Third Series Vol. V part 1.
No. 217
Spring 2009

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 V

2009

Part 1

Number 217 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 LAWS OF ARMS OF THE PROVINCES OF CANADA

C. S. T. Mackie

Previously in this journal I described how Canada has received armorial law from England.[1] Yet as the former Lord Lyon King of Arms, Lyon Blair, observed, 'The legislation creating the Canadian heraldic office allows them to create arms which are subject to "the law of Canada". Now, Canada has a series of differing laws, emanating from each province, some based on French legal principles, and others on English legal principles…'.[2] The question then arises, does this series of differing laws affect the law of arms of Canada?

To answer this question, I will first examine just what laws of arms the provinces of Canada have received (and, incidentally, whether their courts are empowered to administer these laws). Having determined this, I will detail what effect these provincial laws have upon Canada's heraldic system as administered by the Canadian Heraldic Authority (henceforth 'the Authority'), and what significance they may have to an authority outside Canada that is faced with determining the law that applies to a grant of arms by the Chief Herald of Canada.

Before proceeding, it is worthwhile to detail the constitutional structure of Canada, as this structure supports the relationship between the Dominion of Canada and her provinces.[3] The United Kingdom is a unitary state (with elements of devolution), while Canada is a federal state. In a unitary state, a single, central authority exercises the state's governmental power. In a federal state, however, a central authority exercises only part of the state's governmental power (the part that extends throughout the country), while regional authorities exercise the other part of the state's governmental power (extending only through their regions); and neither authority is subordinate to the other (as a local authority in a unitary state would be subordinate to that state's central authority). In many spheres, the powers of both authorities in a federal state may overlap, but when the resulting laws conflict, the

[1] C. S. T. Mackie, 'The reception of England's armorial law into Canada', *CoA* 3rd ser. 4 (2008), pp. 137-53.

[2] Robin Blair, lecture to Heraldry Australia Inc., December 2003, *Heraldry News* 34 (2004), p. 9.

[3] 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: henceforth Hogg 2002), p. 111.

law of the central authority prevails. Every individual in a federal state is subject to the laws of both the central authority and a regional authority.[4]

While the powers of Canada's central authority (i.e. the Dominion, or federal government) and regional authorities (i.e. the provinces) are divided, justiciary powers are unified. Though every province has her own courts, these courts are not restricted to deciding strictly provincial matters: a province can empower her superior courts (whose judges are appointed by the Dominion) to decide matters arising from both provincial and federal law. Thus, there is no need for a separate system of federal courts in Canada to decide federal matters. The Supreme Court of Canada, though technically a federal court, is more accurately a national court, as it may hear appeals from any of the provinces' courts of appeal; and as such, it unifies the administration of justice across the country.[5] Therefore, where the discussion below touches on the jurisdiction of a given province's superior courts to decide matters of armorial law, any such jurisdiction would be over both provincial and federal laws of arms (where the former is shown to exist).

Finally, mention below of the dates of reception of armorial law is really only relevant in regards to statutory law: any legislation of the U.K., Scottish or English parliaments enacted before the date of reception would have been received into the province in question, while any legislation enacted after the date of reception would not have been received. As for non-statutory armorial law, the dates of reception are immaterial, as reception is a continual process.[6]

The Provinces[7]

Ontario

What is now Ontario was, at the time of confederation, part of a province called 'Canada', which included what is now Québec. This province of Canada (saving Québec – see below) would have officially received England's armorial law as of

[4] Hogg 2002, pp. 79f. While in Canada most of the powers of each authority are exclusive, some are expressly concurrent, e.g. both the Dominion and her provinces have concurrent power to make laws regarding agriculture and immigration, *per* s. 95 of the Constitution Act 1867 (UK), 30 & 31 Vict., c. 3, reprinted in RSC 1985, appendix II no. 5. There is also an impliedly concurrent power of taxation exercised by both the Dominion and her provinces; cf. Hogg 2002, p. 337. It may be that the power to grant honours is another such impliedly concurrent power (see more below).

[5] Hogg 2002, pp. 134f.

[6] Ibid., pp. 24f.

[7] In respect of Canada's three territories (the Northwest, Yukon, and Nunavut), Royal Prerogatives there (which include the prerogative to grant arms) appear to remain vested in the Crown in right of Canada; Paul Lordon, *Crown Law* (Markham 1991), p. 11. England's law of arms as of 1870 would have been received into the Northwest Territories, as well as Nunavut and the Yukon (North-West Territories Amendment Act, SC 1886, c. 25, s. 3). As for administering this law, the Dominion has established federal courts for the territories: Northwest Territories Act, RSC 1985, c. N-27, Part II; Yukon Act, SC 2002, c. 7, ss. 38-44; Nunavut Act, SC 1993, c. 28, ss. 31-36. See Peter Hogg, *Constitutional Law of Canada* (student edition, Scarborough 2007: henceforth Hogg 2007), pp. 43, 217.

1792.[8] As far as administering this law, while Ontario's modern-day Superior Court of Justice only 'has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario', historically the Court of King's Bench for Upper Canada (now Ontario) exercised (*per* act of 1794) all powers as by the laws of England were incident to a superior court of civil and criminal jurisdiction (i.e. civil jurisdiction includes that of the High Court of Chivalry) and held plea in all manner of actions civil, real, mixed, etc., within the province.[9] Thus, Ontario has received England's law of arms, and has established courts that can administer it.

Québec

The province of Québec began as the French colony of New France, which had its own honours system: the colonial governor awarded honours on behalf of the French king, after having received permission from the latter to do so. And sometimes the king himself would award an honour to a New Frenchman without consulting the governor.[10] As for coats of arms, the king did not (as his English counterpart did) delegate his prerogative to grant these particular honours: a corporate body of heralds existed in France, but it only drafted the arms after the king had granted them in response to a petition directly to his person.[11] Nevertheless, lawful arms appeared in the colony: officials began displaying the French Royal Arms there in the early sixteenth century (e.g. with the landing of Jacques Cartier in 1534, who erected a cross bearing the Royal Arms); and colonists displayed their personal, inherited arms since at least the seventeenth century (e.g. the arms of the Duke of Montmorency engraved in the foundations of Champlain's second *Habitation* in 1623). And beginning at the latest in the next century, the king did grant new arms to his Canadian colonists, e.g. the Barons de Longueuil, François Hertel, René Godefroy de Tonnancourt, etc.[12]

Great Britain, however, conquered this colony in 1759, and France ceded it by the 1763 Treaty of Paris.[13] Yet even after conquest and until the French Revolution, the King of France continued to bestow honours upon Canadians (e.g. the Order of St Louis), usually in belated recognition of services rendered prior to the conquest.[14]

[8] Stats Upp. Can. 1792 (32 Geo. III), c. 1, s. 1. Courts initially deemed the reception of English law by Canadian jurisdictions to have occurred on the date of the first settlement of the colony, but the courts later determined that reception occurred on the date of the institution of a local legislature in the colony; Peter Hogg, *Constitutional Law of Canada* (2nd edn., Toronto 1985: henceforth Hogg 1985), pp. 23, 30.

[9] Courts of Justice Act, RSO 1990, c. 43, s. 11(2).

[10] Christopher McCreery, *The Canadian Honours System* (Toronto 2005), p. 21f.

[11] L. G. Pine, *The Story of Heraldry* (London 1963), p. 34; id., *International Heraldry* (Newton Abbot 1970), p. 148, 154.

[12] Alan Beddoe, *Beddoe's Canadian Heraldry* (Belleville 1981), pp. 40-4.

[13] Treaty of Paris 1763, s. IV, in William Houston, *Documents Illustrative of the Canadian Constitution* (Toronto 1891), p. 61.

[14] McCreery, op. cit. (note 10 above), p. 23, cf. p. 22: 'King Louis XIV. established the *Ordre Royal et Militaire de Saint-Louis* in April 1693. For subjects of New France, this was the most familiar honour'.

English law held that a conquered colony retained its private law (the law of arms being essentially private law), but its *public* law was replaced with English law.[15] Initially, however, King George III issued a proclamation that appeared to exclude French law from the colony. Then later, section VIII of the Quebec Act 1774 restored pre-conquest French civil law as the law of Québec, providing that 'in all matters relative to property and civil rights, resort shall be had to the laws of Canada' (i.e. the civil law of France that prevailed before conquest).[16]

Sir Conrad Swan (then England's York herald of arms) appears to have argued for the persistence of French armorial law in Québec when he wrote that England would confirm the arms emanating from the French Crown and inherited by Canadians on the basis that the British Crown undertook to guarantee its new subjects (and their descendants) their rights, privileges and property (including arms) according to their pre-conquest laws and customs. He based this on articles 37 and 42 of the Articles of Capitulation of Montreal (viz. 'the Canadians ... (and) the French ... shall keep the entire peaceable ownership and possession of their property ... movable and immovable ...' and 'The French and Canadians shall continue to be governed according to the custom of Paris, and the laws and usages established for this country'); and article IV of the Treaty of Paris, 1763 (which conceded sovereignty); and section VIII of the Quebec Act 1774.[17] Indeed, in an apparent recognition of the validity of French armorial law in Québec, Sir Conrad noted that England's heralds confirmed the French arms of the Québécois Gaspard Chaussegros de Lery in 1763.[18]

Québec's Superior Court does have jurisdiction to administer the province's armorial law: under part II, division I of Québec's Courts of Justice Act (i.e. Civil Jurisdiction of the Superior Court), the Superior Court continues in its jurisdiction under an 1849 act, viz. original jurisdiction to determine *all* civil matters whatsoever (as well as those in which the Crown was a party).[19] Thus it appears that Québec received the law of arms of France, and has established courts to administer it.

[15] Patrick Monahan, *Constitutional Law* (2nd edn., Toronto 2002), p. 35. Private law is that law dealing with private interests, where the legal system must resolve essentially private disputes, e.g. estate law, property law (i.e. law concerned with legally-recognised rights attached to ownership and possession of realty, such as coats of arms, or personalty). Public law is administrative, constitutional, criminal and taxation law, i.e. those areas of law in which public interest is primarily involved; G. Gall, *The Canadian Legal System* (5th edn., Scarborough 2004), p. 26. If the public law of Québec is English, then such elements of English armorial law that could be considered public, e.g. a cause-of-office proceeding in response to someone assuming arms, might hold sway in Québec over comparative French practice; cf. Thomas Woodcock and John Martin Robinson, *The Oxford Guide to Heraldry* (Oxford 1988), p. 144.

[16] Hogg 1985, p. 27; Quebec Act 1774, in Houston (note 13 above), p. 90.

[17] Articles of the Capitulation of Montreal 1760, in Houston (note 13 above), p. 33; Treaty of Paris 1763, ibid. p. 61.

[18] Ian Campbell, *The Identifying Symbols of Canadian Institutions* (s.l. 1990), part I, p. 184, note 7.

[19] Courts of Justice Act, RSQ 1977, c. T-16; An Act to amend the Laws relative to the Courts of Original Civil Jurisdiction in Lower-Canada, SProvC 1849 (12 Vict), c. 38, s. 6.

Nova Scotia

Nova Scotia presents a challenge: she is one of the Dominion's three, original provinces, but was ceded by France to the United Kingdom in 1713; and according to the English rule noted above, a conquered colony (such as Nova Scotia at cession) retained its private law (in Nova Scotia's case, the private law of France).[20] Thus, French armorial law would have persisted in this province, as it would appear it does in Québec. Yet after authorities expelled French colonists from the province mid-century, the law came to treat the colony as settled, not conquered, which means that her private law would not have been French.[21] But does this mean, then, that Nova Scotia's private law (including her law of arms) is English?

Hogg emphasises that since the union of Scotland and England in 1707, the law that followed British subjects to new colonies such as Nova Scotia was English, not Scottish, law.[22] Indeed, this is supported by a nineteenth-century Nova Scotia decision, which held that the colony received English law in 1758 when the colonists held their first legislative assembly.[23]

This perspective, however, is not faultless. Before the union of 1707, it is reasonable that Scots and English colonists would each have relied upon their own, distinct legal systems. After the Union, however, the presumption that all British colonists are Englishmen ('the self-referring fiction of the English common law') and the imposition of English law as imperial law, excluded Scots law from the administration of British colonies without explanation.[24]

Note how the Crown created the colony of Nova Scotia in September 1621 (well before Union) with the following words:

> We, therefore, from our royal attention ... to promote the wealth, prosperity and peace, of the natural subjects of our said Kingdom of Scotland, have, by the advice and consent of our Cousin and Counsellor, John Earl of Mar, &c. and of the other Lords Commissioners of the said Kingdom [i.e. Scotland], given, granted and transferred ... to the said Sir William Alexander ... the lands of the Continent and Islands situate and lying in America ... all which said Lands shall for the future bear the name of New-Scotland, (Nova-Scotia,) ...[25]

This charter was passed under the Great Seal of Scotland, not England.[26] And while it is unclear whether this charter was implemented in all its respects, the administrator of neighbouring New England supported this grant, saying the grant

[20] Treaty of Utrecht 1713, art. XII, in Houston (note 13 above), p. 3.

[21] Hogg 1985, p. 22 note 4.

[22] Ibid., p. 23 note 5.

[23] *Uniacke* v *Dickson* (1848) 2 NSR 287 (SCNS).

[24] Sir Thomas Smith, 'Pretensions of English law as "Imperial Law"', in *The Laws of Scotland: Stair Memorial Encyclopaedia* (Edinburgh 1987), vol. 5, pp. 382f, 390.

[25] 'Extract of the grant of Nova-Scotia, to Sir Wm. Alexander' (*Registrum Magni Sigilli Regum Scotorum* 1620-1623, no. 226), in Thomas Haliburton, *History of Nova Scotia* (Belleville 1973), vol. 1, pp. 324f.

[26] Conrad Swan, *Canada: Symbols of Sovereignty* (Toronto 1977), p. 121.

of Nova Scotia ought 'to be held by the Crown of Scotland and governed by the law of that kingdom'.[27] The manner of the colony's creation suggests a Scottish (rather than English) legal character. And pertaining to matters armorial, it is perhaps significant that Scottish armorial officers appear to have assigned the arms for Nova Scotia (in contrast, for example, with the arms for the equally-venerable colony of Newfoundland, assigned by English officers).[28]

The implication is that Nova Scotia's law of arms could be Scottish in origin. Scottish or English, the law of arms of Nova Scotia is enforceable by the province's Supreme Court, which has original and appellate jurisdiction in both civil and criminal cases.[29]

New Brunswick

This province was, along with Nova Scotia and Ontario/Québec, one of the three, original provinces of the Dominion. Yet as Nova Scotia at the end of the Seven Years' War had annexed New Brunswick (to the extent that it had not already been ceded to Nova Scotia in 1713), this province would have received Nova Scotia's law as it existed at that time (i.e. 1763), which may, as I suggest above, have included the law of arms of Scotland.[30] Curiously, however, the New Brunswick courts have fixed the reception of *English* law into the province at 1660 (at the Restoration of the Stuart Kings).[31]

As for the armorial jurisdiction of New Brunswick's courts, the 'Trial Division [of the Court of Queen's Bench] shall have and exercise general and original jurisdiction in *all* causes and matters' [emphasis added].[32] Thus, as with Nova Scotia, New Brunswick may have received the Scots law of arms, enforceable by this province's courts.

Manitoba

Canada created Manitoba from part of the territory of Rupert's Land in 1870, and subsequent legislation fixed the reception of English law (which includes the law of arms) for the same year.[33] Manitoba's Court of Queen's Bench 'possesses and may exercise all the rights, incidents and privileges of those courts as fully to all intents and purposes as they were on July 15, 1870 possessed and exercised... by any other court in England having cognizance of property and civil rights and of crimes and offences'.[34] Thus this province too derives her law of arms from England, and has courts to administer it.

[27] 'Pretensions of English law' (note 24 above), pp. 382f.
[28] Swan (note 26 above), pp. 85, 121.
[29] Judicature Act, RSNS 1989, c. 240, s. 4 (1).
[30] Hogg 1985, p. 22 note 4; for the cession, see Treaty of Utrecht 1713, art. XII, in Houston (note 13 above), p. 3.
[31] *Scott* v *Scott* (1970) 15 DLR (3d) 374 (NBAD).
[32] Judicature Act, RSNB 1973, c. J-2, s. 9 (1).
[33] Queen's Bench Act, SM 1874, c. 12, s. 5.
[34] The Court of Queen's Bench Act, CCSM 1988, c. C280, s. 32.

Alberta and Saskatchewan

Canada simultaneously created these two provinces out of a portion of the Northwest Territories in 1905, but subsequent legislation fixed the reception of English law at 1870.[35] In Alberta's case, however, the courts have implied that this province has *not* received armorial law: as some heralds have noted, '... heraldry was a product of the feudal system of land-tenure in Europe'; and in the province of Alberta, courts have held that an English law resulting from the feudal land-tenure system is not in force, as that province has never had a feudal society.[36] This decision would seem to suggest that armorial law may not be in force in Alberta.

If, however, armorial law is in force in Alberta, her Court of Queen's Bench 'possesses ... the jurisdiction that on July 15, 1870, was in England vested in ... (g) any other superior court...' – a superior court being that not under the control of any other court except by appeal (such as the High Court of Chivalry).[37] Saskatchewan's legislation gives to that province's Court of Queen's Bench 'original jurisdiction throughout Saskatchewan, with full power and authority to consider, hear, try and determine actions and matters' – including, of course, armorial matters.[38]

British Columbia

Canada admitted British Columbia into the Dominion in 1871, and the new province received England's armorial law as it received the rest of English law, with a reception date fixed at 1858.[39] As for the armorial jurisdiction of the province's courts, British Columbia's Supreme Court has 'original jurisdiction and has jurisdiction in all cases, civil and criminal' arising in that province.[40]

Prince Edward Island

Canada admitted Prince Edward Island into the Dominion in 1873, but the province could have received armorial law as early as 1758, when Nova Scotia (to which the island was later annexed) held her first legislative assembly.[41] Like New Brunswick, however, there is a question as to what law of arms this province received: as Nova Scotia annexed Prince Edward Island at the end of the Seven Years' War, this province too would have received Nova Scotia's law as it existed at that time, which may therefore have included the law of arms of Scotland.[42]

Prince Edward Island's Supreme Court is legislated to have jurisdiction '*historically* exercised by courts of common law and equity in England and Prince

[35] North-West Territories Amendment Act, SC 1886, c. 25, s. 3.

[36] Woodcock and Robinson (note 15 above), p. 1; *Re Simpson Estate* [1927] 3 WWR 534 (Alta CA) at para. 16, and *Re Budd Estate* (1958) 24 WWR 383 (Alta SC). Note that certain eastern provinces did, in their colonial origins, have feudal or quasi-feudal societies; see e.g. George Wrong, *A Canadian Manor and its Seigneurs* (Toronto 1926).

[37] Judicature Act, RSA 2000, c. J-2 s. 5 (1).

[38] Queen's Bench Act 1998, SS 1998, c. Q-1.01, s. 9 (1).

[39] The English Law Ordinance 1867, SBC 1867, c. 7.

[40] Supreme Court Act, RSBC 1996, c. 443, s. 9 (1)

[41] Hogg 1985, p. 33.

[42] Ibid., p. 22, note 4; Treaty of Utrecht 1713, art. XII, in Houston (note 13 above), p. 3.

Edward Island' [emphasis added]: and historically this court possessed 'original and appellate jurisdiction in civil and criminal cases'.[43]

Newfoundland and Labrador

Canada did not admit Newfoundland into the Dominion until 1949, but the province received England's armorial law as other English colonies in Canada had, with a reception date fixed at 1832.[44] Whether the judicature of Newfoundland and Labrador (as the province later came to be called) can exercise armorial jurisdiction is, however, unclear: 'The Supreme Court of Newfoundland and Labrador ... shall have all civil and criminal jurisdiction conferred upon the Supreme Court of Newfoundland (a) by the Imperial Statute passed in the 5th year of the reign of His late Majesty King George the 4th, entitled "An Act for the better administration of justice in Newfoundland, and for other purposes"'.[45] This act determined that the court 'shall have all Civil and Criminal Jurisdiction whatever in *Newfoundland* ... to all Intents and Purposes, as His Majesty's Courts of King's Bench, Common Pleas, Exchequer and High Court of Chancery, in that Part of *Great Britain* called *England*, have ...'.[46] One notes that there is no mention of the High Court of Chivalry. Subsection 3 (1) (c) of the 1990 act, however, does also admit jurisdiction of the court as conferred 'by a law in force in the province': one might argue that the existence of the law of arms in Newfoundland and Labrador thereby confers armorial jurisdiction upon that province's courts.

The Law of Arms of Canada

From the above discussion, it is apparent that each of Canada's provinces received laws of arms. Ontario, British Columbia, Manitoba, Saskatchewan and Newfoundland and Labrador have laws of arms derived from England's. The province of New Brunswick has a law of arms, but either derived from England's law of arms or from Scotland's. So too with Nova Scotia and Prince Edward Island: both provinces received a law of arms, but perhaps that of Scotland (or, possibly, even France). And Québec likely received French armorial law. In light of this revelation, must the Authority navigate a tempest of armorial laws when seeking to grant or regulate arms scattered amongst regional jurisdictions? And must a foreign heraldic authority confront this same host of armorial jurisdictions when considering the status of grants made by the Authority? The answer to both questions is the same, and is no.

Though Canada's constitution does not specifically distribute the prerogative powers (of which the power to grant arms is one) between the Dominion and the provinces, courts have held that the prerogative powers follow the comparable legislative powers.[47] But does the armorial (or honours) prerogative fall under

[43] Supreme Court Act, RSPEI 1988, c. S-10, s. 2 (1); Judicature Act, SPEI 1925, c. 7, s. 3.
[44] *Young* v *Blaikie* (1822) 1 Nfld LR 277, 283 (SC Nfld).
[45] Judicature Act RSNL 1990 c. J–4, s. 3 (1).
[46] An Act for the better administration of justice in Newfoundland, and for other purposes 1824 (UK), 5 Geo. IV, c. 67, s. 1.
[47] Hogg 1985, p. 11 note 59.

provincial or federal legislative powers? The Federal Court of Canada considered that, as the law of dignities (including arms) is akin to realty law, it could be either provincial in scope, or federal:

> Possibly argument could be made that dignities are a type of interest dealt with by a law similar to the law of real property and therefore of a local [provincial] nature. The plaintiff would no doubt counter that the law of arms by which much in relation to dignities is determined was intended for more than even national scope and therefore is not local.[48]

Clearly the 1988 delegation of armorial prerogative to the Governor General of Canada was national in scope, not local or provincial.[49] Thus the Canadian Heraldic Authority operates at the national level, and, in effect, grants *federal* coats of arms, i.e. grants armorial property that exists in the federal realm.[50] It is fitting, therefore, that grants of arms made by the Chief Herald of Canada include the phrase, 'all according to the law of arms of Canada.' The courts have considered just what the 'laws of Canada' are, and have settled that the phrase means all federal laws, i.e. not *all* laws in force in Canada, whatever their source, but laws existing only in the federal realm.[51] Therefore, the law of arms of Canada is strictly *federal* armorial law (but this does not mean that the provincial laws of arms discussed above are extinguished).

What is this federal law of arms? Comparing the modern composition of Canada's admiralty law (which is closely related to armorial law), I suggest Canada's law of arms comprises (a) armorial law received from England; (b) jurisprudence of

[48] *Canadian Olympic Assn* v *Great Northern Ticket Services Inc*, 71 CPR (3d) 468, 126 FTR 190 at para. 5.

[49] 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 Alan Beddoe, 'The historical and constitutional position of heraldry in Canada', *Heraldry in Canada* 3 (1969), p. 8), the Government of the day decided that for greater certainty and for publicity, supplemental letters patent would be preferable to establish the Authority (ex inf. H. L. Molot, Senior General Counsel, Department of Justice). For the process of delegation, see Gall, op. cit. (note 15 above), pp. 540-2.

[50] Compare how the provinces are excluded from the federal honours system, e.g. lieutenant governors may be asked for comment on nominations of residents of their respective provinces for the Order of Canada, and may present federal medals to such residents, but other than this, the provinces have no involvement in federal honours. Cf. 'Hope for the monarchy in Canada: the provincial Crown', *Canadian Monarchist News* (spring 2005), p. 12.

[51] Clearest example of a law of Canada is a federal statute, including a regulation or order made under a federal statute; cf. Hogg 2007, p. 209. Blackstone notes that 'statute' includes all *leges scriptae*, or written laws, of the kingdom; F. A. R. Bennion, *Statutory Interpretation: a code* (Edinburgh 2002), p. 142. Canada's federal *leges scriptae* would include the enabling letters patent of 1988, as they were issued by the Queen in her federal capacity, i.e. in Her Majesty's right of Canada.

Canadian courts before and since reception; (c) federal statute; and (d) principles of civil law and even the common law as the courts may determine applicable 'through a comparative methodology' in an armorial law setting.[52] As Canadian courts have rarely ventured into the 'armorial law setting'; and as both jurisprudence and federal statute applying to armorial law is comparatively thin, one may rely primarily upon English armorial law as an indicator of what Canadian armorial law presently is.[53]

Conflict between Provincial and Federal Laws of Arms

But what of Canada's provincial laws of arms? Assuming for argument that, for example, French law persists in Québec, does it not conflict with the federal law of arms? Consider how under French law anyone could assume a shield of arms, crest, motto – even supporters – for himself without reference to state authority (so long as he did not assume arms already lawfully borne by someone else, and so long as he did not bear them with a helm or coronet, or charged with golden fleurs-de-lys on an azure field).[54] This contrasts with federal law, in which no one might bear arms without Crown authority. A Québécois armiger might also transmit his arms by private conveyance, without Crown approval – something not possible under federal law, except, perhaps under a Royal Licence.[55] Additionally, under French law the arms of executed criminals were destroyed, i.e. they could not be inherited by their bearers' descendants (though the descendants could petition the king for a new grant).[56] Thus, in a modern interpretation of the law of arms in Québec, the descendants of a Québécois armiger whom a court convicts of what formerly were capital offences under the 1970 Criminal Code (viz. treason, capital murder, and piracy involving murder or attempted murder or an act endangering life) might lose any right to the convicted armiger's ensigns.[57]

[52] Compare the sources for Canadian maritime law (i.e. admiralty law, a body of law related to armorial law, and determined to be federal law by the Federal Courts Act, RS 1985, c. F-7, s. 22): 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 Dominion is party – cf. Edgar Gold, Aldo Chircop and Hugh Kindred, *Maritime Law* (Toronto 2003), p. 117. As far as the law of arms is a matter of continual interpretation, seeking a precise date for its reception is unnecessary, but if one sought to do so, the confederation of the Dominion in 1867 (which resulted in the establishment of 'a bi-cameral national Parliament') would appear to be the logical moment (see note 8 above).

[53] 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 18th century; G. D. Squibb, *The High Court of Chivalry* (Oxford 1959), p. 163.

[54] Ian de Minvielle-Devaux, *The Laws of Arms in England, France & Scotland* (s.l. 2007) pp. 39, 79, 106, 108. Under French law, a herald might not record arms with a helmet or coronet unless the petitioner could prove his noble status: ibid., p. 98f.

[55] Minvielle-Devaux (last note), p. 54.

[56] Pine, *International Heraldry* (note 11 above), p. 151.

[57] Criminal Code, RSC 1970, c. C-34, ss. 47 (1), 75 (2) & 218 (1).

And are there conflicts between Scots armorial law (which might, as described above, be in force in Nova Scotia, Prince Edward Island and New Brunswick) and the federal armorial law of Canada? According to Lyon Blair, there are significant conflicts.[58] One major obstacle is that, under Scots law, arms can only pass to a person having the same surname as the original grantee, whereas the federal practice is for arms to pass regardless of surname.[59] Thus, it may be that, if the law of arms of Nova Scotia is that of Scotland, only those who bear the same surname as the original Nova Scotian grantees of arms may inherit those arms.

It is apparent, therefore, that differences between provincial and federal laws of arms exist. Under Canadian constitutional law, however, a provincial law is only held to conflict with a federal law if compliance with one would involve breach of the other; and where such conflicts between provincial and federal law exist, federal law shall prevail.[60] Thus, while under Québec law it may be that anyone can assume a coat of arms, complying with federal law by seeking a Crown grant of arms would not involve a breach of the Québec law, and so no legal conflict exists. Similarly, a Nova Scotian who wished to inherit a coat of arms originally granted to someone with a surname different from his own could legally change his name to do so, avoiding a breach of provincial law and without offending any federal practice.

Thus, the federal law of arms can still overlap with provincial law; and depending on whether provincial law or federal law is applied, outcomes may differ.[61] Looking at the test created by the Supreme Court of Canada for situations in which a court must determine if a provincial law can apply in an admiralty-tort context, one might theorise that a comparable test for determining if a provincial law of arms can apply to a matter regarding Canada's heraldic system would be as follows:

> 1. Does a federal law exist (either legislated, or – more likely – received from England) that applies to the facts? In determining the existence of such a federal law, the court could draw on the sources for this law enumerated above to draw forth an applicable 'counterpart principle'.[62]

[58] Blair, op. cit. (note 2 above) pp. 9f.

[59] Robin Blair, Lord Lyon King of Arms, pers. comm., 23 January 2007; Kevin Greaves, *A Canadian Heraldic Primer* (Ottawa 2000), p. 37. I write 'federal practice' as it is unclear to this author whether English law is comparable with Scots law in this respect: if it is, then – in absence of new legislation – federal law would also stipulate that Canadian arms can only pass to a person having the same surname as the original grantee, in spite of the current contrary policy of the Authority. See Mackie, op. cit. (note 1 above), pp 149-52, for discussion of the Authority's ability to alter armorial law.

[60] Hogg 1985, pp 354f. While normally this doctrine of 'federal paramountcy' applies to legislation, there is some authority that pre-confederation law (such as the law of arms) in a field of federal jurisdiction will also prevail over a provincial law: *Hellens* v *Densmore* [1957] SCR 768 at 784; and *Re Broddy* (1982) 142 DLR (3d) 151 at 157 (Alta CA), cited ibid., note 7.

[61] Cf., again, Canada's admiralty law: *Maritime Law* (note 52 above), p 113.

[62] Cf. *Ordon Estate* v *Grail* (1996), [1998] 3 SCR 437 (affirming 30 OR (3d) 643) (CA), at para 73.

2. If such an applicable federal law (or counterpart principle) exists, then a provincial law of arms would not apply to Canada's national heraldic system. If no such applicable federal law or principle exists, then the court could develop, through judicial reform, the law of arms of Canada to fill whatever gap has been made apparent by the facts.[63]

3. Only where a court could not fill such a legal gap by drawing on the sources of Canadian armorial law outlined above would it then consider the application of a provincial law of arms, and in doing so, would endeavour to prevent the application of the provincial law permitting the indirect regulation of the Canadian heraldic system by a provincial authority.[64]

Thus, it seems unlikely that any provincial law of arms would be found to effect Canada's federal law of arms.[65] And could the federal law of arms ever influence a provincial law? Yes, for federal law is not foreign to the provinces: it is an integral part of the law of each province.[66] But does this mean these provincial laws of arms are effectively moot? Are there no instances in which they would govern coats of arms in Canada? There might be, if such coats of arms were themselves provincial.

Lieutenant governors in Canada exercise the Queen's powers in right of the provinces, fulfilling the same rôle for the provinces as the Governor General does for the Dominion, i.e. the lieutenant governors are not merely federal officers representing federal interests in provincial affairs.[67] Exercise of the Queen's powers in right of the provinces includes the exercise of the Royal Prerogative, albeit at a provincial level.[68] Yet the provinces are excluded from the federal honours system: lieutenant governors may be asked for comment on nominations of residents of their respective provinces for the Order of Canada, and may present federal medals to such residents; but other than this, the provinces have no involvement in federal honours.[69]

But is there still a provincial honours 'jurisdiction'? Starting in 1925 with Québec, and continuing into the 1980s, several provinces have established orders

[63] Cf. *Ordon Estate* v *Grail*, para 76. In doing so, the court would be restricted to developing the law of arms in response to social change, while being mindful of the interests of uniformity among armorial jurisdictions internationally.

[64] Cf. *Ordon Estate* v *Grail*, para. 80.

[65] Comparing *ITO International Terminal Operators Ltd* v *Miida Electronics Inc* (*The Buenos Aires Maru*) [1986] 1 SCR 752, preventing provincial law from effecting the Dominion's armorial law would be to ensure that, as a body of federal law, Canadian armorial law would be consistent across the country, regardless of the local legal systems. Consider, however, *QNS Paper Co* v *Chartwell* [1989] 2 SCR 683 at 697, whereby one could imagine a court considering the *principles* of a provincial armorial law *where there is no precedent* in federal law for the matter at issue.

[66] *The Buenos Aires Maru* at 753.

[67] *Maritime Bank (Liquidators of)* v *NB (Receiver General)* [1892] AC 437 and Monahan (note 15 above), pp. 80, 98 with note.

[68] Lordon (note 7 above), p. 71.

[69] 'Hope for the monarchy in Canada' (note 50 above), p. 12.

of honour.[70] Rideau Hall initially refused to recognise such provincial honours, but in 1991, the Governor General acquiesced and recognised them.[71] Even earlier, the Privy Council held that lieutenant governors may, for provincial purposes, exercise the Royal Prerogative to appoint Queen's Counsel (which appointments are Crown honours).[72] Thus, the provinces do exercise the Royal Prerogative to grant honours, and as the 1988 enabling letters patent were issued in the name of the Queen in right of Canada (not in right of any of the provinces), there does not appear to be any bar to a lieutenant governor granting arms without reference to the Authority. Indeed, if the will existed, one sees no legal argument as to why a province could not establish her own heraldic authority to grant provincial (as opposed to Canadian, i.e. federal) arms.[73] In certain jurisdictions, this may be desirable. For example, French heralds were not empowered to grant arms as their English and Canadian counterparts are: rather, they only drew the arms of a petitioner who petitioned the king directly, and only after the king had already granted the arms. Thus it may be that a Québec resident seeking 'Québec arms' must directly petition the Lieutenant Governor of Québec, as the Queen's representative for that province, who would grant the arms in the name of the Queen, to then be drawn up by the provincial authority.[74]

If such 'provincial' arms were granted, then it would stand to reason that they would be subject to the particular law of arms of the province in which they were created. Such grants, however, would have no effect on the Canadian (i.e. federal) heraldic system, particularly on the federal law of arms, by which all arms granted by the Authority are governed.

Thus, while Lyon Blair's remark that Canada has a series of differing laws which at first blush might present an armorial conundrum, careful examination from a legal perspective reveals that, in its present and foreseeable state, arms granted by the Canadian Heraldic Authority are governed by a single body of law, and a body

[70] McCreery (note 10 above), pp. 121f.

[71] 'Hope for the monarchy', loc. cit. Interestingly, at the national conference preceding the Authority's establishment, two of the provincial chiefs of protocol expressed concerns about Rideau Hall's refusal to recognise provincial honours – concerns which a former president of the Heraldry Society of Canada attending the conference sought to dismiss without explanation; 'Summary of the verbal proceedings', *A Canadian Heraldic Authority – National Conference on the Issue* (Ottawa 26 March 1987), pp. 14f.

[72] *A-G Canada* v *A-G Ontario (Queen's Counsel Case)* [1898] A.C. 247. The Privy Council based this in consideration of ss. 92 (1), (4) and (14) of the *Constitution Act, 1867*; see Lordon (note 7 above), p 104.

[73] Notably, during the National Forum on Heraldry, the Chief of Protocol of the Government of Saskatchewan emphasised the desirability of a provincial element in the Authority; Campbell, op. cit. (note 18 above), part I, pp. 222f. Were such a provincial authority established, perhaps an arrangement analogous to that existing in England could be made, whereby a grant of arms by a provincial herald could be (in the interests of greater uniformity) made jointly with the Chief Herald of Canada, just as a grant of arms by a provincial King of Arms in England is made jointly with Garter; Minvielle-Devaux (note 54 above), p. 34.

[74] Recall that an approach for a grant of arms is an approach to the Queen as Fountain of Honour; Robert Gayre of Gayre and Nigg, *The Nature of Arms* (London 1961), p. 63.

of law not far removed from that of England's. With a little guidance, no heraldist familiar with England's law of arms should find Canada's federal law of arms foreign or daunting.[75]

[75] The author acknowledges the guidance in preparing this work of professors R. G. Howell, LL.M., and J. P. S. McLaren, LL.D., both University of Victoria, as well as the anonymous referee appointed by the editors of the *Coat of Arms*. Thanks also to Robin Blair, Esq., sometime Lord Lyon King of Arms; Bruce Patterson, Esq., Saint-Laurent Herald; Mr Brian Dillon; Ms Carron Rollins, Associate Law Librarian, University of Victoria; and particularly to H. L. Molot, Esq., Q.C., sometime Department of Justice. Any errors or omissions are, of course, entirely the author's own.