) provides that “[t]he Court of Appeal shall have and exercise appellate jurisdiction, *with such original jurisdiction* as may be necessary or incidental to the determining of an appeal.<sup>266</sup> Justice La Forest of the New Brunswick Court of Appeal (as he then was) had previously reviewed the history of s. 8(2) and concluded that it had vested the New Brunswick Court of Appeal with the powers of the Chancery Court. When the case came to the Supreme Court of Canada, Justice Wilson agreed but cautioned that the “inherent jurisdiction” of the Court of Appeal was not unlimited since its invocation requires an exercise of judicial discretion in accordance with accepted principles. These principles may be found in statute or in inherited practice.<sup>267</sup>

In the same year, 1996, that Justice Hallett was adopting and confirming Chief Justice MacKeigan’s conclusions in *Midland* which was decided ten years earlier, another justice of the Nova Scotia Court of Appeal was invoking the inherent power of the Court to take appropriate action where justice required. In *Brown v. Metropolitan Authority*,<sup>268</sup> the Nova Scotia Court of Appeal decided it had the power to order relief in the form of an order of mandamus that had not been requested by the parties in their application before a Chambers judge of the Supreme Court. The Court cited an earlier decision of the Court of Appeal in which Justice Hallett, speaking for the Court, had declared, “There is an inherent jurisdiction in the court to take appropriate action where justice requires.”<sup>269</sup> Justice Hallett then went on in this case to refer to *Halsbury’s* for a description of inherent jurisdiction in support of his position.<sup>270</sup> The difficulty is that Justice Hallett’s reference to inherent jurisdiction of the Court was in the context of a decision of a Supreme Court trial judge rather than a Court of Appeal. The quotation from *Halsbury’s* similarly is made in the context of the jurisdiction of a trial court and not that of a Supreme Court.

A review of other Court of Appeal decisions reveals a lack of consistency in approach to the issue of inherent jurisdiction. Quite recently, the Court has apparently taken the position that it is a statutory court and derives its appellate jurisdiction from statute only.<sup>271</sup> In this case the Court

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266. *Société des Acadiens*, *supra* note 32 at 550-51 [emphasis added].

267. *Ibid* at 592.

268. *Brown v Metropolitan Authority* (1996), 150 NSR (2d) 43 (CA).

269. *Ibid* at para 78 citing *ABN Bank Canada v NSC Diesel Power Inc* (1991), 101 NSR (2d) 361 at 363.

270. *Supra* note 48 at 12.

271. *R v Black*, 2002 NSCA 72, *aff’d* 2002 NSCA 89.

also maintained that it was not a court of original jurisdiction and could not issue an order of prohibition, a position that seems to be at odds with the decision in *Brown*.<sup>272</sup>

In other cases, the Nova Scotia Court of Appeal has held that it can set aside the decisions of arbitrators<sup>273</sup> and stay an action because it was vexatious but had no jurisdiction inherent or original to hear cases reserved from criminal courts or appeals or other applications apart from statute.<sup>274</sup>

Although there appears to be some lack of uniformity within the Nova Scotia Court of Appeal as to the existence, source and extent of any inherent jurisdiction it might have, Chief Justice MacKeigan's historical analysis of the court's powers in *Midland Doherty*<sup>275</sup> seems to provide sufficient basis for concluding that the Court, like its counterpart in New Brunswick, is not solely a statutory court. Just how extensive its non-statutory powers are, however, is an open question. Clearly the scope enunciated by Chief Justice MacKeigan and Justice Hallett allowing it to take action where justice required is very broad. Given the caution set out by Justice Bertha Wilson to trial courts in the exercise of their discretion,<sup>276</sup> and concern expressed by the Nova Scotia Court of Appeal in *Ocean*, a similar caution directed to the Courts of Appeal seems required.

### *Conclusion*

Our survey of cases from 1853 to 2009 has shown that the number of cases in which the superior courts of Nova Scotia have actually exercised their inherent jurisdiction is very small, some would say minute.<sup>277</sup> There are reasons for this but the fact remains that in these few cases and in a somewhat larger group where the court actually considered whether or not to exercise its inherent jurisdiction before deciding not to, there is potential for judicial arbitrariness. Both the Nova Scotia Court of Appeal and the Supreme Court of Canada have cautioned against the use of inherent jurisdiction except in very clear cases and have suggested methods to limit the jurisdiction.

This paper has also demonstrated in its review of cases and courts at every level that inherent jurisdiction is not just one jurisdiction but

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272. *Supra* note 171.

273. *Town of Middleton*, *supra* note 92, in which Cooper JA, for the Court, declared that the Court of Appeal had inherent jurisdiction at common law to set aside the decision of arbitrators which involved an error in law.

274. *Carson*, *supra* note 91.

275. *Supra* note 29.

276. *Société des Acadiens*, *supra* note 32.

277. See Part III, above.



several. A consideration of the declared purposes or functions of inherent jurisdiction supports this view. Jacob himself, as part of his suggested definition of inherent jurisdiction states that it is to be exercised particularly but not exclusively for several purposes including the following: to assure the due process of law; to prevent an improper vexation or oppression; to do justice between the parties; and to ensure a fair trial.<sup>278</sup> Other legal commentators have suggested similar purposes, all of which emphasize the importance of controlling the court process, of preventing abuse and delay, and even promoting higher court standards.<sup>279</sup>

Such purposes stress and underline the procedural content of inherent jurisdiction, but as Jacob suggests, allow for a certain amount of non-procedural power to be exercised under the guise or label of inherent jurisdiction.<sup>280</sup> Nova Scotia courts have been shown to exercise portions of the historic chancery jurisdiction by providing remedies, filling in gaps in statutes and rules, varying trusts and protecting children via the *parens patriae* doctrine.<sup>281</sup> They also exercise the historical supervisory role of supreme courts vis-à-vis inferior courts and tribunals, including arbitration panels.

This examination of the functions or purposes of inherent jurisdiction supports the conclusion of Dockray that inherent jurisdiction is not a single jurisdiction which originates in the ineffable spirit of the court but is rather “a rational collection of related common law powers, each of which has a separate history, aims and boundaries.”<sup>282</sup>

As to the source and nature of inherent jurisdiction, our survey shows Nova Scotia trial courts adopting a typical common law approach with reliance upon precedent as a guide in relation to issues concerning inherent jurisdiction.<sup>283</sup> The Jacob article has had some influence on our courts<sup>284</sup> but on the whole, the emphasis has been on the control of the trial process by the court and the subsequent need to have the necessary powers to do this. The source of any so-called inherent jurisdiction is more often found in the cases and the history of the common law and equity than in the nature of the court. The fact that all levels of courts in Nova Scotia have exercised some degree of inherent jurisdiction suggest that

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278. *Supra* note 2 at 51.

279. Dockray, *supra* note 2 at 125-26; Mason, *supra* note 2 at 458.

280. *Supra* note 2 at 51, particularly the part of his definition that incorporates the concept of what is just and equitable.

281. See Survey Results, Part III, above.

282. Dockray, *supra* note 2 at 132.

283. Survey Results, Part III, above.

284. Survey Results, Part III, above.

judicial necessity rather than metaphysical emanation is the source of this jurisdiction. Even Jacob's article contains comments that support this view. For example, he suggests that superior courts are bound to claim that they have inherent jurisdiction because it is an indispensable adjunct to all of their other powers.<sup>285</sup> It is his view that inherent jurisdiction "is a necessary part of the armoury of the courts [superior courts only] to enable them to administer justice according to law."<sup>286</sup> Furthermore, the arbitration cases clearly demonstrate that the superior court's jurisdiction or power to intervene in arbitration awards by overturning or sending them back for reconsideration stems from the common law rather than any inherent attribute of a superior court.<sup>287</sup>

As to the problem of uncertain limits, in one-third of the cases in which inherent jurisdiction was invoked, it was denied or limited, either by conflicting statutory provisions or rules of court, or by the exercise of judicial discretion.<sup>288</sup> With regard to the rules of court, two points are worth noting. One is the unique situation in Nova Scotia whereby the rules are, in practice, the product of the judiciary rather than the non-judicial body.<sup>289</sup> Second, some aspects of inherent jurisdiction, such as vexatious and or frivolous claims and parts of the contempt process, are now governed by the provisions in the rules of court.<sup>290</sup> Another more general limitation exists in the accepted notion that inherent jurisdiction is primarily procedural and cannot be exercised so as to effect substantive rights.

If there is not one inherent jurisdiction and if inherent jurisdiction does not spring from the unique nature of a Superior Court but is, instead a judicial creation made necessary by the judicial function or purpose of courts to administer justice efficiently, then, logically, inferior courts should have at least some of the powers of inherent jurisdiction. They may not have the equitable jurisdiction to create remedies or protect children but there seems to be no reason to prevent them from having some unwritten residue of power that enables them to control their own court process.<sup>291</sup>

Despite the pronouncements from the Supreme Court of Canada<sup>292</sup> that appeal courts generally have no inherent appeal jurisdiction, this does

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285. Jacob, *supra* note 2 at 52.

286. *Ibid.*

287. Part V, above.

288. See Part VI, generally, and Part III, specifically, above.

289. See Part VI for a discussion of the Nova Scotia situation, above.

290. Part IV, above.

291. See Part VI, above, for a discussion of the inherent jurisdiction of inferior court.

292. *Société des Acadiens*, *supra* note 32.

not appear to be the accepted position in Nova Scotia.<sup>293</sup> Chief Justice MacKeigan made it clear in 1986 that the Nova Scotia Court of Appeal was not limited in jurisdiction as some statutory courts may be. In spite of this pronouncement there is still, however, some inconsistency in the cases and there are decisions to the contrary.<sup>294</sup> If, as seems to be the case, the Nova Scotia Court of Appeal has come degree of inherent jurisdiction it would seem advisable to keep in mind Justice Wilson's caution that the application of inherent jurisdiction requires an exercise of judicial discretion in accordance with accepted principles.<sup>295</sup> This approach echoes that mandated by the Nova Scotia Court of Appeal regarding trial courts in *Ocean*.

Inherent jurisdiction as a residual pool of jurisdictional power that is available to a court when needed, would seem to be a valuable judicial tool. Its use by the judiciary, at least in Nova Scotia, does not appear to be abusive in terms of the number of instances when it is utilized. It is subject to certain limitations but, at the same time, its limits remain undefined in some areas of that jurisdiction. The Court of Appeal in Nova Scotia has suggested some control mechanisms to ensure a judicious use of judicial discretion. On balance, the continued use of inherent jurisdiction by courts should be welcomed as long as that power is used cautiously, as it seems to be in Nova Scotia and in support of the judiciary's best efforts to maintain and improve the litigation process as part of the administration of justice.

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293. See Part VII.

294. *Midland Doherty*, *supra* note 29.

295. *Société des Acadiens*, *supra* note 32 at 592.

**Appendix A**

*Survey Results: Supplemental Data, Analysis and Discussion*

I. *Frequency of use*

If the use of inherent jurisdiction by Nova Scotia trial courts is broken down into smaller time frames we find that between 1853 and 1970 approximately 4,000 cases were reported with inherent jurisdiction discussed or mentioned in 23 or .005%. In the period 1970 to 1980, there were 2,471 reported cases with 24 cases involving inherent jurisdiction or .009%. During the period 1980 to 2009 there were 844 reported cases with inherent jurisdiction involved in 51 or .06%. The breakdown of reported cases by decade is as follows<sup>296</sup>:

1853-1890	265 cases
1890-1900	679 cases
1900-1910	802 cases
1910-1920	685 cases
1920-1930	515 cases
1930-1940	432 cases
1940-1950	187 cases (wartime)
1950-1960	224 cases
1960-1970	199 cases
1970-1980	2471 cases
1980-1990	2627 cases
1990-2000	2812 cases
2000-2009	3009 cases

What caused the very significant increase in references to inherent jurisdiction after 1970? Two factors appear to be responsible. Firstly, nine of the 24 cases were cases involving private arbitrators (37.5%).<sup>297</sup> This suggests a greater use of arbitration as a dispute resolving mechanism in the seventies. Secondly, the seminal article by I.H. Jacob, published in 1970, no doubt raised the collective awareness of the legal community in Canada and elsewhere to the relevance and importance of “inherent jurisdiction” as part of the court’s authority.<sup>298</sup> Perhaps the period 1980 to 2009 is a more accurate measure of the use of inherent jurisdiction by more contemporary Nova Scotian courts. In this time period there were 51 cases or 1.8 cases per year.

II. *Early use of the term inherent jurisdiction*

As to the use of the term “inherent jurisdiction,” or similar terms by the Nova Scotia courts in the latter half of the nineteenth century, such as in *Holmes v. Taylor*,<sup>299</sup> their choice of language may have been influenced by declarations of members of the Supreme Court of Canada around that time. For example, in *Re Sproule* Canada’s

296. The dramatic increase in reported cases from 1970 onward coincides with the publication of the second series of the Nova Scotia Reports which began in that year. The first series reports covered the period 1853 to 1929. From 1929 to 1965 Nova Scotia cases were reported in the Maritime Provinces Reports. From 1965 to 1970, Nova Scotia cases were published in five volumes of Nova Scotia Reports.

297. For a list of arbitration cases, see Appendix “B”.

298. *Supra* note 2.

299. *Supra* note 87.

highest court stated that “every superior court ... has incident to its jurisdiction *an inherent right* to inquire into and judge of the regularity or abuse of its process.”<sup>300</sup>

In this same case, Strong J. specifically referred to the “inherent jurisdiction” of the court to control its own process.<sup>301</sup> Similarly, a decade later the Supreme Court of Canada in *Clark v. Phinney*, considering the powers of the court of probate to correct its own mistakes stated:

[A]ll common law courts...like the Probate Court, with its common law powers and all the powers of the old court of Chancery (so far as the administration of the estates is concerned) as well, have *inherent power and jurisdiction* over their own proceedings, and can in a proper case revoke or set them aside at will.<sup>302</sup>

A more direct reference to the term inherent jurisdiction was made by the Supreme Court of Nova Scotia in *The King v. Fraser*<sup>303</sup> in the context of the inherent jurisdiction of a superior court to review all matters considered or decided by an inferior court. However, the term was also used by some courts in Nova Scotia to distinguish the original jurisdiction of the trial court from the appellate jurisdiction of the Court of Appeal.<sup>304</sup>

### III. *Refusal to apply inherent jurisdiction*

The court refused to invoke its inherent jurisdiction in 37 cases. In 15 cases the reason was a conflict either with a statutory provision or a rule of court.<sup>305</sup> In the remaining 22 cases, the court did not identify any external restriction on the exercise of inherent jurisdiction but exercising discretion still decided not to invoke that jurisdiction as the basis for court action. In some cases the facts precluded the exercise of inherent jurisdiction or made its application unnecessary.<sup>306</sup>

### IV. *Subject matter breakdown*

In terms of subject matter breakdown, the survey reveals a clear predominance of procedural issues. These cases (34), represented 56% of the cases involving inherent jurisdiction.<sup>307</sup> Within this general category, the court acted in eight cases to control vexatious or frivolous actions which the court considered to be an abuse of the court’s

300. *Re Sproule* (1886), 12 SCR 140 at 180 per Ritchie CJ [emphasis added].

301. *Ibid* at 208.

302. *Clark v Phinney* (1896), 25 SCR 633.

303. *Supra* note 91.

304. *The Queen v Mosher* (1899), 32 NSR 139 (SC); *Re Dominion Coal Co* (1907), 42 NSR 108 (SC).

305. *Supra* note 90.

306. See e.g. *Shatford v LeBlanc* (1888), 20 NSR 373, Judge did not err—no need to correct pleadings; *Holmes*, *supra* note 87, plea had to be false and it was not; *Fraser*, *supra* note 91, not the right factual situation; *R v La Brasseur* (1997), 163 NSR (2d) 261, conduct of Crown counsel not so serious as to justify the use of Court’s inherent jurisdiction to award costs against Crown for misconduct. Several cases involved arbitrations in which the court found as a fact that there had been no error in law on the face of the record and therefore no need for the court to intervene: see e.g. *Canadian Gypsum*, *supra* note 206; *Dominion Bridge*; *Bowater Mersey*; and *Centennial Properties*, *supra* note 214.

307. *Supra* note 91.

process.<sup>308</sup> In the remaining cases the NS courts exercised inherent jurisdiction to perform a variety of actions. The second largest group of cases (16) are those in which the court appears to be exercising what appears to be some aspect of the old Equity or Chancery jurisdiction, but doing so under the rubric of inherent jurisdiction. These cases are listed in Appendix "C". Of the sixteen cases comprising this group, ten are cases where the Nova Scotia court exercised its function as "*parens patriae*". In the remaining cases, the courts acted to provide a needed remedy (two cases) as well as exercising historical Chancery jurisdiction to correct a mistake, vary or alter a trust or authorize the sale of trust property.

The third largest group of cases where Nova Scotia courts exercised their inherent jurisdiction involved the court acting to affect the outcome of an arbitration proceeding by ordering a stay or reconsideration of the arbitrator's decision.<sup>309</sup> Of the fifteen cases (25%) in which counsel urged the court to act, the court did act in 11 of these cases representing 18% of the total. The role played by the courts as a supervisor based on their exercise of inherent jurisdiction is examined more closely in Part III of this paper in an attempt to demonstrate the historical evolution of inherent jurisdiction of this one area of activity.

The last group of cases in which inherent jurisdiction was applied by Nova Scotia courts involves the control by superior courts of inferior tribunals, excluding arbitration awards.<sup>310</sup> Requested by counsel in six cases and applied by the courts in four of the six, this area of inherent jurisdiction application constitutes 6.2% of the total cases surveyed.

#### V. *Justification for use: precedents, textbooks and Jacob*

It is significant to note that in 86% of the cases where the court did acknowledge and apply its inherent jurisdiction the courts supported the decision by referring to judicial precedents in the form of either Canadian or English court decisions in which the court had exercised inherent jurisdiction in similar circumstances. In other words, the courts of Nova Scotia followed a typical common law approach to the question of inherent jurisdiction. It is also important to realize that many of the Canadian precedents used to support the exercise of inherent jurisdiction, had, in turn, relied on English precedents to justify the use of this concept. These results point to the importance of English court decisions in providing a judicial base for the exercise by Canadian superior courts and the courts in Nova Scotia of inherent jurisdiction.

In addition to reference to cases, Nova Scotia courts also referred to textbooks to support their exercise of inherent jurisdiction. Several of these dealt with arbitrations, while others were textbooks on procedures which summarized Canadian court decisions in which the court had exercised inherent jurisdiction. Only one textbook referred to dealt directly and primarily with inherent jurisdiction (in South African

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308. *Holmes*, *supra* note 87; *The King v MacDonald (No 2)* (1901), 5 CCC 279 (NSSC); *Carson*, *supra* note 91; *Fenerty*, *supra* note 91; *Hirtle v Hirtle* (1949), 24 MDR 447 (NSSC); *Canada (AG) v Marineserve.MG Inc*, 2003 NSSC 26, 212 NSR (2d) 140; *Lutz*, *supra* note 243; and *353903 Ontario Ltd v Black & MacDonald Ltd* (1999), 180 NSR (2d) 194 (SC).

309. *Supra* note 92.

310. See *Fraser*, *supra* note 91; *Johnson v City of Halifax* (1974), 12 NSR (2d) 562 (SC (TD)); *Canadian Automatic Sprinkler Association*, *supra* note 93; *Little Narrows Gympsum*, *supra* note 93; *Walker*, *supra* note 93; and *Re Amiro*, *supra* note 93. In *Fraser* and *Re Amiro* the court did not exercise its inherent jurisdiction.

courts). In several cases the Nova Scotia courts referred to textbooks dealing with the substantive law in particular areas such as trusts, company law or injunctions.

In all, there are ten cases with textbook references (10.3%) with approximately half of these dealing directly with inherent jurisdiction. However, if we were to include references by Nova Scotia courts to *Halsbury's Laws of England* we would add another ten cases making a total of 20 (26.6%), not an insignificant number.

The seminal article on inherent jurisdiction is considered to be that published by Jacob in 1970. Direct reference to this article is found in eight Nova Scotia cases. Five of these are Court of Appeal decisions decided between 1978 and 2009. However, if we include court references to *Halsbury's* between 1970 and 2009, there were 75 cases in which inherent jurisdiction was an issue. The Jacob article was referred to either directly or indirectly (via *Halsbury's*) in 24% of these, clearly a significant impact.

#### VI. *Nature and source of inherent jurisdiction*

It is clear from an examination of the Nova Scotia cases that there is not much judicial appetite for a philosophical discussion of the nature and source of inherent jurisdiction. Instead, we see an approach very similar to that described by Dockray in his survey of English decisions on the issue of the existence of particular inherent powers. As Dockray explains, “the cases recognize and reject claims after argument in a conventional form about precedents which relate to the power in question and about the merits, consequences and alternatives to the particular power which is claimed the court possesses.”<sup>311</sup> Not surprisingly, it is the same approach that the courts would take to any other question involving the common law.

It is Dockray's view that the most reliable guide to the scope and nature of inherent jurisdiction lies in a group of cases in which the court has denied that it had any inherent power to make a procedural order of some particular sort. A review of these decisions revealed to the author that they were quite “inconsistent with the idea that inherent jurisdiction is an unlimited reservoir from which new powers can be fashioned at will.”<sup>312</sup> They also refute according to this author, the idea that inherent powers can be discovered “by analyzing the character or immanent attributes of a superior court.” I would suggest that the performance of Nova Scotia courts leads to the same conclusions. An examination of the denial cases mentioned by Dockray and Nova Scotia courts will be made in the next section of this article dealing with the limits of inherent jurisdiction.

#### *Survey results and trilogy observations compared: a closer look*

The trilogy of appeal cases contain a number of statements or observations about the nature of inherent jurisdiction and its use by the Nova Scotia trial courts. The survey of Nova Scotia cases provides evidence as to the actual application of this concept and can provide some indication of the extent to which Nova Scotia courts understand the nature of this particular jurisdiction. The comparison of the two should provide a better overall understanding of the role played by this concept in the administration of justice in Nova Scotia. We will start with a consideration of the Court of Appeal observations and compare each observation with whatever empirical evidence the survey provides.

311. Dockray, *supra* note 2 at 130.

312. *Ibid.*

I. *The nature of inherent jurisdiction and the impact of the Jacob article*

In none of the three Court of Appeal decisions which constitute the trilogy,<sup>313</sup> as well as two other decisions that preceded that trilogy (*Golden Forest Holdings*<sup>314</sup> and *ABN Amro Bank*<sup>315</sup>) was there any discussion about or analysis of the source or nature of inherent jurisdiction. In all five cases, the Court of Appeal refers to other Canadian or English cases, or a number of academic articles which discuss inherent jurisdiction or both. Jacob's article was the most influential.<sup>316</sup> This article is referred to and quoted from for its definition of inherent jurisdiction as well as other attributes of this concept. For example, Justice Saunders in *Ofume* appears to quote with approval Jacob's explanation of the source of inherent jurisdiction which he suggests is "derived from the very nature of the court as a Superior Court" and that inherent jurisdiction is that "which enables the court to fulfill itself as a court of law."<sup>317</sup> Other Justices of the Court of Appeal have been content to quote the words of Jacob or other authors but without attempting to probe any further into the nature and source of inherent jurisdiction. Clearly the Jacob article, either directly or indirectly via *Halsbury's* paraphrasing of relevant parts of it, had a significant impact upon the Nova Scotia Court of Appeal.

Of a total of nine decisions where Jacob was referred to and quoted, five were Court of Appeal decisions handed down between 1990 and 2009.<sup>318</sup> The remaining four were trial court decisions reported between 1978 and 2001.<sup>319</sup> In terms of the total number of cases reviewed, the nine cases represent just under one per cent of the total. Not surprisingly, the trial courts do not try to explore in greater detail the nature and source of inherent jurisdiction, being content to use the explanation and definition being provided by Jacob.

II. *The initial narrow application of inherent jurisdiction – abuse of court and contempt*

The Court of Appeal noted in *Ocean*, as have other legal commentaries, that the initial exercise of inherent jurisdiction historically was limited to maintaining order in the courtroom via contempt orders and trying to prevent the court process from being abused.<sup>320</sup> This latter objective provided a wider scope for the exercise of inherent jurisdiction than the former and clearly covered cases involving frivolous or vexatious claims. An examination of survey results shows the contempt power being exercised or considered in only four cases by Nova Scotia trial courts.<sup>321</sup> It might be thought that contempt matters have been subsumed under statutory provisions but this is only partially correct. The latest version of the Nova Scotia *Civil Procedure Rules* does contain provisions that govern the procedure to be followed by the court where

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313. *Goodwin; Ofume; and Ocean*, *supra* note 43.

314. *Supra* note 46.

315. *Supra* note 77.

316. *Supra* note 2.

317. *Supra* note 43 at para 40.

318. These include: *Golden Forest Holdings*, *supra* note 46; *ABN Amro Bank*, *supra* note 77; *Goodwin*, *supra* note 43; *Ofume*, *supra* note 43; and *Ocean*, *supra* note 43.

319. See *Bowles v Western Approaches Ltd* (1978), 9 BCLR 226 (Co Ct); *Embil*, *supra* note 92; *CIBC*, *supra* note 243; and *353903 Ontario Ltd*, *supra* note 306.

320. *Ocean*, *supra* note 43 at 224 quoting Jacob, *supra* note 2.

321. *Re SM* (1987), 111 NSR (2d) 381 (Fam Ct); *Begg v East Hants* (1988), 85 NSR (2d) 304 (SC (AD)); *353903 Ontario Ltd*, *supra* note 306; *Currie v Currie* (1941), 16 MPR 187 (NSSC).



contempt is involved but does not establish the circumstances in which the court can invoke contempt proceedings.<sup>322</sup> The court still has to decide on a case-by-case basis when to punish a person for contempt of court.

The area covered by the term “abuse of the court process” is potentially much larger than contempt and this is borne out by the fact that our survey shows a total of eleven cases in this category.<sup>323</sup> Of the eleven cases, eight involve what the court describes as frivolous or vexatious claims, that is, claims which have no merit and merely take up court time and cause delay.<sup>324</sup> However, abuse of court process can and has involved other situations that do not fit within the vexatious or frivolous group. For example, an attempt to get the same case heard twice, as in *Fenerty v. The City of Halifax*<sup>325</sup> or an attempt to introduce a questionable confession by a youth, as in *R. v. Marsman*<sup>326</sup> or a delay in carrying forth an action as in *Martell v. Robert McAlpine Ltd.*,<sup>327</sup> were all considered to involve an abuse of the court process. Since the abuse of process category involves 11.3% of the total number of cases, it does constitute and provide the court with a much broader scope for the exercise of inherent jurisdiction that does the contempt power. As we have already seen, the jurisdictional justification referred to as “control of the court’s process” provides an even wider amount of operation.

### III. *The expansion and use of inherent jurisdiction to areas other than contempt and abuse of court process*

The Court of Appeal also noted that the operation of inherent jurisdiction evolved from a rather limited historical base (even taking into account the larger area of abusive process) into a much broader based jurisdiction.<sup>328</sup> This is also confirmed by the survey which shows the trial courts of Nova Scotia taking a number of actions, not involving contempt or abuse of court.<sup>329</sup>

As these examples demonstrate, Nova Scotia courts have not considered themselves restrained in the exercise of their inherent jurisdiction to the confines of

322. Nova Scotia, *Civil Procedure Rules*, Rule 89.

323. *Holme*, *supra* note 87; *MacDonald (No 2)*, *supra* note 306; *Carson*, *supra* note 91; *Fenerty*, *supra* note 91; *Hirtle*, *supra* note 306; *Martell*, *supra* Appendix “B”; *Corkum*, *supra* Appendix “B”; *Marineserve.MG*, *supra* note 306; *Marsman*, *supra* Appendix “B”; *Lutz*, *supra* note 243; and *Pottier*, *supra* note 91.

324. These include: *Holme*, *ibid*; *MacDonald (No 2)*, *ibid*; *Carson*, *ibid*; *Fenerty*, *ibid*; *Hirtle*, *ibid*; *Marineserve.MG*, *ibid*; *Lutz*, *ibid*; and *Pottier*, *ibid*.

325. *Supra* note 91.

326. *Ibid*.

327. *Ibid*.

328. *Ocean*, *supra* note 43 at para 73, quoting WH Charles, *supra* note 72.

329. The expansion of inherent jurisdiction beyond contempt (and a base of processes referred to in Appendix “A”) includes as follows: (1) altering the terms of a trust (*Re Spencer*, *supra* Appendix “C”); (2) exercising power to deal with child custody matters (*Re Margaret Murphy*, *supra* Appendix “C”); (3) exercising power to authorize a trustee to sell trust property (*Re Nathanson Estate*, *supra* Appendix “C”); (4) exercising jurisdiction over infants brought before the court (*O’Neill*, *supra* Appendix “C”); (5) to prevent an injustice (*Sharma*, *supra* note.91); (6) power to review child support (*Warner*, *supra* Appendix “C”); (7) to alter the administration of a charitable trust (*Re Killam Estate*, *supra* Appendix “C”); (8) to fashion a remedy such as declaratory relief (*Re Gerrard (2000)*, 188 NSR (2d) 224); (9) power to interfere in a proposal to creditors (*Re Laserworks Computer Services*, *supra* Appendix “C”); (10) to fill a gap in a statute (*NMM*, *supra* Appendix “C”); and (11) the power to order division of property (*Viadi v Viadi* (1986), 73 NSR (2d) 418).

situations involving “contempt of court” or “abuse of the court process.” Thus, they confirm the observation of Justice Bateman in *Ocean* in this regard.

IV. *Inherent jurisdiction is primarily procedural*

This characteristic of inherent jurisdiction is clearly borne in the survey results which show that 50 per cent of the cases involving the exercise of inherent jurisdiction have been characterized by the court as involving a procedural aspect or a procedural matter. As already mentioned, this constitutes a major limitation on the operation of inherent jurisdiction and shows that Nova Scotia courts have adhered to such a limitation. This particular characteristic of inherent jurisdiction is based upon the need for the court to control its own process, a necessity that Justice Saunders considers vital to the court being able to carry out its constitutional function as a court. Nova Scotia courts have therefore recognized and accepted the procedural elements of inherent jurisdiction both in terms of its importance to the court and the fact that it operates as a general limitation upon the scope of inherent jurisdiction.

V. *Limits of the court jurisdiction*

As previously noted, Justice Bateman observed in *Ocean* that “in this jurisdiction the courts have generally addressed what is not a proper exercise of the court’s inherent jurisdiction on a case by case basis.”<sup>330</sup> The case survey confirms this observation. Apart from the general suggestion that inherent jurisdiction be exercised primarily with regard to procedural matters, the more definitive limitation imposed by statutes and the rather ambiguous situation vis-à-vis the rules of court, Nova Scotia courts have not attempted a more general and theoretical explanation of the limits of inherent jurisdiction. In view of the fact that there may be more than one area covered by inherent jurisdiction this result is not surprising.

None of the theories put forward to explain the basis for inherent jurisdiction attempt to explain or define its limits<sup>331</sup> even though Jacob asserted that this is a question that deserves to be answered.<sup>332</sup>

In a case decided prior to *Ocean*, Justice Hallett of the Nova Scotia Court of Appeal recognized the lack of clearly defined limits. However, he went on to suggest that in some cases, (which he did not mention) certain limits had been established. His decision in *Golden Forest Holdings*<sup>333</sup> that a court could not exercise its inherent jurisdiction to vary a consent order, appears to be an example of the case-by-case approach described by Justice Bateman in the *Ocean* case.

In yet another decision of the Court of Appeal (non-trilogy) the only limit referred to by the court was the need to apply a common law rule or rule of court regarding fairness before using the court’s discretion to exercise its inherent jurisdiction.<sup>334</sup>

Our survey of cases demonstrated that there are some general limits imposed by statutes and rules as well as a general restriction that inherent jurisdiction be limited to procedural matters. Statutes and rules accounted for 20.4%<sup>335</sup> of such cases while the more general restriction to procedural matters was applicable in 56% of the cases.<sup>336</sup>

330. *Supra* note 43 at para 74.

331. Charles, *supra* note 72.

332. *Supra* note 2.

333. *Supra* note 46.

334. *ABN Amro Bank*, *supra* note 77.

335. For a list of these cases see *supra* notes 91 and 92.

336. *Supra* note 91.

In addition to these general limitations there were more specific limits imposed by the trial courts of Nova Scotia. These are listed, discussed and compared with the Dockray list in Part IV of this paper entitled "Limits of Inherent Jurisdiction." As can be seen when that data is reviewed, there are at least seven specific limits that the Nova Scotia courts have imposed on the exercise of inherent jurisdiction.<sup>337</sup>

#### VI. *Just and equitable basis for inherent jurisdiction*

The Jacob article has also been used by Nova Scotia courts to support the exercise of inherent jurisdiction on the basis that it is just and equitable to do so. In *Ocean* the Court of Appeal cautions "inherent jurisdiction does not bestow an unfettered right to do what in the judge's opinion, is fair as between the parties."<sup>338</sup> This appears to be a reference to the court's earlier decision in *Goodwin* where the Court, paraphrasing the words of Jacob, suggest that inherent jurisdiction "is a power which a superior trial court enjoys to be used where it is just and equitable to do so."<sup>339</sup> Such an approach according to the latest decision of the Nova Scotia Court of Appeal "must be employed within a framework of principles relevant to the matter in issue."<sup>340</sup> This suggestion clearly indicates concern that inherent jurisdiction exercised on the basis on what is just and equitable in the circumstances could result in the arbitrary exercise of that discretion.

If we look at the survey results to see how many times the trial courts of Nova Scotia have actually resorted to the just and equitable basis for exercising inherent jurisdiction we find that they did so in only three cases when the Jacob rationale was specifically referred to and applied.<sup>341</sup> There were six other cases where the court did make reference to just and equitable when arriving at its decision but did so without any reference to the Jacob article.<sup>342</sup> We can only speculate as to whether the court was aware of the article (at least in the four cases decided after 1970) or whether the trial courts were merely exercising their historical chancery or equity court powers.

There were a total of eight cases where the courts specifically made reference to the Jacob rationale of just and equitable.<sup>343</sup> Five of these were Court of Appeal decisions and of these the rationale was only applied in one (*Goodwin*).<sup>344</sup> Therefore, the actual number of trial court decisions in which the Jacob rationale was referred to and applied was three or three per cent of the total of 97: not a significant number. If we count both trial and Court of Appeal decisions we have eight out of 97 cases amounting to 8.2 per cent of the total cases where justice and equity as a basis for inherent jurisdiction exercise was considered. In terms of the actual application of inherent jurisdiction the trial court seemed more likely to apply justice and equity

337. See Part IV.

338. *Supra* note 43 at 225.

339. *Supra* note 43 at para 17.

340. *Ocean*, *supra* note 43.

341. *Bowles*, *supra* note 316; *Embil*, *supra* note 92; and *CIBC*, *supra* note 243.

342. These include: *Auchterlony*, *supra* note 89; *Verge*, *supra* note 91; *Sharma*, *supra* note 91; *Metropolitan Authority*, *supra* note 268; *Re Gerrard*, *supra* note 326; and *Laserworks*, *supra* Appendix "C".

343. *Ocean*, *supra* note 43; *Ofume*, *supra* note 43; *ABN Amro Bank*, *supra* note 77; *Golden Forest Holdings*, *supra* note 46; *Goodwin*, *supra* note 43; *Bowles*, *supra* note 316; *Embil*, *supra* note 92; and *CIBC*, *supra* note 243.

344. *Supra* note 43.

than the Court of Appeal. This is not surprising in light of the caution expressed by the Nova Scotia Court of Appeal in *Ocean*.

VII. *The exercise of judicial discretion generally*

It is also interesting to note that prior to the decision in *Ocean*<sup>345</sup> there had been courts concerned with the exercise of judicial discretion when invoking inherent jurisdiction. In *ABN Amro*<sup>346</sup> the Court of Appeal had insisted that the trial court should consider and apply the test of fairness developed by the common law and the rules of court before making a decision based on inherent jurisdiction. Similarly, in *Ofume*, Justice Saunders emphasized the need for the court to give full consideration to a number of factors before exercising discretion to allow lay persons to represent others before the courts of Nova Scotia. He made no reference to what is just and equitable in this situation or between the parties but he did state that it was in the interest of justice generally to allow judges to decide who may appear before them on a case by case basis. In *Ocean*,<sup>347</sup> Justice Bateman made no reference to justice in her decision, but did emphasize the need for the court to explain the reasons for the court invoking its inherent jurisdiction.

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345. *Supra* note 43.

346. *Supra* note 77.

347. *Supra* note 43.

**Appendix B**

*Survey results: procedural cases*

1. *Shatford v LeBlanc* (1888), 20 NSR 373. Court amends pleadings in order to rectify mistake.
2. *Re Murray Estate* (1889), 22 NSR 125 (SC). Court corrects its own decision.
3. *Paint v Gillies* (1891), 26 NSR 526. Court rescinds the order of a single judge fixing the date of a trial of an election petition.
4. *Auchterloney v Palgrave Gold Mining Co* (1897), 29 NSR 41. Court stays the execution of judgments and postpones foreclosure sales.
5. *Holmes v Taylor* (1899), 32 NSR 791 (CA). Court strikes out frivolous pleas.
6. *The King v MacDonald (No 2)* (1901), 5 CCC 279 (NSSC). Court awards costs regarding an unfounded claim.
7. *Carson v Montreal Trust Co* (1915), 23 DLR 690 (NSSC). Court deems action vexatious or frivolous.
8. *Fenerty v The City of Halifax* (1920), 53 NSR 457 (SC). Court dismisses an action already heard on the basis of *res judicata*—deemed to be an abuse of process.
9. *The King v Verge* (1924-25), 57 NSR 235. Court exercises court power to fix or adjourn a hearing “as the court thinks fit, in the interest of justice.”
10. *Hirtle v Hirtle* (1949), 24 MDR 447 (NSSC). Court acknowledges its power to strike out all or part of a pleading that is scandalous, vexatious and an abuse of the court’s process.
11. *Lockwood v Brentwood Park Investments Ltd* (1970), 1 NSR (2d) 669 (SC). Court consolidates several actions.
12. *R v Marsman* (1976), 22 NSR (2d) 491 (SC). Court dismisses a criminal action as an abuse of the court’s process because of a questionable confession by a youth.
13. *Lutz v Pyke* (1977), 36 NSR (2d) 420 (Co Ct). County Court has the power to strike out a frivolous and vexatious claim per Rule 14.25.
14. *Martell v Robert McAlpine Ltd* (1978), 25 NSR (2d) 540 (SC). Action dismissed for unreasonable delay.
15. *Hammerling v AG For Nova Scotia* (1978), 32 NSR (2d) 366. Court has the power to rehear or reconsider matters before the court and to modify or withdraw decision prior to final judgment.
16. *Widrig v Widrig* (1981), 48 NSR (2d) 269 (SC (TD)). Court can supervise its own process and interpret the decision of the divorce judge.
17. *Pothier et al v AG of NS et al* (1984), 63 NSR (2d) 151 (SC). Court can strike out a statement of claim because it does not demonstrate a reasonable cause of action. Action taken to present an abuse of the court process.

18. *Re Keddy Motor Inns Ltd* (1991), 107 NSR (2d) 419 (SC). Court can amend or vary an order made under the *Companies Creditors Arrangement Act* pursuant to its inherent jurisdiction to control its own process.
19. *NsC Corp v ABN Amro Bank Canada* (1992), 116 NSR (2d) 97 (SC). Court has inherent jurisdiction over counsel.
20. *Snair v Halifax Insurance Nationale-Nederlanden North America Corp* (1994), 139 NSR (2d) 161 (SC). Power to control the court's own process not affected by contractual provisions that try to nullify its inherent jurisdiction.
21. *R v Curragh Inc* (1995), 146 NSR (2d) 163 (SC). Court has power to award costs in a criminal case against the Crown in order to preserve the integrity of the criminal justice system.
22. *R v Corkum* (1997), 163 NSR (2d) 197 (SC). Court can make an order for costs and control its own process when the Crown fails to disclose certain documents.
23. *R v Pottier*, [1999] NSJ no 95 (NSCA). A superior court has jurisdiction to award costs in a criminal matter.
24. *353903 Ontario Ltd v Black & MacDonald Ltd* (1999), 180 NSR (2d) 194 (SC). Court has inherent jurisdiction to present an abuse of process regarding a frivolous or vexatious action.
25. *Goodwin v Rodgeron*, 2002 NSCA 137. Court can set aside an order of the Prothonotary in order to avoid an unjust result as part of the court's power to control its own process.
26. *Van de Wiel v National Life Assurance Co of Canada*, 2002 NSSC 209. Court can set aside or vary an order of the Prothonotary that is procedural in nature.
27. *Canada AG v Marinserve.MG Inc*, 2003 NSSC 26. Court can dismiss an application on the ground that it is frivolous or vexatious, or an abuse of process.
28. *R v R (MC)*, 2004 NSSC 10. Court has power to ban the publication of certain information before the Court as part of its inherent jurisdiction to control its own process.
29. *Halifax (Regional Municipality) v Ofume*, 2003 NSCA 110, 218 NSR (2d) 234. Court permits a husband to represent his wife in legal proceedings as part of the court's inherent jurisdiction to control its own process.
30. *Oakland/Indian Point Residents Assn v Seaview Properties Ltd*, 2008 NSSC 209, 266 NSR (2d) 256. Court can review affidavit evidence where an application is made, on the basis that the claim discloses no reasonable cause of action.

In *Ocean*, *supra* note 43, the Nova Scotia Court of Appeal suggested that in exceptional circumstances the court could order a litigant to undergo mental assessment to determine the litigant's competency to carry forward the litigation.

## Appendix C

*Inherent jurisdiction cases based on Chancery jurisdiction*

For ease of reference the cases have been identified to show which aspect of Chancery jurisdiction was being invoked under the label of inherent jurisdiction. “PP” designates an exercise of the *parens patriae* powers. “E” indicates the exercise of some specific equitable power and “R” indicates a remedy permitted by the court.

- E 1. *Shatford v LeBlanc* (1888), 20 NSR 373.
- E 2. *Re Estate of William P Spencer* (1969), 1 NSR (2d) 282 (SC) [*Re Spencer*].
- PP 3. *Re Murphy, Margaret* (1970), 3 NSR (2d) 293 (SC (TD)).
- E 4. *Re Nathanson Estate* (1971), 4 NSR (2d) 113 (SC).
- PP 5. *O’Neill v O’Neill* (1971), 4 NSR (2d) 640 (SC).
- PP 6. *Dernell v Children’s Aid Society of Cape Breton* (1978), 26 NSR (2d) 125 (SC (AD)).
- PP 7. *Mintz v Mintz* (1979), 33 NSR (2d) 585 (SC (TD)).
- PP 8. *Warner v Warner* (1996), 150 NSR (2d) 38 (SC).
- R 9. *Re Laserworks Computer Services Inc* (1998), 165 NSR (2d) 296 (CA).
- E 10. *Re Killam Estate* (1999), 185 NSR (2d) 201 (SC).
- R 11. *Gerrard (Bankrupt), Re* (2000), 188 NSR (2d) 224 (SC).
- PP 12. *Nova Scotia (Minister of Community Services) v R Petel* (2007), 253 NSR (2d) 177 (SC).
- PP 13. *Nova Scotia (Minister of Community Services) v NNM and RDM* (2008), 262 NSR (2d) 384 (SC).
- PP 14. *Quigley v Willmore*, 2008 NSSC 353, 272 NSR (2d) 61.
- PP 15. *Pottinger v Hann* (2003), 215 NSR (2d) 176 (SC).
- PP 16. *EAH v TDG* (1995), 143 NSR (2d) 232 (CA).