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PLATE 3



The Royal arms of British Columbia.
As displayed in the rotunda of the British Columbia Legislative Assembly,
Victoria (B.C)
See pages 60-1.

THE ARMS OF THE QUEEN ON THE BENCH

CONSTITUTIONAL CONFUSION OVER HERALDIC DISPLAY IN BRITISH COLUMBIAN COURTROOMS

C. S. T. Mackie

As both a student of heraldry and a barrister, I am intrigued by the arms that courts in British Columbia display. A coat of arms hanging in a courtroom must be ripe with significance to be prominent in such a grave setting. As one writer has argued: 'The ritual character of proceedings in court have, first, an obvious material character in the higher courts in the form of ... emblazoned royal arms on and frequently above the judicial seat or throne.'¹ This 'obvious material character' can make a definite impression upon those participating in courtroom proceedings. See the following *mise en scène*:²

The court-room itself is an inspiration to the imagination: it has a mystic atmosphere, as if it held somewhere out of sight the spirits of its departed litigants. A voice sounds full and reverberant as if it came from a tunnel. The persons present move on tiptoes and communicate with each other in the lowest whispers. The windows are diamond-paned, sometimes leaded or moulded, and are veiled as with crepe by the soot which the rain has washed upon them. The open rafters of the roof are oaken, and the walls are panelled in with the same wood. There are heavy hangings of drapery, and the whole effect of the chamber is so dark that the blazonry of the royal arms glows over the bench like a fire.

While the architecture of modern British Columbian courtrooms may no longer inspire the imagination, courtrooms are still 'places of solemnity and deliberation, sanctuaries where the spoken word of written law has a powerful impact' and so they 'must reflect the importance of this space in the administration of justice.'³ Simply put, they are places where 'people go free, pay a fine or go to jail' and therefore

¹ Peter Goodrich, 'Modalities of annunciation: an introduction to courtroom speech', in R. Kevelson (ed.), *Law and Semiotics 2* (New York 1988), p. 149, cited in John Gibbons, *Forensic linguistics: an introduction to language in the justice system* (Oxford 2003), p. 79. Reference to the judicial 'throne' is not an overstatement: originally, judges sat in the king's actual throne; e.g. 'Within the Chancery court the Chancellor appears to have used the marble table and chair reserved for the king on state occasions... it seems likely that at Winchester too the judges occupied the king's apartments and his seat in the hall, emphasizing their quasi-regal role'; Clare Graham, *Ordering law: the architectural and social history of the English law court to 1914* (Aldershot 2003), p. 19.

² William H. Rideing, 'English lawyers and law courts', *Lippincott's Magazine* 2nd ser. 3 (June 1882), p. 611.

³ Barbara A. Nadel, *Building security: handbook for architectural planning and design* (New York 2004), p. 6.19.

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must convey an appropriate solemnity and significance.⁴ Through their design and furnishings they must promote a sense of dignity and the importance and stability of the judiciary and the Canadian legal system.⁵ As heraldic display in these courtrooms is a part of their design and furnishings, it contributes to their dignity, solemnity and importance. Therefore, arguing for proper heraldic display British Columbian courtrooms is not (as one writer called it) a mere 'idle debate'.

Such arguments were made several years ago by two Canadian magistrates, District Registrar Blok (as he then was) and Mr Justice John Wright.⁶ These two writers diligently canvassed the issue, with Blok feeling that the arms of the United Kingdom are properly displayed in British Columbian courtrooms; and Wright determining that the arms of Canada and British Columbia ought to appear instead. The issue, however, did not seem settled. After examining the arguments of both authors, evidently there is only one fundamental question, viz. (to paraphrase Wright): not what arms ought to appear in British Columbia courtrooms, but *whose* arms? To answer this, I begin by setting out the facts that both writers accept surrounding the issue, and then consider the relevant protocol by asking what is the convention of heraldic display in courtrooms; and what is meant by 'royal arms'? Next, by applying this protocol to the issue at hand I determine whose authority a coat of arms in British Columbian courtrooms is meant to represent. Finally, if confusion persists, I suggest how this issue might be more conclusively resolved.

Facts

In order to focus this debate, it is worthwhile to list the matters that are not in contention. There are a number of facts about which neither author argues.

Studies have been made as to which coat of arms is proper. Blok details several occasions in the last century (i.e. 1965, 1974, 1975, 1980 and 1995) when judges and former judges undertook to determine whose coat of arms ought to be employed in British Columbian courtrooms. In 1965 judges and government departments discussed the matter – but discussed with whom? Was anyone with heraldic knowledge consulted?

Again in 1974 Mr Justice Dryer apparently 'researched the issue' but there is no information as to how he conducted his research, or what sources he consulted. And Blok concedes that the extent of research done in 1980 'cannot now be ascertained'. As for the most recent (1995) investigation, when Martin Taylor wrote his report on the matter: what sources did he consult? What special knowledge of heraldry did he possess? Did he consult the Canadian Heraldic Authority (which was by then in existence)? If not, why not?

⁴ Peter M. Tiersma, *Legal Language* (Chicago 2000), p. 100.

⁵ Todd S. Phillips and Michael A. Griebel, *Building Type Basics for Justice Facilities* (Hoboken 2003) pp. 173, 179.

⁶ Murray B. Blok, 'Honi soit qui mal y pense: heraldry in the courtroom', *The Advocate* (Vancouver) 62 (2004), pp. 869-77; John de P. Wright, 'A mari usque ad mare: more heraldry in the courtroom', *ibid.* 63 (2005), pp. 353-9; Blok, 'A farewell to arms (a last word)', *ibid.* 63 (2005), pp. 361-3.

HERALDIC DISPLAY IN BRITISH COLUMBIAN COURTROOMS

Figure 1: The arms borne by the Sovereign in right of Canada.



It is no embarrassment that judges might misunderstand proper courtroom heraldry. The judges whom Blok lists in his reply must all be well-educated and intelligent people, but it does not follow that they therefore understand heraldry. Judges in British Columbia have completed law degrees and at least ten years experience in legal practice (or academia), yet it is most doubtful that any such experience will have included heraldic studies.⁷ As one advocate argued, to be a judge of heraldic matters 'is a service that requireth more than ordinary understanding'.⁸ The examples Blok gives of the late Chief Justice McRuer, O.C. (of Ontario's High Court of Justice) and a certain Yukon judge only serve to emphasise this requirement (and the confusion that results when it is not met).

Heralds & heraldists did not participate in these studies. As indicated above, there is no evidence that during any of these five investigations did anyone ever consult any heraldists or heralds, and so I assume that there was no active input from anyone versed in heraldry.

The Monarch bears distinctive arms for both Canada and British Columbia. Blok acknowledges that the Sovereign bears arms in right of Canada and in right of British

⁷ Ian Greene, *The Courts* (Vancouver 2006), p. 12.

⁸ *Abergavenny Peerage Case* (1588) Collins 71, in G. D. Squibb, *The High Court of Chivalry* (Oxford 1959), p. 165.

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Columbia. The former (**Figure 1**), appointed by the Monarch in 1921, have been recorded recently by the Canadian Heraldic Authority as the arms of 'Her Majesty The Queen in Right of Canada'.⁹

As for British Columbia (**Figure 2** and **Plate 3**), the Protocol and Events Branch of the provincial Ministry of State for Intergovernmental Relations publishes an article by the former Chief Herald of Canada detailing the history of this province's arms. In it Chief Herald Watt writes, 'Our [provincial] Coat of Arms is a symbol of sovereignty as these are the arms of Her Majesty in right of British Columbia...'.¹⁰

English Royal Arms are displayed in British Columbia courtrooms. Both Blok and Wright agree that presently it is the Royal Arms of the United Kingdom as borne in England that are displayed in British Columbian courtrooms. Blok calls these arms simply (but imprecisely) 'the Royal Arms' and Wright calls them (more accurately) 'the English Royal Arms'.¹¹ This display is (in Blok's words) a 'long-standing tradition in our courts'.

Protocol

Heraldry in Courtrooms

From where did British Columbia derive this 'long-standing tradition'? Blok traces it to an 1856 order of Her Majesty in council.¹² In reality, however, the tradition goes back much further, to medieval England (the nation from which British Columbia

⁹ Note that when construction plans for the provincial courthouse on Georgia Street in Vancouver were finalized, and advice from the College of Arms was sought as to the correct display of heraldry in the courthouse, this was in 1907 – about 14 years before the Monarch formally appointed distinct arms in his capacity as Sovereign of Canada.

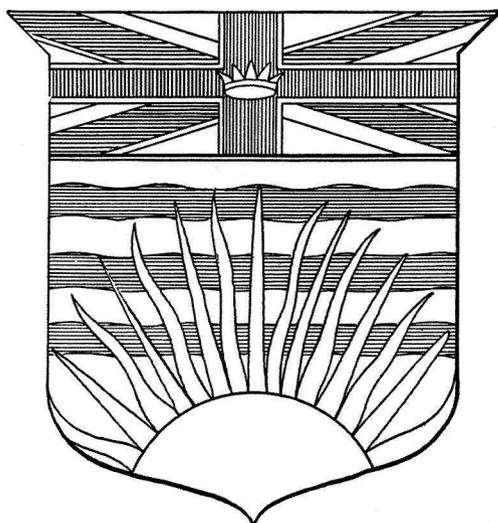
¹⁰ Robert D. Watt, 'The coat of arms of British Columbia: a brief history', www.protocol.gov.bc.ca/protocol/prgs/symbols/coat_of_arms.htm. See also the account of the proclamation of the arms on 15 Oct. 1987, in 'Legislative reports: British Columbia', *Canadian Parliamentary Review* 10.4 (1987), available at www.revparl.ca/english/issue.asp?param=123&art=755.

¹¹ I adopt Wright's phrasing for this article. The New Zealand Ministry of Justice demonstrates Wright's accuracy, referring to an example of Blok's 'Royal Arms' displayed on the Old High Court Building (built 1881 and restored in 2009 as a heritage site) as 'an intricately-crafted English coat of arms' (emphasis added); 'Supreme Court of New Zealand' (Wellington 2010), p. 2 (available on line at www.justice.govt.nz/publications/global-publications/s/supreme-court-of-new-zealand/Publication). Confusingly, Blok also refers to 'the motto of the sovereign', i.e. what A. C. Fox-Davies correctly described as 'the English Royal motto, "Dieu et mon Droit"'; *A Complete Guide to Heraldry* (New York 1978), p. 452. What Blok means to write is 'motto of the sovereign of England'. Of course, the motto of the sovereign of Canada is *A mari usque ad mare*.

¹² This order mandated a seal for the Supreme Court of the colony of Vancouver Island, bearing 'Her Majesty's Royal Arms'. Note that it made no reference to the display of arms in courtrooms of that colony. Conventionally, court seals display royal arms. Cf. one of the earliest surviving seals of England's Court of King's Bench, from the reign of Henry VIII: its reverse bears a shield of the arms of France and England quarterly supported by a crowned lion rampant guardant and a wyvern, all on a field of roses and fleurs-de-lys, and in base a scroll inscribed S[IGILLVM] PRO BREVIUS CORAM NOBIS 1543 (*BM Seals*, no. 881).

HERALDIC DISPLAY IN BRITISH COLUMBIAN COURTROOMS

Figure 2: The arms borne by the Sovereign in right of British Columbia. For the full achievement see **Plate 3**.



inherited her legal system). At an early point in England the convention arose that the arms displayed in a courtroom signify the authority exercised in that courtroom.¹³

As any heraldist knows, in the era during which coats of arms originated most people could not read, and thus symbols such as arms became important in identifying significant individuals, particularly kings. People of that time thought in symbolic or allegorical terms.¹⁴ As a scholar has written:¹⁵

In a secular society which was largely illiterate, and in which great significance was attached to outward trappings and social display, arms, banners and badges, often loaded with deep-seated significance but readily discernible to most, were swiftly enlisted in the war to win hearts and minds... They might openly speak of authority, presence...

Coats of arms spoke of the authority, and of the *presence*, of the persons who rightfully bore them. Thus it was that when a magnate of import sat in judgement, he would employ his arms to speak of his authority and presence.

In that time 'court' was the name for an assembly of those who exercised powers delegated by the king (especially his power of justice). The word referred to the

¹³ The 'first clear evidence we have of the courts' appearance ... shows the judges sitting on an elevated bench, below shields with the arms of (left to right) Edward the Confessor, France and England, and England... the superior status of the judges being very literally indicated by their elevated seat'; Graham, *op. cit.* (note 1 above), pp. 19f. The pattern persisted centuries later in Canada: cf. the 1885 description of a courtroom in Niagara, which was 'of the old conventional pattern' with the 'throne of justice' extending half way across the room; John Charles Dent, *The Story of the Upper Canadian Rebellion* (Toronto 1885). p. 10.

¹⁴ John P. D. Cooper, *Propaganda and the Tudor state: political culture in the Westcountry* (Oxford 2003), p. 35

¹⁵ Adrian Ailes, 'Heraldry in medieval England: symbols of politics and propaganda', in Peter R. Coss and Maurice H. Keen (edd.), *Heraldry, Pageantry and Social Display in Medieval England* (Woodbridge 2002), p. 83-104.

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entourage of the king, which gave him help and advice in making his decisions and in administering his justice.¹⁶ But there were courts other than the king's: there were also, in early stages, feudal and manorial courts, which rivalled the king's court.¹⁷ An example is the court of the first Earl of Chester, Hugh d'Avranches – 'the Wolf': when he sat in court, he sat beneath his coat of arms, which spoke of his authority and presence: *Azure a wolf's head erased Argent*.¹⁸

This tradition of a local, judicial body displaying the arms that spoke of its authority persisted into more recent times, e.g. at the eighteenth-century headquarters of the East India Company in London (i.e. East India House), the arms of the company hung in the Directors' Court Room. And even today the arms of the Duchy of Lancaster (now vested in the Queen of the United Kingdom) hang in the chancery courtroom in Liverpool to 'grace the space above the judge's head' (reflecting the fact that Liverpool used to be part of the County Palatine of Lancaster).¹⁹

The era of many of these private courts was circumscribed. During the reign of King Henry II, his court (or *entourage*) began to specialise in legal business and to act in a judicial capacity – in the name of the king. The king sent these specialists out into the counties as his delegated, travelling justices, asserting royal authority in regions that had hitherto been subject to local baronial courts. As members of the king's entourage travelling in circuit, these royal delegates held 'circuit courts' as 'justices in eyre' (*eyre* or *erre* being an Old French noun from the verb *errer*, to wander).²⁰

¹⁶ *Encyclopedia of the Middle Ages* (Oxford 2001), s.v. 'court, royal'. *Entourage* is a French word, coming from the verb, 'to surround'. Originally, a courtroom was simply a space (called the 'well') enclosed by four benches, occupied by delegates, while suitors gathered outside the benches – the backs of which formed the 'bar' of the court, i.e. 'the point at which its business was transacted'. This was the origin of the inner bar. At first lawyers stood outside it, but from the sixteenth century certain barristers were appointed King's Counsel, and 'were called "within the bar" in recognition of their quasi-official status'. Law courts in England were held in such temporary settings until the seventeenth century, when buildings began to be erected so as permanently to 'house the ceremonies of the law in some splendour'; Graham, op. cit. (note 1), pp. 315, 318.

¹⁷ Gary Slapper and David Kelly, *The English Legal System* (London and New York 2006), pp. 5f. Some members of the king's entourage who helped the king by appearing on his behalf before these feudal and manorial courts in matters that concerned him became known (from 1243) as the King's Attorneys (i.e. agents). While initially such agents were appointed to represent the king on specific matters, later some were appointed to represent the king generally, in all matters. Therefore, they became known as 'general attorneys', or 'attorneys general'. In 1399, the king appointed one man to handle all his general matters, and in 1461, this post was entitled the Attorney General of England. British Columbia had her first Attorney General in 1859: Philip Stenning, *Appearing for the Crown* (Cowansville 1986), pp. 17f., 59.

¹⁸ Charles James Vyner, *Vyner. A family history* (privately printed 1885), p. 7.

¹⁹ Martin Davies, 'Court heraldry', *Heraldry Gazette* 95 (March 2005).

²⁰ Slapper & Kelly, op. cit. pp. 5f. Curiously, a surviving seventeenth-century seal of an English justice in eyre is that of John, Baron Lovelace of Hurley, Chief Justice and Justice in Eyre of Royal Forests (1670-93). His seal as a justice in eyre bore his personal arms, *Gu. on a chief indented sa. three martlets ar.* (for Lovelace of Hurley) quartering *Az. on a saltire engrailed ar. five martlets sa.* (for Lovelace); *BM Seals*, no 1005-6.

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This system persists in British Columbia today, with some forty circuit-court sites throughout the province. And the Sovereign today is still properly known as the 'judge ordinary' of the whole of Canada and her provinces, while all others who administer justice in her name are her 'judges delegate'.²¹ These judges derive their authority from the Queen's commission, for justice in our system 'is said to emanate from Her Majesty.'²² By law, judicial appointments to British Columbia's superior courts are made by the Governor General of Canada in the name of the Sovereign in right of Canada; and appointments to the inferior (i.e. provincial) courts are made by the Lieutenant Governor of British Columbia in the name of the Sovereign in right of that province.²³

The deference shown to judges in court is 'the modern instantiation of the sovereign.'²⁴ The Sovereign is 'very much the sponsor of the judicial system' and justice in the province is dispensed in her name: British Columbia's courts of justice are actually royal courts; formally we speak of the need to 'keep the Queen's peace', and every breach of it is a transgression against the Queen; she alone has the authority to prosecute criminals and does so through her prosecutors, known as Crown Counsel; when sentence is passed, the Sovereign alone can remit the punishment; and offenders serve their time in Her Majesty's Prisons. Such language is used 'to convey what

²¹ F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (Cambridge 1898), p. 515.

²² Martin Loughlin, 'The state, the crown and the law', in Maurice Sunkin and Sebastian Payne (edd.), *The Nature of the Crown: a legal and political analysis* (Oxford 1999), pp. 33-76 at 58.

²³ Terence Morley, 'Administering justice' in R. Kenneth Carty (ed.), *Politics, Policy, and Government in British Columbia* (Vancouver 1996), pp. 174-97 at 192f. British Columbia's superior courts are the Court of Appeal (the highest court in the province, i.e. 'the effective court of last resort for most litigants and for judicial elaboration of the laws made by the legislature': op. cit. p. 189) and the Supreme Court, which can hear any type of case, civil or criminal. Though these courts are created by a provincial law, its judges are appointed federally according to the provisions of a national law (ibid.). 'One way of looking at the courts is to say that there are two "levels" of court in Canada: provincial [i.e. inferior] courts (whose judges are appointed by the provincial government) and superior courts (whose judges are appointed by the federal government). In B.C., the "Provincial Court" has several divisions: Small Claims, Traffic, Family, and Youth. The "superior courts" include the Supreme Court of British Columbia, the B.C. Court of Appeal, and the Supreme Court of Canada.' See Justice Education Society and Centre for Education, Law, & Society, 'Judges and the Law', www.lawconnection.ca/index.php?q=content/role-judges-backgrounder: 'Most cases coming to the courts in British Columbia are disposed of by the Provincial Court. That court deals with about 90% of the criminal cases, many family cases, and many civil actions under \$25,000. The B.C. Supreme Court hears serious criminal offences, family cases, and many civil matters, including all civil matters involving more than \$25,000. The Court of Appeal reviews decisions made in those lower courts when one of the parties appeals a decision.'

²⁴ William R. Uttal, *Human Factors in the Courtroom: mythology versus science* (Tucson 2006), p. 2.

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has been described as “the majesty of the law”.²⁵ As the Department of Canadian Heritage summarises the system:²⁶

As an institution, the Crown is a cohesive force for the three functions of government: legislative, executive and judicial. The legislative function (Parliament/Legislature) is “The Queen in Parliament” and enacts the laws. The executive (cabinet/governments) is “The Queen in Council” and executes the laws. The judicial (courts) is “The Queen on the Bench” and interprets the laws.

By the later twelfth century, the king’s legal specialists had become full-fledged judges, empowered by the king to render judgements themselves even when he was not personally present. They were ‘no longer simply a representative of the royal authority of an absent king.’²⁷ Yet their power to judge still sprang from that absent king, as ‘all justiciary powers are derived from the king’, who is appropriately known as the fountain of justice.²⁸ And therefore, with the rise of legal institutions so closely associated with the rise of royal power, judges became vice-regal figures and accordingly sat beneath regal (or royal) arms (for ‘legitimacy is located in the material sign’).²⁹ These arms denoted not only the king’s authority but also his presence, relying upon ‘the concept that arms or the armorial beast directly represented the armiger.’³⁰

²⁵ Nigel Forman, *Constitutional Change in the United Kingdom* (London 2002), p. 194; Loughlin, op. cit. (note 22) p. 58. The Queen’s peace is quiet behaviour towards the Sovereign and her subjects. It is one of the Crown prerogatives to make peace, as it is to make war. Formerly, an indictment concluded with the charge that an offence had been committed *contra pacem Regis*, i.e. ‘against the peace of our lord the king.’ In British Columbia today, indictments still conclude with the phrase, ‘against the peace of Our Lady, the Queen, her Crown and dignity.’

²⁶ *A Crown of Maples: constitutional monarchy in Canada* (Ottawa 2008), p. 17 = www.pch.gc.ca/eng/1287415524511/1320068157440.

²⁷ James Q. Whitman, *The Origins of Reasonable Doubt: theological roots of the criminal trial* (New Haven 2007), p. 145.

²⁸ Pollock & Maitland, op. cit. (note 21 above) p. 514; Loughlin, op. cit. (note 22 above) p. 60. Though the Monarch is fountain of justice, ‘at least since the reign of Henry III the Monarch has not been able to disturb the fountain or divert the stream from its proper channel, expect through the agency of her judges.’ (Loughlin, p. 58).

²⁹ Lee Patterson, *Chaucer and the Subject of History* (London 1991), p. 186; Graham, op. cit. (note 1 above) p. 327. Cf. the judge’s seat (or ‘throne’) situated beneath royal arms in the courtroom in St James’ Palace: there, at the western end of the Throne Room, stands the Royal Chair of State, upholstered in rich scarlet velvet and centred ‘with a royal coat of arms containing jewels and miles of gold thread’, the whole under a canopy also emblazoned with the English Royal Arms: Jack Swift, *Below Stairs* (Raleigh 2008), p. 30; Frederick Saunders, *Memories of the Great Metropolis: or, London from the Tower to the Crystal Palace* (New York 1852), p. 77.

³⁰ Daniel Birkholz, *The King’s Two Maps: cartography and culture in thirteenth-century England* (London 2004), p. 22. The courtroom at the trial of Mary, Queen of Scots, dramatically depicted this idea of the absent king at a judicial proceeding: ‘At the upper end sat a chair on a dais beneath a cloth of state emblazoned with the royal arms of England. This symbolised Elizabeth’s throne and was left empty throughout the proceedings’: John Guy, *Queen of Scots: the true life of Mary Stuart* (Boston 2005), p. 472. To this day in Canadian courtrooms, barristers bow upon entering and leaving. This is not to the judge, but to the arms. Cf. the advice given by

(Note 30 continues on next page.)

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To remind the reader of the historical context: 'In an age of widespread illiteracy, the political significance of royal buildings, heraldry, and iconography potentially outweighed that of written instruments in disseminating the "presence" and authority of the monarch throughout the realm.'³¹

A mere written sign above the king's judges, reading 'The King', would have been worthless, as most people coming before the judges could not read the sign. But most people could 'read' the royal arms, as there had developed a 'widespread heraldic literacy'.³² Hence it came to be that royal judges sit beneath the royal arms when holding court. And so the convention persists today: a 2002 architects' handbook records of English courthouses that, 'an important supplement to the architectural form, symbols reinforce the recognition of the courthouse... The Royal Arms are prominently and permanently incorporated in the fabric of the building and are mandatory features in all courts.'³³

When the Crown extended its power across the seas to colonise other lands, its delegate judges followed, and so did the royal arms.³⁴ Even during colonial times, when literacy was more widely spread than formerly, the use of royal arms in a courtroom had its effect: 'The trappings of Crown authority – red robes, wigs, royal coat of arms – were intimidating, especially in a colonial situation...'³⁵ Consider

(Note 30 continued)

the Jury Central Summoning Bureau of England and Wales: 'Why do the barristers and court officials bow to the judge when they enter the room? They are not bowing to the judge. They are bowing to the Queen's coat of arms above the judge to show respect for the Queen's justice' ('Being a juror', *juror.cjsonline.gov.uk/faq/*).

³¹ John Morrill (ed.), *The Oxford Illustrated History of Tudor and Stuart Britain* (Oxford 1996), p. 221.

³² Birkholz, op. cit. p. 22.

³³ Quentin Pickard (ed.), *The Architects' Handbook* (Oxford 2002), p. 64. Though there was never any formal requirement that courtrooms display the royal arms, they have become standard in modern courtrooms: Graham, op. cit. p. 327.

³⁴ The use of the term 'Crown' in Canada has many manifestations and meanings, including as a symbol of national unity throughout the country; a symbol of kingship and Canadian sovereignty; a dignified emblem for the judicial system and its judges; and a reminder that the Sovereign remains Commander-in-Chief of the armed forces: Forman, op. cit. p. 193. Recall that officers of the Canadian Forces are commissioned and impose discipline in the Queen's name: Christopher Vincenzi, *Crown Powers, Subjects and Citizens* (London 1998), p. 66. Heraldically, the Crown as it appears atop the royal arms is a symbol for the power of the Canadian state and its civil servants (particularly as our common law never really recognised the concept of the state) Forman, op. cit. p. 194.

³⁵ Robert Blair St George, *Possible Pasts: becoming Colonial in Early America* (Ithaca 2000), p. 339. Yet still during the seventeenth century more than two-thirds of men and four-fifths of women could not write their own names: David Cressy, *Literacy and the Social Order: reading and writing in Tudor and Stuart England* (Cambridge 2006), p. 59. A judge's robes, however, are less about intimidation, and more about highlighting his or her role and de-emphasising the judge's persona: Kwai Hang Ng, *The Common Law in Two Voices: language, law, and the postcolonial dilemma in Hong Kong* (Stanford 2009), p. 87. The wigs of barristers originated with the clergy. Until the time of King Henry III, it was the tonsured clergy who (by and

(Note 35 continues over.)

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the following passage, describing the importance of royal symbols to the courts established in the American colonies:³⁶

In the mid-eighteenth century Englishmen on both sides of the Atlantic made new efforts to embellish royal authority. Since the colonial courts were hardly awesome by English standards, every little effort was made to dignify the king's dispensing of justice... In 1764 the New York Supreme Court, in emulation of the mother country and several other colonies, ordered the judges and the counsel appearing before them to don robes or gowns and bands in order to advance the "Dignity Authority Solemnity and Decorum of the Court,"... John Adams recalled that in the early 1760s the Massachusetts authorities had likewise introduced new "scenery" in the supreme court... in order to create a more "theatrical" and "ecclesiastical" setting for the doing of justice.

(Note 35 continued)

large) appeared in court as advocates. Early in Henry's reign, however, the Bishop of Salisbury determined that clergy (i.e. 'clerks') should not appear in court, unless on their own causes. Yet many clergy still endeavoured to appear, and so hid their tell-tale tonsure under wigs. This eventually became the mark of an advocate: William Forsyth, *Hortensius: or, The advocate, an historical essay* (London 1849), p. 311. The royal crown served as the crest of the arms of New York City until the revolution, and a colonial Governor of New York, Thomas Dongan, sent images of the royal arms to be put up in each aboriginal 'castle' in order to display royal authority 'in the northern wilderness': Brendan McConville, *The King's Three Faces: the rise & fall of Royal America, 1688-1776* (Chapel Hill 2006), pp. 235, 237.

³⁶ Gordon S. Wood, *The Radicalism of the American Revolution* (New York 1993), pp. 16f. An 'ecclesiastical' setting for the doing of justice is not fanciful: in Sweden, for instance, it has been argued that the courthouse was built as a parallel to the parish church: Kjell Å Modéer, 'From "Rechtsstaat" to "welfare-state": Swedish judicial culture in transition 1870-1970', in W. Wesley Pue and David Sugarman (edd.), *Lawyers and Vampires: cultural histories of legal professions* (Oxford 2003), pp. 151-69 at 158. And heraldically, from the time of Edward VI churches in England displayed the royal arms to signify acceptance of the settlement of the Crown in the Tudor line – in other words, a pledge of loyalty (particularly after the restoration in 1660), and also simply to decorate what had become bare walls after the removal of roods from the churches – or perhaps even to express reverence arising from a newfound religious conviction: *le nouveau Messie, c'est le Roi*. Cf. N. J. G. Pounds, *A History of the English Parish* (Cambridge 2000), pp. 497f.: John N. King, *Tudor Royal Iconography: literature and art in an age of religious crisis* (Princeton 1989), p. 17 ('Royal iconography filled the vacuum left by iconoclastic attacks when images of monarchs and royal heraldry inherited the veneration that statues of the Virgin and Child, saints' images, and other cult objects had acquired by the late Middle Ages'). This display was a convention, not law (Pounds, *ibid.*), and was maintained in the North American colonies: S. Scott Rohrer, *Wandering Souls: protestant migrations in America, 1630-1865* (Chapel Hill 2010), p. 65. To this day, 'A law court is like a church, in that it is a setting for a solemn ritual, designed to reinforce our beliefs in the myths that uphold society' (Graham, *op. cit.* (note 1 above) p. 317). The bands Canadian barristers still wear today originated with the white neck-cloth worn by English clergymen in Tudor times, which later became 'falling-bands' in the time of King Charles I. These soon became standard for a barrister's costume: thus George S. Tyack, *Historic Dress of the Clergy* (London 1897), p. 76, 'after the Restoration, a barrister would as soon have thought of appearing at the King's Bench without his gown as without his band.' Cf. John Cordy Jeaffreson, *Pleasantries of English Courts and Lawyers: a book about lawyers* (New York 1876), pp. 301f.

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Thus the colonial courtrooms became 'more uniformly anglicized, and the courts sat in the monarch's name.'³⁷ This theatrical setting 'for the doing of justice' included the royal arms of the monarch in whose name the courts sat. These arms 'decorated courtrooms in many colonies, reinforcing the power of courts by linking them to the human embodiment of the empire', i.e. the king.³⁸ For examples, Bostonian officials put up the royal arms in the town's courthouse in the mid-1670s as the 'visualisation of royal authority'; in 1739 a county in Virginia 'paid a visiting English artist 1,600 pounds of tobacco to paint the king's arms on the side of their new courthouse, to remind them of the king's power and justice'; and in a courtroom in Niagara.³⁹

The Royal Arms of George III were prominent in a painting that hung above the judicial bench, and the lion in this painting actually looked out on the courtroom, glowering fiercely, as if he personally embodied the awful might of the law.

And so it is today in British Columbia. As Blok writes, 'The judiciary has taken the view that judges dispense the Queen's justice, acting on behalf of the sovereign herself, and thus it is the arms of the sovereign under which judges should sit.'⁴⁰ The only – yet crucial – wrinkle is that currently the arms these judges sit under are those that, as Blok puts it, 'can be traced back to colonial times'.

What are Royal Arms?

As will by now be clear, 'the judges on their benches still sit beneath the Royal Arms to remind them that the sovereign is the "fount and source of justice".'⁴¹ But just what are 'Royal Arms'? It is this question that has so perplexed Blok.

As noted above, feudal and manorial courts displayed the arms of those who wielded power there, as royal courts displayed the arms of the king. There is, however, an important distinction between the two types of display: usually the arms appearing in manorial courts were personal arms, while those in royal courts were not.

Consulting Brook-Little's authoritative *An Heraldic Alphabet*, one reads under the entry 'Royal arms' the following definition: 'The royal arms as borne by the monarch are arms of sovereignty or dominion rather than family arms', i.e. rather than personal arms. Another source emphasises, 'The Royal arms have long ceased to be personal arms. They are the sovereign arms of dominion.'⁴² This is consistent

³⁷ McConville, op. cit. (note 35 above) p. 149.

³⁸ McConville, *ibid.*

³⁹ McConville, op. cit. pp. 34, 130; David Murray, *Colonial Justice: justice, morality, and crime in the Niagara District, 1791-1849* (Toronto 2003), p. 151. Note the legend that the heraldic lion of the kings of England (prophesied by Merlin to be the 'Lion of Justice') commemorates the 'foundation of the administrative and legal system by the organisation of the *curia Regis* for financial and judicial business, the establishment of itinerant justices to carry the King's law throughout the realm, and the strengthening of the popular courts of shire and hundred to resist the encroachment of feudal franchises': C. Wilfred Scott-Giles, *The Romance of Heraldry* (London 1957), pp. 46f. This Lion of Justice persists in the Canadian Royal Arms.

⁴⁰ Sadly, it appears that the judges of the Ontario Superior Court of Justice no longer sit under the arms of the Sovereign, but under arms granted (strangely) to the court itself (see below).

⁴¹ Brian Barker, *The Symbols of Sovereignty* (Newton Abbot 1979), p. 8.

⁴² J. H. and R. V. Pinches, *The Royal Heraldry of England* (Rutland 1974), p. xv.

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with, for example, the definition of royal arms in the New South Wales legislation to which Blok refers.⁴³ It reads, '*Royal arms of the United Kingdom* means the arms of sovereignty and dominion borne by Her Majesty Queen Elizabeth II in her capacity as Queen of the United Kingdom of Great Britain and Northern Ireland...'

And what is meant by 'arms of sovereignty or dominion'? Consulting again *An Heraldic Alphabet*, under 'arms of dominion' one learns,

These, which are also styled "arms of sovereignty", are those borne by a sovereign in respect of the territories he rules rather than his own family arms. The royal arms are arms of dominion; the Queen's arms of descent would be those of her branch of the House of Saxony.

While royal arms are borne in respect of a territory (and not of a family or individual), they are not national arms, in the sense of signifying the country of Canada and her people; rather, they signify the Crown: royal arms 'are not the national arms... They are the Arms of The Sovereign alone.'⁴⁴

The arms of the Sovereign for Canada are the arms King George V appointed in 1921 – as Blok notes, Canada's 'royal arms of dominion and sovereignty'. As other writers more thoroughly described them, they are the 'Arms of Dominion and Sovereignty of Her Majesty the Queen in Right of Canada, or the Royal Arms of Canada for short, are the Queen's Arms as Queen of Canada'.⁴⁵

As for the arms of the Sovereign for British Columbia, these are the arms King Edward VII warranted in 1906, which Blok acknowledges as the 'arms of the sovereign in right of the province'.⁴⁶ Thus they are royal arms, for the coat of arms of the sovereign is a royal coat of arms.⁴⁷ Looking to the *Oxford English Dictionary* for the definition of 'royal', one reads, 'Of or pertaining to a sovereign, or the dignity or

⁴³ This legislation determined that 'Whenever after the commencement of this Act, in a Parliament building, a courthouse, an office or official residence of the Governor or a Government office, in any other building or place, or on any official seal or document, or in any other connection, arms representing the authority of the Crown or the State are to be used for any official purpose, the State arms or a State symbol is to be used, and not the Royal arms of the United Kingdom' (emphasis added): *State Arms, Symbols and Emblems Act 2004* (N.S.W.), s. 4 (1).

⁴⁴ Rodney Dennys, *Heraldry & the Heralds* (London 1984), p. 166. Even the language used by the Canadian Heraldic Authority does not always reflect this: in the Authority's published record of the symbolism of the Royal Arms of Canada, it is stated that 'On the bottom portion of the shield is a sprig of three Canadian maple leaves representative of Canadians of all origins' ('Registration of the Arms and Supporters of Her Majesty The Queen in Right of Canada', archive.gg.ca/heraldry/pub-reg/project-pic.asp?lang=e&ProjectID=461&ProjectElementID=1555). No portion of the Royal Arms of Canada represents Canadians: the Royal Arms represent the Sovereign.

⁴⁵ Arthur Bousfield and Garry Toffoli, *Fifty Years the Queen: a tribute to Her Majesty Queen Elizabeth II on her Golden Jubilee* (Toronto 2002), p. 146.

⁴⁶ H.M. the Queen augmented these arms on 15 October 1987 at the Vancouver Law Courts; Bousfield & Tuffoli, op. cit. p. 189.

⁴⁷ Rachel Minay (ed.), *Kings & Queens* (Hampshire 2004), p. 5; Charles Boutell, *English Heraldry*, 3rd ed. (London 1875), p. 279.

office of a sovereign... So of insignia or emblems of royalty... Pertaining to the king (or queen) as civil or military head or representative of the state.⁴⁸ One understands now that the arms of Canada and of British Columbia are:

- borne by the Sovereign in respect of these two territories over which she rules, i.e. they are arms of sovereignty and dominion;
- not the family arms of the Sovereign; and
- in pertainment to the Sovereign and her office as head or representative of Canada and of British Columbia.

Clearly, these coats of arms are *royal* arms. Even the Royal Household at Buckingham Palace refers to the Canadian arms as the 'Royal Arms of Canada'.⁴⁹

One cannot deny, therefore, that royal arms in Canadian and British Columbian contexts are the arms of Canada ('Canadian Royal Arms') and the arms of British Columbia ('B.C. Royal Arms').

Application

So, there are three royal coats of arms pertinent to Blok and Wright's debate: the English Royal Arms; the Canadian Royal Arms; and the B.C. Royal Arms. And as detailed above, the convention is that a judge of a realm sits beneath the arms of the sovereign of that realm as his *locum tenens*, his representative. Such representation explains the famous anecdote of Baron Huddleston (1815-90), judge of England's Court of Exchequer: he and Mr Justice Manisty were guests at a banquet and 'when the health of the Queen was proposed the latter loyally stood up, like the rest of the company. Huddleston, however, the story goes, remained seated, and pulling the sleeve of his brother Judge whispered, "Sit down, Manisty, you – fool! We are the Queen."⁵⁰

If judges are the Queen, the question for judges in British Columbia is, which Queen are they? Which sovereign does a British Columbian judge represent? If one can answer this, one can determine under which royal arms he or she must sit.

Do judges in B.C. represent the Queen of Canada, of B.C., or of the U.K?

The determination of which sovereigns judicial authority a judge in British Columbia has been delegated to exercise is more of a constitutional matter than an heraldic one. Blok seems to have gone astray in his understanding of the Canadian monarchical structure; and in doing so, he may have fallen prey to a common misapprehension, which has its victims believe that 'the Queen of England' is Canada's head of state. But as one writer (in the context of New Zealand) emphasises:⁵¹

As a matter of constitutional law, "the Queen of England" does not exist. There is a Queen in right of the United Kingdom of Great Britain and Northern Ireland, but she has nothing

⁴⁸ *OED*, 2nd edn., s.v. 'royal'.

⁴⁹ 'Queen and Canada: symbols and ceremonies', www.royal.gov.uk/MonarchAndCommonwealth/Canada/Symbolsandceremonies.aspx.

⁵⁰ Frederick Payler, *Law Courts, Lawyers, and Litigants* (London 1926), p. 119.

⁵¹ Andrew Townend, 'The strange death of the realm of New Zealand: the implications of a New Zealand republic for the Cook Islands and Niue', *Victoria University of Wellington Law Review* 34 (2003), pp. 571-608 at 573.

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to do with New Zealand; New Zealand's Head of State is the Queen in right of New Zealand. Same person, different hats...

As Blok and Wright agree, presently it is the arms of the Queen in right of the United Kingdom of Great Britain and Northern Ireland that are displayed in British Columbian courtrooms. But in the twenty-first century these arms have nothing to do with contemporary British Columbia.⁵² As Wright points out, these British arms were appropriate while the Monarch had not assumed distinct royal arms for Canada or British Columbia.⁵³ As dependence upon the United Kingdom waned, however, the Monarch *did* assume distinctive arms for these realms, and at that stage it was no longer proper to display the English Royal Arms to denote the Monarch of Canada or of British Columbia, who was becoming a separate, distinct monarch from that of the United Kingdom. Consider the following historical narrative (pertaining to Australia, but parallel to Canada):⁵⁴

Her Majesty the Queen of Australia is legally separate and distinct from Her Majesty as monarch of her other realms. In the 19th century it was accepted that the Crown was one and indivisible throughout its dominions... Obviously, this theory of indivisibility could only exist while all of the colonies were legally dependent upon the United Kingdom... It can now be accepted that the Crown is no longer one and indivisible throughout the former Empire. The Crown in right of the Commonwealth of Australia is independent from the Crown in right of the United Kingdom and has been independent for many years... As between sovereign nations, the Crown is separate and divisible: the Queen of the United Kingdom is a separate and distinct constitutional entity from the Queen of Australia, even though the same person wears the Crown.

The concept alluded to previously with the phrase, 'same person, different hats' is in a legal context a 'corporation sole'. Canada's Sovereign is, in law, a corporation of one, i.e. a corporation sole: 'The monarch has two capacities; one a natural body which is subject to death; the other a body politic which is a corporation sole and in this capacity the monarch is esteemed to be immortal.'⁵⁵ Corporations sole such as the monarchy, it has been argued,⁵⁶

⁵² Blok does not respond to Wright's point that if 'all judges deriving their authority from the Queen should sit under the English Royal Arms' then so would the judges of Scotland. Scotland's judges, however, sit beneath the Scottish Royal Arms (Margaret McDavid, Scottish Court Services, personal communication, 14 June 2010).

⁵³ The order in council of 1856 that Blok mentions of course referred to the arms used by the Sovereign at the time, i.e. in 1856. These arms were identical in blazon to those presently borne by Queen Elizabeth II in right of the United Kingdom.

⁵⁴ Bradley Selway, *The Constitution of South Australia* (Sydney 1997), pp. 21f. The 'Crown' has come to mean the Government, rather than the Monarch in her personal or official capacity. 'Monarch' and 'Sovereign' have come to indicate the *office* of the head of state. 'The Queen' normally indicates the flesh-and-blood person. For Vincenzi, *op. cit.* (note 34 above) pp. 64f., their 'relationship can be roughly compared to that of a Russian doll, with "the Crown" as the outer skin, the monarch or sovereign as the inner one, and the Queen, the human individual, at its heart.'

⁵⁵ Selway, *op. cit.* pp. 26, 166, citing *Calvin's Case* (1609) 77 ER 377 at 388.

⁵⁶ Christopher C. Nicholls, *Corporate Law* (Toronto 2005), p. 2.

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... share the fundamental trait that they may for many useful purposes be conceived of as artificial legal "persons." (This observation is true even of the English monarchy though not, of course, of any individual English king or queen.) Each of these entities is thought to possess, in the eyes of the law, a personality... that is separate and distinct from the human beings who serve as the entity's office holders, directors, employees, or other agents.

Is it Blok's *point d'appui* that a courtroom's coat of arms represents the human being – the 'natural body' – of the reigning Monarch? If he is, one must not fault him too harshly, for 'it is the *person*, the Queen and her family, that provides the real focal point of the constitution.'⁵⁷ Even so, in the words of another writer:⁵⁸

Canada is not... choosing the sovereign of England to be, *ipso facto*, her sovereign. That person actually occupies several separate jobs, being sovereign, separately, of each of the nations that so acknowledges him or her. It is a simple and understandable process... Any citizen can appreciate this arrangement who has been president of several organizations at the same time.

If Blok would have British Columbian judges sit beneath the personal arms of Queen Elizabeth II, they would be sitting under 'a most complicated shield containing the various coats borne by her paternal family of Saxe-Coburg-Gotha'.⁵⁹ But judges' authority stems from the *office* of the Sovereign, not her person. As Wright notes, royal arms 'do not identify a person but a sovereignty.' In the words of another heraldic writer, 'The Royal Arms are not simple family arms: they are arms of dominion, even arms of office...'.⁶⁰ So, what are the arms of the 'office' of the Queen of Canada? They are Canada's arms of dominion, i.e. 'The armorial insignia of a reigning Sovereign, borne by him or her in right of regal office and as the symbols of supreme authority and power.'⁶¹ Certainly, they are not the English Royal Arms, as now employed in British Columbian courtrooms:⁶²

The Royal Arms of the UK are used by the United Kingdom monarchy and are the arms of dominion and sovereignty of the United Kingdom of Great Britain and Northern Ireland. They are not the personal arms of Queen Elizabeth II.

If these English Royal Arms somehow represented the Sovereign's authority, one might expect that Her Majesty's Great Seal of Canada would depict those arms. Yet the Great Seal – Canada's 'emblem of sovereignty' – instead depicts, 'Elizabeth II crowned, holding sceptre and orb and enthroned above the Royal Arms of Canada'.⁶³

⁵⁷ Vincenzi, *op. cit.* (note 34 above) p. 65.

⁵⁸ Frank MacKinnon, *The Crown in Canada* (Calgary 1976), pp. 78f.

⁵⁹ J. P. Brooke-Little, 'Coats of arms', in Antonia Fraser (ed.), *The Lives of the Kings and Queens of England* (rev. edn., London 1999), p. 15.

⁶⁰ Julian Franklin, *Shield and Crest: an account of the art and science of heraldry* (3rd edn., London 1967), p. 363.

⁶¹ J. S. Milbourne, *Heraldry for Amateurs: a handbook for beginners* (London 1950), p. 118.

⁶² N.S.W. Legislative Council, Standing Committee on Law and Justice, 'Report on the proposed State Arms Bill' (Parliamentary Paper 326: Sydney 2002), p. 15.

⁶³ '[The Great Seal] is considered the emblem of sovereignty, - the *clavis regni*, - the only instrument by which on solemn occasions the will of the sovereign can be expressed': John, Lord Campbell, *Lives of the Lord Chancellors of England* (3rd edn., London 1848), vol. 2 p. 55; cf. Bousfield & Tuffoli, *op. cit.* (note 45 above) p. 105.

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Figure 3: The Queen's personal standard for use in Canada.

Clearly, the Canadian Royal Arms (not the English Royal Arms) typify our Queen of Canada.

Blok asserts that Queen Elizabeth II, when travelling outside Britain, uses stationery that bears the English Royal Arms. He does not mention, however, that when Her Majesty travels inside Canada, she flies her personal flag, which bears the Canadian Royal Arms – not the English (**Figure 3**).⁶⁴

Royal arms connote sovereignty, the Crown. Certainly, the concept of the Crown is a multifaceted one (as a corporation sole): 'Apart from the material Crown, the concept [of the Crown] could refer to the King alone, the King as head of the body politic, the body politic itself, the inalienable rights of that body or those jointly responsible for it.'⁶⁵ Blok is concerned that for a court to use the Canadian or B.C. Royal Arms it would identify itself with the body politic (i.e. the government of Canada or of British Columbia) as litigant. One wonders if he also frets that courts in England using the English Royal Arms identify themselves with the government of England as a litigant.

Elements of royal symbolism have been connected with the propagation of public authority for centuries, and their use in the absence of the Sovereign made them into 'vectors of state power'.⁶⁶ The Crown became a dignified emblem for the government of the day and its agencies, and it is therefore natural that in formal terms

⁶⁴ This flag (adopted in September 1961) is sometimes mistakenly called the Royal Standard of Canada (cf. *Flag Bulletin* 19 (1980), p. 323). It is (by virtue of the Royal Cypher) personal to Queen Elizabeth II alone, and no one but she may fly it; cf. Ronald Allison and Sarah Riddell (edd.), *The Royal Encyclopaedia* (London 1991), p. 188 s.v. 'Flags and standards, personal'.

⁶⁵ J. W. F. Allison, *A Continental Distinction in the Common Law: a historical and comparative perspective on English public law* (Oxford 2000), p. 75.

⁶⁶ John Watts, 'Looking for the state in later medieval England', in Coss & Keen (note 15 above), pp. 243-67 at 245.

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we refer to 'Her Majesty's Government' and that it is the Sovereign's representative who reads the Speech from the Throne.⁶⁷ Blok must agree that 'the Monarch is the titular head of the government and all governmental acts are carried out in the name of the Crown' and that 'All ministers are in law "servants of the Crown" (or of the Queen); civil servants work under the direction of ministers but are themselves also servants of the Crown, not of the departmental minister.'⁶⁸ Canadian and British Columbian government departments therefore often make use of the Canadian and B.C. Royal Arms because ministers and their departments are servants and agencies of the Crown.⁶⁹ The royal arms indicate the authority of government, vested in the Sovereign as *mater patriae*.⁷⁰

It is well known that judges are independent, and that 'the Crown has no legal right to give them instructions', yet they are still Crown servants: their positions are granted by the Crown, their salaries are paid from Crown revenue, and they are subject to dismissal by the Crown.⁷¹ The use of royal arms by Her Majesty's judges should give no litigant cause for concern: it is an established principle of our constitution that, as a 'dignified emblem', 'the Crown is of no party. Its apparent separation from business is that which removes it both from enmities and from desecration, which preserves its mystery, which enables it to combine the affection of conflicting parties'.⁷² A court of law in British Columbia is the Sovereign's court, and 'the king's crown is to do justice and keep the peace.'⁷³ The appearance of the heraldic crown

⁶⁷ Forman, op. cit. (note 25 above) p. 194. It is worth reminding oneself that the government is the Sovereign's, and not the Prime Minister's (e.g. it is the government of Queen Elizabeth II, not 'the Harper government'). The Prime Minister is 'a temporary chairman of the cabinet who has limited formal powers': MacKinnon, op. cit. (note 58 above) p. 25. While normally the Governor General is the Sovereign's representative, in the event of the death, incapacity or absence of the Governor General, it is the chief 'judge delegate' of Canada, i.e. the Chief Justice of the Supreme Court of Canada, who represents the Sovereign as the Administrator of Canada. Physically, the Dominion's throne sits in the Senate chamber in Parliament. The Sovereign last sat on the throne personally in 1957, when Queen Elizabeth II 'ascended the low dais and occupied the Throne of Canada' (Bousfield & Toffoli, op. cit. (note 45 above) p. 16). This account again reminds one of 'the courtroom, with a dais and throne where the judges sat': Henry Adam, *The Life of George Cabot Lodge* (Charleston 2008), p. 80.

⁶⁸ Hilaire Barnett, *Constitutional & Administrative Law* (London 2009), p. 267; Colin Turpin and Adam Tomkins, *British Government and the Constitution: text and materials* (Cambridge 2007), p. 348. The Prime Minister too is, of course, a servant of the Crown (MacKinnon, loc. cit.).

⁶⁹ Denny, op. cit. (note 44 above) p. 166; Loughlin, op. cit. (note 22 above) p. 60.

⁷⁰ Sir Thomas Innes of Learney, *Scots Heraldry: a practical handbook on the historical principles and modern application of the art and science* (2nd edn., Edinburgh 1956), p. 213.

⁷¹ Robert A. Watt, 'The Crown and its employees', in Sunkin & Payne (note 22 above), pp. 284-314 at 309. Note that the Sovereign may only dismiss a judge of a superior court upon receiving an address from Parliament to do so: British North America Act 1867 (UK: c. 3), s. 99, as substituted by the British North America Act 1960 (UK: c. 2), s. 1 = Constitution Act 1867 (Canada), s. 99.

⁷² Walter Bagehot, *The English Constitution* (London 1867), p. 70.

⁷³ Pollock & Maitland, op. cit. (note 21 above) p. 525.



Figure 4: The bauhinia emblem of the government of the Special Administrative Region of Hong Kong as displayed in the Hong Kong High Court.

in a courtroom, along with other elements of royal arms, reassures litigants that the Queen's justice is being done.⁷⁴

Blok wrote, 'the judiciary has taken the view that its independence must not be compromised on any level, even symbolically.' Blok does not, however, explain how the judiciary's use of these royal arms would symbolically compromise judicial independence. Nor does he explain how British Columbian judicial independence is not symbolically compromised by using the symbol of a now-foreign authority, i.e. the English Royal Arms. In other former colonies, the potential of such symbolic compromise occasioned by the display of the English Royal Arms in courtrooms has been such that local authorities could no longer abide their use.⁷⁵

During the American Revolution, English Royal Arms in colonial courtrooms suffered an iconoclasm. For example, in New York City 'the king's coat of arms was "tore to Pieces and burnt in the Presence of the Spectators" after the Declaration was published.'⁷⁶ In the courtroom of the State House of Pennsylvania, a mob, after reading out the Declaration of Independence, pulled down the royal arms that hung above the judges' bench and burned it. They replaced it with the arms of Pennsylvania.

⁷⁴ The Monarch, in assuming arms for Canada and for British Columbia, assumed them with the Royal Crown; 'a Royal helmet'; and (for British Columbia) 'the royal crest of general purpose of our royal predecessor Queen Victoria differenced for us and our successors in right of British Columbia'.

⁷⁵ This is why in New South Wales the decision was made to display the arms of New South Wales in place of the English Royal Arms: 'In this respect, the Committee believes that as all actions of the State of New South Wales and its various offices and institutions are conducted under its own authority, the arms that most accurately and symbolically represent that authority should be used. The Committee has concluded that the State Arms, as the arms of dominion and sovereignty of the State of New South Wales are the appropriate arms in this regard.' 'Report on the proposed State Arms Bill' (note 62 above), p. 44.

⁷⁶ McConville, *op. cit.* (note 35 above) p. 309.

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More recently, in Hong Kong the emblem of the Special Administrative Region (a stylised bauhinia flower) now hangs behind Hong-Kong judges (**Figure 4**), replacing the English Royal Arms used in courtrooms there for over 150 years.⁷⁷ The Supreme Court of the Commonwealth of the Bahamas (though Queen Elizabeth II is judge ordinary of that country) is replacing the English Royal Arms in its courtrooms with a logotype.⁷⁸ In the Republic of Ireland, the Republican Sinn Féin party called for the removal of the English Royal Arms from the courthouse in Monaghan when it was being refurbished in 2008. And even in Northern Ireland, English Royal Arms were removed from the majority of courtrooms there in 2003, as their use was seen as a 'difficult issue'.⁷⁹

As these jurisdictions have determined, the tradition to which Blok advocates British Columbian courts adhere is a colonial one. It must be updated to suit our contemporary sovereignty. I agree with Wright that in British Columbian courtrooms it is not the authority of the Queen of the United Kingdom that is being exercised, but rather:

- a) in a superior British Columbian courtroom [i.e. Court of Appeal and the Supreme Court], it is the authority of the Queen of Canada being exercised; and
- b) in an inferior courtroom [i.e. the Provincial Court], the Queen in right of British Columbia.⁸⁰

Therefore, judges in British Columbia who have been delegated by:

- a) the Queen of Canada to exercise her authority as judge ordinary [i.e. judges of the superior courts (see above)] must sit under the Canadian Royal Arms to signify that authority; and
- b) the Queen in right of British Columbia to exercise her judicial authority [i.e. judges of the inferior courts] must sit under the B.C. Royal Arms.⁸¹

⁷⁷ Ng, *op. cit.* (note 35 above) pp. 80f.

⁷⁸ Supreme Court of the Commonwealth of the Bahamas, 'About Us: About The Logos', www.bahamassupremecourt.gov.bs/logotypes.php.

⁷⁹ 'Coats of arms removed from Ulster courts', *Daily Telegraph*, 15 January 2003 (available online at www.telegraph.co.uk/news/uknews/1418924/Coats-of-arms-removed-from-Ulster-courts.html). This is certainly not applicable to Canada. Cf. *Law Times* 74, 3 Feb. 1883, p. 240: 'Law has been administered alike in the highest tribunal and in the bench of county magistracy under the heraldic blazonment of the national arms, and it is with a feeling somewhat akin to sacrilegious horror that one observes the judgment-seat in the Royal Courts altogether bereft of the Royal emblem. Surely, where money has been spent with a lavish hand on quaint carvings and elaborate embellishments, it is not too much to expect to find the traditional insignia of justice and appropriate reminder that the Sovereign is, in constitutional theory, its fount.'

⁸⁰ In British Columbia proceedings 'the Crown' stands for 'Her Majesty the Queen in right of British Columbia': Crown Proceedings Act (RSBC 1996, c. 89), s. 1. The judges of British Columbia's superior courts 'claim an inherent jurisdiction in supplement to the jurisdiction granted by statute to apply the law and dispense justice as though they directly exercised certain prerogative powers... associated with the sovereign power of a head of state, in this case, the Queen as Queen of Canada': Morley (note 23 above), p. 189.

⁸¹ Blok's anxiety over what arms a master would sit under can be addressed: if a master sits in the Supreme Court, he would simply sit under the arms that would properly hang there, i.e. the Canadian Royal Arms. Interestingly, in the case of Osgoode Hall in Toronto this dilemma (*Note 81 continues over.*)

If doubt persists, look to Her Majesty's heralds

If, after the above revelation, doubt persists as to the proper arms to display in a British Columbian courtroom, whose further advice should one seek? Blok's suggestion that the matter could be resolved by 'knightly combat' is unbecoming. He cites a good precedent, however, when in 1907 the construction plans for the Vancouver courthouse were finalised, and advice from the College of Arms was sought as to the proper use of arms in the courthouse. This is sound practice: *experto crede* and consult the heralds (for 'court fittings [such as arms] have a longer history than court buildings').⁸² Indeed, even the Sovereign herself consults her heralds when seeking guidance in matters heraldic: for example, recall when Queen Elizabeth I, who (though she herself 'spoke the language of heraldry with great fluency') summoned her heralds for their opinion on the import of Queen Mary I of Scotland bearing arms that included those of England.⁸³

Judges frequently rely upon the assistance of lawyers to determine what the law is on a particular issue. Why not rely upon the assistance of heralds to discover what the heraldry is on a particular issue? The only guidance a herald might need in aiding this particular discovery is *whose* arms are to appear in a courtroom: the Queen of Canada's arms, or the Queen of British Columbia's arms?

But should British Columbia's judges consult just any herald? Blok's reference to the late Sir Peter Gwynn-Jones as 'the foremost expert on the subject in the world' is unqualified. What is the subject? Heraldry? Or heraldic display in British Columbian courtrooms? Gwynn-Jones's comment to which Blok refers was directed at Australia, not British Columbia. To wit: 'Garter King of Arms... maintains that this coat of arms [i.e. the English Royal Arms] is the "Arms of The Queen as Sovereign of Australia: they are used throughout the Commonwealth where The Queen is Head of State." He adds that Scotland and Canada are *exceptions*.'⁸⁴

(Note 81 continued)

was resolved by displaying *both* the Canadian Royal Arms and the Royal Arms of Ontario. Following the same reasoning as Wright and this author, it was decided that as the 'arms displayed in a courtroom are symbols of sovereignty and authority ... and as the authority would be exercised within the geographical area of Canada by federally appointed judges, the symbol of sovereignty and authority in those courtrooms [in Osgoode Hall] should be that of Canada, notwithstanding that the courts sitting there were created by provincial legislation': John Honsberger, *Osgoode Hall: an illustrated history* (Toronto 2004), pp. 219f. Ontario Courts of Justice follow the same practice: cf. the Ontario Justice Education Network handout on 'Traditions of the Courts', p. 2 (www.ojen.ca/eng/resources/show.cfm?id=176). The display of multiple coats of arms in a courtroom is not without historical precedent, e.g. the old seventeenth-century courthouse in the town of Malmesbury, England, displayed in its courtroom four coats of arms: the English Royal Arms of 1693; the arms of the borough; and the arms of two prominent burgesses: Richard Luce, 'The St. John's Almshouse Malmesbury', *Wiltshire Archaeological and Natural History Magazine* 53 (1949), pp. 118-26.

⁸² Graham, op. cit. (note 1 above) p. 318.

⁸³ Barker, op. cit. (note 41 above) pp. 237f.

⁸⁴ P. Ll. (later Sir Peter) Gwynn-Jones, letter to Fred Nile, 8 May 2002, cited by Richard Mohr, 'Enduring signs and obscure meanings: contested coats of arms in Australian jurisdictions', in Anne Wagner, Tracey Summerfield and Farid Samir Benavides Vanegas (edd.), *Contemporary*

(Note 84 continues on next page.)

HERALDIC DISPLAY IN BRITISH COLUMBIAN COURTROOMS

Figure 5: The arms of the Federal Court of Canada, as granted 10 December 2007.

Arms: *Or on a Canadian pale Sa. in chief three scrolls two in saltire one in pale Or bound by a ribbon chequy Or and Sable.*

Crest: *Issuant from a coronet of maple leaves and fleurs-de-lys a balance Or.*

Supporters: *Two sea-caribou Or that to the dexter male that to the sinister female both with wings and tarsi Sa. and set on a cloth chequy Or and Sa. above a bar wavy Or.*

Source: Public Register of Arms, Flags and Badges of Canada vol. 5, p. 191 (archive.gg.ca/heraldry/pub-reg/project-pic.asp?lang=e&ProjectID=1203&ProjectElementID=4451).



Notably, Blok omitted this last sentence. And even in Australia, in the main courtroom of that nation's High Court, it is a banner of the arms of Australia that appears – not of the arms of England.⁸⁵

Blok writes, 'The decision on arms was and is for the courts to make...' but in his first article he conceded that it is the heralds to whom that power has been delegated (though remarkably he asserts that it is the English heralds who hold that power for Canada).⁸⁶ If it were solely a decision for the courts to make, why did they feel in 1907 that they ought to consult heralds before hanging arms in the new Vancouver courthouse? And why did they not consult them again in 1995, rather than having Mr Taylor rely upon colonial-era traditions?

(Note 84 continued)

Issues of the Semiotics of Law (Oñati International Series in Law and Society 13: Oxford and Portland 2005), pp. 179-95 (available on line at ro.uow.edu.au/lawpapers/42). Emphasis mine. This letter appears to be Blok's source, as elsewhere Nile refers to it using similar language to Blok's, viz. 'In correspondence dated 8 May 2002 the Garter Principal King of Arms, the foremost authority on coats of arms in the world, stated: The Royal Arms displayed in Australia are the Arms of The Queen as Sovereign of Australia: they are used throughout the Commonwealth where The Queen is Head of State': NSW Legislative Council, Debates 26 September 2006, at 2155 (Rev. Hon. F. Nile); www.parliament.nsw.gov.au/Prod/parlment/hansart.nsf/V3Key/LC20060926007. Nile, however, suffers from the same misunderstanding as Blok regarding the meaning of these arms, i.e. he believes the English Royal Arms represent the Queen personally.

⁸⁵ High Court of Australia, 'The High Court Building', www.hcourt.gov.au/about_04.html (accessed 25 June 2010).

⁸⁶ Similarly, I suggest it is not for the judges of the Supreme Court of Canada to decide by which title they are to be addressed, for they are only delegates of the Sovereign as judge ordinary, and it is for the Sovereign to decide how she wishes her judges delegate to be addressed. When Chief Justice Beverley McLachlin proclaimed that, 'Counsel are asked to refrain from addressing the [Canadian Supreme Court] judges as "My Lord", "My Lady", "Your Lordship," or "Your Ladyship."' (Supreme Court of Canada, 'Frequently Asked Questions', www.scc-csc.gc.ca/faq/faq/index-eng.asp#f10) it was really a matter for Rideau Hall to determine.

THE COAT OF ARMS



Figure 6: The badge of the new Supreme Court of the United Kingdom, as granted in 2008 and recorded at the College of Arms with the reference Standards 5/118.

When the College of Arms concurred with the use of the English Royal Arms in British Columbian courtrooms in 1907, it did so at a time before the creation of both the Canadian Royal Arms (1921) and the Canadian Heraldic Authority (1988), which is now (to use Blok's phrase) 'the delegate of the sovereign for this purpose'. While I disagree with Wright that the Authority is a 'forum for the determination of such questions', I certainly agree that the judiciary could look to the Chief Herald of Canada for direction as to which arms represent the Sovereign in right of Canada or of British Columbia.⁸⁷ I argue, however, against seeking from the Authority arms *de novo* for use by a court, for the judicial authority heraldically symbolised in a courtroom must be that of the Sovereign, not of the judges themselves, who (as noted above) have no authority other than that delegated to them by the Sovereign. In this way, the arms granted to the Federal Court of Canada in 2007 by the Canadian Heraldic Authority (**Figure 5**) are particularly compromising, even unconstitutional, if displayed in the Federal Court as a symbol of its authority: nowhere in these arms is the Sovereign represented as fountain of Canadian justice.⁸⁸ The new arms of Ontario's Superior Court of Justice are not quite as problematic, as they do at least bear the Royal Crown in chief, apparently to symbolise the 'concept of the Crown's justice' – though they

⁸⁷ The Chief Herald of Canada (but not the Canadian Heraldic Authority) is empowered to 'maintain a heraldic system for Canada': Commission of the Chief Herald of Canada, *Canada Gazette* 1988.I.4050.

⁸⁸ Federal Court, 'The Federal Court's coat of arms', http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/CoatofArms. There would be no obstacle, of course, to the Federal Court displaying its arms to identify itself or its property, e.g. buildings.

do not signify the Sovereign's *presence*.⁸⁹ Compare the heraldic badge designed for the new Supreme Court of the United Kingdom (**Figure 6**): while it too bears the Royal Crown, apparently it only appears at the front entrance of the new courthouse, while a *crownless* version appears in the courtrooms, replacing the royal arms. As one British parliamentarian commented: 'I can understand the Supreme Court having its own (emblem) but it should not be superior to the royal coat of arms... It should be prominently displayed in every court. For the Supreme Court not to have that then it is clearly a breach (of tradition).'⁹⁰

Blok concludes his reply to Wright by again referring to Chief Justice McRuer's predilection: 'Thus even the esteemed former chief justice of Wright J's court felt that the [English] Royal Arms were the proper arms to use.' Indeed 'felt' is the appropriate word, as it appears that the late Chief Justice McRuer relied upon his *feeling* as to what arms ought to be employed – not upon an informed survey of heraldry, or upon the advice of those whose occupation it is to study and regulate these matters, i.e. the heralds. Courtrooms across the province may have displayed the English Royal Arms for decades now, but just because heraldically uneducated persons practice bad heraldry does not mean that they have established a precedent worth following.

Conclusion

Historically, courtroom fittings such as arms 'were used to define the participants' roles, and so to ensure these [legal] problems were resolved fairly, decisively and with dignity.' For this reason, these furnishings 'continue to characterize the modern courtroom... even if they have been considerably adapted over time to accommodate alterations in the nature of the proceedings and the roles of the various participants.'⁹¹ Certainly such adaptations have occurred in British Columbia over the years, but the role of the judges as representatives of the Sovereign as fountain of justice, has not altered. What has altered is the identity of the Sovereign of Canada and of British Columbia as distinct entities from the Sovereign of the United Kingdom. This cannot be overemphasised.

As these identities have altered, so has the significance of the coats of arms assumed by them in relation to the dominion and the province, with the result that distinct royal arms – as heraldic insignia representing the Sovereign – now exist for Canada and for British Columbia. Adhering to the long-standing convention in British Columbia that royal arms are to be displayed in a courtroom in order to symbolise the sovereign whose authority is exercised in that courtroom, it is now the Canadian Royal Arms and the B. C. Royal Arms that are proper to display in British Columbian courtrooms: not the English Royal Arms that presently appear.

⁸⁹ Robert Watt, 'The arms of the Ontario Court of Justice', *Heraldry in Canada* 27.2 (June 1993), p. 12. Apparently these arms are displayed in the corridors of some Ontario courthouses in order to identify Superior-Court-of-Justice courtrooms, which certainly would be proper display.

⁹⁰ 'Crown sidelined from new Supreme Court', *Daily Telegraph*, 7 October 2009, (www.telegraph.co.uk/news/uknews/law-and-order/6266742/Crown-sidelined-from-new-Supreme-Court.html).

⁹¹ Graham, op. cit. (note 1 above) p. 318.

THE COAT OF ARMS

A courtroom, 'intended to house the solemn procedures of the law [is] generally expected to achieve the necessary dignity and authority by drawing on an ornamental vocabulary derived from history and symbolism.'⁹² Heraldists must ensure that the courtroom's 'ornamental vocabulary', i.e. its heraldry, accurately reflects both the history of armorial display in court and the symbolism of royal arms in order to achieve the necessary dignity and authority of the justice system. Formalities maintained in this justice system, such as the distinctive clothing of the judge and barristers; the central position and elevation of the judge's bench; the decorum to which observers must adhere; and the 'insignia of power and authority (seals, coats of arms...)' emphasise the seriousness of court proceedings; their separateness from ordinary life; and 'the venerable and authoritative character of the court.'⁹³ The author's hope is that this seriousness, separateness and venerable character of British Columbian courts will be properly emphasised by correct heraldry in the courtroom.

⁹² Graham, *op. cit.* (note 1 above), p. 254.

⁹³ Tiersma, *op. cit.* (note 4 above), p. 154.