Third Series Vol. IV part 2.
No. 216
Autumn 2008

THE COAT OF ARMS

ISSN 0010-003X
Price £12.00

an heraldic journal published twice yearly by The Heraldry Society

THE COAT OF ARMS

The journal of the Heraldry Society

Third series
Volume IV
2008
Part 2
Number 216 *in the original series started in 1952*

The Coat of Arms is published twice a year by The Heraldry Society, whose registered office is 53 High Street, Burnham, Slough SL1 7JX. The Society was registered in England in 1956 as registered charity no. 241456.

THE RECEPTION OF ENGLAND'S ARMORIAL LAW INTO CANADA

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Since the formation of the Canadian Heraldic Authority (henceforth 'the Authority') in 1988, it has become apparent that several matters of importance to Canada's armorial law are unclear. To clarify these matters, one had best begin by examining from a legal perspective whence Canada derives her law of arms. Perhaps the most legal-minded writer on English armorial law, George Squibb, Q.C., sometime Norfolk Herald Extraordinary,[1] posited that the armorial law of Commonwealth states such as Canada derives from English armorial law.[2]

> ...each of the countries comprising the Commonwealth had a colonial period and in many matters the law now in force can only be properly understood if it is set in its context of legal history. This is particularly the case with the law of arms. There may have been many changes in the constitutional law of a Commonwealth country, but it is unlikely that any of these changes will have affected the continued operation of the [English] laws of arms (if any) in operation in colonial times.

Is this accurate in regards to Canada? To begin to answer this question, a brief review of the nature of England's armorial law is worthwhile.

Armorial law is part of what Blackstone called England's 'unwritten' law,[3] that is non-statutory law, which encompassed general or universal custom (i.e. the common law); local custom; and particular law used in certain courts (e.g. Roman law, canon

[1] George Drewry Squibb, LV.O., Q.C., F.S.A., F.R.Hist.S. (1906-94), Norfolk Herald Extraordinary from 1959; Earl Marshal's Surrogate for the Court of Chivalry from 1976.

[2] G. D. Squibb, 'Heraldic authority in the British Commonwealth', *CoA* 10 (1968-9), no. 76, pp. 125-33 at 133. Note, however, that changes in Canada's constitution (particularly the adoption of its Charter of Rights and Freedoms, i.e. part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK: 1982, c. 11) have affected the operation of England's law of arms in Canada.

[3] *Commentaries on the Laws of England* with Barron Field's Analysis, vol. 1 (Philadelphia) pp. 68-79, cited in Gilbert Sadler, *The Relation of Custom to Law* (London 1919), p. 59. As to England's canon law, see *Ecclesiastical Law* (London 1975), paras 305-8: the canon law of England is, in origin, the canon law of papal Rome, subject to modifications by English custom, enforced by a separate system of courts, and later recognised by statute 35 Henry VIII c. 16 (Canon Law) (1543) as part of the law of England. England's ecclesiastical law includes canon law along with those portions of the civil law of imperial Rome essential to the laws of England, and as such is as much the law of England as any other part of the law; *Edes* v *Bishop of Oxford* (1667) Vaugh 18 p. 21.

law). England's armorial law is of this last variety of unwritten English law, viz. the particular law used in the High Court of Chivalry.[4]

Squibb wrote the most authoritative analysis of this particular law in the twelfth chapter of his book, *The High Court of Chivalry*.[5] He revealed that armorial law in England is an 'amalgam of English custom and [Roman] civil-law procedure'. That is to say, its procedure is the customs and usages of the High Court of Chivalry ('except in cases omitted', when Roman law guides – as it did in the law merchant and in admiralty law); its substantive law is English and peculiar to England, ascertainable from the practice of the judges and counsel of England's High Court of Chivalry (just as one ascertained admiralty law from the practice of admiralty court).[6] This reliance upon custom parallels the predominant reliance upon unwritten usage in the related area of peerage law, which 'consists for the most part of rules evidenced by long-established usage – usage which has prevailed from time immemorial, or has at least the sanction of some centuries'.[7] And as one author observed, 'A custom existing in a State, which the State will enforce or has already recognised, is a law'.[8]

The prime tenet of English armorial law is that one may not independently assume arms for oneself: lawfully, one may only bear arms by right of birth, or by

[4] Properly, the law of arms is the *ius militaris* (i.e. the unwritten laws and customs of military service and of war) of which coats of arms are only a part (but, formerly, an essential part): William Winthrop, *Military Law and Precedents* (Boston 1896), c. IV; Stephen Friar, *Heraldry* (London 1992), p. 6. It includes the rules, regulations and customs observed by both heralds and armigers, as a sort of *corpus legis heraldicae*; see Julian Franklyn, *Shield and Crest* (London 1960), p. 255.

[5] G. D. Squibb, *The High Court of Chivalry* (Oxford 1959), pp. 162-90.

[6] Ibid., pp. 162-6. As for this 'fallback' on Roman civil law, compare the French reception of Roman civil law, which was partial, in the sense that jurists only looked to Roman law when it supported their cases and when individual judges felt inclined to accept it: otherwise French custom or legislation prevailed. Alan Watson, *Sources of Law, Legal Change, and Ambiguity* (Philadelphia 1984), p. 69.

[7] F. B. Palmer, *Peerage Law in England* (London 1907), p. 19. Peerages are a type of dignity to which is attached the right (now subject to the House of Lords Act 1999) to a summons by name to sit and vote in the U.K. Parliament. See *Halsbury's Laws of England*, 4th edn., vol. 35 (London 1994), paras 901-2. 'Peerage law' (like armorial law) is a branch of dignitary law. Incidentally, the Crown has bestowed twelve such dignities upon Canadians during the history of the Dominion (the first in 1891, the most recent in 2000), of which five are considered 'Canadian' peerages, in that they were bestowed after consultation with the Canadian government; see Christopher McCreery, *The Canadian Honours System* (Toronto 2005), pp. 23f. During the colonial era, some felt life peerages ought to be bestowed on colonists by the Governor General at the advice of his ministers and parliament, and at different times in the history of the British Empire attempts were made (in vain) to establish colonial peerages: Arthur Berriedale Keith, *Responsible Government in the Dominions* vol. 3 (Oxford 1912), p. 1300n; William MacPherson, *The Baronage and the Senate* (London 1893), pp. 292f. Writers on Canadian constitutional law continue to use Dominion to distinguish the central authority from the provinces: 'Canada' is ambiguous, as the central authority is not the same as the nation as a whole – see Peter Hogg, *Constitutional Law of Canada* (Scarborough 2002), p. 111.

[8] Sadler, op. cit., p. 33.

right of grant from a 'competent authority', viz. the Crown.[9] The authority to grant arms thus became one of the Crown prerogatives.[10] Furthermore, as the law came to recognise arms as a class of honour, and as the Crown is the fountain of all honour (for, as the law understands, no one but the Sovereign can be so good a judge of the merits and services of her subjects), the Crown naturally would seek to regulate their creation.[11]

[9] Squibb, *High Court of Chivalry*, pp. 184f.; J. P. Brooke-Little, *An Heraldic Alphabet* (London 1996), p. 27. Note that right of birth originates either with a grant or with use before time of legal memory. Though the judge in *R* v *Sovereign Seat Cover Mfg Ltd* (1977) 38 CPR (2d) 46 saw 'no reason why any one who wishes to cannot either draw or prepare his own coat of arms in Canada or have somebody else prepare it for him', he was an inferior judge, and perhaps without the 'more than ordinary understanding' required by dignitary cases – see *Abergavenny Peerage Case* (1588), Collins 71, in Squibb, *High Court of Chivalry*, p. 165. While the assumption of a coat of arms by prescription in England was outlawed, no machinery existed to prevent it; see M. L. Bush, *The English Aristocracy* (Manchester 1984), p. 26. It is true that no common-law court can prevent one from assuming arms, provided one does not interfere with rights of property, but to *lawfully* assume arms, one requires a grant from the Crown - see *Re Croxon, Croxon* v *Ferrers* [1904] 1 Ch 252 at 258f. Contrast the *R* v *Sovereign Seat Cover* decision with a later one by the Federal Court, *Insurance Corp. of British Columbia* v *Canada (Registrar of Trade Marks)* [1980] 1 FC 669 (TD), in which the court noted p. 675, '...the adoption of bogus arms... is gradually being abandoned with a revived knowledge of heraldry... and grants are being sought by legitimate exercise of the Royal prerogative'.

[10] The Crown (or Royal) Prerogatives being those flexible but unordered residual powers, privileges and attributes *exclusive* to the Crown over and above all other persons, in right of the Sovereign's royal dignity and allowed by law; see H. V. Evatt, *The Royal Prerogative* (Sydney 1987), pp. 11f. The claim of the Crown to be the sole authority to grant arms derives from a royal writ of 2 June 1417, addressed to the Sheriffs of certain counties. In it, the King forbade anyone from assuming arms and recognised the right to bear coats of arms only for: (a) those who inherited (or ought to have inherited) arms from their ancestors [who, however, may have assumed arms prior to this proclamation]; (b) those who had arms 'by the gift of some person having adequate power for that purpose' [said person not exclusively the King, e.g. a prince or other lord, even a 'knyghte cheyfteyn in the felde']; and (c) those 'who bore arms with us at the battle of Agincourt': Close Roll 5 Henry V (NA (PRO): C54/267), mem. 15d. Note, however, that this third class of right likely did not enable those who were not armigerous at Agincourt to assume arms later: rather, it probably absolved armigers at Agincourt from having to prove a right to the coats of arms they bore at that battle (see Squibb, *High Court of Chivalry* p. 182). Generally, the connection of arms with the nobility gradually came to mean that by the thirteenth century, as only a prince could ennoble a person, only a prince could grant that person the right to bear arms (as the symbol of that ennoblement); see Robert Gayre of Gayre and Nigg, *The Nature of Arms* (London 1961), p. 12.

[11] *Prince's Case* (8 Co Rep 1, 18) and Joseph Chitty, *Prerogatives of the Crown* (London 1820), pp. 107f. '[A]rms are defined in law as a grant of honour from the Crown'; *The Canadian Heraldic Authority* ([Ottawa] 1990), p. 15. The shift in the balance of power from the magnates to the Crown that occurred with the accession of the Tudors to the English throne resulted in King Henry VIII's successful monopolisation of honours (along with military and fiscal power), so that from the sixteenth century the Crown became the exclusive fountain of honour: John Scott, *The Upper Classes* (London 1982), p. 30.

Returning to Squibb's position, in the case of Canada was he accurate? Is Canada's armorial law English? Canada's foremost authority on constitutional law, Peter Hogg, C.C., Q.C., explains the reception of English law into Canada thus: 'In the case of a colony acquired by settlement [e.g. much of Canada], the settlers brought with them English law, and this became the initial law of the colony'.[12] This derives from the English common-law tenet set down by Blackstone: 'It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force'.[13] Blackstone went on, however, to note a caveat:[14]

> But this must be understood with very many and very great restriction. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance of the established Church, the jurisdiction of spiritual Courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the decision and control of the King in Council.

Thus, in the matter of 'the jurisdiction of spiritual Courts', jurists did not consider colonists as having carried with them the ecclesiastical law of England (assuming the colony in question had been settled, not conquered; and assuming it did not have an established church).[15] Even so, such law is still a guide for judges interpreting issues raised by it.[16] And one must also consider Blackstone's 'infant colony' theory in light

[12] Peter Hogg, *Constitutional Law of Canada* (2nd edn., Toronto 1985), pp. 21f. What became Québec, however, was acquired by conquest, and therefore has a unique legal position in Canada that must be considered in another article.

[13] *Blackstone's Commentaries*, vol. 1 (3rd edn., London 1862), pp. 90f. Of course, Blackstone's conception of 'uninhabited' meant uninhabited by peoples he and his contemporaries equated with European civilisations.

[14] Ibid.

[15] *Re Lord Bishop of Natal* (1865) 3 Moo PCCNS 115 at 152. The 'essential mark' of an established church being its identification with the state, i.e. the church's officials are state officials; its governmental organs are state organs; its law can be interpreted by state courts and written by the state legislature – Garth Moore and Timothy Briden, *English Canon Law* (2nd edn., London 1985), pp. 15f.

[16] The only case in British Columbia 'where the civil courts ventured into the ecclesiastical realm' is *Bishop of Columbia* v *Cridge* (1874), 1 BCR (Pt 1) 5 (SC). In that case, the court considered the applicability of the Church Discipline Act to an Anglican diocese in Canada, and found that, as it was unparalleled in Canada, the act was 'at least in its entirety… not law'. While the law would not always apply to the unique circumstances of the Anglican church in Canada, the court would still use it as a guideline in reviewing the decision of the bishop's court - Russ Brown, 'Judgements of Solomon: law, doctrine and the Cridge Controversy of 1872-1874' in H. Foster and J. McLaren (edd.), *Essays in the History of Canadian Law*, vol. 6: *British Columbia and the Yukon* (Toronto 1995), pp. 335, 339.

of a subsequent decision by the highest possible Commonwealth authority, the Privy Council:[17]

> Blackstone, in that passage was setting right an opinion attributed to Lord Holt, that all laws in force in England must apply to an infant colony of that kind. If the learned author had written at a later date he would probably have added, that, as the population, wealth and commerce of the colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it…

And so while originally the Canadian colonies may have received only rudimentary law, more and more English law came into force 'with the increase of population and the general development of [Canadian] political, social and economic life.'[18] This gives rise to a juristic principle that Canadian jurisdictions should not hold English law to be inapplicable 'without tangible grounds for doing so', i.e. English rules are in force in Canada unless there is some reason to the contrary.[19] As a result, courts rarely find a non-statutory English law – such as armorial law – unsuited to Canadian jurisdictions.[20]

As the High Court of Chivalry was the 'twin brother' of the Court of Admiralty, it is significant that Canada has received the law administered by the latter court.[21] As with armorial law, admiralty law originated outside England, and was administered by a separate court, yet was still part of the law of England received by her colonies. So too was the law merchant (noted above as comparable to armorial law in derivation and composition).[22]

[17] *Cooper* v *Stuart* (1889) 14 App Cas 286 at 292 (PC) (NSW).

[18] *Hellens* v *Densmore* [1957] SCR 768 at para. 40.

[19] J. E. Cote, 'The reception of English Law', *Alberta Law Review* 15 (1977) pp. 29-92 at 69. *Uniacke* v *Dickson* (1848) 2 NSR 287 (SCNS), in Cote, op. cit., p. 67. Compare *Leong Ba Chai* v *Lim Beng Chye* [1955] AC 648 at 665.

[20] Robert G. Howell, 'Important aspects of Canadian Law and Canadian legal systems and institutions of interest to law librarians and researchers in law libraries', in Joan Fraser (ed.), *Law Libraries in Canada* (Toronto 1988), p. 64; and Bruce Ziff, *A Property Law Reader: Cases, Questions and Commentary* (Toronto 2004), p. 83. The only instance in which a Canadian court has directly considered armorial law resulted in a ruling that arms are not actionable in any Canadian court – see *R* v *Sovereign Seat Cover* (note 9 above) at para. 6, as they are not cognizable by the common law (but more precisely, they are not within the *jurisdiction* of common-law courts in England: see above). The court did not consider, however, whether armorial law had been received into Canada. Yet, tellingly, in deciding that arms are not actionable in Canada, the court relied upon the armorial law of England. Hogg (note 12 above), p. 25, also notes that where a court found an English law was unsuitable to a colony, it was normally an English *statutory* law (which the law of arms is not).

[21] Sir Anthony Wagner, *Heralds of England* (London 1967), p. 37; Alfred Howell, *Admiralty Law, Canada* (Toronto 1893), p. xv. Both the courts of Admiralty and of Chivalry came into existence at the same time, viz. about 1350; the civil law governed both; appeals from each lay with the King in Chancery; and a basic part of the business of both was disputes arising from contact with foreigners; cf. *Atkin's Encyclopædia of Court Forms in Civil Proceedings*, vol. 31 (2nd edn., London 1993), p. 189.

[22] Cote, op. cit., pp. 61f.

To argue that an English law (e.g. the law of arms) was inapplicable to Canada, one must show that the law 'is based on or presupposes social or political conditions peculiar to the country of its origin.'[23] Were the social and political conditions upon which England's law of arms is based peculiar to England? No. Firstly, 'Heraldry is a phenomenon of European [i.e. not peculiarly English] history... It is alive not only in Europe but also in the other continents where it was introduced by migrating and colonizing Europeans.'[24] Many aboriginal peoples in North America also employed and regulated heraldic devices. As for the social and political conditions that resulted in arms and their law, there are convincing arguments that conditions in northern Europe in the late eleventh century gave rise to a desire by ruling families for 'personal family identification in a recognizably hereditary form' in order to perpetuate links with former rulers.[25] This form of identification began with seals, then in the following century spread to shields as social and political conditions in Europe resulted in a military upper class that sought thereby to declare its social status and display its vanity.[26] Conditions were by that time such that armory spread across Europe in less than thirty years.[27] As it spread, so did the idea that the law must regulate arms, so that no two persons bore the same arms, and thus laid claim to the same lineage and status denoted by those arms.[28] Older theory claims that the conditions of medieval warfare (e.g. the prevalence of face-obscuring helmets on

[23] *Re Ezrah* (1930) 1 LR 58 Calc 761 at 765, in Cote, op. cit., p. 71.

[24] Carl-Alexander von Volborth, *Heraldry: Customs, Rules and Styles* (Poole 1981), p. vii.

[25] Thomas Woodcock and John Martin Robinson, *The Oxford Guide to Heraldry* (Oxford 1988), pp. 3f., and Friar, op. cit. (note 4 above), pp. 2f.; cf. Rodney Dennys, *Heraldry and the Heralds* (London 1982), p. 31.

[26] Woodcock and Robinson, pp. 3f. As the 'warrior aristocracy' extended down into the ranks of the lesser gentry, this latter group adopted armory 'as the primary expression of its rise to social acceptability', and then, in turn, those who did not go to war emulated their neighbours who did by acquiring arms of their own. Maurice Keen, 'Heraldry and hierarchy: esquires and gentlemen' in Jeffrey Denton (ed.), *Order and Hierarchies in Late Medieval Europe* (Basingstoke 1999), pp. 98-100; id., *The Origins of the English Gentleman* (Stroud 2002), chapter 5; both cited in Peter Coss, *The Origins of the English Gentry* (Cambridge 2003), p. 243. As for armory and seals, see Friar (note 4 above), pp. 44f.: 'One of the principal functions of armory is on seals' and 'the use of the same sigillary devices by succeeding generations of the same family' consolidated the hereditariness of armory. Around the 1140s in England, lesser men began to imitate the great tenants-in-chief by adopting seals of their own, as seals became a symbol of lordship, and those who employed them viewed themselves as lords in their own right; Coss, op. cit., p. 36.

[27] These conditions included the cultural transformation of Europe at the time, parts of which were the expression of visual decoration and the ideals of chivalry; Friar, pp. 2ff. In England, there were more than 3,000 armigerous families by 1300; Scott (note 11 above), p. 30.

[28] Stephen Slater, *The Complete Book of Heraldry* (London 2003), p. 43; Rodney Dennys, *The Heraldic Imagination* (London 1975), p. 32. The heraldic visitations in England can be seen as a suppression of the usurpation of status: Scott, loc. cit. Examples of such usurpation or alleged usurpation (i.e. arms of pretension) are the removal of differencing marks by the proud Henry, Earl of Surrey, from his arms (which, by his right of descent from Edward I, were the Royal Arms). This suggested a claim to the throne, which may have added to the evidence for

the battlefield) resulted in coats of arms, but even accepting this, such 'battlefield heraldry' would have expired by 1500. Yet arms persisted as 'a potent instrument of social mobility' (particularly for the emerging middle class) and as 'an indicator of blood lines, marriage connections and degree (status).'[29] Status was also a reason for civic bodies to desire arms, e.g. when a village achieved the status of a borough, or when settlers founded a new town, the community sought a grant of arms as recognition of this new status.[30]

Were such conditions peculiarly English? Examining the historical rôle of armory in North America, one sees circumstances paralleling those in England. The first regulation of armory by England in North America appears to have been as early as 1586, with a grant of arms to the City of Ralegh, in the Colony of Virginia. The sovereigns of France, England and Scotland employed armorial seals in regard to North America as early as the sixteenth century. The English Crown first granted arms to an American colonist in 1694, namely William Nicholson, Governor of Maryland; while the French Crown granted arms to New French colonists beginning at least in the seventeenth century, e.g. the grant of arms to Charles de Moyne in 1668. Several of the Fathers of Confederation received arms from England soon after Canada's formation, as did the Crown in right of the four foundation provinces of Canada.[31] Plausibly, one may suppose the conditions resulting in these arms and their regulation in North America to be comparable to those in England described above: likely colonists desired arms for the display of familial connections and pride; and colonial settlements, for the display of newly-acquired status. Summarising (and paraphrasing Squibb), it seems difficult to argue that the laws of arms were *not* applicable to the conditions in which colonial armigers found themselves.[32]

[*note 28 continued*]
his execution for treason by a paranoid Henry VIII: Slater, op. cit., p. 139; Dennys, *Heraldry and the Heralds*, pp. 123ff. This king also executed the Duke of Buckingham, the Earl or Suffolk, the Marquess of Exeter, and the daughter of the Duke of Clarence, all of whom bore arms indicating pretensions to membership of the Royal Family; Dennys, *Heraldry and the Heralds*, p. 121.

[29] Slater, op. cit., p. 21; von Volborth, op. cit., p. vii; Coss, op. cit., p. 140; Friar, pp. 7, 21. There was undeniably, however, a real connection between battle and armorial display, but more practically the display was by means of flags rather than clothing or accoutrements (which could be rent and muddied in battle so as to render identification difficult or impossible). Thus, while arms may originally have been an 'occupational designation', by the close of the 15th century in England, they had become firmly recognised as a means of social distinction; Bush, op. cit. (see note 9 above), pp. 26, 91, 95.

[30] Jiří Louda, *European Civic Coats of Arms* (London 1966), p. 14.

[31] Woodcock and Robinson, p. 156; Ian L. Campbell, *The Identifying Symbols of Canadian Institutions* 1 ([Wellington] 1990), p. 183; Alan Beddoe, *Beddoe's Canadian Heraldry* (Belleville 1981), pp. 40-4, 56; Henry Paston-Bedingfeld, 'English grants of arms in North America', *Heraldry in Canada* 39 (2005) no. 3, p. 11; Conrad Swan, *Canada: Symbols of Sovereignty* (Toronto 1977), pp. 6, 15f. One of the first individuals in what is now Canada to receive a grant of arms from England was Major General Sir Isaac Brock, in 1812.

[32] Squibb, 'Heraldic authority' (note 2 above), p. 129.

Furthermore, as Cox has noted reasonably, 'Arms are not granted in isolation, there must be a Law of Arms'.[33] Thus, if Canadian colonists and their settlements were receiving grants of arms, must not the colonies where they resided also have received a *law* of arms? Accordingly, the English heralds drew patents of arms to colonists in North America on the basis that England's law of arms had become part of the law of the colonies.[34]

Another consideration for the reception of England's law of arms is whether a Canadian colony had the necessary local machinery to enforce the law, i.e. did the courts have jurisdiction to enforce armorial law? [35] In England, this machinery was the High Court of Chivalry, which, as noted above, had exclusive jurisdiction over armorial law. None of the Canadian colonies, however, established an equivalent court.[36] One ought not to attribute much significance to this, for as one Canadian jurist observed, under the circumstances during which the Canadian justice system arose, the distribution of jurisdiction and the 'indulgence in the luxury of separate courts' that existed at the same time in England was neither applicable nor possible in the Canadian colonies.[37]

Yet some Canadian colonial courts appear to have *ipso jure* received jurisdiction of the High Court of Chivalry, e.g. in 1859 the Supreme Court of British Columbia received 'jurisdiction in all cases, civil as well as criminal' arising within the colony.[38] Later, at confederation, all the superior courts of Canada's provinces received jurisdiction (if they did not already have it) unlimited by subject matter, i.e. they received general jurisdiction over *all* causes of action.[39] As the Privy Council decided,

[33] Noel Cox, 'Commonwealth heraldic jurisdiction', *CoA* 3rd ser. 1 (2005), pp. 145-62 at 158.
[34] Squibb, loc. cit. Accepting this, colonial courts in what is now Canada ought to have been able to enforce the rights of an armiger granted arms by an English herald (see more below).
[35] Compare this, again, with admiralty law in Canada. The commanders of fishing vessels entering Newfoundland harbours in the early seventeenth century were probably the first to exercise admiralty law in Canada, by virtue of their becoming 'judges' in disputes between fishermen *per* the 'Western Charter' issued by the Privy Council in 1633. By the 18th century, commissions from the Admiralty in England established Vice-Admiralty Courts in many parts of what is now Canada; Edgar Gold, Aldo Chircop and Hugh Kindred, *Maritime Law* (Toronto 2003), pp. 107f.
[36] This could be argued as the court's reasoning in *R* v *Sovereign Seat Cover*, i.e. the Crown does not enjoy the exclusive right to grant arms because there is no authority in Canada (akin to the College of Arms) constituted to exercise this right (para. 10). If this is the case, then the establishment of the Authority in 1988 would have asserted the Crown's 'exclusive right in the preparation and issuing of coats of arms.' For an interesting proposition on the resurrection of Carolina's colonial equivalent of the High Court of Chivalry, viz. the Court of Honour, see Duane Galles, 'A Southern call to arms: an armorial compact', *William Mitchell Law Review* 16 (1990), pp. 1281-91.
[37] Bora Laskin, *The British Tradition in Canadian Law* (London 1969), p. 10.
[38] *Watts* v *Watts* [1908] AC 573 at 576.
[39] Hogg (note 12 above), pp. 134, 147. General jurisdiction is unrestricted and unlimited in all matters of substantive law, both civil and criminal (except in so far as that has been taken away in unequivocal terms by statute); see S. A. Cohen, *Due Process of Law* (Toronto 1977), p. 344.

'if the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the [Queen's] Courts of justice'.[40] Thus Canada did possess the necessary local machinery to enforce the law of arms. And if this law had been otherwise unsuitable to Canada (and thus dormant during its unsuitability), reason and case authority suggest that upon the courts receiving jurisdiction to enforce armorial law, 'it [then] springs into effectiveness'.[41]

Changes to Armorial Law in Canada since Reception

Having established that Canada received the armorial law of England, what can one say that law now is in Canada? Much of England's armorial law developed by custom from the thirteenth to the fifteenth centuries, and was set down in books of precedents by heralds in the sixteenth century. One may further ascertain this law from the practice of the judges and counsel of England's High Court of Chivalry.[42] In Canada, armorial law may have additional sources: (a) jurisprudence of Canadian courts before and since reception; (b) federal (and perhaps provincial) statute; and (c) principles of civil law and the common law as the courts may determine applicable 'through a comparative methodology' in an armorial law setting.[43]

[40] *Board* v *Board* [1919] AC 956 at 962. Also, 'where there is a law to be enforced the King's courts are *prima facie* the authority to enforce it'. *Board* v *Board* 41 DLR 286 at 302, in *Re Michie Estate and City of Toronto* (1968) 66 DLR (2d) 213 at 216f.

[41] Cote (note 18 above), pp. 72f.; *Hellens* v *Densmore* at 782-3; *Gloth* v *Gloth* (1930) 153 SE 879 at 888 (Va); and *Fitzgerald* v *Luck* (1839) Legge 118. This denies the suggestion of one Scots officer of arms – Campbell (note 31 above), p. 220 – that, prior to the establishment of the Authority, the only arms recognised by Canadian law were those granted personally by the Sovereign and those recognised by the Trade-marks Act RS 1985, c. T-13. A further argument in favour of the reception of armorial law is that, under the preamble of the Constitution Act 1867 (UK), 30 & 31 Vict, c. 3, reprinted in RSC 1985, App. II, no. 5, the constitution is 'similar in principle to that of the United Kingdom'; and just as that similarity can imply, for example, the Dominion receiving a bill of rights, so too could it imply the Dominion receiving armorial law (though there were several distinct armorial jurisdictions at that time within the United Kingdom). See Hogg (note 12 above), pp. 636f., and Alan Beddoe, 'The historical and constitutional position of heraldry in Canada', *Heraldry in Canada* 3 (1969) no. 1, p. 6. England's College of Arms may be considered an aspect of that part of 'the English Constitution which Bagehot classified as the "Dignified"' – quoted in Woodcock and Robinson, p. 139. At the very least, the Dominion received as part of its constitution the Royal Prerogatives by which the Crown creates arms, for the prerogatives of the Crown were as extensive in the colonies as in Great Britain. *Liquidators of the Maritime Bank of Canada* v *Receiver-General of New Brunswick* [1892] AC 437 (PC) 441 and *A.-G. B. C.* v *A- G. Canada* (1889) 14 App Cas 295 at 302.

[42] Woodcock and Robinson, p. 117; Squibb, *High Court of Chivalry*, p. 166.

[43] Compare the sources for Canadian maritime law (i.e. admiralty law, a body of law related to armorial law): federal statute; case law, viz. jurisprudence of the English courts until reception; jurisprudence of Canadian courts before and since reception; 'principles of civil law and the common law as may be determined applicable through a comparative methodology in a maritime law setting by the Federal Court'; and maritime law conventions to which the

[*Note 43 continues over*]

As for statutory sources of Canadian armorial law, note that statute can abolish or limit a prerogative power of the Crown (such as the power to grant arms), or regulate the manner in which it is exercised.[44] There does not appear to be, however, any federal statute to date that has limited or that regulates the armorial prerogative. But federal statute has likely altered certain aspects of federal armorial *law*. One example is the effect of attainder under armorial law: in English law, attainder resulted in the forfeiture of an armiger's right to arms, yet the Criminal Code of 1892 eliminated attainder in Canada, along with, one assumes, any forfeiture to armorial rights.[45]

Several provincial statutes purport to enable certain legal persons to assume arms without reference to the Crown, e.g. section 12 (2) (s) of the Brandon University Act empowering a university's board of governors to assume arms for the school; section 63 of the Municipal Government Act empowering municipal councils to assume arms; etc.[46] What effect do such powers of assumption have upon Canada's law of arms? Normally, where statute supplants the prerogative, the Crown may no longer act pursuant to the prerogative, but only subject to the supplanting statute. Yet while the prerogatives of the Crown in right of a province are not immune from federal legislation, a prerogative of the Crown of Canada conventionally cannot be altered by laws enacted by the provincial legislatures; so provincial statues such as those above would appear to limit only the armorial prerogative of the Crown in right of the enacting province.[47] In reality, however, these statutes do not even affect the Royal Prerogative (which is vested in the executive, and not the legislature), but only alter the substance of armorial law, i.e. they make it legal for certain persons to assume arms without reference to the Crown, and do not bestow upon any person the power to *grant* arms (for the Crown is the sole fountain of honour in Canada).[48] In fact, therefore, such lawfully assumed arms would not be honours, i.e. would have no honourable status.[49]

Perhaps the most significant changes to armorial law in Canada arise from the effect of part I of the Constitution Act 1982, i.e. the Canadian Charter of Rights

[*Note 43 continued*]
Dominion is party – see Gold, Chircop and Kindred (note 35 above), p. 117. Note, however, that judges in the civil-law courts in England (such as the High Court of Chivalry) did not feel bound by precedent until the end of the eighteenth century: Squibb, *High Court of Chivalry*, p. 163. Note also that Canadian jurisprudence of armorial law is scant.

[44] *A.-G.* v *De Keyser's Royal Hotel* [1920] AC 508 (HL) and *Clarke* v *A.-G. Ontario* (1965), 54 DLR (2d) 577 (Ont CA).

[45] Woodcock and Robinson, pp. 68f. The Criminal Code, 1892, SC 1892, c. 29, s. 965

[46] Brandon University Act, CCSM c. B90; Municipal Government Act, SNS 1998, c. 18.

[47] Paul Lordon, *Crown Law* (Markham 1991), pp. 67, 130, 133f.

[48] Ibid., p. 72. The conferral of honours continues to be a prerogative power in Canada – see Hogg (note 12 above), p. 11; and 'the value of an honour depends [in a constitutional monarchy] entirely upon its being considered as a mark of royal favour' – Keith (note 7 above) vol. 3, p. 1299.

[49] As princes often granted arms simultaneously with ennoblements, such granted arms became considered superior to assumed arms. Gayre (note 10 above), p. 12.

and Freedoms (henceforth 'the Charter'), which applies to armorial law as it does to all Canadian law. A dictum of the Federal Court of Canada also suggests that the Charter would apply to the actual *granting* of arms (as an exercise of the Royal Prerogative).[50]

The Authority has taken this to mean that certain aspects of English armorial law regarding women are unconstitutional, e.g. the denial of crests to women; the denial of shields to spinsters and widows; etc. Under armorial law as received from England, only men may lawfully bear crests, and spinsters and widows must display their (father's) arms on a lozenge, rather than on a shield.[51] The Authority has interpreted this (*per* section 15 (1) of the Charter) as unconstitutional, and thus grants both crests and shields to Canadian women. This interpretation may have been prudent at the time of the Authority's inception, for then the Charter was but a few years in force, and the courts had had little time to interpret its full implications. But, looking at subsequent jurisprudence, is this law actually unconstitutional?

All laws make distinctions between categories or groups of individuals. These distinctions can be justified by referring to relevant differences in the needs, circumstances or abilities of the persons affected by the law.[52] But when such distinctions cannot be justified, they are unlawfully discriminatory. The Supreme Court of Canada (hereinafter simply referred to as the Supreme Court) has established a three-stage analysis of discrimination under section 15 (1), and it is the third stage of this that would be crucial to the Authority's interpretation, viz. does this differentiation between men and women by the armorial ensigns they display amount to a form of discrimination that demeans a woman's dignity? In other words, discrimination that reflects the stereotypical application of presumed female characteristics, or which otherwise has the effect of perpetuating or promoting the view that the woman armiger is less capable or worthy of recognition?[53] To properly answer this question, one would need to uncover the reasoning behind the denial of crests and shields to women.

Formerly, women did not typically fight wars, and so had no occasion to use a shield: thus, the warlike shield was heraldically inappropriate to a woman.[54] Nor did women compete in tournaments (at which armigers wore their crests) and so had no reason to bear crests. Another reason for women not to bear crests has been to prevent their transmitting them to descendants, for if a crest granted to a particular surname were inherited by a different surname, this would cause 'great confusion in

[50] *The Queen* v *Operation Dismantle* [1983] 1 FC 745 at 751, 756, 782 (Fed CA).

[51] Woodcock and Robinson, p. 75.

[52] Patrick Monahan, *Constitutional Law* (3rd edn., Toronto 2006), pp. 428f.

[53] *Law* v *Canada (Human Resources)* [1999] 1 SCR 497 at 529. Essentially the Supreme Court has decided that if a law treats individuals or groups differently, that treatment must be justifiable by reference to relevant and appropriate differences between those individuals and others. Ibid., p. 432.

[54] L. G. Pine, *Heraldry, Ancestry and Titles: Questions and Answers* (New York 1965), p. 40; Slater, *Complete Book of Heraldry*, p. 112.

armorial bearings', and would abridge the Earl Marshal's authority by permitting one to assume the crest of an ancestor without reference to that officer.[55]

Now, of course, the majority of men armigers do not fight wars, and the tournaments at which crests were worn no longer truly occur, yet men continue to bear both shields and crests, so why should not women begin to bear them? Does not the denial of shields and crests to women perpetuate a view that women are less capable than men or reflect a stereotypical application of the presumed characteristic of women as irenic and peaceful?

The persistence of these elements amongst men armigers who no longer have practical need for them, however, derives in part from an object of armory, namely to distinguish the individual armiger. Gender or marital status have been useful attributes in distinction, e.g. arms borne on a lozenge or oval signifying a woman; arms of married armigers impaled on the same shield; etc. The loss of this distinction might contribute to the 'great confusion in armorial bearings' feared above. It is for this reason one could argue that the denial of shields and crests to women could be demonstrably justified in a free and democratic society under section 1 of the Charter.

Another factor to consider is a phrase in the third stage of the Supreme-Court analysis mentioned above: does this differential treatment withhold a benefit from women? Are shields and crests, indeed, are coats of arms, benefits? Furthermore, the Federal Court ruled that, at the stage an honour might be granted, the potential grantee has neither right nor expectation to the receipt of that honour.[56] Comparatively, at the stage a woman has petitioned for a grant of arms, she has neither right nor expectation to receive that honour (nor, one assumes, what elements it might include).[57] The

[55] Garter King of Arms, CA record Ms Chapter Book 8 p. 90, cited by Woodcock and Robinson, p. 92. Other problems are that it could result in the assumption of the Royal Crest of England by someone descended from that Royal Family; and that previous Royal Licences given to permit the use of certain crests would be rendered pointless. Ibid., pp. 76f. Under English law, a woman may only bear a crest if a sovereign prince.

[56] *Black* v *Chrétien* (2001), 54 OR (3d) 215, 199 DLR (4th) 228 (CA). See Lorne Sossin, 'The Rule of Law and the justiciability of Prerogative Powers: a comment on *Black* v. *Chrétien*', *McGill Law Journal* 47 (2002), pp. 435-56 at 443f. Also, '... the individual in society cannot demand that utopian justice provide him with a shield bearing his personal coat of arms': *R* v *Fisher*, 49 CR (3d) 222, 39 MVR 287, 23 CCC (3d) 29, 37 Man R (2d) 81, at para. 10.

[57] The use of the word 'petition' in the Canadian context might not be entirely appropriate, though the Authority uses this term (or sometimes, curiously, 'petition letter'). The Authority has decided that 'the intent of the initial *letter* is more important than the form' (personal correspondence from Darrel Kennedy, Assiniboine Herald, 12 May 2006, emphasis added). A true petition, however (which is 'peculiarly suited to the dignity of the sovereign' and which preserves the respect and submission due to the Sovereign), *does* have a specific form, without which it is *not* a petition, *viz.* it must state the whole of the titles of the Crown and of the petitioner (which petitions to the Authority do not) and is addressed either to the Queen in Parliament or to any of the Queen's courts (e.g. in England, the High Court of Chivalry); Chitty (note 11 above), pp. 341, 345f. The Authority is not, however, a court. In South Africa, such requests made to the Bureau of Heraldry (which is not empowered to act judicially) are termed 'applications'; *The Law of South Africa*, vol. 10 (Durban 1997), para. 255.

situation is different, however, where a woman were to *inherit* the arms of an ancestor. In England this is not possible unless the woman has no brothers.[58] While this might also be unconstitutional in Canada, once a woman *does* become heiress to a coat of arms, she has a right and expectation, enforceable at law, to those arms. At this stage, it would be difficult in Canada to argue that she could not inherit the crest her male ancestors bore, along with the arms they bore on a shield.

Of course, I write here only of the inability of the Authority to *enforce* these rules: nothing would prevent a grantee from requesting that his differencing mark adhere to the rules – just as nothing prevents a woman grantee from electing not to receive a crest or not to bear her arms on a shield.

And, as argued above, if these practices of differencing based on age or marital status, and of denying crests to women, were integral to armory (whose basic function is identification), i.e. integral to the heraldic system of Canada, then could not one successfully argue such practices are a reasonable limitation of the right to equality? [59] If so, there would be no legal reasons to abandon these practices, only political reasons.

Another potential source of change in armorial law since reception is the Authority itself, which, since its creation in 1988 has done much to try and alter this law. While perhaps the most notable example regards the use and inheritance of arms by women (see above), the Authority has sought to make other changes, e.g. whereas under English law a man is entitled to bear only one crest (that of his father), the Authority has decided that under Canadian law a person may bear more than one; under English law, daughters do not difference their arms, whereas the Authority claims that they must; etc.[60]

But is the Authority truly empowered to make these changes? Under principles of administrative law, an inferior body such as the Authority may be delegated to make law.[61] By and large, such delegation is from the federal parliament or provincial legislature. Prerogative power, however, is not vested in the legislature, but in the executive; and the Crown may choose to delegate the exercise of certain prerogatives.[62] Thus, after the Sovereign authorised the Governor General of Canada to 'exercise or provide for the exercise' of the armorial prerogative, the latter was able to delegate this power to the Authority.[63]

[58] Woodcock and Robinson, p. 128 and Brooke-Little (note 9), p. 27.

[59] Swan (note 31 above), p. 3. Section 1 of the Constitution Act 1982 permits the reasonable limitation of constitutional rights.

[60] Woodcock and Robinson, p. 76; Boutell, rev. JBL, p. 118; Kevin Greaves, *A Canadian Heraldic Primer* (Ottawa 2000), p. 55; personal correspondence from Bruce Patterson, Saguenay Herald (as he then was), Canadian Heraldic Authority (7 June 2006).

[61] G. Gall, *The Canadian Legal System* (5th edn., Scarborough 2004), p. 542.

[62] While the Crown may so delegate, it cannot voluntarily divest itself of a prerogative power; see *A.-G. Canada* v *A.-G. Ontario* (1894), 23 SCR 458 at 469.

[63] Letters Patent of Governor General Jeanne Sauvé, 4 June 1988 (37 Eliz. II), *Canada Gazette* 1988.I.2226. Although the Governor General was able to exercise the Royal Prerogative by which arms are granted by virtue of the Letters Patent constituting the office of the Governor General of Canada, 1947, RSC 1970, Appendix II, no. 35 – see Beddoe (note 41 above), p. 8;

[*Note 63 continues over*]

There seems, therefore, no question that the Authority has been lawfully delegated to exercise the prerogative to *grant* arms, but there is a question as to whether or not it can legislate (that is, make new armorial rules) regarding the use and inheritance of arms. The Crown, in right of England or Canada, cannot legislate via its prerogative; and while there are suggestions in statutory and case law that the Governor General may promulgate a regulation or other instrument via the Royal Prerogative, such regulation will only have effect in limited circumstances, such as where vested rights are *not* affected.[64] Clearly, rules regarding the use and inheritance of arms can affect vested rights in such arms. Furthermore, while the Crown may create a dignity (such as a coat of arms) and, at creation, determine the course of its devolution, once brought into existence, the Crown's control of a dignity largely ceases, i.e. it cannot alter the course of its descent (according to the settled rules of law); give effect to a surrender of it; restore it if forfeited; etc.[65] Thus, while the Authority received the exercise of the prerogative to grant arms, there is no evidence that it received any power to alter the substance of the law of arms Canada, as received from England.

One argument in favour of the Authority being able to alter armorial law is some kind of convention: convention regulates Crown prerogative, and in England the College of Arms appears, by some kind of convention, to be able to make rules via its Chapters regarding the use and inheritance of arms.[66] If it can be held that this same convention regulates the Authority, then the Authority would appear (as it suggests) to be able to make such rules and, in effect, alter armorial law received from England. On the other hand, one has difficulty determining (in the absence of jurisprudence) if the rules England's College of Arms makes are law or merely College practice:

[*Note 63 continued*]
the Government of the day decided that for greater certainty and for publicity, supplemental letters patent would be preferable to establish the Authority – personal communication with H. L. Molot, Senior General Counsel, Department of Justice. These were issued in 1988.

[64] Lordon (see note 47 above), pp. 19f.

[65] Palmer (note 7 above), p. 2. As to arms being a variety of dignity, see William Cruise, *An Essay on the Law of Dignities, or Titles of Honour* (London 1804), p. 5, and *Sullivan Entertainment Inc.* v *Anne of Green Gables Licensing Authority Inc.*, (2000), 7 CPR (4th) 532, viz. 'the subject matter of section 9 [of the Trade-marks Act R. S. 1985, c. T-13] is dignities', including the Royal Arms; the arms of members of the Royal Family; arms adopted by the Dominion, by any province, and by any municipal corporation in Canada; and any arms granted 'pursuant to the prerogative powers of Her Majesty as exercised by the Governor General', i.e. by the Chief Herald of Canada – cf. Trade-marks Act s. 9 as above. The prerogative to create dignities is a direct prerogative of the royal character, or dignity, rooted in and springing from Her Majesty's political person. It is a prerogative necessary to secure reverence to the Queen's person, distinguishing her from her subjects and ascribing to her certain inherent qualities distinct from, and superior to, any other subject. See *Blackstone's Commentaries*, pp. 239-41.

[66] Hogg (note 12 above), p. 12; Dennys (note 25 above), p. 145; Woodcock and Robinson, pp. 75f. Occasionally (e.g. when a Chapter cannot resolve a question) the Earl Marshal will also legislate by warrant.

one has the same difficulty in the Canadian context.[67] One English herald has distinguished heraldic rules and conventions from the law of arms: the latter being the laws governing the inheritance and use of arms; the former being regulations promulgated by the Kings of Arms, 'some of which might well be upheld in the Court of Chivalry'.[68] In a Canadian context, however, regulations are juristically akin to law.

The mandate of the Authority as expressed in its 'enabling statute' (i.e. the letters patent of 1988) is comparatively circumspect, suggesting that the Authority is strictly limited to granting arms in Canada. Recalling the summation of Canadian legislative interpretation by the Supreme Court is worthwhile: 'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.'[69]

What, then, was the object of the letters patent, the intention behind the creation of the Authority? Considering a summary of the proceedings of the national conference on the Authority prior to its creation, one may interpret the powers of the Authority contemplated to be the preservation and enhancement of symbols, including those of 'native people'; the making of 'heraldic traditions' in Canada 'more representative' (of the nation's cultural diversity?); and the domestication of 'heraldic traditions' (i.e. the elimination of 'reliance on the heraldic authorities overseas').[70]

One receives further interpretive assistance from the commissions of Her Majesty's Canadian officers of arms, whom the Governor General commissions 'with a view to providing for the creation and administration of a heraldic system for Canada'.[71] What might this mean? The Supreme Court has considered a 'system' to be a practice under instruction and observation, and 'administration' to mean all conduct engaged in by a governmental authority in furtherance of governmental policy.[72] Policy (in legal usage) involves planning; allocating resources; discretionary

[67] Sir Crispin Agnew of Lochnaw, 'The conflict of heraldic law', *Juridical Review* 61 (1988), pp. 61-76 at 75. Other writers consider the rules part of armorial law: Franklyn (note 4 above), p. 255.

[68] Brooke-Little (note 9 above), p. 26.

[69] *Stubart Investments Ltd.* v *R*, [1984] 1 SCR 536.

[70] 'Summary of the verbal proceedings', *A Canadian Heraldic Authority – National Conference on the Issue*, Ottawa: 26 March 1987, pp. 20f, cited in Campbell (see note 31 above), pp. 219, 223. As to the emphasis on cultural diversity, see Watt's comments, pp. 9f. (e.g. 'cultural and geographic issues pose barriers to many groups within Canadian society [seeking arms]'; '[the Authority] would eliminate any cultural biases'); Jackson's comments, p. 13 ('Saskatchewan… could be well-served by such a Canadian authority since the province is multi-cultural in nature…'); and Matheson's comments, p. 17 ('we have to consider Dublin, Eastern European authorities and Asiatic traditions').

[71] Commissions of Her Majesty's Canadian officers of arms, *Canada Gazette* 1988.I.4048ff.

[72] *Creveling* v *Canadian Bridge Co.* (1915), 51 SCR 216 and *B. C. Development Corp.* v *Friedmann* [1984] 2 SCR 447, in *Ontario (Ombudsman)* v *Ontario (Labour Relations Board)* (1985), 21 DLR (4th) 631 (Div Ct) [*Ontario* v *Ontario*].

decision-making; and the setting of standards.[73] Furthermore, courts have defined 'administrative' as those functions of government *not* performed by the legislature and the courts.[74] Fleshing out the commissions of these officers with the above definitions, one may interpret the officers' duties as being to provide for (a) the creation of heraldic practices (under instruction and observation by the Office of the Governor General) and (b) the furtherance of Government policy regarding these practices, which excludes legislating and adjudicating, but which can include standard-setting and discretionary decision-making.

Thus, one could argue (based on the wording of these commissions) that the Authority – in administering Canada's heraldic system – cannot legislate armorial law, nor can it adjudicate armorial disputes. Conversely, one could argue that the standard-setting and discretionary decision-making capacities would permit the officers of the Authority to create rules (in setting standards) and make decisions to resolve armorial disputes. At present the heralds hold meetings at which they discuss issues to be 'ruled on' by the Chief Herald, whose 'rulings' are recorded in the Authority's Policy File.[75] The use of such terms as 'rule' and 'ruling' does suggest standard-setting and discretionary decision-making.

There is a fine line, however, to be heeded in such rule making. Referring back to the foundational conference summary above, one notes that while the conference referred to domesticating heraldic *traditions*, it did not refer specifically to domesticating heraldic law.[76] Also, a booklet introducing the Authority and its work (published by Rideau Hall two years after the foundation of the Authority) lists the Authority's activities as granting and registering arms and insignia; providing information; and developing ceremonies.[77] There is no mention of rule making or legislating. Furthermore, only Parliament and the legislatures can make new laws: no exercise of a prerogative power can create law.[78] As noted earlier, it is difficult to distinguish whether these rulings are actually Canadian law or merely Authority practice.[79] If these rulings recorded in the Authority's Policy File are indeed policy, then they are not law.[80]

[73] *Just* v *British Columbia* (1985), 33 CCLT 49 at 52f.

[74] *Ontario (Ombudsman)* v *Ontario (Health Disciplines Board)* (1979), 26 OR (2d) 105 (CA), in *Ontario* v *Ontario*.

[75] Personal correspondence from Bruce Patterson, Saguenay Herald (as he then was), Canadian Heraldic Authority (7 June 2006).

[76] Tradition has been defined judicially as knowledge, belief, or practices transmitted *orally* from ancestors to posterity [*re Hurlburt's Estate*, 35 A. 77, 81, 68 Vt 366, 35 LRA 794]. The Supreme Court has considered 'traditional customs' (at least in an aboriginal context) to mean, 'those things passed down, and arising, from the pre-existing culture and customs…'; *R* v *Vanderpeet* (1996), [1996] 9 WWR 1 at 15, 50 CR (4th) 1.

[77] *The Canadian Heraldic Authority* (note 11 above), p. 13.

[78] Hogg (note 12 above), p. 10.

[79] Agnew of Lochnaw (note 67 above), p. 75. Recall, however, that Franklyn (note 4 above), p. 255, considered heraldic rules part of the law of arms.

[80] A good example of Government policy regarding honours is the infamous Nickle Resolution, which was a 1919 resolution of the House of Commons alone that Canadians not receive

Prior to the establishment of the Authority in 1988, there was some debate among heraldists as to which body of armorial law the new Authority of this former British colony would administer: was it England's, or Scotland's? [81] This article resolves that, upon careful, legal examination, the substance of Canada's law of arms *is* that of England's law of arms, just as the substance of Canada's common law is that of England. Yet, while Canadian courts and legislatures certainly could (and did) modify England's common law after reception, whether the Authority can modify the law of arms Canada received from England is (juristically) still uncertain. Despite this, the author hopes that the findings in this article might do much to assist heraldic authorities outside Canada determining what the substance of her law of arms is when considering arms granted by her Authority.[82]

[*Note 80 continued*]
titles of honour from the UK. This is a policy that successive governments have adhered to (often in an *ad hoc* fashion), but it is not, and has never been law. Christopher McCreery, *The Canadian Honours System* (Toronto 2005), p. 38 and Sossin (note 56 above), p. 437. If the Authority is able to make armorial law, it might do well to consider the concerns raised by Gall regarding such delegated legislation, *viz.* it ought to have *advance* consultation by all authorities concerned or affected; continuing consolidation and revision; scrutiny in order to ensure that it accords with enabling statue (i.e. the letters patent of 1988), and does not violate any rule of law or bill-of-rights provision; and (most importantly for Gall) provision to be accessed by Government personnel and the general public; Gall (note 61 above), p. 51. Some of the other authorities that might be concerned or affected by such armorial legislation could be the Canadian Identity Directorate (Department of Canadian Heritage); Canadian Intellectual Property Office (Department of Industry); Directorate of History and Heritage (Department of National Defence); etc. The Statutory Instruments Act R.S.C. 1985, c. S-22, s. 26, requires that statutory instruments are to be referred to committee. Generally, this act requires that a federal regulation must be registered to take effect, and is unenforceable until published in the *Canada Gazette*: Lordon (note 47 above), p. 24. If the Authority is able to write armorial law, it would need to abide by this act.

[81] D'A. J. D. Boulton, 'The law and practice of cadency in Canada (part II)', *Heraldry in Canada* 6 (1972) no. 2, p. 15; K. W. Greaves, 'The Canadian heraldic rules – part I', *Heraldry in Canada* 21 (1987) no. 4, p. 18.

[82] The author acknowledges the guidance in preparing this article of professors R. G. Howell, and J. P. S. McLaren, both University of Victoria. Thanks also to Bruce Patterson, Esq, St-Laurent Herald; Mr Brian Dillon; H. L. Molot, Esq.; Ms Carron Rollins, Associate Law Librarian, University of Victoria; and this journal's anonymous referee. Any errors or omissions are, of course, entirely the author's own. Questions persist about the application of England's law of arms to certain Canadian jurisdictions, viz. the provinces of Québec, Nova Scotia, and, possibly, Alberta: but these the author shall answer in another article.