The Inherent Jurisdiction and its Limits

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Introduction

The "inherent jurisdiction of the court" is a phrase often relied upon by courts and perennially examined by commentators. The currency of this phrase would suggest a clear and definite meaning, but such a supposition is surprisingly wide of the mark: there are few concepts in the common law that are invoked so often yet remain so nebulous. This paper is a further attempt to define the inherent jurisdiction, describe its exercise and prescribe its limits.

The paper has two parts. The first part seeks to define the inherent jurisdiction. It does so by commencing with the traditional and oft-cited definition, and then attempts to resolve the confusion that this definition has caused. This part will also examine the exercise of the inherent jurisdiction in four similar but distinct common law systems with a view to identifying common denominators in their experiences of the concept.

The second part attempts to formulate limits on the inherent jurisdiction. It draws on the common denominators identified in the first part and constitutional principles to determine theoretical limits that apply to all judicial actors, before examining the practical limits that force compliance with those theoretical limits.

The paper concludes that it is important and possible to define and distinguish the inherent jurisdiction, but its commonality and conflation with other, related concepts, means that it must be examined in the way it is often invoked, as an umbrella term. The paper also finds more similarities than differences in various common law systems' experiences of the inherent jurisdiction; similarities that give rise to clear, if not always enforceable limits.

I The Inherent Jurisdiction Defined

This part will attempt to explain what is meant by the term "inherent jurisdiction". Depending on the type of legal system, the concept of an inherent jurisdiction is either significant or meaningless. Those jurisdictions that attach significance to the term vary in their dependence upon it: for some, it will be an essential part of the legal system; for others, simply an unnecessary but useful adjunct. In order to identify the limits of the inherent jurisdiction, it is important to firstly identify its parameters.

This part will draw those parameters in two sections. First, it will look at the definition of the inherent jurisdiction and draw distinctions with other concepts that are confusingly similar but nevertheless distinct.

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Second, it will give an account of different jurisdictions' approaches to the inherent jurisdiction in practice.

1 Jacob's account of the inherent jurisdiction

The modern account of the inherent jurisdiction begins with Sir Jack Jacob's seminal piece "The Inherent Jurisdiction of the Court".[1] Jacob defines 'inherent jurisdiction' as the:[2]

> […] residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.

Jacob's definition has received approval in the highest courts of New Zealand,[3] Canada[4] and United Kingdom, whose House of Lords described it as a definition that "has never perhaps been bettered."[5]

However, whilst Jacob's definition is cited with authoritative and near-universal approval, the concept of the inherent jurisdiction remains a difficult idea to pin down.[6] It is perhaps the amorphousness of the definition provided by Jacob that makes it such an easy proposition to approve: it does little more than indicate the existence of a non-statutory jurisdiction that a court can employ in a range of circumstances. The definition – by itself – does not provide a substantive definition of any specificity: we are left none the wiser as to how it manifests itself in the day-to-day operations of a court. Crucially, the definition does not indicate any limits or boundaries to the jurisdiction – indeed quite the opposite – by stating that a court can and will use its inherent jurisdiction wherever and whenever just and necessary, the definition indicates that it is essentially a limitless concept.[7]

Jacob's seminal piece contained more than simply a definition of the inherent jurisdiction. It provided the historical basis for the concept and then provided several examples of why and how a court invokes the jurisdiction. It is through this descriptive process that the fundamentals of the concept were fleshed out – the examples Jacob used are not simply a "ragbag" of cases; rather, each involved several common denominators that provides a more substantive definition of the inherent jurisdiction that the pithy and general definition above could not achieve by itself.[8]

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1 I H Jacob "The Court's Inherent Jurisdiction" (1970) 23 CLP 23.
2 Ibid, 51.
3 *Taylor v Attorney General* [1975] 2 NZLR 675, 680 (NZCA) and *Siemer v Solicitor-General* [2010] 3 NZLR 767 at [29] (SCNZ).
4 *R v Caron* [2011] 1 SCR 78 at [24] (SCC).
5 *Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024 at 3037 per Lord Bingham of Cornhill.
6 M S Dockray "The inherent jurisdiction to regulate civil proceedings" (1997) 113 LQR 120, 120.
7 Ibid, 127.
8 Ibid, 125.

In his account, Jacob summarised the fundamentals of the inherent jurisdiction as follows:[9]

1. The inherent jurisdiction is exercised as part of the administration of justice and in relation to the process of litigation: it is procedural, not substantive;
2. Its distinctive and basic feature is that it exercised by way of summary process rather than normal trial;
3. Its nature as part of the machinery of justice means that a court can exercise it against anyone, whether a party to proceedings at issue or not;
4. It is distinguishable from the exercise of judicial discretion; and
5. Rules of Court provide powers in addition to – not as a substitute for – the powers arising from the inherent jurisdiction.

In addition to these fundamentals, Jacob states that the inherent jurisdiction is possessed only by "superior courts", ie those courts without a statutory foundation.[10] As he notes: "the jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law."[11]

Superior courts owe their existence not to statute but instead to the exercise of the Royal prerogative.[12] Originally, the entirety of the English superior courts' jurisdiction was inherent in that it had no statutory basis, with legislation slowly codifying the majority of that jurisdiction.[13] The powers and jurisdiction not codified or overruled by statute – the residue which Jacob alludes to in his definition – make up the inherent jurisdiction.[14]

Since the inherent jurisdiction is derived from the very nature of a superior court, Jacob argues that its limits are "not easy to define, and indeed appear to elude definition."[15] Nevertheless, Jacob classifies the residual powers not regulated by statute as falling into three major categories:[16]

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9 Jacob, above n 1, 24–25.

10 Ibid, 27.

11 Jacob, above n 1, 27; J Liang "The Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals: an Appraisal of Their Application" (2012) 15 New Crim L Rev 375, 378.

12 C Brown "The Inherent Powers of International Courts and Tribunals", (2005) 76 BYBIL 195, a 207, citing W Blackstone *Commentaries on the Laws of England* (Chicago: Univ of Chicago, 1979), vol 1, 257.

13 Ibid, 207. This was effected, most notably, by the United Kingdom's Supreme Court of Judicature Acts of 1873 and 1875.

14 Sometimes, that codification will actually confirm the inherent jurisdiction, as per section 16 of Judicature Act 1908 in New Zealand: "The court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand."

15 Jacob, above n 1, 24

16 Ibid 32–49.

- control over process (eg punishing for contempt);
- control over persons (eg, a court's judicial review jurisdiction); and
- control over inferior courts and tribunals (eg punishing for contempt of those fora)

Jacob concluded his survey of the history and nature of the inherent jurisdiction as follows:[17]

> The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers […] it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice.

This paper, among other things, seeks to test whether Jacob's definition remains as justifiably authoritative 43 years after publication.

2 Distinctions, terminology and confusion

Despite – or perhaps because of – Jacob's cataloguing of the inherent jurisdiction, it is a concept that is beset by confusion.[18] That confusion appears to have arisen due to the difficulty in delineating and separating it from other, related concepts. According to Jacob, "inherent *jurisdiction*" is something only "superior courts" – ie those courts without a statutory foundation – possess. The problem is, however, all courts, including "superior courts", possess "inherent *powers*".

This disjunct arises because the corollary of Jacob's proposition is that those courts with a statutory foundation – "inferior courts" – cannot possess an inherent jurisdiction. This proposition, however does not accord with a significant degree of recognition that courts with a statutory foundation also possess an inherent jurisdiction (as defined by Jacob) and the powers that come under that definition; recognition that is arguably difficult to ignore.[19] There are many instances of inferior courts asserting the same powers that Jacob argues constitutes the inherent jurisdiction of superior courts.[20] As Baron Alderson made clear in 1841 in *Cocker v Tempest*:[21]

> The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice.

If Jacob's definition posits that the inherent jurisdiction includes a

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17 Ibid, 50.

18 R Joseph "Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 Canterbury L Rev 220.

19 Dockray, above n 6, 125–126.

20 See, for example, Dockray above n 6, 125–126; J Kovacevich "The inherent power of the District Court: Abuse of process, delay and the right to a speedy trial" (1989) NZLJ 184; and S M Sugunasiri "The Inferior Jurisdiction of Inferior Courts" (1990) 12 Advoc Q 215, 218–219.

21 *Cocker v Tempest* (1841) 7 M & W 502, 503–4 (Court of Exchequer).

court's power to control its own processes, then *Cocker v Tempest* shows that Jacob must be incorrect in arguing that only superior courts possess an inherent jurisdiction.

The problem accordingly lies within Jacob's definition: he has conflated – as so many have since – "inherent jurisdiction" with "inherent powers".[22] The two terms are related, but distinct. In New Zealand, this was made clear in *Watson v Clarke*, namely that there is an:[23]

> [...] important distinction between "inherent power" and "inherent jurisdiction". The latter connotes an original and universal jurisdiction not derived from any other source, whereas the former connotes an implied power such as the power to prevent abuse of process, which is necessary for the due administration of justice under powers already conferred.

Watson v Clarke is a rare instance of a court treating the terms as distinct concepts.[24] As Joseph notes:[25]

> The courts' treatment of inherent jurisdiction and inherent powers has been fraught with confusion and misapplication. Many of the judgments dealing with inherent jurisdiction have conflated the distinct concepts of inherent jurisdiction and inherent power.

Theoretically, the terms "jurisdiction" and "powers" are separable by arguing that jurisdiction is a substantive power to hear and determine a matter whereas powers, in contrast, are simply incidental; procedural devices that are used by the court to effect its jurisdiction.[26]

Liang posits a similar distinction: whereas "inherent jurisdiction" indicates some sort of *substantive* authority based on the original and unlimited jurisdiction superior courts received from the sovereign, "inherent powers", which were instead a type of *procedural* authority incidental to a court's statutory authority.[27]

As Liang argues, however such a distinction is blurred by the gradual convergence of the concepts.[28] Despite being at two different conceptual levels, the distinction between "inherent powers" and "inherent jurisdiction" is arguably nothing more than semantic. If both "superior" and "inferior" courts are both exercising the same inherent powers, what relevance is the fact that as a superior court, those powers derive from its inherent jurisdiction? Liang argues that such a "distinction of powers that is based on the origin of the source of the power is artificial."[29] There is a temptation that given the confusion surrounding inherent jurisdiction and inherent powers, conflation of the terms is an elegant

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22 Joseph, above n 18, 221.
23 *Watson v Clarke* [1990] 1 NZLR 715, 720 (NZHC).
24 See also *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740, [16] (NZCA) and *Zaoui v Attorney-General* [2005] 1 NZLR 577 (NZSC) at [35].
25 Joseph, above n 18, 221.
26 Ibid, 221.
27 Liang, above n 11, 379–380.
28 Ibid, 382.
29 Liang, above n 11, 381.

solution if "inherent jurisdiction" acts little more than as a descriptor of where those powers originate.

The whole issue is complicated further by jurisdictions who use the term in a slightly different manner. Australia, for example, maintains that the inherent jurisdiction is actually an *implied* jurisdiction; with some judges arguing that all jurisdictions are founded in the constitution and/or statute, and thus any "inherent" jurisdiction must instead be a jurisdiction implied from one or both of those sources.[30] As a result, the Australian commentator Lacey takes the same approach to Liang, arguing that there is functional similarity between "inherent jurisdiction" and "implied or inherent powers" even if the source of each is different.[31]

This added complexity only makes the prospect of combining all the different concepts into one, catch-all term that applies to all legal systems all the more attractive. Accordingly, to resist this temptation, "inherent jurisdiction" needs to act and mean something more than 'inherent powers' or "implied powers" if is to be worth distinguishing.

One indicator that the concepts are distinguishable in a meaningful sense is that that courts themselves have maintained a distinction between superior and inferior courts. Most jurisdictions conscious of Jacob's definition of inferior and superior courts – ie those with or without statutory foundation – have insisted on deeming its higher appellate courts as "superior courts", despite those appellate courts being statutory creatures. For example, the Supreme Court of the United Kingdom is deemed by its founding statute to be "a superior court of record",[32] New Zealand has emphasised that their final appellate courts are "senior" courts,[33] Australia's High Court, Family Court and Federal Court are deemed "superior courts of record",[34] and Canada has insisted that its statutorily created federal courts are "superior" courts, relying upon Blackstone:[35]

> A Superior Court as distinguished from an inferior Court possesses broad supervisory jurisdiction over inferior tribunals and keeps them within the bounds of their authority by removing their proceedings to be determined in such Superior Court or by prohibiting their progress in the inferior tribunal.

Blackstone's distinction between superior and inferior courts also neatly provides its rationale: superior courts exist to keep inferior courts

30 M Aronson, et al, *Judicial Review of Administrative Action* (Sydney: 2009, Lawbook Co), 22, citing J Kirby in *Batistatos v Roads and Traffic Authority* (NSW)(2006) 26 CLR 256, 263.

31 W Lacey "Inherent Jurisdiction, judicial power and implied guarantees under Chapter III of the Constitution" (2003) 31 Fed LR 57, 61.

32 Section 40(1), Constitutional Reform Act 2005 (UK).

33 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35, [1] (NZSC).

34 Lacey, above n 31, 65.

35 *Addy v Canada* (1985) 22 DLR (4th) 52 at [25] (FC (Trial Div)), citing 3 Blackstone's *Commentaries* (1768), vol 3, 43–46.

in check. It is important to note, however, that Blackstone's distinguishing factor is that superior courts possess a particular *jurisdiction*: an ability to hear and decide matters that their inferior counterparts cannot.

To be clear, courts have not held that by simply deeming a statutory court as a superior court, it also grants it an inherent jurisdiction – this is still determined through the origin of the court.[36] However, the focus on jurisdiction generally when distinguishing superior from inferior courts shows that all that is required for the concept of "inherent jurisdiction" to be worth distinguishing from "inherent" or "implied" powers is showing that those courts with an inherent jurisdiction – those without a statutory foundation – can hear and decide matters that other courts cannot, despite all courts possessing inherent powers. What is required is a functional difference that sets inherent jurisdiction apart.

A worthy candidate for such a difference is the jurisdiction to engage in judicial review of administrative action. Lord Coke described this jurisdiction as having arisen from an "irrevocable delegation" by the King and only one that Parliament could "shake".[37] However, in the legal systems that inherited this jurisdiction, legislatures have only partially "shaken" it from the superior courts which exercise it. For example, in Ontario and the United Kingdom, legislative regimes provide the procedure for bringing an application for judicial review to Court, but do not grant or confirm the substance of the jurisdiction (ie why and how the Court would decide on such applications).[38] New Zealand only specifies a procedure for reviewing statutory exercises of power – the jurisdiction to review other executive or administrative action remains without any statutory guidance or foundation.[39] At no point do these legislative regimes, however, grant or confirm the jurisdiction of its superior courts to engage in judicial review – that is derived from their inherent jurisdiction.

More importantly, however, absent a particular statutory grant, inferior courts do not possess a jurisdiction to engage in judicial review (despite still possessing inherent powers) unless it is granted to them by statute. So, whilst Ontario's Superior Court of Justice enjoys a jurisdiction to

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36 Liang, above n 11, 379.

37 G Brennan "The Purpose and Scope of Judicial Review" in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Auckland: OUP, 1992), 23.

38 Respectively, the Judicial Review Procedure Act 1990 (RSO) and section 31 of the Supreme Court Act 1980 (UK).

39 See the Judicature Amendment Act 1972 (NZ), section 4. Section 16 of the Judicature Act 1908 (NZ) recognises that that the High Court has the same jurisdiction that superior courts in the United Kingdom had at the time (including their inherent jurisdiction to engage in judicial review of administrative action). However, in simply recognising the pre-existing nature of this jurisdiction, this section cannot be said to create or found that jurisdiction; instead it merely "fortified" that jurisdiction: *Cates v Commissioner of Inland Revenue* [1982] 1 NZLR 530, 531 (NZCA). See also *Zaoui v Attorney-General* [2005] 1 NZLR 577, [34] (SCNZ).

engage in judicial review via their inherent jurisdiction, the Federal Court of Canada – a statutory creation – only enjoys a similar jurisdiction because it was granted to it by legislation.[40] This shows a clear, functional difference between inherent powers and inherent jurisdiction such that they are – and should be – distinguishable from one another.

As one commentator puts it:[41]

> "Inherent jurisdiction" is, then, a self-generating intrinsic source of power. The terms "jurisdiction" and "power" are frequently used together or interchangeably. It might be, perhaps, more accurate to think of the term "jurisdiction" as the source of powers but this distinction is not often made.

Yet it is more than accuracy for accuracy's sake that is at stake; resolving this confusion is more than simply an exercise in pedantry. As Yihan argues:[42]

> While Jacob has described the courts' inherent jurisdiction as "amorphous and ubiquitous", this surely does not extend to the conflation of several concepts within a mix of expressions. Untangling and differentiating the meanings used by the courts is not merely about resolving a semantic problem; there are consequences beyond whether the usage of each expression is elegantly consistent across the cases.

The key consequence of such confusion that Yihan identifies is the problem of limits: in trying to determine the limits of the inherent jurisdiction, the clarity of what is meant by that concept becomes of critical importance.[43] Thus to summarise: superior courts – strictly defined as those without a statutory foundation – possess an inherent jurisdiction, giving them a particular authority to hear and decide matters. Some courts are deemed by statute as superior courts, but this is only an indicator of their place on the judicial hierarchy: it does not grant them an inherent jurisdiction, which depends on a non-statutory origin. Inherent jurisdiction is, however, separate to and different from inherent powers, which all courts possess, regardless of their origins, simply by virtue of their function as a court.

This paper has gone to pains to distinguish the various concepts above. However, it must be acknowledged that despite any conceptual separation, "inherent jurisdiction" and "inherent powers" share a common denominator: they each lack statutory authority. Just as inherent jurisdiction is by definition the residual jurisdiction of a court not yet codified by statute, "inherent powers arise from common law,

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40 Federal Courts Act 1985 (RSC), section 18(1).

41 W H Charles "Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?" (2010) 33 Dalhousie LJ 63, 64.

42 G Yihan "The Inherent Jurisdiction and Inherent Powers of the Singapore Courts" (2011) Sing JLS 178, 188.

43 Ibid, 188.

independently of the statutes which create the jurisdiction of the court."[44] As a result of that common denominator, any limits that apply to the inherent jurisdiction ought to apply to implied powers, especially when those powers, despite being procedural in nature, can have a significant substantive effect. As Dockray argues:[45]

> Procedure is not necessarily simpler, less important or easier to reform than substantive law. And of course, a matter which is procedural from the position of an applicant may be constitutional in the eyes of the respondent. The fact that procedural law can be described as subordinate or adjectival because it aims to give effect to substantive rules should not conceal the truth that procedures can and do interfere with important human rights, while the means by which a decision is reached may be just as important as the decision which is made in the end.

Accordingly, acknowledging the importance, but also the Sisyphean quality, of the foregoing analysis, this paper will treat "inherent jurisdiction" as an umbrella term that includes both superior courts' inherent jurisdiction and all courts' inherent powers. Doing so will ensure that the limits of what courts often conflate as inherent jurisdiction and inherent powers are properly and thoroughly examined. Having distinguished the various terms in play, the next section will examine the inherent jurisdiction in practice.

3 Approaches by different common law systems to the inherent jurisdiction

This paper is only examining inherent jurisdiction as it is practiced in common law systems, because it is a concept firmly rooted in the common law. Whilst the concept of inherent powers is not exclusive to common law systems, and is not unknown in civil law systems, it is clear that the concept of a substantive jurisdiction that does not derive from statute is very much a common law creature.[46] Any inherent jurisdiction in civil law systems appears to be limited to purely procedural aspects only; whereas there is a myriad of substantive powers under the inherent jurisdiction in common law systems, civil law systems tend to require statutory authority for such powers.[47] Similarly, at an international level, the concept of an inherent jurisdiction exercised by international courts and tribunals remains novel and controversial.[48]

Within common law systems, there are a range of varying approaches to the inherent jurisdiction. This part provides examples with a view to contrasting these approaches. The four systems examined below – England, Canada, Singapore and New Zealand – each have different governmental and constitutional arrangements, but share a common

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44 Charles, above n 41, 68, citing *R v Norwich Crown Court* [1992] 1 WLR 54 (QB).
45 Dockray, above n 6, 131.
46 Brown, above n 12, 206.
47 Liang, above n 11, 377, and Brown, above n 12, 206, n 71.
48 Ibid, 412.

thread in that the inherent jurisdiction remains the "virile and viable" doctrine that Jacob described. There are, of course, other common law systems that have the concept of the inherent jurisdiction – Australia, and the United States, for example – however, as the discussion about terminology in Australia above shows, particular nuances in those and other jurisdictions make them problematic comparators. For simplicity and brevity, the approaches of these four systems are examined below.

(a) England

England provides a valuable starting comparator in that it is the birthplace of the common law. In his comprehensive analysis of the inherent jurisdiction to regulate civil proceedings in England, Dockray notes that the term has "found its way into the judgments in over 40 reported cases in 1995."[49] In the past year, the term was mentioned in over 100 judgments in the United Kingdom.[50] Thus, even allowing for the wider geographical catchment, the concept continues to ever more "regularly crop up" in reports: a continuation of the trend that commenced in the second half of the twentieth century.[51]

Dockray also notes that inherent jurisdiction is the fount of a "whole armoury" of powers in English courts, sometimes "significant" and "extraordinary", including: "the power to deny a litigant a full hearing; to make orders without listening to the party affected; to decline to hear an advocate; to exclude a party or the public from the courtroom; to arrest or to grant bail; to order a party to speak or to keep silent; to require parties to surrender their property before judgment or to submit to a search and seizure."[52]

Two examples are worth discussing in particular, to show how England's usage of the concept has changed in modern times. The first decision, *Anton Piller KG v Manufacturing Processes Ltd*,[53] established the jurisdiction to grant an ex parte order to a party to enter, search and remove property from the premises of its opponent in civil litigation, when it is likely that the opponent was going to destroy integral evidence.[54] The Court of Appeal admitted that that there was little precedent – statutory or common law – to warrant such an order, but that it was necessary so as to do justice between the parties, and therefore justified through the invocation of the Court's inherent jurisdiction.[55] Nevertheless, the party applying for the order was required to act with circumspection, and "it is obvious that such an order can only be justified

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49 Dockray, above n 6, 120.

50 Search of Westlaw UK "All United Kingdom Reports and Transcripts" using the term "inherent jurisdiction" between 4 December 2012–4 December 2013 with multiple instances of the same judgment excluded.

51 Ibid, 124.

52 Ibid, 120.

53 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 (CA).

54 H Laddie and M Dockray "*Piller* problems" (1990) 106 LQR 106, 601, 601.

55 *Anton Piller*, above n 53, 61.

in the most exceptional circumstances."[56]

Anton Piller orders soon lost their novelty and courts became lax about the Court of Appeal's requirement that they should only grant the order in the most exceptional cases.[57] However, the potency of the order persisted: they were "offensive weapons",[58] and there was judicial acceptance that "that a common, perhaps the usual, effect of service and execution of an *Anton Piller* order is to close down the [defendant's] business..."[59] Accordingly, Laddie and Dockray concluded in 1990 that "an exceptional device intended to avoid injustice has become almost a routine method of creating it".[60] This led to a committee appointed by the Judges' Council recommending in 1992 that: "in view of the draconian nature of *Anton Piller* orders with their serious implications for the civil liberty of the individual and their potential for abuse a statutory framework is required..."[61] That framework took the form of primary legislation, enacted in 1997 – over twenty years after the establishment of the order.[62]

The contemporary analogue to the 1970s' *Anton Piller* order is the "closed material procedure", as recently ruled upon by the United Kingdom Supreme Court in *Al Rawi v The Security Service*.[63] A closed material procedure is where, in the public interest, the Court permits one party to comply with its evidential disclosure requirements by only supplying the information to the Court and to "special advocates" – counsel cleared by government officials to examine the withheld evidence and represent the opposing party's interests – but not to the opposing party itself.[64] Such a procedure was permitted in certain criminal contexts through statutory authority, for example in proceedings under the Prevention of Terrorism Act 2005 and the Counter-Terrorism Act 2008, in order to prevent the disclosure of sensitive information that could undermine national security.[65]

However, the procedure was not statutorily mandated in civil contexts. Thus, when the plaintiffs in *Al Rawi* sued the United Kingdom government for their complicity in their detention and ill-treatment at various locations including Guantanamo Bay, the government had to rely on the court's inherent jurisdiction to engage the closed material procedure.

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56 Ibid, 58; 61.
57 Laddie and Dockray, above n 54, 605.
58 Ibid, 603.
59 *Columbia Picture Industries Inc v Robinson* [1987] 1 Ch 38, 73, cited in Laddie and Dockray, above n 54, 603–604.
60 Laddie and Dockray, above n 54, 620.
61 K Reece-Thomas and M Dockray "*Anton Piller* orders: the new statutory scheme" (1998) 17 CJQ, 272, 273.
62 Civil Procedure Act 1997 (UK), section 7.
63 *Al Rawi v The Security Service* [2011] UKSC 34; [2012] 1 AC 531.
64 Ibid, [1] per Lord Dyson.
65 Ibid, [14] per Lord Dyson.

Whilst the Queen's Bench accepted that it had the inherent jurisdiction to establish a closed material procedure in the civil context, this was overruled by both the Court of Appeal and the House of Lords. In his judgment, Lord Dyson began with Jacob's analysis and an important point of principle: that the a court cannot exercise its inherent jurisdiction in contravention of legislation or rules of court.[66] However, Lord Dyson went on to accept Dockray's argument that even where there is no risk of contravening legislation, the court's jurisdiction is not unlimited. His Lordship concluded as follows:[67]

> The basic rule is that (subject to certain established and limited exceptions) the court cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice.

Applied to the current case, Lord Dyson JSC held that "the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that."[68]

Concurring with Lord Dyson JSC, Lord Hope of Craighead JSC held that the proposition that this was an issue best left to resolution by Parliament was not a "surrender" of the Court's inherent jurisdiction, but instead a recognition that this was an issue that:[69]

> […] raises such fundamental issues as to where the balance lies between the principles of open justice and of fairness and the demands of national security that it is best left for determination through the democratic process conducted by Parliament, following a process of consultation and the gathering of evidence.

In contrast, Lord Mance JSC took s less strict approach, ruling out the applicability of the Court's inherent jurisdiction in the present instance, but not discounting the possibility that it might nevertheless extend to granting a closed material procedure in others:[70]

> If the court never has jurisdiction (in the strict sense) to order a closed material procedure, that means that, even where a court concluded that a claimant must be denied access to material and the case must otherwise be struck out as untriable, it would be impossible for the court to order, with the consent of the claimant, a closed material procedure. [...] I would be surprised if the court's inherent jurisdiction (in the strict sense) were inhibited to this extent.

Not allowing the jurisdiction to grant such a procedure, with the consent of both parties, his Lordship argued, would amount to denying something even more basic than open justice and fairness: justice itself.

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66 Ibid, [18] per Lord Dyson.
67 Ibid, [22] per Lord Dyson.
68 Ibid, [35] per Lord Dyson.
69 Ibid, [74] per Lord Hope of Craighead JSC.
70 Ibid, [112] per Lord Mance JSC.

There was, however, "a real distinction between having jurisdiction and exercising it".[71] Absent statutory authority, it was only the compulsion of necessity to avoid the greater injustice that should engage such a jurisdiction.[72]

In the only dissenting judgment, Lord Clarke of Stone-cum-Ebony argued that although "I cannot conceive of circumstances in which the court could in fact properly make an order for use of a "closed material procedure" as defined",[73] but argued that the common law ought to be sufficiently flexible to provide an alternative that achieves the same ends as the closed material procedure. In sum – the Court unanimously rejected the unjustified expansion of the inherent jurisdiction to allow the closed material procedures in civil litigation.

The epilogue to *Al Rawi* is one of swift legislative response. Just three months after the release of the Supreme Court's decision, the Government-commissioned *Justice and Security Green Paper* was presented to Parliament.[74] The *Green Paper*, inter alia, recommended the establishment of closed material procedures in civil litigation, and after a period of consultation, such procedures were incorporated into the Justice and Security Bill, presented to Parliament in May 2012.[75] The Bill secured royal assent on 25 April 2013, meaning that less than two years after the *Al Rawi* decision, the legislature filled the gap the Supreme Court was not prepared to broach with its inherent jurisdiction.[76]

The contrast between *Anton Piller* and *Al Rawi* is striking. Both involved potential engagement of the inherent jurisdiction to secure justice overall at the cost of the liberties of one party. Whereas *Anton Piller* decided to engage the inherent jurisdiction, however, *Al Rawi* declined – forcing legislative action to provide the Court with a statutory jurisdiction, showing that regardless of Jacob's pronouncement, there are clear limits to the concept.

(b) Canada

As early as 1886, the Supreme Court of Canada had adopted Jacob's conception of the inherent jurisdiction, holding in *Re Sproule* that "every superior court [...] has incident to its jurisdiction an inherent right to inquire into and judge the regularity or abuse of its process."[77] Courts have since explicitly accepted Jacob's definition, with the Supreme Court as recently as 2011 in *R v Caron* accepting Jacob's summary on the scope of concept: "[t]he inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised

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71 Ibid, [115] per Lord Mance JSC.
72 Ibid.
73 Ibid, 130] per Lord Clarke of Stone-cum-Ebony JSC.
74 *Justice and Security Green Paper*, (London: HMSO, 2011), accessible at <www.official-documents.gov.uk/document/cm81/8194/8194.pdf>.
75 Justice and Security Bill 2012 (HL Bill 27).
76 Justice and Security Act 2013 (UK) c 18.
77 *Re Sproule* (1886) 12 SCR 140 at 180, cited in Charles, above n 41, 121–122.

in different ways."[78]

Guidance on that exercise received unusually full analysis in *Ocean v Economical Mutual Insurance Co*,[79] as detailed by Professor William Charles in his comprehensive analysis of the operation of inherent jurisdiction in Nova Scotia.[80] In *Ocean*, the issue was whether it a court had jurisdiction to order a mental assessment of a lay-litigant to determine whether she could represent herself at trial, ie when mental capacity was not an issue to be determined on the merits of the case.[81] The Court of Appeal observed that: "none of the theories put forward to explain the basis for inherent jurisdiction attempt to determine its limits. Indeed, in this jurisdiction the courts have generally addressed what is *not* a proper exercise of the court's inherent jurisdiction on a case by case basis".[82] Although Bateman JA for the Court did not discuss the origin or nature of inherent jurisdiction, she did analyse its exercise, which Charles extrapolated into a series of principles, relevantly including the following:[83]

- Superior courts' inherent jurisdiction originally narrowly applied to issues involving contempt of court or abuses of the court's process. Even in this narrow ambit, a court should exercise it sparingly;
- It was subsequently was expanded to cover variation of trusts, safeguarding of children, the provision of remedies and situations where statutory provisions do not so provide, supervision, protection and assistance to inferior tribunals (including arbitrations) and filling of gaps in statutes;
- It is primarily a procedural concept and courts should not invoke it to make changes in substantive law;
- Any invocation requires an exercise of judicial discretion; and discretion must always be exercised judicially; and
- A judge does not have an unfettered right to do what is thought to be fair as between the parties. A court's resort to its inherent jurisdiction must be employed within a framework of principles relevant to the matters in issue.

This case is notable for the circumspection which the Nova Scotia Court of Appeal displayed regarding the inherent jurisdiction's theoretically unlimited scope: in the event, the Court held that an inherent power to order a mental assessment did exist, but since "the court's inherent jurisdiction is an extraordinary power […] and should not be used save in the clearest of cases",[84] the Court held that it was not appropriate to exercise it in this instance.

The principles in *Ocean* were clearly evident in the Manitoba Court of

78 *R v Charon* [2011] 1 SCR 78, [21] per Binnie J, citing Jacob, above n 2, 23.
79 *Ocean v Economical Mutual Insurance Co* (2009) 281 NSR (2d) 201 (NSCA).
80 Charles, above n 41, 76–83.
81 Ibid, 76.
82 *Ocean*, above n 79, [74].
83 Charles, above n 41, 81–82.
84 *Ocean*, above n 79, [100].

Appeal's decision in *Gillespie v Manitoba (Attorney General)*.[85] The peculiar facts of this case involved whether the Chief Justice of the Manitoba Court of Queen's Bench had the inherent jurisdiction to make an order authorising the searching of persons entering a Winnipeg courthouse after an existing scheme was disbanded after a court declared it was illegal. Delivering the decision for the majority, Twaddle JA cited Dockray, agreeing that:[86]

> […] the inherent jurisdiction is not a kind of "ubiquitous judicial prerogative." Indeed, it is not a prerogative at all. The Divine Right of Kings is dead; it has not passed to judges. In a democracy, such as ours, judges have a distinct function which enables them to command others, but the power to do so must be exercised within the Constitution and the law.

The majority held that the Chief Justice's order broke the principle that the inherent jurisdiction cannot extend to the creation of a new rule of substantive law, because it generally changed the law relating the constitutional right to security from search.[87] The minority, in contrast, held that the inherent jurisdiction could be invoked, to ensure the security of the courthouse since:[88]

> […] in certain unique and exigent circumstances, of which this is one, a superior court possesses the inherent jurisdiction to invoke its own "residual source of powers" […] when it is essential to enable it to preserve or maintain the essential role of the court itself as the institution responsible for maintaining the rule of law. […] To suggest in circumstances such as these that the superior court is powerless to act and must wait for another branch of government to do what is essential to ensure safe public access to justice, is to risk a denial of the rule of law itself.

Interestingly, however, even the minority were only inclined to grant a stay of the order so as to ensure the appropriate legislative intervention could occur.[89]

Any reticence displayed by the Manitoba and Nova Scotia Courts of Appeal regarding the exercise of inherent jurisdiction is not a universal attribute of Canadian courts. A retired judge on the Ontario Superior Court of Justice expressed a disdain for codification of its inherent jurisdiction arguing that:[90]

> Inherent jurisdiction is not palm tree justice. Rather, as an element related to the common law, it should be used sparingly (cautiously, but as often as truly required). […] If Parliament cannot crystal-ball the future, perhaps it would be better to minimize codification and allow an experienced

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85 *Gillespie v Manitoba (Attorney General)* (2000) 185 DLR (4th) 214.
86 Ibid, [27].
87 Ibid, [32].
88 Ibid, [117].
89 Ibid, [140].
90 J Farley "Minimize codification by expanding use of inherent jurisdiction" (2007) 27 Lawyers Weekly 13, 13.

> sector of the superior court judiciary to deal with problems using the full panoply of inherent jurisdiction and statutory discretion.[91]

It is in this spirit that the Supreme Court expanded the superior courts' inherent jurisdiction in *British Columbia Telephone Co v Shaw Cable Systems (BC) Ltd*[92] At issue was "operational conflict" between the decisions of two administrative tribunals. As L'Heureux-Dubé J explained in her judgment:[93]

> This will occur where compliance with the decision of one tribunal necessitates violation of the other tribunal's decision. Such a result places a person in an intolerable situation. He or she has no choice but to ignore one of the operationally conflicting orders.

Here, a decision of the Canadian Radio-television Telecommunications Commission ("CRTC") was in conflict with a labour arbitration award, such that compliance with one decision would violate the other. The appellant – BCTel – appealed the CRTC decision to the Federal Court of Appeal, which held that the CRTC had gone outside its jurisdiction by exercising its discretion in a manner which led to the operational dilemma: it should have taken into account the arbitration award and erred when it did not do so.[94] In contrast, the Supreme Court held that the CRTC decision was within its jurisdiction, and instead, when faced with irreconcilable decisions, that it is "the responsibility of the courts, exercising their inherent jurisdiction, to determine which of the two conflicting decisions should take precedence."[95] This was an unusual expansion in the Court's inherent jurisdiction, because:[96]

> "Inherent jurisdiction" is not a phrase which would normally be applied to appeals. By definition, appeals do not involve the inherent jurisdiction of the court at all, but rather arise when the legislature has specifically granted jurisdiction to the court to review the decision of [an administrative tribunal]. [...] Until now, it would have been unusual to speak of the courts' "inherent jurisdiction" to do something on an appeal which the legislature has not specifically authorized.

The Supreme Court argued that such a power was necessary and, in any case, consistent with legislative intent.[97] However, the legislature had precluded review or appeal of the arbitration board through a "virtually 'impenetrable privative provision'"[98] insulating it from

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91 J Farley "Minimize codification by expanding use of inherent jurisdiction" (2007) 27 Lawyers Weekly 13, 13.

92 *British Columbia Telephone Co v Shaw Cable Systems (BC) Ltd* [1995] SCR 739.

93 Ibid, [49].

94 D Philip Jones "Out of Nowhere: 'Inherent Jurisdiction' to Resolve Operational Conflicts" (1996) 31 Admin LR (2d) 151, 154.

95 *British Columbia Telephone Co* above n 91, [49].

96 Philip Jones, above n 93, 163.

97 *British Columbia Telephone Co* above n 91, [53].

98 Ibid, [20].

judicial interference.[99] Arguably then, the expansion of the inherent jurisdiction – which could eventually lead to the overturning of that arbitration board's decision – was precisely *against* legislative intent. As Philip Jones identifies, however, the real concern with the decision was the uncertainty it created:[100]

> In practical terms, what are the limits of the court's "inherent jurisdiction"? How does one know when the court is going to create new "inherent" powers for it to do other things in Administrative Law? That is the danger of adopting an analysis which does not fit comfortably within the conceptual framework of the area.

The issue is the breach of the principle enunciated in *Ocean*: any exercise of the inherent jurisdiction must be consonant with the framework of principles relevant to the matters in issue. Establishing powers of inherent jurisdiction in a statutory appellate context is conceptually confused and thus the expansion was problematic.

This brings the analysis back to the Supreme Court's decision in *R v Caron*. The issue in this case was whether a court could order order costs in advance of public interest litigation – essentially requiring the state to fund the proceedings. This was not a new issue, but as Binnie J. described it in his judgment, "the novel twist" in this case was a superior court making such advance costs orders so that an accused could defend a regulatory prosecution in a provincial court. The applicant – Mr Caron – claimed the proceedings for a minor traffic offence – a wrongful left turn – were a nullity because the court documents were only in English and not also in French.[101]

The question before the Supreme Court was whether the superior court had the ability to make such an order – ie the inherent jurisdiction to grant an interim remedy in litigation taking place in the provincial court.[102] Justice Binnie for the majority held that such an order fell properly within the superior court's jurisdiction. Although noting that "the very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution",[103] Binnie J invoked Jacob to reach the conclusion that "superior courts *do* possess inherent jurisdiction 'to render assistance to inferior courts to enable them to administer justice fully and effectively'".[104] The novelty of the exercise of the jurisdiction was no barrier, given the inexhaustible variety of circumstances in which a Court could invoke it inherent jurisdiction.[105] Nor was its apparent inconsistency with existing legislation. Only explicit contravention of legislation would suffice to nullify the inherent jurisdiction, for "[i]t would be contrary to all authority to draw a negative inference

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99 Philip Jones, above n 93, 163.
100 Ibid.
101 *Caron*, above n 4, [1]–[3].
102 Ibid, [17].
103 Ibid, [30]
104 Ibid, [26], emphasis original.
105 Ibid, [27]; [29].

against the inherent jurisdiction of the superior court based on "implication" and conjecture about legislative intent."

Although agreeing with the result, Abella J. delivered the only separate judgment, in order to express his concern "that the reasons may be seen to unduly expand the scope of the common law authority of a superior court in the exercise of its inherent jurisdiction."[106] His concern came from an interesting perspective, namely that an expansion of the superior courts' inherent jurisdiction to "assist" provincial courts and tribunals could have a negative effect on those inferior courts. Expanding the reach of a superior court's inherent jurisdiction into matters of which an inferior is seized could be inconsistent with those courts independence, integrity and expertise.[107] To that end:[108]

> When considering the proper limits of a superior court's inherent jurisdiction, any such inquiry should reconcile the common law scope of inherent jurisdiction with the implied legislative mandate of a statutory court or tribunal, to control its own process to the extent necessary to prevent an injustice and accomplish its statutory objectives.

Caron has been described as the "sleeper" case of 2011: a prima facie uninteresting and unimportant case that could actually have significant implications.[109] Specifically, as Arvay and Latimer identify:[110]

> The Court did not seem to even limit the superior court's power to act in aid of inferior courts, leaving open the possibility of superior courts acting in aid of administrative tribunals as well. One expects to find now a "variety of circumstances", whether involving provincial courts (child protection proceedings come to mind) or administrative tribunals (the list is "inexhaustible"), where inventive counsel will be seeking the assistance of the superior court.

Thus Canada's federal system shows contrasting approaches at different levels in the judicial hierarchy. Manitoba and Nova Scotia's Courts of Appeal have provided a series of principles and displayed reticence to engage the inherent jurisdiction, whereas the Supreme Court has taken an expansive view.

(c) Singapore

The concept of inherent jurisdiction has recently received a significant amount of analysis in Singapore, including by Goh Yihan, who has provided a comprehensive framework for determining the theoretical limits of a court's inherent jurisdiction, which this paper will discuss in the next part. For the moment, it is worth noting how its superior courts have treated their inherent jurisdiction, which – in contrast to other legal

106 Ibid, [50]
107 Ibid, [54].
108 Ibid.
109 J J Arvay and A Latimer "Cost Strategies for Litigants: The Significance of *R v Caron*" (2011) 54 SCLR (2d) 428, 439.
110 Ibid, 439.

sytems[111] – is recognised by its rules of court as follows:[112]

> For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

The first case has similar hallmarks to Ocean, discussed above. In *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and Others*,[113] the Court was asked to consider whether the court's inherent jurisdiction extended "to making orders against persons who are not parties to this action, requiring them to furnish handwriting samples." UMCI made an insurance claim against Tokio. Tokio attempted to resist the claim on the basis that UMCI fraudulently doctored cargo checklists so as to indicate damage had occurred in transit. To prove the fraud and establish its defence, *Tokio* required samples from the cargo handlers, a non-party to the proceedings, who were unwilling to voluntarily supply such samples.

The Court held that it had the jurisdiction to make an order for discovery under the rules of court.[114] In the alternative, however, the Court went on to consider whether it could invoke its inherent jurisdiction to grant the order. It noted that the rules of court acknowledging the existence of inherent powers did not give the Court unlimited powers, and instead the touchstone for the exercise of inherent jurisdiction was "necessity", viz. whatever needed to be done to secure justice between the parties and avoid abuses of the court's processes.[115] Necessity, however, was to be ascertained after looking at all the circumstances of the case, and not only with regards to the existing statutory guidance, an acceptance of the following statement of principle:[116]

> [T]he inherent jurisdiction of the High Court to make interlocutory orders for the purpose of promoting a fair and satisfactory trial is available to assist the Plaintiff in a case like this. The Court should not, in my judgment, be thwarted by the inherent laggardliness of the rule-book […] from making use of new methods of adducing evidence for the court if such evidence is otherwise admissible.

Thus whilst the Court acknowledged that its inherent jurisdiction was

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111 *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 4 SLR 25 (SGCA), [26].

112 Rules of Court, O 92, r 4, made pursuant to the Supreme Court of Judicature Act 1969 (UK). Note that the High Court of Singapore also possesses a substantive inherent jurisdiction to, among other things, engage in judicial review: *Ng Chye Huey v Public Prosecutor* [2007] 2 SLR 106, 134.

113 *UMCI Ltd v Tokio Marine and Fire Insurance Co (Singapore) Pte Ltd and Others* [2006] SGHC 142.

114 Ibid, [86].

115 Ibid, [89], citing *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117 at [81].

116 *UMCI*, above n 113, [95], citing *Ash v Buxted Poultry Ltd*, The Times (29 November 1989) 44.

constrained by explicit and contrary statutory provisions, it acknowledged that absent a conflict, the jurisdiction was not so constrained and indeed, where necessary, should extend beyond statutory guidance. In the event, the Court held this was not such a case where necessity required the exercise of its inherent jurisdiction.

The second case, *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd*, involved whether the Court of Appeal (Singapore's highest court) has the inherent jurisdiction to reopen and set aside an earlier decision which it made and reconstitute itself to rehear the matters dealt with in that decision.[117] The applicants alleged that a decision of the Court of Appeal had breached natural justice and in such a situation, the Court had an inherent jurisdiction to reopen that decision in order to correct the injustice. The argument was reliant upon (inter alia) the House of Lords' decision in *R v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No 2)*[118] where the Court had used its inherent jurisdiction to vacate and rehear an earlier decision tainted by apparent bias.

The court below had held that cases like Pinochet were distinguishable on the basis that the House of Lords was operating in a statutory vacuum, whereas the Court of Appeal in Singapore was a statutory creature. Rejecting the argument that an inherent jurisdiction to reopen existed, that court stated the following:[119]

> "Inherent power" should not be used as though it were the joker in a pack of cards, possessed of no specific designation and used only when one [does] not have the specific card required. The same might be said of "doing justice" because one man's justice can be another man's injustice. "Inherent power" does not mean unlimited power, and if a substantive power to reopen a case on [the] merits is to be given, it must come expressly from the legislature.

Whilst the Court of Appeal upheld the High Court's decision overall, it held that theoretically, it had the inherent jurisdiction to reopen and rehear an issue which it decided in breach of natural justice and to set aside the whole or part of its earlier decision founded on that issue.[120] The rationale for this conclusion was familiar and similar to that provided in the decisions examined above:[121]

> […] we see no justification to circumscribe the inherent jurisdiction of this court (which would be the effect if we were to rule that the CA has no inherent jurisdiction to reopen an issue which it decided in breach of natural justice) as that could potentially result in this court turning a

117 *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2010] SGCA 39, [1].

118 *R v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.

119 *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2009] SGHC 234 at [9], cited in *Lee Tat*, above n 117 at [39].

120 *Lee Tat*, above n 117, [55].

121 Ibid, [55].

> blind eye to an injustice caused by its own error in failing to observe the rules of natural justice.

Both *UMCI* and *Lee Tat* are in accordance with the principles expressed in the Court of Appeal's decision in *Wee Soon Kim Anthony*.[122] The principles, as summarised by Jeffrey Pinsler, relevantly include the following:[123]

- The Court may exercise its inherent jurisdiction not only to avoid "injustice", but also to avoid "serious hardship or difficulty or danger". In determining whether the exercise of the Court's approach is appropriate, it must be flexible and not bind itself to "rigid criteria or tests";
- If the court acts "judiciously" or in a "just and equitable" manner, it does not have to limit the circumstances in which it can exercise its jurisdiction;
- Necessity – contrasted with a party's interest or desire – is an essential criterion to invoke the inherent jurisdiction;
- In considering whether to exercise its inherent jurisdiction, the Court may consider its own needs, viz. whether it would be able to deliberate more effectively; and
- The Court should not exercise its inherent jurisdiction merely because to do so would not cause prejudice to the other party.

The undercurrent in these principles is the acceptance of the theoretically unlimited inherent jurisdiction, and the rejection of the High Court's approach in *Lee Tat*, namely that the amorphousness of "justice" meant that limits were important. On the contrary, it is this amorphousness that means there cannot be limits. In his analysis of those principles, Pinsler argues that as a consequence, the Court has an inherent jurisdiction to fill lacunae in the procedural rules and, in extreme circumstances, override or modify those rules, if it is acting judiciously and the circumstances require it to do so.[124] Although Pinsler welcomed the clarification, it is clear that the Court's ability to act beyond its statutory bounds in Singapore is theoretically significant, even if it is not practically realised.

(d) New Zealand

The concept of inherent jurisdiction in New Zealand has received close examination in recent years. Quite incidentally to the issue in the case, the inherent jurisdiction of the High Court was examined by the Supreme Court of New Zealand in *Mafart v Television New Zealand Ltd*, and described by Elias CJ as so:[125]

> Except to the extent modified by statute and rules, the Court continues to have inherent jurisdiction and powers to determine its own procedure. The inherent jurisdiction is not ousted by the adoption of rules, but is

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122 See n 111 above.

123 J Pinsler "Inherent Jurisdiction Re-Visited: An Expanding Doctrine" (2002) 14 SAcLJ 1, 12–13, citations omitted.

124 Ibid, 14–15.

125 *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 18 (SCNZ).

> regulated by the rules, so far as they extend. To the extent that the rules do not cover a situation, the inherent jurisdiction supplies the deficiency.

The Chief Justice then proceeded to adopt Jacob's definition of the inherent jurisdiction. With this framework in mind, the Court of Appeal and Supreme Court in *Siemer v Solicitor-General* provided comprehensive analysis of a particular exercise of inherent jurisdiction, viz. The suppression of publication of its judgments.[126] Siemer is important for its analysis of the inherent jurisdiction generally, but in particular, its divergence from authorities in the United Kingdom.

The High Court made important pre-trial rulings in a very high-profile case in December 2010. The rulings were accompanied by orders prohibiting their publication or commentary about them. Mr Siemer immediately published two articles on his website about the rulings and provided links to the rulings themselves. The Solicitor-General successfully applied to the Court that it hold Mr Siemer in contempt, and the Court imposed a penalty of six weeks' imprisonment. Mr Siemer appealed to the Court of Appeal against the decision on the grounds that, inter alia, the High Court never had the jurisdiction to make the suppression orders in the first instance.

The basis of Mr Siemer's argument was that a 1975 decision establishing the inherent jurisdiction to make such suppression orders was wrongly decided and had diverged from precedent in the United Kingdom. The 1975 precedent, *Attorney-General v Taylor*,[127] dealt with similar circumstances, and stood for the proposition the High Court could exercise its inherent jurisdiction to permanently suppress the names of witnesses in a trial open to the public if doing so was in the interests of justice.[128] Such a power was available to the Court because – and only because – it was necessary to enable it to act effectively.[129] Adopting the approach of Jacob, the Court of Appeal held that it may even exercise such a jurisdiction in respect of matters regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision.[130]

In the years since *Taylor*, however, whilst New Zealand retained the precedent as good law, the United Kingdom diverged. The Privy Council in *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago*[131] considered and rejected *Taylor*, holding that a court could not extend its inherent jurisdiction to postponing publication of a report of proceedings conducted in open court. Only legislation could confer such a power, and without such statutory guidance, an order postponing the fair and

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126 *Siemer v Solicitor-General* [2012] 3 NZLR 43 (NZCA); [2013] 3 NZLR 441 (SCNZ).

127 *Attorney-General v Taylor* [1975] 2 NZLR 138 (SC), upheld by the Court of *Appeal in Taylor v Attorney-General* [1975] 2 NZLR 675.

128 *Siemer* (NZCA), above n 126, [19].

129 *Taylor v Attorney-General*, above n 127, 683.

130 Ibid, 680.

131 *Independent Publishing Co Ltd v Attorney-General of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 AC 190.

accurate recording of court proceedings infringed the constitutional rights of free speech and freedom of the press.[132] The Court of Appeal in *Siemer* respectfully disagreed with the Privy Council's approach, noting the difficulties with the English system that relies on non-binding judicial warnings against publication rather than suppression orders.[133] Accordingly, the Court decided to retain the precedent of *Taylor*, noting that:[134]

> […] once the existence of an inherent power in a court to regulate its procedures is accepted, New Zealand courts should be free to settle its boundaries and develop the law according to their perception of domestic conditions and policy considerations.

Moreover, it disagreed with Mr Siemer's contention that even if *Taylor* remained good law, legislative reforms in 1985 and 2011 that further regulated suppression of proceedings impliedly repealed that decision. Those legislative reforms allowed suppression of evidence, submissions and the names of witnesses, but did not cover final judgments. It was significant that the 1985 provisions also included the following:[135]

> The powers conferred by this section to make [suppression] orders [...] are in substitution for any such powers that a court may have had under any inherent jurisdiction or any rule of law; and no court shall have power to make any order of any such kind except in accordance with this section or any other enactment.

The Court of Appeal had earlier noted that "the legislature should not be treated as having interfered with [an] inherent power unless that conclusion was required by the terms or spirit of the enactment."[136] In this vein, legislative silence as to the inherent power to suppress judgments was interpreted by the Court of Appeal as leaving the inherent jurisdiction intact; it was not a code that accordingly ousted any powers that fell outside its ambit.[137] The 2011 provisions covered the same types of suppression but were more prescriptive. Importantly, however, they lacked the provision ousting the inherent jurisdiction cited above, causing the Court of Appeal to observe: "Parliament could have closed off the inherent jurisdiction or power if it had wished."[138] The Court thus followed the approach that required Parliament to act explicitly in ousting or interfering with the inherent jurisdiction. This was in accordance with earlier Supreme Court authority which held that a court will not infer from statutory silence an exclusion of its inherent jurisdiction.[139]

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132 *Siemer* (NZCA), above n 126, [43].
133 Ibid, [61].
134 Ibid, [74].
135 Criminal Justice Act 1985 (NZ), s 138(5).
136 *Siemer* (NZCA), above n 126, [90], citing *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA), 130.
137 *Siemer* (NZCA), above n 126, [81]–[84].
138 Ibid, [90].
139 *Zaoui v Attorney General* [2005] 1 NZLR 577 (NZCA); (SCNZ); Joseph, above n 18, 232.

The Court of Appeal's judgment was upheld by the Supreme Court, with the majority of the Court holding for similar reasons to the Court of Appeal that the statutory scheme did not act as a code. After reviewing the decision in *Taylor* and the cases that followed, McGrath and William Young JJ for the majority held:

> [169] Our discussion of the New Zealand cases indicates that, since the 1970s, New Zealand courts have exercised the power to make non-party suppression orders which go beyond anything provided for by statute. We have demonstrated that this power has not been extinguished by either the Criminal Justice Act or by any earlier enactment. Neither s 138 of the Criminal Justice Act nor the provisions in the Criminal Procedure Act purport to provide anything like a code in relation to non-party suppression orders.

Moreover, there was a practical concern that such an inherent power was necessary to protect fair trial rights and the administration of justice. For example, in the absence of such a power, there is a heightened risk of material being published that irreparably damages fair trial rights, and since there is no statutory ability to suppress information in civil proceedings, the revocation of such a power would invalidate such orders made in the past, with significant consequences for those who had relied upon them.[140]

The Chief Justice dissented from the majority's view, holding that the that inherent power to make the suppression orders at issue was ousted by s 138 of the Criminal Justice Act 1985. In her judgment, Elias CJ does not cite her dictum in *Mafart*, although the two decisions are reconcilable insofar as she felt *Siemer* was not a situation where "the rules do not cover a situation [and] the inherent jurisdiction supplies the deficiency."[141] Looking at s 138, Elias CJ held that its provisions were more than apt to protect fair trial rights whilst respecting the importance of open justice, and that the inherent power was either ousted by or in contradiction with the provisions. She accordingly held:

> [46] It may be that the practice of the courts has not been sufficiently respectful of the provisions of s 138 and its emphasis on open justice. [...] As the majority reasons indicate, the approach [the High Court] adopted seems general practice. If so, it does not seem to me to meet the open justice requirements of s 138. More importantly, I am of the view that any inherent power to make the suppression orders made in respect of the judgment of 9 December 2010 was excluded by s 138. I would allow the appeal on this basis.

The majority's – and not Elias CJ's – judgment in the Supreme Court's decision in *Siemer* is indicative of the approach to inherent jurisdiction in New Zealand. In *Harley v McDonald*,[142] which concerned whether a court possessed the inherent jurisdiction to award costs against a barrister personally, the Court of Appeal cited several of its previous decisions

140 *Siemer* (SCNZ), above n 126, [173].
141 See n 125 above.
142 *Harley v McDonald* [1999] 3 NZLR 545 (NZCA).

which confirmed Jacob's expansive approach.[143] Those decisions held that it was unnecessary and undesirable to define the inherent jurisdiction,[144] whose strength was its adaptability.[145] The Court of Appeal in *Harley* quoted Thomas J in *R v Moke* and Lawrence to reiterate the point:[146]

> [I]t is both unwise and unnecessary to seek to define the scope of the Court's inherent jurisdiction. Broad principles governing its exercise is all that is required. The Court may invoke its inherent jurisdiction whenever the justice of the case so demands. It is a power, which may be exercised even in respect of matters, which are regulated by statute or by rules of Court providing, of course, that the exercise of the power does not contravene any statutory provision. The need to do justice is paramount.

In the most recent and comprehensive analysis of the inherent jurisdiction in New Zealand courts, Joseph argues that to treat is the inherent jurisdiction as one nebulous concept is a mistake. Instead, it is better understood as "being comprised of a number of separate jurisdictions, which have developed piecemeal and mostly in isolation".[147] Accordingly, if the inherent jurisdiction is not simply a singular concept, it is questionable as to whether the "broad principles" that the Court of Appeal has referred to have the ability to provide accurate or meaningful guidance. If one particular category or manifestation of inherent jurisdiction is of greater constitutional importance than another, then it is uncertain whether the principles will have equal application.[148]

Joseph castigates New Zealand courts' approach for leaving "unsettling and unanswered questions".[149] She argues that "it is unsatisfactory that our superior appellate courts must usurp jurisdiction to correct injustices. Any lacuna in the jurisdiction of either court ought to be squarely confronted."[150] While the Court of Appeal in *Siemer* went some way to clarifying the difference between inherent jurisdiction and inherent powers, it is questionable whether it or the Supreme Court's expansive approach can provide guidance in future decisions and this is indicative of New Zealand's courts' approaches to the inherent jurisdiction overall.

4 Conclusions on the nature and exercise of the inherent jurisdiction

This part has focused on outlining the nature and exercise of a court's inherent jurisdiction in a range of common law legal systems. From the analysis above, we can draw some conclusions.

First, the terminological confusion as to "inherent jurisdiction", "inherent powers" and the relationship between those concepts and

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143 Ibid, [48]–[49].
144 *Accused (CA 60/97) v Attorney-General* (1997) 15 CRNZ 148, 151 (NZCA).
145 *R v Accused (T 4/88)* [1989] 1 NZLR 660, 667 (NZCA).
146 *R v Moke and Lawrence* [1996] 1 NZLR 263, 267 (NZCA) cited in *Harley* at [49].
147 Joseph, above n 18, 225.
148 Ibid, 232.
149 Ibid, 238.
150 Ibid.

"superior courts" is endemic. Both commentators and courts have used the terms interchangeably, and without regard to the strict definition of "inherent jurisdiction" that sees it attaching only to those courts without a statutory foundation. Courts have justified the exercise or invention of inherent powers on the same grounds as they do the exercise or expansion of the inherent jurisdiction; they have argued that explicit statutory direction is the only delimiter available. Meanwhile, commentators have treated the two as interchangeable because the two concepts share a common denominator in their lack of a statutory basis.[151]

Moreover, the substantive effect of the Court's inherent powers, described as fundamentally procedural in nature, means that the substantive/procedural distinction between the two concepts is of little consequence.[152] As we will see, the distinction is also of little importance in terms of the limits on the exercise of the inherent jurisdiction, for they apply equally to the exercise of inherent powers. Nevertheless, other courts and commentators are committed to the distinction, and thus the confusion is lamentable.

Second, in terms of the exercise of the inherent jurisdiction, each of the four jurisdictions analysed have adopted Jacob's definition. Moreover, there is a symmetry in the principles that courts have identified as guiding the exercise of the jurisdiction. Synthesised, those principles are as follows:

1. The exercise of the inherent jurisdiction will only occur where and when it is necessary to do so;
2. The ultimate aim of the inherent jurisdiction is to ensure that justice is done between the parties to litigation (and other affected persons), and this involves a process of balancing the rights and responsibilities of all those involved; and
3. The exercise of the inherent jurisdiction cannot contravene legislative intention, but only explicit legislative intention will suffice to ousting that inherent jurisdiction.

Whilst each of these principles is a common denominator in the systems analysed, there are significant differences in emphasis. Accordingly, whilst Canada, New Zealand place strong emphasis on giving the Court flexibility to achieve justice (arguably to the detriment of the first and third principles),[153] the United Kingdom has expressed some reluctance to pre-empt legislative action.[154] Singapore recognises that Parliament cannot constrain the inherent jurisdiction in the absence of explicit direction, but the emphasis it places on necessity means that it is not often exercised.[155]

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151 See, eg, Liang, above n 11, 382.
152 Charles, above n 41, 91.
153 See discussion of *Caron* and *Siemer* above.
154 See discussion of *Al Rawi* above.
155 In each of the cases discussed in Singapore the declaration of an expansive inherent jurisdiction were not followed by its actual exercise.

What are we to garner from this conclusion? It is an obvious reflection of what New Zealand courts termed the ability of individual jurisdictions to develop organically. It is also an indication that Jacob's definitions and analysis has not acted as authoritative guidance. That each system has a different approach to the inherent jurisdiction whilst simultaneously citing Jacob is evidence that his account acts instead as a universal justification. The next part of this paper will attempt to move beyond justification and instead identify the limits on the exercise of the inherent jurisdiction.

II The Limits of the Inherent Jurisdiction

We have seen in Part I the various ways the inherent jurisdiction of the Court is defined and exercised by a range of different common law systems. What was evident in the set of three principles this paper has identified as guiding the exercise of the inherent jurisdiction is that they act as a floor; a set of minimum criteria that are required before its exercise is justified. It is less obvious as to whether they can act as a ceiling. As the United Kingdom Supreme Court in *Al Rawi* remarked:[156]

> In proceedings which are not regulated by statute or statutory rules, it might be thought that there are no limits to the inherent power of the court to regulate its own procedure and that it has an untrammelled power to manage litigation in whatever way it considers necessary or expedient in the interests of justice.

Yihan describes the flexibility of these principles as a strength, but the concomitant uncertainty also makes it a weakness; they are simply too broad and amorphous to act as limits in and of themselves.[157] Instead, using the principles, he develops three-stage test to determine when a court can and should invoke its inherent jurisdiction. The test focuses on (a) whether there is express legislative exclusion of the jurisdiction; (b) if not, whether legislative exclusion should be implied; and (c) whether there is sufficient need to exercise the jurisdiction.[158]

Although a welcome synthesis, it still has a heavy focus on the legislative limits of the inherent jurisdiction, and says little about its limits absent any express or implied legislative exclusion. Dockray observes, however, there *must* be limits on a court's inherent jurisdiction beyond statutory regulation. There are many cases which have decided not to expand the Court's inherent jurisdiction, despite the satisfaction of these minimum criteria, which is "quite inconsistent with the idea that the inherent jurisdiction is an unlimited reservoir from which new powers can be fashioned at will."[159] This part will attempt to identify the theoretical and practical constraints that operate to limit this "untrammelled power" of the Court.

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156 *Al Rawi*, above n 63, [18].
157 Yihan, above n 42, 200.
158 Ibid, 201–209.
159 Dockray, above n 6, 130.

1 Theoretical limits

The Court in *Al Rawi* concluded with his 'basic rule' that its inherent jurisdiction was not in fact unlimited.[160] Even free of statutory constraint, there are wider principles at play that not only guide the court in the exercise of its inherent jurisdiction but also prevent its exercise. This paper argues that these principles are constitutional in nature, and as such, in attempting to to synthesise these principles into limits, a great amount of utility is derived from Dicey's observation that two principles pervade the English constitution: parliamentary sovereignty and the rule of law.[161] Of course, neither the Diceyan conception of parliamentary sovereignty nor his conception of the rule of law is universally accepted, and they have sustained considerable criticism.[162] However, for the purposes of this paper Dicey's perspective provides a useful starting point as a framework of two important constitutional values that could limit the exercise of the inherent jurisdiction.

Dicey's "famously straightforward"[163] definition of parliamentary sovereignty was as follows:[164]

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

Obviously, as already discussed, the principle of parliamentary sovereignty forms a clear limit to a court's inherent jurisdiction. The inherent jurisdiction is defined as those areas of jurisdiction and powers not yet provided for through legislation and a Court will and must yield its inherent jurisdiction should it run contrary to legislative intention. We have also seen, however, that it is not a universal limit. Absent legislative provision, there is no limit to the exercise of inherent jurisdiction, and both those systems with an entrenched and supreme constitution (such as Canada[165] and Singapore,[166]) and those without (New Zealand and England) recognise that sometimes the constitutional importance of a court's inherent jurisdiction is such that only explicit legislative action – and sometimes only constitutional amendment – will displace it.[167]

Less obvious is whether Dicey's second principle of the rule of law

160 See n 67.

161 A V Dicey *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1959), 406.

162 See, for example, J Allison *The English Historical Constitution* (Cambridge: Cambridge University Press, 2007), chapters 7 and 8.

163 M Gordon "The conceptual foundations of parliamentary sovereignty: reconsidering Jennings and Wade" (2009) PL 519, 520.

164 Dicey, above n 161, 39–40, cited in Gordon, above n 163, 520.

165 Canada Act 1982 (UK); Constitution Act 1982, s 52.

166 Constitution of the Republic of Singapore, s 4.

167 Joseph, above n 18, 232; *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725 at [44] (SCC).

operates as a limit. In contrast to parliamentary sovereignty, far from limiting a court's inherent jurisdiction, the rule of law is seen as its enabler.[168] This is assisted by Dicey's definition of the rule of law, which had three meanings:[169]

- the supremacy of "regular law" (judicial power) over "arbitrary power" (discretionary administrative decision-making);
- equality before the law (officials were bound by the same laws as ordinary subjects); and
- the constitution was the product of the common law and not legislative instrument.

In each of these three meanings, the inherent jurisdiction of the Court is given implicit prominence and validity, because it requires judicial power free from restraint. For example, it is this conception of the rule of law that makes a court's inherent jurisdiction to engage in judicial review of administrative decisions a "fundamental element of a constitution which is based on respect for the rule of law"; part of the inherent jurisdiction that "cannot be taken away consistently with respect for the rule of law".[170]

In *MacMillan Bloedel v Simpson*, the Supreme Court of Canada held that a statute could not give a youth court the exclusive jurisdiction over young persons charged with contempt; the inherent jurisdiction would still vest this power in the superior court absent a constitutional amendment. The Supreme Court described such a power as "crucial" to the rule of law, and removing it would "maim the institution which is at the heart of our judicial system".[171] This decision is a reflection of the almost definitional necessity of inherent jurisdiction under the Diceyan conception.

As mentioned, Dicey's conception, however, has come under significant criticism as being nothing more than a meaningless and rhetorical device that "exaggerated the virtues of the courts".[172] Others have criticised it as not going far enough, arguing that "the rule of law demands not merely that positive law be obeyed but that it embody a particular vision of social justice."[173] A conception that falls somewhere between these two viewpoints was offered by Hogg and Zwibel, who argue that the rule of law is manifested in:[174]

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168 See, eg *Gillespie*, above n 85, [117].

169 P W Hogg and C F Zwibel "The Rule of Law in the Supreme Court of Canada" (2005) 55 U Toronto LJ 715, 715–716.

170 J J Clyde and D Edwards, *Judicial Review* (Scottish Universities Law Institute/W Green, 1999), [1.01] cited in *Ho, Ho, Hong and Chin v Lord Advocate* [2004] SC 1, [36] (OHCS).

171 *MacMillan Bloedel*, above n 167 [44].

172 Hogg and Zwibel, above n 169, 716.

173 Ibid, 717

174 Ibid, 718.

1. a body of laws that are publicly available, generally obeyed, and generally enforced;
2. the subjection of government to those laws; and
3. an independent judiciary and legal profession to resolve disputes about those laws.

This conception preserves the role of the judiciary, but does not make their power and office sacrosanct; the "rule of law" cannot simply act as a vehicle for protecting powers of judges as the Supreme Court arguably did in *McMillan Bloedel*.[175]

Under such a definition, it is clearer how the inherent jurisdiction is limited by the rule of law. As former Chief Justice of Australia, Murray Gleeson, argues:[176]

> The rule of law is not just a principle that, in a variety of ways, is enforced by the courts. It controls the operation of the courts themselves.

Gleeson argues that it does so by constraining judicial discretion. Of course, one of Jacob's core principles is that there is a "vital juridical distinction" between the inherent jurisdiction and judicial discretion.[177] However, whatever Jacob's conception of the inherent jurisdiction was, there is no doubt that today, the exercise of the inherent jurisdiction is a quintessential exercise of judicial discretion.[178] As Lamer identifies, judicial discretion is "the power to select the most appropriate among a variety of permissible solutions in adjudicating disputes based on broad statements of principle."[179] This describes the inherent jurisdiction: it is gives the court the ability to craft solutions to particular problems on the basis of a broad principles. It is a "power born out of the realization that no one can codify all solutions to human problems in advance of their occurrence" and therefore, once again in contrast to Jacob's contention, "it is, above all, a power and therefore a human institution that must operate within fixed boundaries."[180]

If the inherent jurisdiction operates as a judicial discretion, then it – as with all discretionary power – is anathema to the rule of law because it carries with it the risk of arbitrariness.[181] The rule of law, accordingly, limits the discretionary power of a judge so as to make the outcome of litigation clear, predictable, and not dependent upon the personality of any particular judge.[182] Judges are limited by statute, but also by the common law itself in the form of binding or influential precedent, and

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175 Ibid, 732.
176 M Gleeson "Courts and the Rule of Law" in C Saunders and K Le Roy (eds), The Rule of Law (Sydney: Federation Press, 2003), 178, 188.
177 See n 9 above and Jacob, above n 1, 25.
178 Charles, above n 41, 82.
179 F Lamer "The Rule of Law and the Perils of Judicial Discretion" (2012) 56 SCLR (2d) 135, 137.
180 Ibid, 137.
181 Ibid, 139.
182 Gleeson, above n 176, 191.

fidelity to both these sources of law is of such importance that the "power and influence of a supreme court is greater, the more its behaviour is constrained by past decisions", because its authority is derived its conformance to the discipline of the law in which it administers.[183]

Thus, it follows from the rule of law that no discretion, including judicial discretion, is unlimited.[184] It is, instead, "a delegation of authority importing with it an implied duty to define, on a case-by-case basis, its own limits."[185] Such a description explains the United Kingdom Supreme Court's self-imposed limit on its inherent jurisdiction in *Al Rawi* – the Court cannot exercise its judicial discretion in such a manner that would undermine fundamental common law principles because the Court is bound by those principles; they are the limits. The alternative, is, as Dockray observes, a rule that gives a Court unlimited inherent jurisdiction as long as it is exercised in the interests of justice. Such a rule "is too vague and unpredictable to be treated as having the quality of law. Taken literally, this claim is an invitation to the court to assume virtually despotic powers".[186] Accordingly, such a definition of the inherent jurisdiction is far from enabled by the rule of law, but is instead inimical to the concept, and explains why Dockray argues that the inherent jurisdiction is "an inefficient and an inappropriate way to develop the law."[187]

Accordingly, Dicey's two constitutional principles assist a great deal in providing firm theoretical limits to the inherent jurisdiction. Parliamentary sovereignty prevents a court exercising its inherent jurisdiction in a way contrary to legislative intent; the rule of law prevents a court exercising its inherent jurisdiction in a way contrary to established common law practice and principle.

As Gleeson, notes, however, "the rule of law is not enforced by an army" and instead depends on the respect by the judiciary.[188] The theoretical limits that these constitutional principles provide depend on judicial acquiescence, and the cases discussed from the various systems in the first part of this paper show that this acquiescence is not always forthcoming. To that end, there must exist complementary practical limits on the exercise of a court's inherent jurisdiction.

2 *Practical limits*

Gleeson makes an observation that is apposite in identifying an obvious practical limit on the exercise of inherent jurisdiction.[189]

> There are 976 judicial officers in Australia, and only seven of them are judges whose decisions are never the subject of a potential appeal to a

183 Ibid, 192.
184 *R v Morgentaler* [1988] 1 SCR 30, [227] (SCC).
185 Lamer, above n 179, 146.
186 Dockray, above n 6, 128–129.
187 Ibid, 131.
188 Gleeson, above n 176, 192.
189 Ibid, 190.

> higher court or some other form of judicial review. The appellate system is a powerful instrument for insuring adherence to the principle of legality by the judiciary.

The same principle applies in every common law system; a judge that steps beyond her bounds in exercising her inherent jurisdiction will more than likely be subject to appeal. For example, Lord Dyson postulated the following in *Al Rawi* (a decision which, incidentally, confirmed the overturning of a lower court's expansion of the inherent jurisdiction):[190]

> [I]t is surely not in doubt that a court cannot conduct a trial inquisitorially rather than by means of an adversarial process […] or hold a hearing from which one of the parties is excluded. These (admittedly extreme) examples show that the court's power to regulate its own procedures is subject to certain limitations.

It is more accurate to say that a court *will not* or *must not* do these things rather than that they *cannot*, and the distinction is important. Of course a court could conduct an inquisitorial trial or exclude a party, and could do so by exercising its inherent jurisdiction in the name of justice and necessity. However, were a court to do so, an appeal by one or both parties would be a near inevitability. On appeal, the appellate court would likely order a new trial, because the original did not conform to the well-established requirements and norms of the trial process, found in both statute and in the common law. The appellate court would hold that the trial judge was acting beyond her discretion in engaging her inherent jurisdiction, and thus was acting beyond the law. This almost inevitable consequence is what keeps trial courts within the bounds of their discretion, and thus acts as a de facto limit on their inherent jurisdiction: there is no point in exercising it if the resulting decision will inevitably be overturned.

Of course, the very existence of the inherent jurisdiction and the examples of expansion detailed in Part I of this paper show that the limits that appellate threat places on the inherent jurisdiction are not absolute. Novel expansions of the inherent jurisdiction still occur despite the threat of such expansions being rejected by appellate courts. A court must therefore calibrate the extent of that novelty so as to insulate it from the appellate threat. A starting point for this calibration exercise is the dicta in the High Court of Australia's decision in *Breen v Williams*.[191]

> Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal principles.

In Canada, it was held in *Gillespie* that "courts must be extremely cautious when asked to extend the scope of inherent jurisdiction to novel circumstances", and there is a preference for major innovations to be

190 *Al Rawi*, above n 63, [22].

191 *Breen v Williams* (1996) 186 CLR 71, 115, cited in Gleeson, above n 176, 190.

introduced by legislation or (if procedural) by rules of court.[192]

Similarly, House of Lords held in *Tehrani v Secretary of State for the Home Department*:[193]

> Courts whose jurisdiction is not statutory but inherent, too, may have jurisdictional limits imposed on them by rules of court. But whether or not a court has jurisdictional limits (in the strict sense) there are often rules of practice, some produced by long-standing judicial authority, which place limits on the sort of cases that it would be proper for the court to deal with or on the relief that it would be proper for the court to grant.

Thus that the theoretical limits that the rule of law places on the inherent jurisdiction manifest themselves in the appellate system: there are limits to the inherent jurisdiction, and those limits are only extendable or modifiable if such alterations are based on existing and accepted legal principle. Any change beyond that existing principle ought to come from the legislature. This explains decisions such as *Anton Piller*. Despite its ongoing controversy the decision was an extension of the existing common law and statutory rights to a search order with notice to the other party. It is revealing how Lord Denning justified the extension of the inherent jurisdiction to grant such orders ex parte:[194]

> If the defendant is given notice [of the order] beforehand and is able to argue the pros and cons, it is warranted by that case in the House of Lords and by [the Rules of the Supreme Court]. But it is a far stronger thing to make such an order ex parte without giving him notice. This is not covered by the Rules of the Supreme Court and must be based on the inherent jurisdiction of the court. There are one or two old precedents which give some colour for it [...] But they do not go very far. So it falls to us to consider it on principle.

This is not a case of inventing a legal doctrine; there was already a baseline principle and analogies which could be made that guided the exercise of the inherent jurisdiction. In citing the existing statutory scheme and relevant precedents, Lord Denning had calibrated his approach so that he was simply extending an existing jurisdiction by way of the inherent jurisdiction, thereby insulating the decision, despite its controversial nature, from appeal (the decision was never appealed). In contrast, Dockray provides several examples of where the Court has not exercised its inherent jurisdiction,[195] and the resounding theme in those cases is that to do so would have been a bridge too far: either established legislative or common law principle (or both) meant in those cases, the exercise of the inherent jurisdiction would have amounted to invention of powers and doctrine rather than extension, thus raising the prospect of a successful appeal.[196] Of course, courts are not so conniving as to

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192 *Gillespie*, above n 85, [102]; [110].

193 *Tehrani v Secretary of State for the Home Department* [2006] UKHL 47, [2007] 1 AC 521 at [66].

194 *Anton Piller*, above n 53, 60-61.

195 Dockray, above n 6, 130.

196 See, eg *CT Bowring & Co (Insurance) Ltd v Corsi & Partners Ltd* [1994] BCC

simply make a decision based on the likelihood that it will face appeal, but it certainly is a factor in the decision-making process, even if it is only a subconscious one.

Absent the threat of appeal, there is doubt as to whether a court would fetter its own discretion in this way. Certainly, the extreme examples of Lord Dyson would not be an inevitability, but one can easily imagine a trial scenario where necessity and expediency make an abrogation of normal trial procedure through the inherent jurisdiction desirable, and the lack of appellate threat makes it more likely that the desire is acted upon. Imagination is not necessary of course, because there are plenty of examples of where the lack of an appellate threat means that the de facto limit it provides is also absent.

Caron, discussed in Part I above, held that "novelty has not been treated as a barrier to necessary action" under the inherent jurisdiction.[197] Unlike *Anton Piller*, the Supreme Court of Canada did not need to seek analogous exercises of the inherent jurisdiction to justify its decision that superior courts had the inherent jurisdiction to grant advance costs orders for litigation in lower courts. Instead, the Court started from the principle expressed by Jacob that the inherent jurisdiction extended "to render assistance to inferior courts to enable them to administer justice fully and effectively"[198] and held that this justified this particular exercise of the jurisdiction, even in the face of an existing statutory regime.[199]

Similarly, the Supreme Court of Canada *British Columbia Telephone Co* developed an inherent jurisdiction to resolve operational conflict between tribunals that was termed by one commentator as coming "out of nowhere".[200] In *Taylor*, the decision relied upon by the New Zealand Court of Appeal and Supreme Court in Siemer, the Court was necessitated "by the public interest" rather than existing legal norms in extending the inherent jurisdiction to making particular suppression orders, despite a pre-existing statutory regime.[201] The Court of Appeal in Singapore in *Lee Tat* and approved a novel expansion of the inherent jurisdiction to revisit its own decisions, despite the English precedent it relied upon having significant differences.

The common denominator in these decisions is the absence of an appeal risk. The discipline that applies to the lower courts when they engage in novel expansions of the inherent jurisdiction is lacking at the highest appellate courts, because there simply is no disincentive beyond the theoretical limits that apply to all courts. Thus lower courts conform closely to the theoretical constraints of parliamentary sovereignty and the rule of law because of the practical constraints that apply; appellate courts, lacking the practical constraints, throw caution to wind when it

713, 729 (CA) as cited by Dockray above n 6, n 80.

197 *Caron*, above n 4, [27].

198 Ibid, [26], quoting Jacob, above n 1, 48.

199 Ibid, [26]–[35].

200 Philip Jones, above n 4.

201 *Gillespie*, above n 85, [103]–[105].

comes to the theoretical.

Of the cases discussed in this paper, only the United Kingdom Supreme Court's decision in *Al Rawi* is the only example of a court of final appeal exacting the same discipline that practically constrains lower courts. Whilst it is arguable that this decision might have been influenced by the highly politicised issues, the Court nevertheless held that using its inherent jurisdiction to apply a closed material procedure in a civil context would amount to invention rather than extension of existing powers. In doing so, the Court respected, and indeed, enunciated, the theoretical limits that apply to the inherent jurisdiction, even in the absence of practical limits.

As Lord Dyson stated, "[i]f this is to be done at all, it is better done by Parliament after full consultation and proper consideration of the sensitive issues involved."[202] Such is the response to the other appellate courts which exercised the jurisdiction out of necessity. As the aftermath of the *Al Rawi* decision shows, legal necessity can also prompt legislatures into action; the powers that the Supreme Court deemed inappropriate to exercise in the inherent jurisdiction were implemented by Parliament less than two years later.

The alternative – if the Supreme Court had decided it did have the inherent jurisdiction to extend closed material procedures to the civil context – could have caused the same problems that followed *Anton Piller*. Despite insulating itself against the appeal threat by recognising the theoretical constraints on the jurisdiction, *Anton Piller* was nevertheless a highly controversial decision that introduced a power that, although originally tightly circumscribed and intended as an extraordinary measure, became commonplace and a cause of injustice, until legislative intervention twenty years afterward. Other cases discussed in this paper – *Siemer*; *Caron* – also involved significant legal impact caused by the pursuit of reducing another injustice. The consequences of those cases and the concerns for certainty expressed after cases like *British Columbia Telephone Co* brings the analysis back to the theoretical and normative limits discussed eartlier: even absent an appellate threat, the uncertainty and potential injustice of an unjustified expansion of the inherent jurisdiction *should* limit the court in its exercise, even if that does not occur often in practice.

Final courts of appeal might act without practical constraints in the development of the inherent jurisdiction, but this does not mean that they are free from theoretical constraints or a practical solution in passing the issue to another arm of government. Whilst "necessity" is a powerful reason to act, it cannot and should not undermine the discipline that the rule of law requires and imposes upon all courts.

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202 *Al Rawi*, above n 63, [48].

Conclusions

This paper commenced with a summary of Jacob's seminal piece on the inherent jurisdiction of the court. Jacob is doubtless the doyen of this area of law, and he is cited with universal approval in nearly every common law system. However, with the greatest respect, it is increasingly clear that regardless of the authority of Jacob's account in 1970, it paints an incomplete picture in 2013.

Jacob's definition of the inherent jurisdiction, an expansive account that includes inherent powers, is not restricted to superior courts as he maintains. Although there is an important and defensible distinction between the inherent jurisdiction and inherent powers, and one evident by different common law systems' commitment to distinguishing superior courts from those lower in the judicial hierarchy, increasingly, the inherent jurisdiction is being used as an umbrella term for both concepts.

The confusion surrounding the terminology is possibly the reason why the concept of the inherent jurisdiction has such an ephemeral quality. It might also explain why Jacob and courts since have been unwilling or unable to prescribe limits to the inherent jurisdiction; it is difficult to contain or control the indefinable. Once the exercise of the inherent jurisdiction by various common law systems is examined, however, common denominators arise that provide it with definable substance.

That substance takes the form of a set of three principles, namely that the inherent jurisdiction:

(a) is exercised where necessary;

(b) has the aim of avoiding injustice; and

(c) exists in the absence of explicit statutory regulation, but is not easily wrested away from the courts by legislative action.

The principles are an acknowledgement, among other things, that the inherent jurisdiction is far from the "joker in a pack": there are constraints on its exercise. Accordingly, whilst those principles do not provide direct limits, but they provide a basis for determining them. Accordingly, this paper has proposed theoretical limits on the inherent jurisdiction derived Dicey's common law constitutional principles. The first – parliamentary sovereignty – is clearly manifested in the principles that gives the legislature the power to circumscribe the inherent jurisdiction. The second – the rule of law – is less obvious a limit, and indeed, seems instead to act as the enabler of the inherent jurisdiction. Yet if the character of the inherent jurisdiction is acknowledged as one of judicial discretion, then the rule of law can and does act as a limit; requiring any exercise or expansion of the inherent jurisdiction to conform with established legal principle.

Of course, theoretical limits are for nought if they are not enforced. Practical limits complement those theoretical limits, with the threat of appeal preventing a novel advancement of the inherent jurisdiction that goes beyond expansion or extension of existing legal norms and strays

instead into invention. The caveat with these practical limits is that they cannot and do not apply to the highest appellate courts in these legal systems. At this juncture, we see diverging approaches, with some of these courts self-imposing restraint and others choosing not to do so, with deleterious consequences.

Several commentators have written of the confusion surrounding the inherent jurisdiction and the difficulty in nailing its colours to the mast. This paper is not the last word on the matter, but it has shown that the continued effort to define the inherent jurisdiction and its limits is not in vain and ultimately improves this unique area of judicial discretion.