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William H. Charles*

Access to Justice in the Nova Scotia Small Claims Court 1980–2022

In his latest research paper the author explores the extent or degree to which the Nova Scotia Small Claims Court achieves its declared purpose of providing the citizens of the province with what can accurately be described as a "People's Court," that is, a legal agency that would allow ordinary citizens to pursue their legal claims expeditiously and at a reasonable cost with a process that involved lawyers/adjudicators rather than judges. After a review and analysis of several thousand decisions by Nova Scotia Adjudicators/lawyers, the author concluded that the creators of the court had been largely successful and its full vision as a "People's Court" had been substantially achieved, although as the reviewers cautioned, it is still a work in progress. The author further suggests that now, more than ever, with our increasingly litigious society pressing its' perceived legal claims, the Nova Scotia Small Claims Court is a Nova Scotia legal institution that needs and deserves to be supported by the Nova Scotia government.

Dans son dernier rapport de recherche, l'auteur étudie dans quelle mesure la Cour des petites créances de la Nouvelle-Écosse atteint son objectif déclaré de fournir aux citoyens de la province ce que l'on peut décrire avec justesse comme un « tribunal populaire », c'est-à-dire un organisme juridique qui permettrait aux citoyens ordinaires de faire valoir leurs revendications juridiques rapidement et à un coût raisonnable dans le cadre d'une procédure faisant intervenir des avocats/adjudicateurs plutôt que des juges. Après avoir examiné et analysé plusieurs milliers de décisions rendues par des juristes/adjudicateurs de la Nouvelle-Écosse, l'auteur a conclu que les instigateurs du tribunal avaient largement réussi et que leur vision d'un « tribunal populaire » s'était largement concrétisée, même si, comme l'ont souligné les examinateurs, il s'agit encore d'un travail en cours. L'auteur suggère en outre qu'aujourd'hui, plus que jamais, avec notre société de plus en plus procédurière qui insiste sur les revendications juridiques qu'elle perçoit, la Cour des petites créances de la Nouvelle-Écosse est une institution juridique de la province qui doit et mérite d'être soutenue par le gouvernement de la Nouvelle-Écosse.

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(Note: The author has published within the last two years another article dealing more broadly with the historical background and development of the present Small Claims Court in Nova Scotia entitled "Small Claims Disputes in Nova Scotia and Access to Justice," [1] and which appears in the *Dalhousie Law Journal*. This work will be referred to throughout the present article.)

Introduction

In 1980, following the completion of several reports in the preceding years which examined and assessed the need for a dedicated legal process to handle small claims disputes, the Nova Scotia legislature introduced Bill 92 into the House.[2] The Bill was intended to address the pressing need for an economical legal procedure or process that was specifically targeted at small civil disputes under $2,000. Bill 92 created a dedicated small claims court to deal with civil disputes involving claims under $2,000.[3] The purpose or vision was to create a legal process that would allow ordinary citizens to press or pursue their small civil disputes on their own and without the need for legal representation.[4] As such, the new court would be a "people's court," dispensing justice in a non-court setting and with simplified procedures and reasonable expenses, presided over by so-called adjudicators rather than judges, who would employ a more interventionist and inquisitorial role intended to assist the ordinary citizen litigants with their dispute.[5] *Such was the vision!*

When Bill 92 was introduced to the Nova Scotia House of Assembly in May of 1980, reference was made by several members of the NS legislature to the fact that their new legal creation would be a "people's court." In the new process, the role of lawyers would, hopefully, be decreased and the role of non-judicial adjudicators would be emphasized.[6]

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1. William H Charles, "Small Claims Disputes in Nova Scotia and Access to Justice," (2020) 43:2 Dal LJ 963, online: <digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2139&context=dlj> [perma.cc/7N54-D2J3] [Charles, "Small Claims Disputes"].
2. "Bill 92, An Act Respecting a Small Claims Court," 1st reading, Nova Scotia, House of Assembly, Debates & Proceedings, 52nd Parl, 2nd Sess, No 4 (21 May 1980) at 2455 (Hon Harry Howe) ["Bill 92," House of Assembly].
3. *Ibid* at 2457. Howe explained that the general purpose of the Bill was to increase "access to Justice" by creating a forum or legal process for people who have small claims and who were frustrated by the fact that they had no court in which to press their legal claims and to provide a forum where citizens could pursue their small civil disputes personally without the need for legal counsel to represent them (*ibid*).
4. *Ibid* at 2456.
5. *Ibid* at 2458.
6. *Ibid*.

I. *Jurisdiction*

The newly invented court was to have a monetary jurisdictional limit initially at $2,000 with claims limited to disputes involving contracts or tort damages involving legally recognized civil wrongs as well as claims for the return of personal property not exceeding $2,000 in monetary value.[7] Lawyers were permitted to appear in court as representatives of ordinary citizens, but were not permitted to charge their clients fees for their services.[8] The hope was that this restriction would discourage them from representing clients in small claims court, thus helping to maintain the appearance of a "people's court."[9]

1. *Changes to the jurisdiction (expanded)*

From the time of its creation in 1980 up to 2022, the jurisdiction of the Small Claims Court has been increased, both in terms of monetary limits and subject matter. For example, between 1980, when the court was created, until 2022, the monetary limits have been increased over tenfold, from $2,000 to $25,000 and the subject matter of claims has been increased as well. With regard to the latter, the Nova Scotia Small Claims Court now has jurisdiction to (1) hear appeals from the Nova Scotia Residential Tenancies Board, assess decisions of Tenancy Board Officers and (2) hear matters in regard to municipal taxes.[10]

II. *The purpose of this study*

The main purpose or objective of this study is to try and determine whether or not the current Small Claims Court is *still* operating as a "people's court" and carrying out its original legislative mandate. In the course of pursuing this purpose, other more specific, relevant issues will be explored, such as: (a) whether or not the role of the adjudicators has changed from the original concept of interventionist, semi-inquisitorial, dispute resolver whose main purpose was to help ordinary citizens navigate the dispute resolution process and provide a solution to the dispute that would be fair or equitable to all the parties; (b) to seek out relevant factual data that would cast some light on the nature and dollar amount of claims currently being pursued in the small claims courts, as well as the type of litigants (whether citizens or corporations) who are currently using the court;

7. See the *Small Claims Court Act*, RSNS 1980, c 430, s 9, as it appeared in 1989.
8. Section 16 of the *Small Claims Court Act* allows lawyers to represent citizens in the court. See *ibid*, s 16. However, their inability to charge full fees and costs is permitted by regulation NS Reg 114/2019, s 15.2 which provides that "No agent or barristers fees of any kind shall be awarded to either party."
9. See "Bill 92," House of Assembly, *supra* note 5 at 2458.
10. *Small Claims Court Act*, *supra* note 7.

(c) to determine, if possible, the extent to which the court has developed its own particular jurisprudence relating to the resolution of small claims disputes; (d) to determine the roles currently being played in small claims courts, not only by adjudicators, but by lawyers and self-representatives as well, including agents; (e) to determine and assess the effect or impact of the two studies that assessed the operation of the court—specifically, to determine what changes, if any, these reports inspired or produced, and (f) to determine and assess the role played by the Nova Scotia Courts of Appeal, the County Court and the Supreme Court in relation to any development of a small claims court jurisprudence or the operations of the court.

At this point it might be advisable to note that the data upon which this paper is based is limited due to the fact that it is based on the written decisions of adjudicators which account for only 5% of all decisions handed down by adjudicators.[11] Adjudicators make the decision whether to issue a written judgement or not based on their assessment of the importance of a particular case in terms of its legal significance. It is difficult to tell or determine the extent to which written decisions are different in their legal significance, but presumably adjudicators think that some cases require a written explanation.

III. *Previous studies on the Court*

There were two reports published between 1980 and 2022 that reviewed the operations of the Nova Scotia Small Claims Court and tried to identify operational issues to which they offered solutions. The Nova Scotia Court Structure Task Force ("Task Force Report") published its report in March 1991.[12] The second came from Saint Mary's University ("Saint Mary's Report") and focused solely on the Nova Scotia Small Claims Court and examined its operations through the lens of court users.[13] It too made suggestions for operational improvements.[14]

1. *The Nova Scotia Court Structure Task Force (1991)*

The Task Force looked at the operation of the Nova Scotia Small Claims Court as part of a larger study commissioned by the Nova Scotia Attorney General's Department to review the entire court organization of Nova

11. See Charles, "Small Claims Disputes," *supra* note 1.
12. William H Charles et al, *Report of the Nova Scotia Court Structure Task Force: March 1991* (NS: Nova Scotia Court Structure Task Force) [*Task Force Report*] at 195-214.
13. Marc Patry, Veronica Stinson, & Steven M Smith, *Evaluation of the Nova Scotia Small Claims Court: Final Report to the Nova Scotia Law Reform Commission* (Halifax, NS: Saint Mary's University, 2009) [*Saint Mary's Report*].
14. *Ibid* at 90-102.

Scotia.[15] In their review of the Small Claims Court, the commission did not address the question or issue of a "people's court." Their assessment, apparently without hard statistical data, was that the majority of litigants were unrepresented, and they did not distinguish between self-representing ordinary citizens, agents, or corporations. There was no discussion of the use of the court by corporations or whether it had been co-opted by corporations for use as a debt collection legal mechanism.

2. *The Saint Mary's Report (2009)*

Unlike the Task Force, the Saint Mary's researchers spent some time in their report discussing the concept of a "people's court," but in their "Conclusions," they did not specifically state whether they thought the court at that time (2009) was operating as a "people's court."[16] Their assessment of its operations, based upon user feedback, was that it was doing a good job dealing with small civil disputes that were brought to the court for resolution. This could be interpreted as implying that the court was still operating as the legislators intended, as a "people's court" but there was still no hard data to support such a conclusion or implication. They did, however, have some court statistics presumably supplied by the Nova Scotia Attorney General's Department that showed a sharp and troubling decrease in the number of disputes heard by the court during a five-year period (2002–2007) just preceding the report in 2009.[17]

The authors of the report made no mention of this disturbing information, probably because their general focus was on user reaction to the court's operation and performance. Users would not know about the decline in case numbers and therefore would have no comments to make about this decline. As a result, the authors focused their attention on things that did cause court users some concern. These "things" were processes or statutory provisions that were either hard to understand or not functionally effective, or unclear in their application. Such concerns involved, for example, an execution or enforcement process that was functionally defective and dysfunctional.[18] This was a problem for most courts in Nova Scotia and one, in the opinion of the report's authors, that needed to be addressed. Other difficulties referred to in the report were (a) costs, (b) the lack of a default judgment process, (c) lack of a recording on tape or transcription of the hearings, (d) lack of court staff to assist litigants organize and commence their claims, and (e) the need for court

15. *Task Force Report*, *supra* note 12.
16. *Saint Mary's Report*, *supra* note 13 at 102-103.
17. *Ibid* at 22.
18. *Ibid* at 5.

forms that were clear and easier to understand or, in other words, were more "user friendly."[19] From the researchers' point of view, there was a lack of hard, empirical, statistical data about case numbers from which conclusions might be drawn.[20]

Many of these issues were discussed by the authors of the report in their discussion of the more philosophical question or issue of organizational justice.[21] But, again, neither the Saint Mary's or Task Force Report directly addressed or discussed the specific question whether the then current Small Claims Court was adequately or effectively carrying out the Nova Scotia legislators' vision of a "people's court."

IV. *Legislative amendments*

In the years following its enactment, the Nova Scotia *Small Claims Court Act* was amended and revised numerous times.[22] Some amendments were the result of recommendations made by studies such as the Task Force Report and the Saint Mary's Report, while others were carried out and proposed by the Nova Scotia Attorney General's Department. Some were more significant than others. Besides amendments that changed the monetary limit on claims that could be commenced in the Small Claims Court,[23] there were the following: (1) the requirement that a defence be filed by the Defendant; (2) giving the Court the power to issue a Default Judgment, if certain conditions were met;[24] (3) an increase in the amount of general damages the Court could award to $25,000;[25] (4) limiting the liability of court clerks and adjudicators;[26] (5) changing the enforcement process (execution orders)[27] and (6) changing the appeal process so as to require adjudicators to provide a more full and complete explanation of the reasons for their decision so that the appeal becomes more closely aligned with the requirements of a stated case.[28] Other, less significant, amendments involved: (1) claims in other courts, whether in Nova Scotia or not; (2) the transfer of proceedings from the Nova Scotia Superior Court

19. *Ibid* at 57.
20. *Ibid* at 94.
21. For the author's opinion on this important issue see Charles, "Small Claims Disputes," *supra* note 1.
22. See e.g. *Small Claims Court Act*, *supra* note 7, as amended by *Justice Administration Amendment (1999) Act*, SNS 1999(2), c 8; *Small Claims Court Act*, *supra* note 7, as amended by *An Act to Amend Chapter 430 of the Revised Statutes, 1989, the Small Claims Court Act*, SNS 2007, c 53.
23. Charles, "Small Claims Disputes," *supra* note 1 at 999, n 232.
24. *Small Claims Court Act*, *supra* note 7, s 23.
25. *Ibid*, s 9(a).
26. *Ibid*, ss 34-35.
27. *Ibid*, s 31.
28. *Ibid*, s 32.

to the Small Claims Court;[29] (3) changes in the way documents were to be processed by Small Claims Court clerks;[30] and (4) disposal of records of the court.[31]

V. *Clarifying the Act—the role of Courts of Appeal*

The two appeal courts (the County Court up to 1992 when it was merged with the Nova Scotia Supreme Court and the Nova Scotia Supreme Court itself), in the course of many appeals from the decisions of the Nova Scotia Small Claims Court adjudicators, did much to influence the jurisdiction of the Court, as well as its operational provisions. Both courts by virtue of their decisions, which required them to provide a suitable meaning to ambiguous language and to determine when a matter was a suitable one to be disposed of by an adjudicator in that Court, had a very important impact on how the Court operated and, to some extent, it determined the kind of court it would be—the extent to which it would be a "people's court." As we shall see later in this study, not all Court of Appeal decisions by individual justices of the Nova Scotia Supreme Court were necessarily consistent with each other, which did lead to some confusion. However, with regard to decisions involving residential tenancy disputes and matters, the taxing of lawyers accounts, issues relating to default judgments (quick judgments), appeal procedures, property disclosure statements and doctor's medical certificates, their decisions had an important effect on the scope of the jurisdiction of Small Claims Courts in Nova Scotia. They also had a significant impact on how the court operated and determined, to some extent, the degree to which the Nova Scotia Small Claims Court could be said to be a "people's court," in the same envisaged by its creators—the legislature of Nova Scotia.

VI. *Four basic questions about the Court*

Our latest review and assessment of the Nova Scotia Small Claims Court reveal the existence of four basic problems that consistently emerged with regard to the operations of the Court. They involved (1) the question of whether the Nova Scotia Small Claims Court is truly a court of record in the full, historical sense and understanding of what this means and entails, even though it is considered to be a minor court in the Nova Scotia court hierarchy. Somewhat related to the previous point, is (2) the question of inherent jurisdiction and, connected to both of these issues, is (3) the question of whether the Nova Scotia Small Claims Court has the authority

29. *Ibid*, s 19.
30. *Ibid*, s 21.
31. *Ibid*, s 32A.

to provide equitable relief to claimants of the circumstances of the case or dispute before the court warrant or justify such relief, and 4) the question of jurisdiction also arises and has to be addressed. Such issues and questions need to be determined or addressed to determine if the Nova Scotia Small Claims Court is still a "people's court"?

2. *Court of Record*

The issue of what is or what constitutes a court of record and the legal impact or significance of such a designation has been raised in a number of cases. The historical origins of the concept can be found in the theory that the records kept by the King's Courts were incontestable and could not be challenged as to their truth or accuracy.[32] Sub-section 3(1) of the Nova Scotia *Small Claims Court Act* designates the Court as a court of record but it is not clear why this was done.[33] It is possible that the legislature was merely concerned with making sure that the court could control its own procedures and processes. Being an inferior court, it was not clear, from a legal perspective, whether the court had the necessary authority or power as an inferior court to do so by virtue of any inherent jurisdiction it might or might not have. To be able to fine or imprison parties before the court was important. Certainly, the early decision of the Nova Scotia County Court in *Trimper v McClement*[34] seemed to adopt this reasoning (repeated in *Clarke v PF Collier & Son Ltd*[35] in 1993), but other Nova Scotia courts, such as the Supreme Court of Nova Scotia and Court of Appeal took a different view and could not accept that the Nova Scotia Small Claims Court was truly a Court of Record regardless of what the statute said. Many of these decisions handed down by different individual judges based their conclusion on the fact that there was no recorded transcripts of proceedings.

The majority of Small Claims Court decisions are oral decisions handed down by adjudicators, so there is no detailed written transcript of the proceedings of the trial. On appeal, the adjudicator is required to prepare a summary of the case, including their conclusions and the factual basis for that conclusion.[36] More recently, more adjudicators have adopted the practice of handing down written decisions, but these only account for about 5% of the total number of cases coming from the Small Claims

32. Henry Campbell Black, *Black's Law Dictionary*, revised 4th ed (St Paul, MN: West Publishing Co).
33. *Small Claims Court Act*, *supra* note 7, s 3(1).
34. *Trimper v McClement*, [1989] NSJ No 12, 13 ACWS (3d) 340.
35. *Clarke v PF Collier & Son Ltd*, 1993 CanLII 3447 (NSSC).
36. See *Small Claims Court Act*, *supra* note 7, s 32 (4).

Court.[37] So the issue or problem of having no detailed written record was a real one. Some courts of appeal have taken a more historical approach and based their decisions on the fact that a statutory, inferior court, unlike the King's Court (Superior Court), cannot be a Court of Record, in spite of what any statute might say.[38]

A review of some Nova Scotia cases reveals court decisions in the first 15 years to be fairly even split on the issue but since then, the vast majority of courts of appeal have indicated, by their decisions, that the Small Claims Court is not a Court of Record, with all that entails in relation to its authority.

2. *Equitable jurisdiction and remedies*

The second of our basic questions is whether or not a Small Claims Court in Nova Scotia can provide equitable remedies or apply the broad equitable principle of fairness in reaching decisions in specific cases. Section 2 of the *Small Claims Court Act* does specify that a Small Claims Court in Nova Scotia must apply the law (both common law and statute) and *natural justice*.[39] This latter term has been defined as the obligation of a court to exercise procedural fairness in reaching its decision and generally to be fair to both parties.[40] A denial of natural justice, such as a court failing to allow both parties to present their cases, has been found to be a ground for an appeal. The question has arisen whether small claims courts in Nova Scotia can provide specific equitable remedies such as prerogative writ relief or other specific equitable remedies such as specific performance. A review of Small Claims Court cases undertaken by the author indicates that the Small Claims Court adjudicators have placed limits on their own ability to provide particular or individual equitable remedies and have shied away from doing so.

The cases suggest a reluctance to provide, for example, specific performance relief, but more ambivalence with regard to an action for unjust enrichment because of its major emphasis upon fairness.

3. *The approach of appeal courts and judicial discretion*

Another complicating factor stems from the fact that the very informal procedures of the Small Claims Court encourages and provides

37. Based on the author's own research.
38. Charles, "Small Claims Disputes," *supra* note 1.
39. *Small Claims Court Act*, *supra* note 7, s 2.
40. This is the definition provided by John Yogis, *Canadian Law Dictionary* (Barron's Education Series Inc, 1983) at 55.

opportunities for adjudicators to exercise their judicial discretion when deciding individual cases.[41]

In general, appeal courts in Nova Scotia have taken a deferential approach to factual decisions made by adjudicators. It must be established that the adjudicator had made a clear misinterpretation of the facts as well as the law.[42] Allegations of bias must also be treated seriously and reviewed by the appeal court.[43] The fact that adjudicators are practising lawyers who rub shoulders with other lawyers on a daily basis provides a basis for allegations of undue familiarity and, perhaps, undue influence to be made.

It is also important to stress that the interventions and role that is expected of Small Claims Court adjudicators, including the duty to assist litigants with their pleadings, gives ample opportunity for adjudicators to exercise their judicial discretion in resolving disputes. However, the exercise of such discretion must also be tempered by a realization that they should not exercise such discretion to the point where it approaches the common law power granted to a Superior Court to exercise a general power or authority.

4. *Inherent jurisdiction*

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.[44] It may be thought of as a self-generating, intrinsic source of power.[45] However, it has also been observed that it is a difficult idea or concept to pin down.[46] There is no idea where it comes from, which courts and tribunals have it, and what it can be used for. In the words of one often quoted English commentator I H Jacob:

> "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 an 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."[47]

41. *Saint Mary's Report*, *supra* note 13 at 50-51.
42. Based on the author's own assessment, see Charles, "Small Claims Disputes," *supra* note 1.
43. *Battiste v Chapel Island Band*, 2005 NSSM 14 (CanLII) [*Chapel Island*].
44. See IH Jacob, "The Inherent Jurisdiction of the Court" (1970) 23:1 Current Legal Problems 23 at 24, 27, DOI: <10.1093/clp/23.1.23>.
45. *Ibid* at 27: "Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute."
46. *Ibid* at 23.
47. *Ibid*.

It has also been observed by another legal scholar as a "[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 evidence arbiter within the structures of the modern democratic state."[48]

As stated in my previous work,

> Reference to this phase 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 fair trial further supports the emphasis upon a chancery—like discretion and jurisdiction as a characteristic of inherent jurisdiction.[49]

a. *Use of the concept by courts generally*

Although it is only recently that the term "inherent jurisdiction" has been recognized and discussed by the legal community and the judiciary, it has been used by courts in Canada generally for some time beginning in 1875,[50] and its use broadened after 1880. Its frequency increased with courts using the concept to justify actions in relation to procedural matters in general and awarding of costs, as well as control over solicitors.[51]

b. *Sources of inherent jurisdiction*

Various efforts have been made to trace the source of inherent jurisdiction.[52] One English court official who studied the concept in depth found it in the very nature of a Superior Court.[53] In his opinion, it is the power authority or jurisdiction that allows a supreme court to fulfill itself as a supreme court, which would include control over its procedures and to punish anyone who did not conform, by imposing a fine or imprisoning the offender. This aspect of inherent jurisdiction arises or finds its source in the common law rather than by statute. This explanation has been accepted in general by judges of the Supreme Court of Canada. Some commentators, while generally agreeing about its nature, see the function of inherent jurisdiction quite differently. The Australian commentator, Keith Mason, sees inherent

48. Marimous Wieslers, "Foreword" in Jerold Taitz, *The Inherent Jurisdiction of the Supreme Court* (Cape Town: Juta & Co Ltd, 1985) 1 at 23.

49. William H Charles, "Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?" (2010) 33:2 Dal LJ, online: <digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1964&context=dlj> [perma.cc/B2WQ-7MRM] [Charles, "Inherent Jurisdiction"].

50. Martin Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113 Law Q Rev 120.

51. Charles, "Inherent Jurisdiction," *supra* note 49 at 67.

52. Jacob, *supra* note 44.

53. Wieslers, *supra* note 48.

jurisdiction as refreshing a judicial power of last resort that will be invoked to block various types of conduct which are not regulated by statutes or rules of court or, may be expressly permitted by them.[54] It is important to draw a distinction between the general jurisdiction of superior courts, as courts of common law and equity, and the courts' inherent jurisdiction.[55] In Nova Scotia, the general power of the Nova Scotia Supreme Court has been traced by a Chief Justice of that Court to the original creation of the Supreme Court of Nova Scotia in 1884. At that time the court was given powers that were formerly exercised by the English Courts of the King's and Queen's Bench, Common Pleas or Court of Exchequers and with the same powers that were exercised by the Supreme Court of Judicature in England as they were on the 19th of April, 1884.[56]

It has been suggested that the notion of an unlimited jurisdiction in a superior court may have evolved from the ancient English legal principle that "The rule for jurisdiction is nothing shall be intended to be out of the jurisdiction of the Supreme Court unless specifically excluded."[57] So, in proceedings before a superior court, it was unnecessary to allege that the court did have jurisdiction unlike the situation with an inferior court proceeding such as the Nova Scotia Small Claims Court. The theory was that it was up to the superior court itself to decide, periodically, whether it was acting within its jurisdiction or not.[58] Such a theory posed the risk that the jurisdiction of superior courts would be considered unlimited.[59] The fact that superior courts had a general jurisdiction to provide equitable relief added to this risk. This general jurisdiction to relieve against the harshness of some common law rules principles is also reflected in the maxim *ubi jus ibi remedium*.[60] But it is important to understand that a superior court's equity jurisdiction and its inherent jurisdiction are different things and have different sources or origins.

An empirical survey of Nova Scotian cases indicates that the Nova Scotia Supreme Court has relied on the concept of inherent jurisdiction very sparingly. Between 1853 and 2009 there were 15,693 reported cases—mainly in the superior court, but only 97, a little over half of 1%, referred to inherent jurisdiction, the oldest reference being in 1899. In most of these cases the concept of inherent jurisdiction was raised with

54. Keith Mason, "The Inherent Jurisdiction of the Court" (1983) 57 Austl LJ 449.
55. Jacob, *supra* note 44.
56. *Midland Doherty v Rohrer and Central Trust Company*, 1985 CanLII 5705 (NSCA).
57. *Peacock v Bell* (1667), 1 Wms Saund 73, 85 ER 84 at 87-88.
58. See Charles, "Inherent Jurisdiction," *supra* note 49 at 71.
59. *Ibid*.
60. Jerold Taitz, *The Inherent Jurisdiction of the Supreme Court* (Cape Town: Juta, 1965).

reference to procedural actions rather than jurisdictional or substantive law issues. When the issue is raised either by counsel or the court itself there is generally speaking no systematic exploration of the concept of inherent jurisdiction or of its limits beyond the possibility for any potential or actual conflicts with statutory provisions or rules of court.[61] In fact, in 13.3% of the Nova Scotia cases, the court applied the doctrine without any reference to supporting precedents. We should also realize that inferior courts such as the Nova Scotia Small Claims Court are not considered by the common law to have the necessary stature, not being a King's Court, to have any inherent jurisdiction. Historically, royal courts were courts of record with power to fine and imprison for contempt. These were powers that other non-record courts did not have. The fact that the Nova Scotia Legislature has declared the Nova Scotia Small Claims Court to be a court of record, complicates the situation.[62] A review of Nova Scotia Court of Appeal decisions reveals a lack of consistency in approach to the question or issue of inherent jurisdiction.[63] In a 2002 decision, the Court of Appeal apparently took the position that it was a statutory court and derived its jurisdiction and powers (including inherent jurisdiction) from statute only.[64] "Both the Nova Scotia Court of Appeal and the Supreme Court of Canada have cautioned against the use of inherent jurisdiction except using clear cases."[65] An examination of the functions or purposes of the theory or concept of inherent jurisdiction supports, I suggest, the conclusion that inherent jurisdiction is not a single jurisdiction that originates in the very nature of the court (a metaphysical approach), but is rather, as Dockray puts it, "a rational collection of related common law powers, each of which has a separate history, aims and boundaries."[66] Given the very small percentage of cases where the theory is raised or applied, there does not seem to be much risk of its overuse.

VII. *What is meant by a "people's court"?*

When the Nova Scotia Legislature was debating whether or not to create a separate small claims court, there was general agreement among members that it should be a court catering to or serving individuals, rather than corporations or businesses and, that it should be easily accessible, with low costs.[67] Although there was some difference of opinions as to the socio-

61. Charles, "Inherent Jurisdiction," *supra* note 49.
62. *Small Claims Court Act*, *supra* note 7, s 2.
63. Charles, "Inherent Jurisdiction," *supra* note 49 at 116.
64. *R v Black*, 2002 NSCA 72.
65. Charles, "Inherent Jurisdiction," *supra* note 49 at 117.
66. Dockray, *supra* note 50 at 132.
67. Nova Scotia, House of Assembly, Debates and Proceedings, 52nd Parl, 2nd Sess, No 1 (12

economic level of individuals that, hopefully, would use the court, the fact that the court was expected to be dominated by individuals necessarily meant that the court should have particular features or characteristics that would reflect the needs of its anticipated major user group. These characteristics included: easy accessibility, low costs, an informal rather than formal atmosphere, and simple procedures, with trained lawyers, or adjudicators, hearing cases rather than judges. Even more specifically, the legislators wanted to ensure that the court would not become a legal venue or mechanism for collection agencies to collect debts owned by individuals.[68] Although there was some difference of opinion as to whether or not corporations should be allowed to use the court, the final decision by legislators was to allow them access as parties but to restrict the time periods during which they could access the court.[69] A final and important characteristic of a "people's court" was one where there were no lawyers, where individuals argued their own cases without the need or benefit of legal representation, which raised the important question "is it still a 'people's court?'" I suggest there are two important and significant indicators that are characteristic or symbolic of such a court. One is the extent to which individuals predominate as parties in Small Claims Court cases, as contrasted with corporations, and the second is the extent to which lawyers are being used, by individuals or corporations, to represent them in cases heard. These general indicators can be supplemented by information or data showing the extent to which individuals sued other individuals or corporations as contrasted with the extent to which corporations sued individuals or other corporations. Also relevant would be the extent to which individuals were the plaintiffs or complainants in cases compared with the extent to which they were defendants.

The second basic factor involves the extent to which lawyers are being used by parties in the Small Claims Court, either as representatives of individuals or corporations and either as representatives of the parties as complainants or defendants. In a "do it yourself" court we might expect to see relatively few lawyers representing the parties—individuals would self-represent and corporations would use agents (the equivalent of self-representation). If the data were to show a significant use of lawyers, would this necessarily mean that the court was no longer a "people's court" with all that implies?

March 1980) at 412 (David Muise); Nova Scotia, House of Assembly, Debates and Proceedings, 52nd Parl, 2nd Sess, No 4 (21 May 1980) at 2464 (Richard Weldon).

68. Nova Scotia, House of Assembly, Debates and Proceedings, 52nd Parl, 2nd Sess, No 7 (28 Feb 1980) at 2461 (Arthur Donahue).

69. Charles, "Small Claim Disputes," *supra* note 1.

1. *What the data tells us*

As previously discussed, one of the basic questions to be answered about the operations of the present Nova Scotia Small Claims Court is the extent to which it can be said to still operate as a "people's court." Although the other three basic questions are important, this more general question seems to be the most important because it seemed to be the underlying rationale for the Nova Scotian legislators who created the court. In their view there were two features or characteristics of a "people's court" that were fundamental to its characterization as a "people's court." One was the predominate use of the court by individuals rather than companies or corporations. The second was the ability of individuals to use the court and its processes successfully without the assistance of lawyers.[70]

Studies of the operation of the court by the Nova Scotia Court Structure Task Force in 1991[71] and the Saint Mary's Report in 2009[72] do little to answer the question surround the idea of a "people's court." The Task Force assumed that most of the Court's users in 1990 would represent themselves, so, to this extent, they seemed to assume that it was operating as a "people's court."[73] The Saint Mary's Report, although discussing the concept of a "people's court" in a general way, did not answer the question specifically. However, the report did discuss the use of lawyers by users of the Court and noted that they represented litigants in only 12% of the hearings, based upon user responses.[74] User responses stated that individual users had consulted a lawyer before their hearing in 17% of the cases.[75] Neither report addressed the issue of who was using the Court the most—individuals or companies/corporations.

To help fill this gap in information, the author, using a variety of different data bases, focused on two main questions: firstly, to what extent was the present court being used by individuals, as opposed to companies/corporations, to press their small civil disputes. Secondly, to what extent were lawyers still being used by the parties to represent them in the Small Claims Court.

The author gathered data from several different data bases of different sizes. These included: (a) data from the authors own personal survey of approximately 1,050 Small Claims Court cases (primarily), (b) data

70. Nova Scotia House of Assembly, Debate and Proceedings, 52nd Parl 2nd session (21 May 1980) at 412 (Hon Harry Howe and David Muise).
71. *Task Force Report*, *supra* note 12.
72. *Saint Mary's Report*, *supra* note 13.
73. *Task Force Report*, *supra* note 12.
74. *Saint Mary's Report*, *supra* note 13 at 72.
75. *Ibid*.

from the author's own personal survey of a different set of 250 cases, (c) data from the Nova Scotia Court website and (d) data from the CanLII database of written and recorded Small Claims Court decisions rendered by Small Claims Court adjudicators (7,050 cases). The data presented in the following pages represents averages of combined statistics from the different databases. An examination and analysis of the combined averages provided the following results:

Individuals appeared, either as plaintiffs or defendants in approximately 8% of all the cases, which were primarily written and recorded decisions published in the various databases (rather than oral decisions). They appeared as claimants or plaintiffs in 73.5% of the cases and defendants in 51.2%. Individuals sued other individuals in 39.6% of the cases and company/corporations in 33%. Corporations appeared in 63.5% of the cases as either claimants (plaintiffs) or defendants. They appeared as claimants (plaintiffs) in 30.7% of the cases and in 45.3% as defendants. Individuals sued other individuals in 39.6% of the cases while corporations sued individuals in 14.8%. The above data would seem to suggest that the present Small Claims Court is still a "people's court" in the sense used by our Nova Scotia legislators when they created the court in 1980. The data also supports the conclusion that it has not been co-opted by large corporations/companies as a legal process for the collection of debts, particularly from individuals. The data also shows that a good number of corporate plaintiffs were actually small Nova Scotia companies which were using the court not just to sue individuals, but other corporate entities as well. The data shows that one corporation sued another in 12% of the cases and individuals in 14%, suggesting that they were not focused on suing only individuals.

The data suggests that the present Nova Scotia Small Claims Court is still a "people's court" in the sense understood by its creator, the Nova Scotia legislature, and is not being used as a legal process or mechanism to collect debts primarily from individual citizens. The Court is still being used predominantly by individuals rather than corporations/companies to press their claims, involving modest amounts of money, or other minor disputes. A review and analysis of the findings produced by the study, which was an amalgam of several separate and distinct smaller databases, seems to confirm this conclusion.

a. *The use of lawyers*

Because the extent to which lawyers are involved in small claims courts appears to have been an important factor in the concept of a "people's court," at least as far as Nova Scotia legislators were concerned, an effort

was made by the author to determine the extent of their use. A review of *available data* suggests that there continues to be a significant use of lawyers by all users of the Small Claims Court—both by individuals and corporations/companies. They seem to have been used in 65% of the cases and constitute 55% of all the representatives used by the parties, the other representatives being agents, or self-representing individuals. It is interesting to note here that the Nova Scotia Court Structure Task Force assumed that most litigants would be unrepresented, but they presented no hard evidence to support their assumption.[76] Some 20 years later, the Saint Mary's researchers, on the basis of information provided by users, estimated that lawyers were used as representation of parties using the Small Claims Court in only 12% of the cases where they represented parties at a hearing before an adjudicator and that 17% had consulted a lawyer prior to the hearing.[77] In these pre-trial meetings, the lawyer usually explained how the court process worked and the role of the adjudicator. The lawyer also helped clients to organize and present their arguments, as well as with the niceties of court room decorum.

Saint Mary's researchers also noted that several users and lawyers commented that it was not cost-effective to employ legal counsel where the monetary amount at stake was less than $10,000. They described such use as a luxury.[78] Another deterrent was the historical opposition to the use of lawyers as evidenced in the provisions of the original 1980 statute that limited recovery of fees by lawyers.[79] An analysis of the data produced by a study of 250 cases, in the time period of 2016 to 2019, produced data that supports the conclusion that lawyers are still in substantial use by all parties in the Small Claims Court of Nova Scotia.[80] The data showed a use of lawyers in 48.2% of the cases and a 47.3% use when compared to other representatives such as self-representatives and agents, a significant percentage. This data is both interesting and significant. Interesting because it shows a continuing significant use of lawyers in spite of that historical bias against their use. The Saint Mary's Report reported comments by lawyers, users, and adjudicators about the usefulness and effect of having lawyers represent parties in the Nova Scotia Small Claims Court. Generally speaking, the comments were mixed.[81] Adjudicators, on the whole, thought that lawyers played a useful role in the resolution of

76. *Task Force Report*, *supra* note 12.
77. *Saint Mary's Report*, *supra* note 13 at 72.
78. *Ibid* at 43.
79. *Small Claims Court Act*, *supra* note 7, as it appeared in 1989.
80. Based on the author's personal research.
81. *Saint Mary's Report*, *supra* note 13.

small claims disputes because of their understanding of the court process and their skill and ability organizing material for the hearings, particularly in complex cases where they were able to speed up the hearing process. It was conceded that, in some cases, their actions on behalf of their client might slow down the hearing process, but that this was offset by the fact that their activities probably produced fairer or more equitable results for all of the parties in the end. This was particularly so in complex cases requiring the analysis and organization of large quantities of factual data. Users of the Small Claims Court in 2009, as interpreted by the Saint Mary's researchers, were a little less positive.[82]

The available data seems to support the conclusion that lawyers are still in significant use by all of the parties using small claims courts in spite of the historical view that lawyers were discouraged from using the court and legislative provisions that curtailed their ability to be reimbursed for the full amount of their fees. The question remains: has the use of lawyers by all of the parties in Small Claim Court disputes affected, in a negative way, the concept of the Court as a "people's court"? I would suggest that it does not, for the following reasons. Lawyers are used by both individuals and corporations/companies, to present their cases in small claims court and individuals continue to use the court in significant numbers (even though they might be decreasing). The Court is *not* being used as a collection agency by large corporations and, when it is used by corporations, they tend to be small, local Nova Scotia companies. Individuals use lawyers when acting as plaintiffs, regardless of whether they are suing other individuals or corporations/companies. So, based on the data that is available, the conclusion seems to be that the Nova Scotia Small Claims Court is still a "people's court," in the sense understood by its creators. However, this is only a tentative conclusion. A more comprehensive study, analysis and review of the Courts' operations, in recent years particularly, will be necessary before we can say with confidence that this is the case.

2. *More recent data—what it reveals*

When the *Small Claims Court Act* was reviewed by the Nova Scotia Court Structure Task Force in 1991, there was no specific reference to the Court as a "people's court," or whether the then Court should be described as such. But the Task Force did emphasize the fact, and seemed to assume, that most of the litigants were unrepresented (as of 1990) and that this fact affected the role that adjudicators were expected to play in the hearing of

82. *Ibid*.

cases.[83] In 2009, the Saint Mary's Report did note that the term "people's court" had been used by both Canadian and American legal commentators when referring to small claims courts in those countries but the report did not discuss whether the Nova Scotia Small Claims Court in 2009 could accurately be called a "people's court."[84]

a. *Parties to litigation (2016–2019)*

If we concentrate for the moment on the question of who is using the Small Claims Court in Nova Scotia most frequently (i.e. individuals or corporations), and using the data collected from an examination of 250 cases covering the period of time from 2016 to 2019 involving written decisions of adjudicators we discover the following:

1. Individuals predominate as parties, both in terms of total individuals versus total corporations (58% versus 41%) and in terms of their involvement in cases (86% versus 67%).
2. Individuals predominated as plaintiffs (claimants) at 71% versus 28% as defendants, a large difference, but corporations were more often defendants (55%) than were individuals (33%).
3. Individuals sued other individuals in 33% of the cases and corporations in 39%, while corporations sued individuals on average in only 13% of the cases and sued other corporations in 16%. Clearly individuals were not being sued in large numbers by corporations and in fact were suing corporations more than they were being sued (individuals versus corporations at 39%—corporations versus individuals at 13%).

On the basis of this data, we can clearly see that individuals do dominate as parties in the Nova Scotia Small Claims Court in terms of total numbers of cases. Individuals are not being taken to court by corporations, just the reverse, as it is individuals who are using the Court to pursue corporations by legal actions. Corporations sued other corporations more than they sued individuals. The corporations tended to be small, local companies. On the basis of this data the Nova Scotia Small Claims Court is still a "people's court."

If we compare the latest four years (2016–2019) with the earlier period (2004–2007), we find that there were more individuals as parties in the later period (71% versus 59%) and that the number of corporations as parties decreased from 41% (2004–2007) to 28% (2016–2019). Individuals sued other individuals at about the same rate (35% in the early period versus

83. See *Task Force Report*, *supra* note 12 at 206.
84. *Saint Mary's Report*, *supra* note 13.

33% in the later period), but sued corporations more in the later period (39%) versus in the earlier period (27%). Corporation actions against individuals decreased by 50% in the later period (13% later versus 26% early), while corporate actions against other corporations stayed almost the same (14% versus 16%).

b. *Use of lawyers—the 2nd indicator*

The second important indicator or marker of a "people's court" is the extent to which the parties rely on lawyers to represent them in their disputes in the Small Claims Court. The Nova Scotia Court Structure Task Force seemed to assume that most litigants at that time were unpresented in the Court, but did not have data to support this assertion.[85] Almost twenty year later, the Saint Mary's researchers in their report stated that 12% of the interviewees who responded to the research questionnaire offered the observation that they had been represented by a lawyer at their Small Claims Court hearing. This seems like a modest percentage, but 18% also indicated their lawyer had filed a claim or defence on their behalf and an additional 18% stated that they had consulted a lawyer about their case and how to proceed as a self-representing litigant prior to the hearing.[86]

The authors of the Saint Mary's Report also interpreted responses received from interviewees as suggesting that lawyers did, on balance, made the process easier rather than impeding it. However, they also questioned whether the actual cost of having legal representation was worth it (interviewees' opinion), particularly for smaller claims.[87]

When considering the following data about the use of lawyers it is relevant to appreciate that this data was generated from written reports provided by adjudicators and that such written reports were usually provided when an individual case was more significant than others that warranted only an oral decision. The significance might involve a novel factual situation or a case involving a novel point of law, or, in some cases, the complexity of the case required a written explanation of the adjudicator's decision. In all of these situations, the probability of lawyers being involved is increased, so such reported cases may not completely and accurately reflect the situation of lawyer representation in the far greater number of cases where an oral decision alone was rendered. The data does, however, provide some sense of the extent to which individuals were represented by counsel compared to the use of counsel by corporations, either as claimants or defendants. The data covers three categories of

85. *Task Force Report*, *supra* note 12.
86. *Saint Mary's Report*, *supra* note 13.
87. *Ibid*.

representation: self representations, counsel or legal representatives, and agents (for corporations, agents can be considered as the equivalent of self-representation). The data covers the years 2016 up to and including 2019, presented as an average percentage

Number of cases with counsel	.....50%
Number of cases with agents	.....38%
Number of cases with non-lawyers	.....63%
Total number of counsel involved	.....35%
Total number of agents involved	.....25%
Total number of non-lawyers	.....43%
Number of individuals represented by counsel	.....23%
Number of corporations represented by counsel	.....47%
Number of corporations represented by agents	.....46%
Number of IND-PLF represented by counsel	.....27%
Number of Corp-PLF represented by counsel	.....431%
Number of Corp-PLF represented by agents	.....67%
Number of IND-DEF represented by counsel	.....38%
Number of Corp-DEF represented by counsel	.....58%
Number of Corp-DEF represented by agents	.....42%

c. Observations and comments

The use of lawyers by one party or the other in 50% of the cases seems quite high and perhaps surprising for a court that was supposed to be a do-it-yourself court. Even allowing for potential inflation of numbers because this data comes from reported cases, the number of lawyers involved in small claims cases still seems higher than one might expect. Looking at the total number of different representatives rather than cases we find that lawyers represented individuals 35% of the time, while individuals represented themselves 44% of the time and agents represented corporations 21% of the time. If we consider agents as the equivalent of self representation the percentages become—counsel 35% of the time and self-representations (non-lawyers) 65% of the time. Representation by counsel 35% of the time still represents a significant presence.

If we consider the use of counsel by individuals, we find individuals using counsel about half as often as corporations (which is to be expected) (23% versus 47%). But when we look at individuals as claimants only compared with corporations as claimants that ratio or percentage of use becomes much closer (27% versus 30%). The gap widens further when we compare individuals as defendants and corporations as defendants, both with counsel (38% versus 58%). This is not surprising given the

reality that corporations are better able to pay for legal representation. However, if we interpret the data it appears to indicate that lawyers played a significant role in the operations of the Small Claims Court during the period 2016–2019.

If we compare the later period (2016–2019) with the earlier period (2004-2007) there seems to be a general decrease in the number of counsel appearing in Small Claims Court actions. For example, the total number of cases in which counsel appeared dropped by 15% and the total number of individual counsel also dropped by 18%. The number of individuals represented by counsel dropped significantly from 42% to 23%—a drop of 19%. Corporate legal representation also suffered a drop in numbers, but not as sharp—only 9%. The one category in which the use of legal counsel increased in more recent years was with corporations as the defendant. In this category, legal representation increased by 18%. Historical opposition to the presence of lawyers in small claims courts has usually been based on three main concerns: (1) that their presence would increase costs, (2) that it would give an unfair advantage to corporate or business litigants who could best afford lawyers, and (3) their presence would change the atmosphere of the court by making hearings longer and more technical and also change the focus of the hearing to be lawyer-oriented rather than client-oriented.[88] In spite of these concerns, the data seems to indicate a still significant number of lawyers are appearing in the Small Claims Court to represent both individuals and corporations. Any decrease in total numbers more recently may be attributed to the rising costs of legal services, making them not cost-effective for clients with small claims. The still significant number of lawyers in the Small Claims Court does not detract or diminish the pure model of a "people's court," but the fact that a good number of individuals still think they are helpful tends to offset their negative effect on the reality of a "people's court." It is still primarily a "people's court," but more information or data is needed if we are to be more comfortable with this conclusion.

3. *The role of adjudicators*

In 2009, the authors of the Saint Mary's Report on the Nova Scotia Small Claims Court expressed concern with what they described as "a fine balance."[89] A major feature of small claims courts is informality which is evidenced and created in several ways. For example, hearings are not necessarily held in courthouses, but can be held in town halls or other

88. Roane Skene, "Small Claims" (1974) Study Paper for the Nova Scotia Law Reform Advisory Commission.

89. *Saint Mary's Report*, *supra* note 13 at 14.

convenient venues. Similarly, hearings are conducted by lawyers rather than judges, the rules of evidence are not as strict, and court procedures are simple and less technical than in superior courts. The particular balance the Saint Mary's authors were concerned with was procedural balance or fairness. Their fear was that simplified procedures could lead to injustice for the parties. However, there is a greater concern that has to do with achieving a proper balance in the trial as a whole. Too much informality can lead to general unfairness in the way the trial is conducted. It is the role of the adjudicator to ensure that the sought after simplicity and informality of the Small Claims Court does not result in unfairness or injustice in the hearing process.

a. *The proper approach: hands-on or hands-off*

Historically, in common law jurisdictions, judges are expected to take a non-partisan, non-interventionist, neutral role in proceedings. Known as the "adversarial approach," each party (or adversary) is expected to present their case by producing evidence and law to support their position. The judge listens, evaluates, and may ask questions to clarify some issues but does not try to assist, actively, one party or the other. The role of the judge in civil law jurisdictions is quite different. In these countries the judge is expected to be an active participant in the trial, more of an interrogator than a referee. They are expected to question the parties to elicit facts. This approach has become known as the "inquisitorial approach" to judging.[90]

In her report in 1974, Professor Skene did not recommend which approach would be most suitable in dealing with small claims, but suggested that the appropriate approach should be left to the decision maker.[91] The Nova Scotia *Small Claims Court Act* makes no reference to the manner in which adjudicators should approach their task, except to state that claims were to be adjudicated "informally and inexpensively," but in accordance with established principles of law and natural justice.[92] The statute also gave a nod to informality by permitting adjudicators to admit evidence that might not be admissible in a general court of law.[93]

In 1990, the Nova Scotia Court Structure Task Force noted that "Since its inception, the philosophy of the Small Claims Court has been to assist

90. In the Small Claims of Nova Scotia, adjudicators are encouraged by the informal procedures to assist litigants with their claims as much as possible and to assume a more interventionist or inquisitorial role in the proceedings. The Nova Scotia Court Structure Task Force also saw this as an important part of their role. See *Task Force Report*, *supra* note 12 at 203.

91. Skene, *supra* note 88.

92. *Small Claims Court Act*, *supra* note 7.

93. *Ibid*.

the claimants and respondents in conducting their own law suits,"[94] and also noted that adjudicators were expected to take an *informal*, inquisitorial approach to the litigation of small claims.[95] The report also expressed the view that adjudicators had, for the most part, adapted well to what the Task Force described as a semi-inquisitorial approach that was required (not by the statute but by necessity). The Task Force assumed that most litigants in the Small Claims Court had been self-represented,[96] with little or no assistance from lawyers, and therefore the process had to be kept informal and the adjudicator, of necessity, had to assume an interventionist stance and assist the parties whenever possible (author's opinion).

The interviewees who were part of the Saint Mary's research group appeared to be generally positive about the adjudication style employed in Nova Scotia Small Claims Court disputes and described the approach as a blend of inquisitorial and adversarial justice.[97] Users described adjudicators as allowing both parties to present their case while probing, where appropriate, especially with unrepresented parties.[98] In cases where two lawyers were involved, interviewees expressed the view that adjudicators tended to adopt a more adversarial (non-probing) approach.[99] When the dispute involved only one lawyer, it was stated that adjudicators adopted their usual inquisitorial approach.[100] The opinions offered suggested that lawyers in a one lawyer case seemed to understand that in such situations, probing by the adjudicator was warranted.

b. *How adjudicators see their proper judicial function*

Because they are legally trained, adjudicators are expected to be aware of and knowledgeable about the general principles and roles of the common law and equity, as well as any applicable statues, regulations, or by-laws. Such general or particular legal knowledge and expertise is not usually to be found in non-legally trained persons, nor do they as litigants or potential litigants in Small Claims Court realize what area or areas of the law apply to their situation. It is not surprising, therefore, to discover that many adjudicators in their opening remarks to the parties at a hearing stress the fact that one of their important functions is to help the parties conduct their case. Realistically, the amount of help provided in individual cases will vary depending upon the nature of the case and the discretion

94. *Task Force Report*, *supra* note 12 at 195.
95. *Ibid* at 203.
96. *Ibid* at 206.
97. *Saint Mary's Report*, *supra* note 13.
98. *Ibid*.
99. *Ibid* at 50.
100. *Saint Mary's Report*, *supra* note 13.

of the adjudicator. It is not unusual to find examples of cases where the adjudicator has applied relevant statutory provisions, regulations, or by-laws that the parties were not aware of or even arcane principles of common law (mesne profits). Assistance of a different kind can involve the adjudicator taking a flexible approach to procedural rules or requirements, imprecise pleadings, or incorrect party names. Flexibility can also be demonstrated in the admission of hearsay evidence (permitted by the *Small Claims Court Act*).[101] Adjudicators themselves can be the beneficiaries of a more flexible approach in relation to the mandatory requirements to render judgements within 60 days.

c. *Limits to assistance of flexibility*

There are some limits to the adjudicator's discretion and their ability to assist the parties. While an adjudicator might find a relevant basis for a claim or a defence not presented to the court by either party to the dispute, or the adjudicator cannot find and use new evidence for either party which they were not aware of. In some cases, the adjudicators have been prepared to adjourn hearings so that the parties can consider new evidence that has emerged with the hope that the new evidence might result in a settlement. The ability of the adjudicator to assist one or both parties may be affected by the demeanour of the parties at the hearing. If the parties are discourteous to each other, if they are combative and uncooperative with each other or the Court, it may prevent the adjudicator from providing assistance that they might wish to provide.

d. *Other assistance for "would-be" litigants*

In an effort to assist "potential" or "would-be" litigants, the Small Claims Court provides very useful information in the form of a brochure entitled *Nova Scotia Small Claims Court*.[102] This useful document supplies information and poses questions to potential litigants that apply to the pre-trial period, as well as information about the hearing itself. For those considering possible litigation in the Small Claims Court, the brochure outlines the monetary and subject matter jurisdiction of the Court, so that a would-be claimant can decide whether the Small Claims Court is the appropriate court to hear their claim. The potential litigant is also asked to consider whether it is worthwhile to initiate a claim given considerations such as costs and the possibility of mediation. The brochure explains to

101. *Small Claims Court Act*, *supra* note 7, s 28.

102. Nova Scotia, Court Services Division of the Department of Justice, *Nova Scotia Small Claims Court* (guide) (Halifax: Department of Justice, 2010), online: <www.courts.ns.ca/sites/default/files/courts/Small%20Claims%20Court/NSSCC_Info_Booklet_2010_updated.pdf> [perma.cc/77KA-NSBH].

potential claimants how to make or submit a claim and what forms are required. The issue of personal service is also covered. The position of a potential defendant is addressed and advice is given as to possible courses of action once the claim document is served, including the option of settlement. The possibility of a quick judgement and its consequence for a defendant are also outlined.[103]

The brochure warns the would-be claimant of the need to prepare for a hearing and the advantages of consulting a lawyer at this stage. As for the hearing itself, the brochure describes the sequence of events that will occur and emphasizes that the hearing will proceed even though one of the parties is absent. The brochure also offers advice about "How to Behave in Court" and emphasizes the need to be respectful to everyone in the Court and in the courthouse. The brochure then describes what happens at the conclusion of the hearing—that the adjudicator may decide the case (by giving an oral judgement) or may give a written decision within 60 days. The brochure does not explain what happens if the defendant does not comply with the order of the adjudicator but refers the reader to another brochure entitled *Enacting a Small Claims Court Order: A Guide for Creditors*.[104]

We should note here that the brochure does explain that it is not necessary to have legal representation within the Small Claims Court, but that a party can use a lawyer for help as needed. The brochure then notes that a lawyer can help a party to decide if they have a good case or defence, can advise as to the evidence or witness that would be required and can explain the hearing process. The brochure clearly does not discourage the use of lawyers nor does it advocate their use, but it does point out potential benefits from consulting one.

In addition to the information provided by the court brochure, adjudicators usually, at the commencement of the hearing, will try to give the litigants information about what to expect. Some litigants may not have seen the court brochure. The adjudicator's advice will normally cover the general procedure to be employed and followed at the hearing, the role of each party and how evidence will be received under oath, with both parties having an opportunity to tell their "side of the story." The adjudicator will explain that each party will have an opportunity to question the other, as well as any witnesses, and that at the end of the

103. *Ibid*.

104. Nova Scotia, Court Services Division of the Department of Justice, *Enforcing a Small Claims Court Order: A Guide for Creditors* (guide) (Halifax: Department of Justice, 2010)," online: <www.courts.ns.ca/sites/default/files/courts/Small%20Claims%20Court/NSSCC_Enforcing_a_Court_Order_2014.pdf> [perma.cc/J829-TE4H].

evidence, each will be given a chance to sum up their positions based upon all the evidence presented. The parties will also be advised that any comments made by them at any time throughout the proceedings would be considered information given under oath. These normal instructions may vary somewhat from adjudicator to adjudicator and depending on whether there are two counsel, one counsel or two self-represented individuals.

VIII. *Problems faced by adjudicators*

Adjudicators can, potentially, face a number of problems they have to deal with. One is political, and, fortunately, occurs very rarely. This is the problem of independence from their employer, the Nova Scotia Government, or more precisely, the Minister of Justice and the Department of the Attorney General. The other problems, less serious or fundamental, can be described as operational issues.

1. *A question of independence*

Adjudicators of the Nova Scotia Small Claims Court are hired (appointed) by the Nova Scotia Government and paid an hourly wage to conduct hearings. They are only paid for hearing time. They are not judges appointed by an independent process with a salary, a pension and tenure. The issue of independence only arises when the Nova Scotia government, more precisely, the Department of the Attorney General, is a party in a small claims dispute or might be involved as a witness. It was the latter possibility that prompted the Chapel Island Band in 2005 to raise the issue of independence.[105] They argued, on a preliminary motion, that the adjudicator might not be able to remain objective and impartial in the presence of the Attorney General of Nova Scotia, a high-profile politician and government Minister who had appointed the adjudicator. They therefore asked the adjudicator to issue an order declaring his conflict of interest and then to recuse himself.

After reviewing the terms of appointment, remuneration, the hiring process, and the fact that the adjudicator's decision was subject to appeal, the adjudicator concluded that independence and impartiality was not a problem.[106] He also noted that section 2 of the *Small Claims Court Act* required the Court to deal with matters in accordance with natural justice and requires the Court to provide a fair hearing Finally, he stated that the statute did not authorize him to make an order declaring that he could not

105. *Chapel Island*, *supra* note 43.
106. *Ibid*.

hear the case because of a conflict of interest (nor did is specifically say that he could *not* do so).[107]

But the adjudicator did point to and identify another potential bias. This might occur in situations where the adjudicator, as a practising lawyer, might have worked with another lawyer on a daily basis and that other lawyer then appears before the adjudicator, representing one of the parties. In such a situation, the adjudicator in the *Chapel Island Band* case suggested that the lawyer with such a conflict of interest should recuse themselves.[108]

2. *Claims of bias and conflicts of interest*

The potential for a claim of adjudicator bias to be raised would seem to be much more likely than a claim of lack of independence, but in the 250-case database we are working with only one case of bias has been raised in the written decisions and that was in 2019.[109] In this case the plaintiff argued that because the adjudicator regularly played golf with the defendant, socialized with him, and the defendant was a former law partner of the adjudicator, there was a perception of bias and a conflict of interest. In this situation it was suggested that the adjudicator should recuse himself and have the case heard by a different adjudicator. In considering this request, the adjudicator reviewed his actions and relationship with the defendant in light of what was alleged and concluded that there was no conflict of interest.[110] In so doing, the adjudicator made some relevant and important observations. Because the claimant produced no tangible or hard evidence of actions to support the allegation of a conflict of interest, the adjudicator was left to rely upon his own recollection of events and his integrity to self-assess whether anything in the past may have placed him in conflict with the defendant or a situation where there might have been a perception of bias. Such a process left the adjudicator to *shadowbox* with themselves in order to justify their position. The adjudicator suggested that a complainant should have to do more than just make an allegation in order for him to decide to recuse himself and that the complainant should be required to supply some minimum foundation of evidence to support the claim. This being the case and having reviewed his own activities for potential bias, the adjudicator was satisfied there was no basis for recusal.[111]

107. *Ibid*.
108. *Ibid*.
109. *Rizzato v Burke*, 2019 NSSM 68 (CanLII).
110. *Ibid*.
111. *Ibid*.

There is no question that the use of practising lawyers as adjudicators will create a risk that one of the parties or their counsel, if they have one, will have had some degree of professional or social contact with the adjudicator hearing the case. The circumstances of interaction will vary considerably and at present it is left up to the adjudicator to make the decision whether or not such interaction amounts to a conflict of interest or bias. The question is whether a basic allegation of bias is sufficient to trigger a recuse. It does not seem very practical to allow a base accusation of bias to result in the appointment of a different adjudicator. But if some evidence beyond the allegation is going to be required, how much should that be and who should make the decision about sufficiency? The present situation leaves the adjudicator in an awkward position. The fact that the available data reveals only one case may indicate that participants in the disputes are prepared to live with the situation. It is interesting to note that users of the Nova Scotia Small Claims Court, responding to Saint Mary's researchers' questions, were prepared to live with the then existing situation, although they were critical of other aspects of the hearing process.[112]

3. *The problem of the suitable cases*

In addition to cases involving allegations of independence or bias, adjudicators also have to contend with cases that are not suitable to be dealt with by the Small Claims Court dispute resolution process, because of their factual complexity or the existence of technical issues.

Opinions of adjudicators have differed as to whether adjudication should try to deal with such cases. The argument against adjudicators hearing such cases appears to have two different components to it. On the one hand is the argument that the procedural rules such as discovery of documents, available in the Nova Scotia courts of appeal, are not available in the Small Claims Court. The other argument against other courts have suggested that adjudicators (even if not real judges) can make decisions that require subtle judgement, such as assessing damages in motor vehicle accidents involving contributing negligence. Those favouring the involvement of adjudicators also note that the Small Claims Court with its less expensive costs has been designed to allow citizens to have their cases heard in that court rather than incurring the higher costs of the Nova Scotia Supreme Court. There is nothing in the provisions of the Nova Scotia *Small Claims Court Act* that prevents such claims from being heard.

112. *Saint Mary's Report*, *supra* note 13.

In some cases, the concern is not with the ability of the adjudicator to deal with the dispute because of the need for judgemental decisions, but more the fact that the adjudicator should not have to deal with the situation because of its legal or factual complexity. In these cases, the concern is not so much with the ability of the adjudicator to make subtle judgemental decisions, as it is with the type of procedural processes or rules that would be available or needed to process these complicated cases. There are cases, such as complicated or complex construction cases, or family problems in which the court adjudicator is being asked to make important decisions about the distribution of family assets. In these types of situations, the court may be asked to provide remedies not involving simple money compensation. It might, for example, be asked to direct the transfer of assets or the assumption of debts when a common law relationship is terminated. The Court is limited to making a monetary award based upon a breach of contract, tort, or ordering the return or delivery of a specific item of personal property. Any attempt to make a decision regarding the appropriate division of assets or the assumption of liability in a common law relationship, let alone trying to account for economic contributions made by different individuals to the common pool of assets or account where finances are merged, is fraught with risk and bound to be unsatisfactory in its results. Such discussions and disputes belong in the family courts or the Nova Scotia Supreme Court. They pose a unique challenge for Small Claims Court adjudicators asked to make Solomon-like decisions.

In a second group of cases, adjudicators are asked to resolve disputes involving family pets, most frequently, dogs. The issues may relate to ownership or liability. In these cases where ownership is the issue, adjudicators are being asked to determine ownership not of an inanimate object, like a piece of furniture, but ownership of a pet to which there are usually strong emotional attachments, often comparable to that of a child. As one adjudicator lamented, "such cases are being brought before the Small Claims Court because, practically speaking, there is nowhere else for people involved in these kinds of disputes to go."[113] In essence, the Small Claims Court adjudicator is forced to apply principles of property law to the case, to treat pets like chattels, not very different form the family court. When pets are involved in the dissolution of a common law relationship, the problem for the adjudicator becomes even more complex.

Copyright cases also present a subject-matter difficulty for adjudicators in terms of whether the Small Claims Court has jurisdiction. First of all,

113. *Kemp v Osmond*, 2017 NSSM 25 (CanLII).

copyrights are a creature of statute rather than the common law, and as such there is no specific mention of them as being within the jurisdiction of the Small Claims Court by section 9 of the *Small Claims Court Act*. In addition, in terms of legal classification, copyrights, as intellectual property, are not considered to be property in terms of general legal classification, and any violation of these rights is not considered to be a tort.[114] Some adjudicators have assumed jurisdiction when infringement of copyright claims have been brought before them and this assumption of jurisdiction has been challenged by defendants in some cases. The question of whether the Small Claims Court has any jurisdiction to hear infringement of copyright cases will be discussed in more detail later in this paper.

In the final group of difficult or unsuitable cases, the major problem involves the complexity of the cases. A good example of such a case emerged in 2020. The dispute in *Kift v Ziegler*[115] involved the negligent construction of a building. The claimant optimistically estimated that the case would take two hours, when, in fact, it took seven days of hearings with 70 multi-page exhibits and 200-page written submissions. The complexity of the case caused the Chief Adjudicator of the Small Claims Court to declare that the Small Claims Court was never intended or structured to undertake and conduct litigation of such complexity.[116] It did not have the staff nor procedures for dealing with such a mass of material. One consequence could be that neither party would be satisfied with the process or the outcome and would think that the Court failed them. In spite of these difficulties, the adjudicator still heard the case and rendered a decision that observed that the claims made required expert assessment and critique which was lacking. They further suggested that the case would have benefited greatly had lawyers been involved to draw clear pleadings and help the parties to organize the evidence and their arguments.[117] In this case, the parties represented themselves. A similar sentiment was voiced in a recent case in which the evidence presented was, in the adjudicator's opinion, inadequate and they explained their frustration by stating:

> Although Small Claims Court is supposed to be accessible to ordinary people, there are simply cases that are difficult for ordinary people to advance. This was one of them. In the final analysis, as much as I am prepared to allow for, and even compensate for the Claimants' lack of sophistication, the case still must be decided on the evidence.[118]

114. Harold G Fox, *The Canadian Law of Copyright* (Toronto: University of Toronto Press, 1994).
115. *Kift v Ziegler*, 2020 NSSM 9 (CanLII).
116. *Ibid*.
117. *Ibid*.
118. *Mossa v Economical Mutual Insurance Company*, 2018 NSSM 19 (CanLII).

4. *The problem of contentious parties*

In some cases, the demeanour of the parties can make things difficult for the adjudicator and may prevent the adjudicator from being able to help them with their case. But such unhelpful behaviour can also make it difficult for the adjudicator to arrive at a correct and fair decision if the behaviour of the parties affects the quality and extent of the evidence presented or the presentation of their case.

In one case (2016), the adjudicator noted that one party exhibited a great deal of anger and frustration in court, not only at the other party, but at the entire court process. As a result, the party's evidence was hard to follow, the party was not responsive to questions, and when a response was elicited, it was not relevant. The opposing party considered, in this case the claimant, to be totally at fault and to be paranoid and so declared. By their actions, these two parties made it extremely difficult for the adjudicator to make a fair and accurate assessment of the evidence and to reach an appropriate decision.[119]

In a separate case, the adjudicator expressed his great disappointment with the way the two self-represented parties conducted themselves at the hearing. In his words,

> I had to repeatedly remind them not to talk over each other, to wait until the question was asked before answering, to wait and allow the answer to be given without interruption, to not interrupt and wait their turn before addressing the court, and generally to conduct themselves in an orderly manner.[120]

In spite of this toxic atmosphere, the adjudicator elected to proceed with the hearing—not an easy task.

With the emergence of COVID-19, courts have been forced to forego "in-person" hearings in favour of telephone hearings or video "Zoom" proceedings. By so doing, the small claims courts have been able to maintain a considerable degree of "access to justice." However, the less personal and more distant setting for hearings has reduced the sense of being in a courtroom-like atmosphere, face-to-face with a judicial officer with the result that adjudicators have noticed, in some cases, an increase in less respectful behaviour, both towards the court (adjudicator) and opposing parties. Not a welcome development.

119. *Crouchman v Ramsay*, 2016 NSSM 22 (CanLII).
120. *On Shore Construction Ltd v The Rendezvous Sports Bar & Lounge Entertainment*, 2020 NSSM 1 (CanLII).

5. Concluding observations

To be successful in its operations, the Small Claims Court relies heavily upon those involved in small claims dispute resolution. All those taking part, whether court staff, lawyers, or adjudicators, have to carry out their duties effectively. Of these groups, none is more important than the adjudicators who must, on occasion, deal with difficult parties and situations and, when necessary, provide assistance to self-represented litigants. Even in simple, straightforward cases, the adjudicator must still determine and maintain the proper balance between formality and informality in the process. The adjudicator is the linchpin of the Small Claims Court and deserves to be recognized as such.

In the short span of 15 years, between 1990 and 2005, the monetary limit of the Small Claims Court increased eight-fold, from $2000 to $25,000. This significant increase in the monetary jurisdiction of the court caused the authors of the Saint Mary's Report in 2009 to recommend that the effects of the increase should be carefully monitored to see what the impact, if any, might have been on the operations of the Small Claims Court.[121] The concern was that the higher limits would attract more complex cases and result in more lawyers representing the parties before the court. Another concern that the higher dollar claims and more complex cases would put pressure on the court to introduce additional pre-trial procedures. The overall impact, it was feared, would change the Small Claims Court, and make it look and operate like a superior court with additional costs and delays, and an increase in formality.

As far as can be determined, there has been no effort to track the consequences of the increased monetary jurisdiction. In response to the request of the author, the administration of the Small Claims Court has recently provided very useful data concerning the number of claims in the $15,000 to $25,000 range, data that was not included in an earlier report. This latest data shows the following breakdown of claims/awards for the period of 2007–2018 into four categories:

$0	–	$4,999	6,306 cases	44.4% of total
$5,000	–	$9,999	2,736 cases	19.3% of total
$10,000	–	$14,999	1,520 cases	10.7% of total
$15,000	–	$25,000	3,632 cases	25.5% of total

It is worth noting that the two categories showing the most cases are the small claims $0 to $5,000, and the largest claims, $15,000 to $25,000.

121. *Saint Mary's Report*, *supra* note 13.

The expanded monetary jurisdiction appears to be attracting more disputes with money at stake.

IX. *The development of a Small Claims Court jurisprudence?*

In their presentation to the Nova Scotia Court Structure Task Force in 1990, the provincial court judges expressed the view that part-time, anonymous adjudicators had little opportunity to develop a body of jurisprudence.[122] They did not say that it could not be done, but they did question the likelihood that it would be developed. Adjudicators themselves have noted that the decisions of other adjudicators in other small claims courts, or even in their own court, are not binding. The result is different decisions being rendered on the same legal issue or problem by different adjudicators. However, the doctrine of *stare decisis* makes clear that the dictates of judicial comity would suggest that a previous decision on the same point of law or fact by a different adjudicator should be regarded as highly persuasive.

A review of written and recorded Small Claims Court decisions for a period of 20 years, from 2000 to 2020, indicates several instances where the once legal or factual problem or issue has been presented to the Nova Scotia Small Claims Court as a civil dispute to then be resolved. These recurring problems have involved: (1) interpretation and application of the federal C*opyright Act*[123]*;* (2) interpretation and application of the *NS Residential Tenancies Act*[124]; (3) the legal effect of Property Disclosure Statements; (4) the legal effect of doctors' medical certificates; (5) the proper interpretation of section 23 of the *NS Small Claims Act* (quick judgements)[125]; (6) section 31 involving Execution Orders and the enforcement process[126]; and finally, (7) decisions about hearing evidence.

In order to better understand the particular circumstances that re-occur and which give the Nova Scotia Small Claims Court and adjudicators an opportunity to possibly develop the courts own jurisprudence, we need to examine the re-occurring situations in detail. Starting with the cases that have arisen involving the federal *Copyright Act*, we will examine in some detail the circumstances that provided an opportunity for Small Claims Court to perhaps make law.

122. *Task Force Report*, *supra* note 12 at 202.
123. *Copyright Act*, RSC 1985, c C-42.
124. *Residential Tenancies Act*, RS 1989, c 401.
125. *Small Claims Court Act*, *supra* note 7, s 23.
126. *Ibid*, s 31.

1. *The federal* Copyright Act

The Canadian legal system protects the work of authors and artists by conferring on them the exclusive right to publish their works and to determine who else may also publish them. This exclusive right is known as copyright. There is no copyrighting of ideas or information; only in the expression (publication) of the ideas. While provincial superior courts have concurrent jurisdiction to hear and determine copyright proceedings as referred to in section 37 of the *Copyright Act*, other provincial courts, such as small claims courts, may not, depending upon what the provincial legislation provides.[127] For example, provinces such as Ontario and Alberta have legislation permitting courts, like Small Claims Courts, to assume jurisdiction in copyright cases. Nova Scotia has no such provision, but the Small Claims Court in *Ducklow v Atlantic Business Consultants Ltd*[128] assumed jurisdiction to determine matters of copyright infringement on the basis that section 9 gave the Court jurisdiction to award damages for breach of contract and in "respect of matters arising under contract or tort."[129] However, in 2009 the Nova Scotia Supreme Court found that the Nova Scotia Small Claims Court did not have jurisdiction to adjudicate in a copyright infringement case because it was a statutory court that requires a person to make a claim under the *Small Claims Act* either in tort or contract and a person cannot be held liable in either tort or contract for a violation of copyright.[130]

It would seem that the *Schwartz*[131] decision by the Nova Scotia Supreme Court in 2009 has refuted any jurisdiction on the part of the Nova Scotia Small Claims Court to award damages for copyright infringement. I would argue that it is still possible to award damages for infringement of copyright if the claim can be linked to (arising out of) a contract. Nova Scotia Small Claims Court adjudicators will continue to be guided by the overall purpose and objectives of the *Small Claims Court Act* to render economic and equitable decisions, to provide an opportunity for litigants who are alleging an infringement of the *Copyright Act* to avoid the high costs of applying to a superior court for a remedy.

2. *Residential tenancy appeal matters*

The Nova Scotia Small Claims Court was given jurisdiction by section 17C of the *Residential Tenancies Act* to hear appeals, either by tenants

127. Fox, *supra* note 114.
128. *Ducklow v Atlantic Business Consultants Ltd*, 2006 NSSM 26 (CanLII).
129. *Ibid*.
130. *Schwartz v Indigenous Ideas Inc*, 2009 NSSC 255 (CanLII).
131. *Ibid*.

or landlords from decisions of the Residential Tenancy Officers (2000–2002).[132] The Court was also given jurisdiction to basically "rubber stamp" administrative decisions made by officers or staff of the commission.[133] According to Department of Justice statistics, appeals from decisions of Residential Tenancy Officers constituted 16.8% of small claims matters filed in the Halifax Small Claims Court. Non-appeal matters from the Residential Tenancy Board were much more numerous (10,370 such matters versus 1,778 appeals),[134] but took less time to handle (no statistics available). To better understand and appreciate the role played by the Nova Scotia Small Claims Court with regard to residential tenancy issues, it might be helpful to quickly review the kinds of issues that have arisen.

One problem or issue that seems to have arisen most frequently involves the question as to what effect should be given to a doctor's certificate in cases where the certificate is being used, either the tenant or the landlord, to establish whether or not the tenant's health had been adversely affected by the physical condition of the premises sufficient to warrant a termination of the lease or a reduction in the rent. Such claims are permitted by Section 10B of the *Residential Tenancy Act* and are more frequently made by tenants.[135] Section 10B appears to be a legislative attempt to provide a procedure whereby objective evidence can be submitted to prove or disprove the tenant's claim.

In 2004, the issue was presented to a senior Halifax adjudicator and the question posed was whether such a medical certificate should be considered to be *conclusive* evidence of the patient's health and the extent to which it had been adversely affected by the physical state or condition of the premises.[136] The adjudicator expressed the view that it was not. He explained that a tick in a box was not *conclusive* and that, in his opinion, the Nova Scotia legislature had not intended to delegate to the medical profession whether a lease should be terminated or not. He did acknowledge, however, that tenants could abuse the process. Six years later a different adjudicator took a similar view, suggesting that a doctor's certificate was only *one* indicator of that the tenant had suffered a significant deterioration in health.[137] Two years later, a third adjudicator had suggested that it was not necessary to go behind the medical certificate

132. *Residential Tenancies Act*, *supra* note 124, s 17C.
133. *Ibid*.
134. See Charles, "Small Claims Disputes," *supra* note 1.
135. *Residential Tenancies Act*, *supra* note 124, s 10B.
136. *Arnaout v Ferla*, 2004 NSSM 47 (CanLII).
137. *Snervrk Management v Atkinson*, 2010 NSSM 1 (CanLII).

to see if there had been any actual medical deterioration in the tenant's health.[138]

In 2012, by regulation, the medical or doctor's certificate was amended to require more specific evidence of the tenant's health deterioration.[139] In 2015, an adjudicator expressed the view that the legislature did not intend that the certificate would be a full answer and that there had to be something inherently problematic about the premises on an ongoing basis as well.[140] In 2017, a respected and senior Halifax adjudicator suggested that a doctor's certificate was entitled *to some degree* of deference. He also pointed out the need to balance the tenant's right to privacy which would prevent going behind the certificate, and the landlord's right or interest in maintaining a flow of rental income.[141]

The question or issue of what legal and practical effect should be given to a doctor's certificate has been the most prevalent re-occurring issue to arise from residential tenancies appeals. The difficulty of balancing the tenant's right to privacy in connection with their medical condition versus the landlord's right or interest in maintaining rental income has, no doubt, been the reason for so many recurring cases involving medical certificates. It is possible to argue that the legislation was enacted to prevent landlords from expelling tenants with serious health problems in order to obtain an early termination of the lease and tried to provide a basis for the presentation of objective evidence by a third party, namely the doctor. The method used to record the doctors' opinion involved ticking off boxes in a standard form document. There was no requirement that the doctor actually physically examine the patient, and so in most cases the doctors questioned the patient/tenant about deteriorating health and was guided by the patient's answers. We have no idea whether the legislators assumed this would be sufficient. Small Claims Court adjudicators appear to be uncomfortable with the idea that the medical professional would determine whether a tenant could terminate a lease early and tended to protect the landlord.[142] Perhaps adjudicators just wanted to return more control over the dispute process. Whatever the real reason was, they seemed to favour allowing the tenant or the court the freedom to look behind the certificate and not be bound by the certificate's conclusions. Interestingly enough, adjudicators used what they presumed to be the real legislative extent to support their own conclusions.

138. *Allen v Black*, 2012 NSSM 27 (CanLII).
139. *Residential Tenancies Act*, *supra* note 124, s 10C.
140. *GNF Investments Ltd v Rossell*, 2015 NSSM 54 (CanLII).
141. *GNF Investments v Whitman and Lang*, 2017 NSSM 35 (CanLII).
142. At least this is the author's observation.

Other issues or problems arising out of the residential tenancies appeals occurred less frequently. These included: (1) the Small Claims Court power, or jurisdiction, to set aside a preciously mediated settlement by exercising the Court's equitable powers; (2) whether a particular landlord problem should be dealt with by the Small Claims Court or the Residential Tenancies Commission; (3) whether the Small Claims Court can, or should, assume jurisdiction in cases where domestic violence prompts a landlord to issue a Notice to Quit; and finally, (4) whether cases involving public housing tenants should be handled by Small Claims Court. Clearly these cases present Small Claims Court adjudicators opportunities to exercise their discretion and apply their own personal view of what the outcome should be by the way they interpret or apply the existing law, or by developing a new legal rule.

3. *Quick judgements under section 23*

In 1993, section 23 of the *Small Claims Court Act* was amended to allow for default judgements to be obtained by claimants in the absence of the defendant at the hearing of the Small Claims Court dispute.[143] This one amendment also provided a remedy for the defendant who, upon becoming aware of the default or quick judgement, wanted to challenge the court order issued against them. Usually, in these situations, the defendant had not filed a defence. The new default judgement procedure of section 23 has spawned a number of cases in the Small Claims Court, some of which have been appealed to the Supreme Court of Nova Scotia. These cases revealed what appears to be a gap in the legislation. The gap involves the question of whether section 23(2) applies to a situation in which a quick judgment has been issued and there has been a hearing, or whether it is restricted in its application to situations where there *has* been a quick judgement rendered in the absence of the defendant *without* a hearing. Conflicting decisions were rendered by both the Nova Scotia Small Claims Court and the Nova Scotia Supreme Court, thereby causing unwanted confusion and uncertainty. The result seemed to be that Small Claims Court adjudicators were left on their own to provide a suitable rationale for cases involving the gap in legislation.

Small Claims Court adjudicators are still trying to be creative in their efforts to provide a current and suitable interpretation of section 23. They are cognizant of the need and desirability of providing access to the appeal process provided by section 23(2). That is, to have the quick judgement issue decided at the Small Claims Court level without having to incur the

143. *Small Claims Court Act*, *supra* note 7, s 23.

expense of an appeal to the Supreme Court. This is particularly important in the case of self-representing litigants who may not understand their legal position vis a vis section 23. But whether the efforts of adjudicators to properly interpret section 23(2) in particular can be said to have created new law or jurisprudence is doubtful.

4. *Enforcement measures and executive orders*

In 1991, the Nova Scotia Court Structure Task Force recommended that "the practice of having the order of the Small Claims adjudicator confirmed by a County Court judge should be abolished and the *Small Claims Court Act* be amended to provide the Small Claims Court with its own execution process."[144] The Task Force explained that the then current practice of having the clerk of the Small Claims Court stamp an order of the Small Claims Court with a notation stating that the adjudicator's decision was made an order of the County Court was purely an administrative step that seemed unnecessary. The Task Force Report suggested that there did not seem to be any reason why an order of the Small Claims Court could not be executed by the sheriff.[145] The Task Force concerns focused on administrative efficiency rather than "access to justice" or other concerns.

Almost 20 years later (2009), the Saint Mary's Report noted that users of the Small Claims Court cited enforcement or execution problems as the most negative part of the Small Claims Court experience and made reform of the process their number one recommendation.[146] The report further suggested that the enforcement of judgements could be seen an "access to justice" issue because the then current procedures of the Nova Scotia Small Claims Court placed the burden on the successful litigant (plaintiff) to collect what was owed to them.[147] The report acknowledged that this was the traditional approach from common law civil disputes—place the burden on the successful plaintiff to collect what is owed to them—failure to collect could be viewed as a barrier to fair outcomes and to justice.[148] The report suggested that enactment of some basic measures could enhance the likelihood of a successful judgement and potentially improve access to justice.[149] They further noted that the existing collection mechanisms were complicated and expensive and suggested that perhaps the legislation pertaining to sheriffs' services and related costs could be

144. *Task Force Report*, *supra* note 12 at 213.
145. *Ibid* at 212.
146. *Saint Mary's Report*, *supra* note 13.
147. *Ibid*.
148. *Ibid*.
149. *Ibid*.

simplified.[150] The report also urged lawmakers to consider requiring some form of pre-judgement financial disclosure for defendants, a provision that would help sheriffs in their efforts to collect monies.[151] The report acknowledged that information about collection mechanisms was often second-hand, and they suggested that further research be done on the issue of enforcement of Nova Scotia Small Claims Court judgements.[152] Amendments were, in fact, made to the original *Small Claims Court Act*, probably the result of the report's recommendations, which eliminated the need to have the County Court, or any other court, rubber stamp Small Claims Court orders. Small Claims Court orders were to be enforced in the same way as orders of the Nova Scotia Supreme Court. A study of Small Claims Court cases involving enforcement reveals the various approaches adjudicators have taken to the enforcement and execution process.

In a case where the Court was asked to issue directions for the examination in aid of discovery, the Court found its authority to do so lay in what seemed to be inherent jurisdiction.[153] In a second case, *Scaraveilli & Associates v Quinlan*,[154] the Court found that section 31 of the *Small Claims Court Act* incorporated the provisions of Civil Procedure Rule 52 and, where necessary, the provisions of Civil Procedure Rule 53.

5. *Conclusions*

In all of the above cases, the Small Claims Court adjudicators were striving to provide a workable solution to a situation that was not specifically covered by the provisions of the *Small Claims Court Act*. In doing so, they became creative in the way they found authority to do what they thought needed to be done. Whether this was motivated by the need to find a practical solution to a particular problem, the desire to bring about a justified concern to provide access to justice at a reasonable cost, the fact is that adjudicators have creative solutions to existing problems. Whether this has resulted in the development of a particular type of small claims jurisprudence is doubtful unless we are willing to accept a desire to do justice and provide access to justice at a reasonable cost versus informal court process, constitutes a type of jurisprudence.

X. *Is it still a people's court? The ultimate question.*

A basic question that should be addressed is whether the existing court is still "a people's court" in the sense that Nova Scotia legislators used that

150. *Ibid*.
151. *Ibid*.
152. *Ibid*.
153. *Wickwire Holm v Wilkes*, 2005 CanLII 94508 (NSSM).
154. *Scaraveilli & Associates v Quinlan*, 2005 NSSM 7 (CanLII).

term in 1980. Their vision or version of a people's court seemed to be one that incorporated the following characteristics: (1) it would be a court where ordinary citizens could present and plead their own cases without the need for legal representation; (2) the court's procedure would be as informal and simple as possible; (3) court disputes would be heard by a non-judicially approved adjudicator who would assist them as much as was possible and proper with their claims; (4) the amounts in dispute would be small to modest with most under $5,000; costs and fees would be as low as possible; (5) court staff would be there to help litigants complete the necessary forms and explain the process to them; (6) small claims disputes could be heard in venues other than courts during the evening hours or at other times convenient to the litigant; and (8) provisions in the statute would discourage lawyers and corporations from using the court. Looking at the available data, I would suggest that the present Court can still be described as a "people's court." It is true that claims are no longer under $5,000 and that lawyers still attend and represent litigants, but they represent citizens as well as corporations. The Court has not become, so far as I am aware, a collection agency for companies or corporations. Procedures have not been made more complicated or more exclusive. Some might argue that costs and fees are still too high and tend to discourage use of the Court by citizens with modest means. We lack up to date data that might indicate whether or not case numbers are decreasing, which had been a problem in the past, and we lack any kind of data about current user satisfaction, but, on the whole, given the data that we do have, I would suggest that the Court is still a "people's court" in the sense used by the original legislation.

As to the question of the Court's current effectiveness and whether potential litigants view the court as a useful mechanism for settling disputes, we do not have any recent user surveys like the Saint Mary's Report of 2009.[155] So what would be the indicators of "customer satisfaction" within the Court? One indicator would be whether the number of Small Claims Court cases (written and oral decisions) has changed since 2018, which was the last date covered by Department of Justice statistics. At the moment, we lack such data. As a result, we are unable to determine, with any degree of certainty, that the Nova Scotia Small Claims Court is achieving its intended legislative purpose or not. Perhaps is it time to find out!

155. *Saint Mary's Report*, *supra* note 13.

XI. *General conclusion—The Nova Scotia Small Claims Court: Accomplished vision or a work in progress?*

The general purpose of this paper has been to assess the degree to which the vision of a people's court has been achieved and to explore some of the difficulties experienced in trying to do so. The vision of a court with clearly defined jurisdiction that was easily accessible, informal, economical, but guided by natural justice, has proven difficult to obtain in full measure. Jurisdictional problems in terms of what it means to be a court of record, the extent, if any, of the Court's "inherent jurisdiction" or its ability to apply "equitable principles" remedies have all had to be faced, as well as the consequences of a rapidly expanded monetary jurisdiction, and subject matter jurisdiction as well. The problem of maintaining a proper balance of between formality and informality in court proceedings has been one of the main issues faced by the adjudicators. The hope was that a decision and assessment of these issues might also give the reader some sense of how the court works and a glimpse of its day-to-day operations.

In the course of carrying out this study, references have been made to: (1) court data provided by the administrator of the Small Claims Courts in relation to the number of small claims actions filed with the various small claims courts in the province[156]; (2) independent research by the author using it as a base for Small Claims Court decisions for the years 2004 to 2007, and 2006 to 2009; (3) the report of the Nova Scotia Court Structure Task Force[157]; the Saint Mary's Report in 2009 by researchers in the Psychology Department of Saint Mary's University, in cooperation with staff at the Nova Scotia Law Reform Commission.[158]

The short answer to the "big question"—is it a still a "people's court"—is yes, in terms of its clientele, its process, and its accessibility. There are, however, one or two qualifications that must be made. First of all, an increased monetary jurisdiction has produced a greater number of more complex, complicated cases. The consequence of this development has been the greater presence of lawyers who hade used by both individuals and companies alike. In addition, there are still some unresolved jurisdictional and procedural issues, such as the continued decline in the total number of claims being filed in Small Claims Court, despite the increase in monetary jurisdiction to $25,000. Since 2007, the number of claims filed has decreased approximately 20% and approximately 50% since the

156. The author wishes to acknowledge and thank the administrator of the Small Claims Court (at that time) for the generous advice and information provided to the author. The information was invaluable and very much appreciated.

157. *Task Force Report*, *supra* note 12.

158. *Saint Mary's Report*, *supra* note 13.

highwater mark of claims in 2011–2012. This concerning development was commented upon by the author in an article in 2020.[159] The trajectory downward has not reversed itself since then.

One very important fact emerged from the present study, that being the extremely important and critical role played by the adjudicator in the operation of the Small Claims Court. They are, in my opinion, the heart and soul of the court. They have, over the years, received valuable guidance from the Nova Scotia Supreme Court of Appeal in relation to the proper interpretation of the *Small Claims Court Act* and its application. When left to their own good judgement, adjudicators have tried to maintain a consistent approach to specific, recurring problems.

Adjudicators have not, to this point, developed any general jurisprudential approach to their cases beyond trying to provide as much access as possible and decide cases according to natural justice. The role performed by adjudicators is difficult at the best of times and it has not been made any easier by the advent of Covid-19, which has made "open court" hearings practically impossible. The Small Claims Court is an important part of the Nova Scotia Court system, and needs to be supported and nourished now, more than ever, by the Nova Scotia government. Its full vision has not yet been achieved and there is still work to do. It is still a work in progress.

159. Charles, "Small Claims Disputes" *supra* note 1.