A JUDICIARY CLEAVED: SUPERIOR COURTS, STATUTORY COURTS AND THE ILLOGIC OF DIFFERENCE

The Hon. Justice David Stratas*

In one important respect, we in the Federal Courts are lucky. My Court, the Federal Court of Appeal, regularly hears applications and appeals here in New Brunswick. We regularly see the beauty of this province and the warmth of its people. We also see the interesting nature of the cases that arise and your many excellent counsel. We are constantly enriched by the insights of the great professors at the University of New Brunswick law school. Truly New Brunswick is a special place.

Here there is a great legal tradition of excellence. One need only think of legendary jurists from New Brunswick like Ivan Rand, Gérard La Forest and Michel Bastarache, intellectually at the top of their class, in every respect hard-working and exceptional.

When I think of New Brunswick, though, I cannot help but recall, with deep affection, two other New Brunswickers, two wonderful judges who served in the Federal Courts system, two who recently and prematurely succumbed to cancer: Chief Justice Edmond Blanchard and Justice Carolyn Layden-Stevenson. Hard working, selfless and brilliant, these two moved from backgrounds of devoted public service—in one case an elected politician; in another, a school teacher—and offered themselves for national judicial service in the Federal Courts system. Truly, they distinguished themselves from coast to coast to coast. Their jurisprudence continues to shine brightly, and as exemplars of great character they remain in our memories as role models. Their lives were well lived.

My lecture today is very much about an issue related to these judges. They served in the Federal Courts system. That's a system of statutory courts, much like the Provincial Courts system in New Brunswick.

In fact, across Canada, thousands of judges serve in statutory courts like these, more than those that serve on superior courts. And statutory courts decide more cases than superior courts.

---

* Justice, Federal Court of Appeal and Courts Martial Appeal Court of Canada, LL.B. (Queen's University, Kingston), B.C.L. (Oxon), LL.D. (*honoris causa*, Queen's University, Kingston). This paper is a modified version of the 2017 Viscount Bennett Lecture which I delivered at the University of New Brunswick Faculty of Law, February 9, 2017. I acknowledge and thank Professor Emeritus David Mullan for his comments on an earlier draft, and the editorial assistance of Bohdana Tkachuk and Miriam Clouthier, law clerks at the Federal Court of Appeal. The views expressed are mine alone. Like the many sitting judges who write extra-judicial works and comment on the jurisprudence, I remain open to correction and persuasion on any point in this paper, especially in the courtroom. My views evolve and sometimes change following discussion and debate, especially in court when faced with real-life situations.

Yet today, as things stand, statutory courts are treated as the lesser cousins of superior courts. In some respects their powers are needlessly shackled, to the detriment of the people they serve.

This needn't be so. And this shouldn't be so. Let me explain.

In Canada, we have superior courts like the New Brunswick Court of Queen's Bench and the New Brunswick Court of Appeal. Then there are statutory courts, the New Brunswick Provincial Court, the Federal Court and the Federal Court of Appeal. All operate in New Brunswick.

Superior courts are fully empowered. For example, superior courts have a full ability to award any constitutional remedies under section 24 and 52 of the *Constitution Act, 1982*.[1]

The power to declare legislation invalid under section 52 matters, deeply so. Let me illustrate. Suppose a statute sets out a police power of dubious constitutionality. The police have the power across the province. Suppose that it likely offends the right against unreasonable search and seizure in section 8 of the *Charter*.[2]

If you go to any courtroom of New Brunswick's superior court, the Court of Queen's Bench, in Bathurst, Woodstock, Edmunston, Campbellton, Miramichi, Moncton or Fredericton and if the court declares the police power unconstitutional, it is invalid not just in that locality, but everywhere in New Brunswick. The ruling becomes the law all across New Brunswick. Right across the province, the police must comply right away. All New Brunswickers are protected and treated alike.

Now take the New Brunswick Provincial Court, a statutory court. Same police power. Same challenge. But the challenge is brought in Edmunston in the Provincial Court there. It reaches the same result, word-for-word the same.

But the ruling doesn't apply across the province. It applies only to the particular case. The Provincial Court does not have the power to declare legislation unconstitutional. It can only disregard laws that are unconstitutional in the particular cases before it.

This means that the law, adjudged unconstitutional, remains on the books across the province. All across the province, the police can continue to use the unconstitutional power. Even in the particular locality where a ruling of unconstitutionality was made, that ruling does not bind a later judge in the locality. The ruling applies only in that particular case.

---

[1] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

Sounds strange? This is the law as set out in the 2016 decision of the Supreme Court in *R v Lloyd*.[3]

Lloyd was convicted in the British Columbia Provincial Court of possession of drugs for the purpose of trafficking. Because he had an earlier conviction for a similar offence, he was subject to a mandatory minimum sentence of one year imprisonment. The Provincial Court judge issued a declaration. He declared that the mandatory minimum sentencing provision offended the guarantee against cruel and unusual punishment under section 12 of the *Charter* and was not justified under section 1 of the *Charter*.

The Supreme Court agreed. It held that the mandatory minimum sentencing provision was unconstitutional. But it also held that the Provincial Court, as a statutory court, did not have the power to make a declaration of invalidity. All the statutory court could do is rule the provision unconstitutional and decline to apply it in the case before it, but nothing more.

The Supreme Court acknowledged that this left the unconstitutional provision alive in other cases across the province or in future cases that arise, even before the same court. It confirmed that only a superior court could make a ruling of province-wide effect through its power to make declarations.

The effect of this is to leave an unconstitutional law in force across the province. And if the Crown does not appeal the decision, there is no risk of a province-wide declaration of unconstitutionality from a superior court. The Crown remains free to reargue the point in any Provincial Court in the province.[4]

As a practical matter, this means persons in one part of a province can enjoy different *Charter* protections and can be subject to different laws than those in another part of the province. Under the constitutional principle of the rule of law,[5] laws should apply to similarly situated people in a similar way. They should not apply depending on where you live.

By far, most criminal prosecutions in this country—and thus, most issues involving the all-important criminal law protections of the *Charter*—take place in provincial courts. The inability of provincial courts, as statutory courts, to have their

[3] 2016 SCC 13, [2016] 1 SCR 13 (6:3 majority).

[4] Recently, in another case, *R v Sharkey*, 2014 ONCJ 437, Justice Paciocco, then of the Ontario Provincial Court, considered this unjust. He wrote that because "the decision rendered by a judge after solemn consideration and full argument cannot be used as a persuasive precedent by other courts," the Crown "is in a position to isolate a Charter challenge that it loses by not appealing that decision to a superior court" and relitigated in another provincial court all over again. In my view, he's right. But the *Lloyd* case is the law. See also to similar effect *R v Michael*, 2014 ONCJ 360.

[5] Preamble to the *Constitution Act, 1982*.

findings of unconstitutionality apply across the province is a significant hole in the coverage of the *Charter*.[6]

So why are provincial courts as statutory courts treated so differently from superior courts?

The difference is merely one of historical oddity. The superior courts are the heirs of the Royal Courts in England, such as the High Court of Chancery. Those English courts had inherent jurisdiction. Thus, so do the superior courts. Historically, superior courts have had the power to grant declarations. So it has been said that statutory courts do not have that power unless their statutes give them it.

I call the difference an oddity because in pith and substance there is no difference between superior courts and statutory courts. Institutionally and functionally, courts are courts. The judges who staff them are judges. Their judgments are judgments. For those convicted in either type of court, jail is jail.

Finally, and perhaps more importantly, in pith and substance both are statutory courts. Both have statutes that set out what they can do and add powers that historically did not exist.[7]

Now let's turn to the superior court's inherent jurisdiction and examine it more closely. First, it's important to get our terms right.

The question of jurisdiction, properly defined, is different from the question of the powers that can be exercised.[8] Jurisdiction—literally from the Latin, speaking the law—means the ability of a court to speak on a particular subject-matter; in other words, to consider it. Once a court has the ability to consider a subject-matter, the next question is what it can do while considering that subject-matter; in other words, what powers can it exercise?

---

[6] It would also seem to be against the notion in *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96, that constitutional remedies should not be granted on a case-by-case basis and that a constitutionally invalid provision should be treated as unconstitutional across the board.

[7] In New Brunswick, see *Judicature Act*, RSNB 1973, c J-2 (superior courts); *Provincial Court Act*, RSNB 1973, c P-21 (provincial courts).

[8] See *Watson v Clarke*, [1990] 1 NZLR 715 at 720. See also Marcelo Rodriguez Ferrere, "The Inherent Jurisdiction and Its Limits" (2013) 12 Otago L Rev 107; Jessica Liang, "The Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals: An Appraisal of Their Application" (2012) 15 New Criminal L Rev 375 at 379–380. The two are frequently confused, as is noted in William H Charles, "Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?" (2010) 33 Dal LJ 63 at 64. Martin Dockray has said it is "a difficult idea to pin down" and "[t]here is no agreement on what it is, where it came from…and what it can be used for" ("The Inherent Jurisdiction to Regulate Civil Proceedings" (1997) 113 LQR 120 at 120). Rosara Joseph has said: "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" ("Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 Canterbury L Rev 220 at 221).

An influential article by Sir Jack Jacob 45 years ago—adopted uncritically in Canada[9]—describes "inherent jurisdiction" of a court as a "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 improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."[10]

But here Jacob is not really talking about jurisdiction, properly defined. Rather, he is speaking of powers that a court must have by virtue of being a court. This is nothing unique to superior courts. All courts, even statutory courts, have these powers.[11]

With the proper definition of jurisdiction in mind, the inherent jurisdiction of the superior courts means nothing more than a residual jurisdiction over matters that cannot be dealt with by others.

So said the Supreme Court in the 1998 decision in *Liberty Net*.[12] There it said that superior courts have a "residual jurisdiction" and confirmed that the doctrine of inherent jurisdiction means nothing more than that.[13] In its words, this residual jurisdiction of the superior court "does not operate to narrowly confine a statutory grant of jurisdiction" to another court, nor does it say anything "about the proper interpretation of such a grant."[14]

Liberty Net put the inherent jurisdiction of superior courts in its proper place. Superior courts do have a time-honoured power to grant declarations. But that

---

[9] See e.g. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 20, [2013] 3 SCR 3; *Conseil scolaire francophone de la Columbie-Britannique v British Columbia*, 2013 SCC 42 at paras 72–74, [2013] 2 SCR 774; *R v Caron*, 2011 SCC 5 at paras 24–34, [2011] 1 SCR 78.

[10] Jack IH Jacob, "The Court's Inherent Jurisdiction" (1970) 23 Current Leg Probs 23 at 51.

[11] All of the cases in *supra* note 9 and most of the cases that rely upon Jacob's article do so in support of the idea that courts have certain plenary powers stemming from their status as courts, powers that all courts, whether superior or statutory, have. See also the discussion in the text to notes 41–48, *infra*.

[12] *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 35, 157 DLR (4th) 385 [*Liberty Net*]: "In my view, the doctrine of inherent jurisdiction operates to ensure that, having once analysed the various statutory grants of jurisdiction, there will always be a court which has the power to vindicate a legal right independent of any statutory grant. The court which benefits from the inherent jurisdiction is the court of general jurisdiction, namely, the provincial superior court. The doctrine does not operate to narrowly confine a statutory grant of jurisdiction; indeed, it says nothing about the proper interpretation of such a grant." The Supreme Court here is speaking of subject-matters, not powers.

[13] *Ibid* at para 35. The "inherent jurisdiction" was also explained as a residual jurisdiction in *Peacock v Bell* (1667), 1 Wms Saund 73, 85 ER 84 at 87–88: "the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of the superior court but that which specifically appears to be so."

[14] *Liberty Net*, *supra* note 12 at para 35. In so deciding, *Liberty Net* does not exalt the status of superior courts under s 96 of the *Constitution Act, 1867* and allows the federal Parliament to create its own fully-empowered courts under s 101 of the *Constitution Act, 1867*. This is perfectly consistent with clear constitutional text: s 101 operates "notwithstanding anything in this Act," including s 96.

has nothing to with their inherent subject-matter jurisdiction. Nor does it automatically foreclose the existence or the scope of that power—express, implied or necessarily incidental—in a statutory court.

So why can't statutory courts grant constitutional declarations of invalidity?

After all, constitutional declarations of invalidity bear no relation to the sorts of declarations granted by the Royal Courts of England as part of their inherent jurisdiction, such as declarations of right under statutes or the common law. This is hardly surprising—the United Kingdom does not have a written constitution and so its courts could not have granted declarations of invalidity.

If declarations concerning the invalidity of legislation do not emanate from the Royal Courts of England, where do they come from?

They came in part from a British statute, the *Colonial Laws Validity Act*,[15] a statute that as far as issues of constitutional validity are concerned in substance had been part of the law of Canada until 1982.[16] That statute applied not only to Canada's superior courts. It applied to all Canadian courts, including statutory courts.

Around the time of Confederation, we had a system of superior courts and certain statutory courts, such as the local provincial courts and the federal Exchequer Court. All these courts, both superior and statutory, had to act according to law, interpreting and applying the law.

Under section 2 of the *Colonial Laws Validity Act*, those courts had to rule "void and inoperative" any federal or provincial laws inconsistent with those of the Parliament of the United Kingdom, including the *British North America Act, 1867*.[17]

The Exchequer Court, a statutory court operating at the federal level and the predecessor to today's Federal Courts, recognized this power and understood that in appropriate cases it would not apply legislation that conflicted with a law of the Parliament of the United Kingdom and that decision would apply to all subsequent cases in the Court.[18]

---

[15] *1865* (UK), 28 & 29 Vict, c 63. See discussion in *Windsor (City) v Canadian Transit Co*, 2015 FCA 88 at paras 55–62, [2016] 1 FCR 265 [*Windsor FCA*].

[16] From 1931 to 1982, s 2 of the *Constitution Act, 1931* (formerly the *Statute of Westminster, 1931* (UK), 22 & 23 Geo V, c 4) required that Canadian laws conform with the *British North America Act, 1867* (UK), 30 & 31 Vict, c 3, in substance continuing the law on issues of constitutional validity as set out in the *Colonial Laws Validity Act*. See the discussion in *Windsor FCA*, *supra* note 15 at para 59.

[17] Now the *Constitution Act, 1982*. See also the discussion in *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 746, 19 DLR (4th) 1.

[18] See e.g. *Algoma Central Railway Co v Canada* (1901), 7 Ex CR 239 at 254–255, rev'd on other grounds (1902), 32 SCR 277, aff'd [1903] AC 478 (PC).

For most of Canada's early years, the idea of a private litigant seeking a formal declaration "having as its sole object" the invalidity of a statute was "not really imaginable."[19] It was only much later, well after Canada's superior courts and statutory courts came into being, that the law developed to embrace the possibility of such declarations.[20] Declarations of invalidity have no origin in the Royal Courts of England whatsoever and in no way can be considered part of the inherent jurisdiction of superior courts.[21]

In 1982, section 52(1) of the *Constitution Act, 1982* came into force. It provides that any legislative provisions inconsistent with the Constitution of Canada are of no force or effect. That overarching principle is not restricted to any one set of courts. It applies to all.

For good measure, under section 24 of the *Charter* "courts of competent jurisdiction" can make any "just and appropriate" remedies to address *Charter* violations. Later jurisprudence has affirmed the ability of any courts, superior courts or statutory courts, to use section 24 as long as they, by structure or function, can grant the remedy.[22] Statutory courts are structurally and functionally capable of granting constitutional declarations, even, if need be, declarations under section 24.

Finally, there is the purposive, "living tree" approach to constitutional interpretation.[23] What purpose does it serve to cleave the courts, empowering superior courts to fully enforce the *Charter* but leaving statutory courts less than fully empowered? Going back to my New Brunswick hypothetical, what purpose is served by allowing police to act under an unconstitutional law in one locality of the provincial court but not in a neighbouring one?

Unless statutory courts can grant constitutional declarations, the same issue of constitutionality can be placed over and over again before statutory courts, leading to relitigation that soaks up precious resources and impedes access to justice.[24] All

---

[19] Lazar Sarna, *The Law of Declaratory Judgments*, 3d ed (Toronto: Thomson Canada Limited, 2007) at 122.

[20] *Dyson v AG* (1910), [1911] 1 KB 410, [1912] 1 Ch 158 at 168 (Eng CA); *Smith v Ontario (AG)*, [1924] SCR 331, [1924] 3 DLR 189.

[21] Recently the New Zealand Court of Appeal has confirmed that declarations of invalidity bear no relation to declarations of right. They are a different remedy altogether. The Court further confirmed that the power to make declarations of invalidity is an implied one that springs from the position of all courts vis-à-vis Parliament: there is no reason to hold that declarations of invalidity are the exclusive preserve of the superior courts. See *AG v. Taylor*, [2017] NZCA 215 at paras 43–109.

[22] See the "structural and functional" test for determining "courts of competent jurisdiction" under s 24: *R v 974649 Ontario Inc*, 2001 SCC 81, [2001] 2 SCR 575; *R v Hynes*, 2001 SCC 82, [2001] 3 SCR 623.

[23] *Edwards v Canada (AG)*, [1929] UKPC 86, [1930] AC 124.

[24] Access to justice is now a constitutional principle: *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59, [2014] 3 SCR 31 [*Trial Lawyers*]. And in any event, principles and

because of an idealized, inaccurate understanding of the nature of the inherent jurisdiction of superior courts.

Today we have the modern, purposive approach to constitutional interpretation. In our law, it's pervasive like a sea. And in the middle of that sea, we have an isolated island. On that island, there is the historical oddity of superior court jurisdiction, a relic of originalism not purposivism, not discarded but worshipped.[25]

We must leave this island. We must keep sailing upon the sea.

Early on in the life of the *Charter*, the Supreme Court did just that, in the seminal case of *Big M Drug Mart*.[26] There, the Crown argued that a provincial court had no jurisdiction to exercise a "prerogative power to declare legislation invalid."[27]

The Supreme Court flatly stated that the objection "must…be rejected." With no equivocation or qualification, it added that "it has always been open to provincial courts to declare legislation invalid in criminal cases."[28] And in support of that, it explained that because of section 52 of the *Constitution Act, 1982*, "no one may be convicted of an offence under an invalid statute."[29]

The reasoning in *Big M Drug Mart* could not be clearer: provincial statutory courts must have the power to make declarations under section 52 in order to fulfil the purposes of the *Charter*. And *Big M* does not stand alone: for good measure in the 1997 *Judges' Reference* the Supreme Court reiterated that holding.[30]

---

practices that pose barriers to access to justice are to be discouraged: *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87.

[25] The unrelated jurisprudence under s 96 of the *Constitution Act, 1867* delineating the "core powers" of superior courts in part may be responsible for the worshipping. Under s 96, only the federal Governor General can appoint the judges of the superior courts. Provincially-appointed bodies are impermissibly "superior courts" when they exercise the "core powers" of a superior court outside of a modern institutional context: see e.g. *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725, 130 DLR (4th) 385 [*MacMillan Bloedel*]; *Reference re Young Offenders Act (PEI)*, [1991] 1 SCR 252, 89 Nfld & PEIR 91; *Re Residential Tenancies Act, 1979*, [1981] 1 SCR 714, 123 DLR (3d) 554 [*Re Residential Tenancies*]; *Tomko v Labour Relations Board (Nova Scotia)*, [1977] 1 SCR 112, 69 DLR (3d) 250. This notion of "core powers" has been wrongly transposed to what sorts of powers statutory courts may generally exercise. It is one thing to say that provinces cannot colourably get around s 96 by creating and appointing administrative bodies that have the "core powers" of a superior court. It is quite another to say that provinces, exercising their own constitutional powers to create valid criminal and civil courts under s 92(14) of the *Constitution Act, 1867* cannot arm those courts with the remedial tools they need to fully exercise their criminal and civil jurisdictions and to enforce the dictates of the Constitution.

[26] *R v Big M Drug Mart*, [1985] 1 SCR 295, 60 AR 161 [*Big M Drug Mart*].

[27] *Ibid* at 315.

[28] *Ibid* at 316.

[29] *Ibid.*

[30] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 at 85–86, 156 Nfld & PEIR 1 [*Judges' Reference*].

But *Lloyd* was decided in the way it was. And for good measure it was soon confirmed by the Supreme Court in *Windsor v Canadian Transit Company*.[31]

In *Windsor*, like *Lloyd*, the Supreme Court queried the ability of statutory courts—this time, the Federal Courts—to make declarations of invalidity.[32] The Supreme Court cited the very portions of *Big M Drug Mart* that I just mentioned even though they go against its position.[33]

But in a very important respect, *Windsor* extends *Lloyd*, further diminishing Canada's statutory courts.

Windsor concerned the Ambassador Bridge, an international bridge connecting Windsor, Ontario with Detroit, Michigan. At issue in *Windsor* was whether parties could seek relief in the Federal Courts system concerning issues concerning the maintaining of the bridge, the construction of a new bridge span, and the management and disposition of certain properties in Windsor, Ontario bought by the bridge owner for these bridge-oriented purposes.

The Federal Courts have the power in certain circumstances to make rulings concerning interprovincial works and undertakings under subsection 23(*c*) of the *Federal Courts Act*. In *Windsor*, the Supreme Court found that in the particular circumstances of the case, subsection 23(*c*) did not give the Federal Courts jurisdiction over the Ambassador Bridge.

In reaching its decision, the Supreme Court emphasized that statutory courts are not superior courts with inherent jurisdiction. It reaffirmed that the powers of statutory courts are set out in statutory provisions.[34]

By itself, that is not controversial and is not much of a limit on what statutory courts can do. Statutes are to be interpreted in accordance with their text, context and purpose.[35] And in the case of public institutions—especially courts that have essential

---

[31] 2016 SCC 54, [2016] 2 SCR 617 (5:4 majority) [*Windsor*]. I was the author of the reasons in the court below, which was reversed: *Windsor FCA*, *supra* note 15.

[32] *Ibid* at paras 70–71.

[33] It also cited *Douglas/Kwantlen Faculty Association v Douglas College*, [1990] 3 SCR 570, 77 DLR (4th) 94 to the effect that administrative tribunals do not have the power to make declarations of no force or effect under s 52 of the *Constitution Act, 1982*. That sort of restriction makes sense for administrative tribunals, often staffed with lay people and fully reviewable by full-fledged judges on judicial review courts. Further, statutory courts occupy a different place in the constitutional firmament and have a constitutional status that administrative decision-makers do not: see the constitutional bases for Canada's statutory courts set out in ss 92(14) and 101 of the *Constitution Act, 1867*. Put another way, "[t]he Federal Court is a superior court, not an administrative tribunal": *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 136, [2007] 1 SCR 350. See also the fundamental constitutional differences between administrative decision-makers and courts described in *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781.

[34] *Windsor*, *supra* note 31 at para 33.

purposes to fulfil and functions to discharge in the separation of powers—the consideration of purpose must play a dominant role. Finally, section 12 of the federal *Interpretation Act* confirms all of this. It provides that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[36]

In the case of the Federal Courts, the objects and the purposes of the *Federal Courts Act* are clear: the Act establishes courts at the federal level to regulate matters that provinces alone cannot regulate and to harmonize the interpretation and application of federal laws.

To illustrate, imagine that the Federal Courts system did not exist. Suppose that federal law could be interpreted only by provincial superior courts. Much chaos would follow. A tax deduction under the federal *Income Tax Act* might be allowed in the western part of the town of Lloydminster, Alberta, but across the street in Lloydminster, Saskatchewan, the deduction might be disallowed. A business act might be anti-competitive in one jurisdiction, but not in another. Federal workers for a single federal company might end up having rights in one province that the workers in another province don't have.[37]

As for regulating matters that provinces cannot alone regulate, suppose there was a big dispute between Ontario and Quebec and so Quebec closed all the bridges to Ontario. As interprovincial works, the bridges are federally regulated. Who would consider the closure? The courts of Quebec? The courts of Ontario? Both? What if they disagree with each other? A strong, neutral Federal Courts system has a role to play.

As for other sections in the *Federal Courts Act* that provide some context surrounding the powers of the Federal Courts, sections 3 and 4 provide that the Courts are "additional court[s] of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and …superior court[s] of record having civil and criminal jurisdiction."

When trying to figure out the powers of the Federal Courts, all this purpose and context is rich grist for the interpretive mill. The striking thing about *Windsor*, though, is that the Supreme Court did not look to any of this.[38]

---

[35] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193.
[36] RSC 1985, c I-21 at s 12.

[37] On the purposes of the Federal Courts system, see the Rt Hon John N Turner, "The Origin and Mission of the Federal Court of Canada" (Paper delivered at the 20th Anniversary Symposium of the Federal Court, 26 June 1991).

[38] *Windsor* has already been the subject of criticism for its narrow textual approach to the interpretation of the powers of a statutory court and for not having regard to the purpose of the statute: see Paul Daly, "When is a Court Not a Court? *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54", online: <www.administrativelawmatters.com/blog/2016/12/12/when-is-a-court-not-a-court-windsor-city-v-canadian-transit-co-2016-scc-54/>; Adam Giancola, "When Court Jurisdiction Meets Statutory

Instead, on its face, *Windsor* seems to teach us that the powers of statutory courts are limited to the express powers you see in their Acts, read literally. What you see in black-and-white is exactly what the statutory court can do, nothing more.

It's as if the only method for interpreting the powers of a statutory court is to look only at provisions that grant visible and tangible powers. And it's as if the only tool to assist in that interpretation is a dictionary.[39]

In *Windsor*, the Supreme Court carved out just a small exception to this. In a footnote, it mentioned that the Federal Court as a statutory court also has the powers that are "necessarily implied in the [statutory] grant of power to function as a court of law," such as the power to control the court's processes.[40]

But even this derogates from our previous understanding of the sorts of powers a statutory court has.

Until *Windsor* was decided, statutory courts were thought to have express powers in their statute, but also implied and necessarily incidental powers discerned through the normal process of statutory interpretation.[41] And this applies to all statutory powers, not just, as *Windsor* says, the powers of the court over its own processes.

This orthodoxy was set down in the Supreme Court's 1992 decision in *Chrysler*.[42] There, following a textual, contextual and purposive approach to the

---

Interpretation: Windsor (City) v. Canadian Transit Co.", online: <https://www.thecourt.ca/when-court-jurisdiction-meets-statutory-interpretation-windsor-city-v-canadian-transit-co/>. The dissenting opinion in *Windsor* finds the language of s 23(*c*) not so clear and, looking to context and purpose, reaches the opposite result.

[39] Indeed, at para 47, the majority in *Windsor* expressly declines to examine the purposes behind the Act, finding the "explicit language" clear. Even where the language of a provision is not clear—and the argument before the Supreme Court in *Windsor* confirms that the language of subsection 23(*c*) was not clear—a court is nevertheless obligated to look at the context and purpose of the provision. See *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10, [2005] 2 SCR 601: "The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but *in all cases* the court must seek to read the provisions of an Act as a harmonious whole" [emphasis added]. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading": *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2006 SCC 4 at para 48, [2006] 1 SCR 140; see also *R v Monney*, [1999] 1 SCR 652 at para 26, 171 DLR (4th) 1, and *R v Lewis*, [1996] 1 SCR 921 at para 68, 133 DLR (4th) 700.

[40] *Windsor*, *supra* note 31 at para 33, n 1.

[41] See *supra* note 35.

[42] *Chrysler Canada Ltd v Canada (Competition Tribunal)*, [1992] 2 SCR 394, 92 DLR (4th) 609 [*Chrysler*]. See also *Canada Labour Relations Board v Québecair*, [1993] 3 SCR 724, 108 DLR (4th) 1. For an analysis of both, see David Stratas, "A Unique Approach to Interpreting Tribunal Powers: Justice Gonthier and the cases of *Chrysler* and *Québecair*" in Michel Morin et al, eds, *Responsibility, Fraternity and Sustainability in Law: In Memory of the Honourable Charles Doherty Gonthier* (Markham: LexisNexis, 2012) 123. In *Chrysler*, the Supreme Court was examining the powers of the Competition Tribunal, a statutory body. Strangely, as things stand today with *Chrysler* and *Windsor* on the books, the

relevant statutory provisions, the Supreme Court held that a statutory body had the power to punish parties for contempt of its orders even though that power was not in the black-and-white of its statute.

This idea was further confirmed in *Liberty Net*.[43] There, the Supreme Court said that the Federal Courts have express, implied and necessarily-incidental powers. For example, suppose the Federal Court of Appeal, a statutory court, has an express statutory power to review decisions of tribunals. But suppose one decision of a tribunal is in conflict with another. Does the Federal Court of Appeal have the power to resolve the conflict? It does, under what the Supreme Court in one case called "inherent jurisdiction," but what is really just an implied power stemming from its general judicial review jurisdiction.[44]

Liberty Net did even more. It introduced the idea that the Federal Courts, as statutory bodies, had a plenary power to regulate proceedings before it. This power was said to be akin to the general powers of the superior courts to regulate their proceedings.[45]

This isn't something in the express words of the *Federal Courts Act*, or implied or necessarily incidental to them. Rather, the plenary power emanates from the Federal Courts' status as courts. The idea is that if you are a court, you have all the powers that a court ought to have.[46]

---

statutes of administrative bodies like the Competition Tribunal may be interpreted more liberally than the statutes establishing and governing statutory courts.

[43] *Supra* note 12.

[44] *British Columbia Telephone Co v Shaw Cable Systems (BC) Ltd*, [1995] 2 SCR 739 at 768, 125 DLR (4th) 443.

[45] Indeed, one foremost constitutional scholar, looking at the nature of the powers, the purposes and the functions of the Federal Courts has concluded that they are superior courts in a very real sense and should be treated as such: William Ralph Lederman, "The Independence of the Judiciary" (1956) 34 Can Bar Rev 1139. Another scholar has written that these days all superior courts are creatures of statute and have a number of qualities such as the ability to determine their own jurisdiction, inherent jurisdiction, immunity from suit and the ability to control contempt. Therefore, "[t]o determine whether a court has the status of a superior court … [one must] look primarily to the statute which has brought the court into being." See Enid Campbell, "Inferior and Superior Courts and Courts of Record" (1997) 6 J Judicial Administration 249.

[46] These are the sorts of powers Jacob identified as inherent powers: see *supra* notes 9–11 and accompanying text. For examples in the Federal Courts system, see *Canada (National Revenue) v Derakhshani*, 2009 FCA 190; *Canada (National Revenue) v RBC Life Insurance Company*, 2013 FCA 50; *Canada (National Revenue) v McNally*, 2015 FCA 195; *Coote v Lawyers' Professional Indemnity Company*, 2013 FCA 143; *Jaffal v Davidson*, 2016 FCA 226; *Mazhero v Fox*, 2014 FCA 226, *Mazhero v Fox*, 2014 FCA 238; *Mazhero v Fox*, 2014 FCA 219; *Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35; *Philipos v Canada (AG)*, 2016 FCA 79; *Amgen Canada Inc v Apotex Inc*, 2016 FCA 121; *Olumide v Canada*, 2016 FCA 287; *Valeant Canada LP v Canada (Health)*, 2014 FCA 50; *Pfizer Canada Inc v Teva Canada Limited*, 2016 FCA 218; *Association des Compagnies de Téléphone du Québec Inc v Canada (AG)*, 2012 FCA 203; *Lukács v Canada (Transportation Agency)*, 2016 FCA 103; *Apotex Inc v Allergan, Inc*, 2016 FCA 15.

And this isn't something that is novel. It has been in place for over a century.[47] In *Cocker v Tempest*, a decision 175 years old, Baron Alderson stated that the inherent power "of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior."[48]

In short, *Chrysler* and *Liberty Net* and authorities like *Cocker* tell us that to determine the powers of a statutory court we should look at the statute purposively, sensitively and alert to nuances. There may be more than meets the eye—there may be implied, necessarily incidental powers and plenary powers too.

But all of this—all these principles and cases—went unmentioned in *Windsor*.

The statutory courts and superior courts spring from similar provisions in the *Constitution Act, 1867*, benignly worded, seemingly narrow.[49] But today, never wider has been the difference in their status and jurisdiction and the interpretation of their powers.[50]

So, in closing, where do we stand today?

We have a judiciary cleaved: at one level fully empowered and at another level less so. And for no good reason.

---

[47] See Ferrere, *supra* note 8; Dockray, *supra* note 8 at 125–126; Shalin Sugunasiri, "The Inferior Jurisdiction of Inferior Courts (1990) 12 Adv Q 215 at 218–219.

[48] *Cocker v Tempest*, [1841] ER 242, (1841) 7 M&W 502 at 503–504. See also *R v Norwich Crown Court*, [1992] 1 WLR 54 (QB); *Connelly v Director of Public Prosecutions*, [1964] AC 1254 at 1301 (HL).

[49] See the *Constitution Act, 1867*, ss 92(14) (the provincial power concerning "the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction"), 96 (the Governor General's power "to appoint the Judges of the Superior, District, and County Courts in each Province") and 101 (Parliament's power "notwithstanding anything in this Act" to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada").

[50] For example, compare the differing judicial treatment of ss 96 and 101 of the *Constitution Act, 1867*. Putting aside part of one recent case, s 101 of the *Constitution Act, 1867*—the constitutional basis for the Federal Courts—has never enjoyed the expansive, purposive, "living tree" approach to interpretation that the most of rest of the Constitution has enjoyed: see e.g. *R v Thomas Fuller Construction Co (1958) Ltd*, [1980] 1 SCR 695 at 707, 106 DLR (3d) 193; *Quebec North Shore Paper Co v Canadian Pacific Ltd*, [1977] 2 SCR 1054 at 1065–1066, 71 DLR (3d) 111; *Northern Telecom Canada Ltd v Communication Workers of Canada*, [1983] 1 SCR 733, 147 DLR (3d) 1; *ITO-International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752, 28 DLR (4th) 641. The recent case is the *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433. There, the Supreme Court, a statutory court under s 101, formed at the same time as the Exchequer Court (see the *Supreme and Exchequer Court Act*, SC 1875, c 11), the predecessor to the Federal Courts, constitutionally entrenched itself. Contrast this with s 96 of the *Constitution Act, 1867* discussed at note 25, *supra*. Read literally, it is just a simple power of the federal government to appoint judges of the provincial superior courts. But the Supreme Court has stretched it to protect the "core" jurisdiction of provincial superior courts (see e.g. *Re Residential Tenancies*, *supra* note 25), to restrict the power of the federal government to vest powers in its own Federal Courts (*MacMillan Bloedel*, *supra* note 25) and even to guarantee a constitutional right of access to all courts (*Trial Lawyers*, *supra* note 24).

We want our statutory courts and the judges on them—the successors of great judges like Justices Rand, La Forest, Bastarache, Blanchard and Layden-Stevenson—protecting and vindicating our rights. We don't want them shackled by artificial distinctions that serve no purpose.

The Supreme Court in *Big M Drug Mart*, *Chrysler* and *Liberty Net* got it exactly right. And the majority reasons of the Court in *Liberty Net* were written by Justice Bastarache—of course a great New Brunswicker!

But of this there can be no doubt: *Lloyd* and *Windsor* are the law today and they are binding.[51]

But sometimes—not always—counsel can persuade courts that authorities are distinguishable. Sometimes they can persuade courts that earlier authorities, not overruled, still govern.[52] Sometimes the Supreme Court—comprised of talented jurists deeply dedicated to the betterment of Canadian law for all—reevaluates and reverses its own authorities.[53]

But for now, to eliminate uncertainty, to prevent any deleterious effects and to serve the public well, statutory courts might well wish to seek statutory amendments to shore up their powers.

In the end, to fulfil the great role of the judicial branch under our separation of powers in this complex age, statutory courts cannot be seen as lesser, cannot be treated as limited, and cannot be left emasculated. Fully empowered they must be.

---

[51] On the binding nature of Supreme Court authority, see *R v Henry*, 2005 SCC 76, [2015] 3 SCR 609.

[52] As for what intermediate appellate courts can legitimately and usefully do in the face of binding higher authority, see Richard M Re, "Narrowing Supreme Court Precedent from Below" (2016) 104 Georgetown LJ 921.

[53] Recent examples where the Supreme Court has overruled its own authorities include *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631; *Carter v Canada (AG)*, 2016 SCC 4, [2016] 1 SCR 13*; Mounted Police Association of Ontario v Canada (AG)*, 2015 SCC 1, [2015] 1 SCR 3; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245; *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504; *Canada v Craig*, 2012 SCC 43, [2012] 2 SCR 489; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364. In *Teva Canada Ltd v Pfizer Canada Inc*, 2012 SCC 60, [2012] 3 SCR 625, the Supreme Court invalidated Pfizer's patent. It later discovered that invalidation was not an available remedy under the regulatory regime in issue in the case and corrected its error: post-judgment decision on motion, June 4, 2013.