The Canadian Law of Arms

Part I: English Origins

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This is the first in a planned series of articles detailing the present state of Canada's armorial law, as received from England and since altered by domestic law. Part I details – from a juristic perspective – the reception of England's armorial law into Canada.[1]

Perhaps the most legally-minded writer on English armorial law, George Squibb, Q.C., F.S.A., sometime Norfolk Herald Extraordinary, posited that the armorial law of Commonwealth states such as Canada derives from English armorial law.

> '…each of the countries comprising the Commonwealth had a colonial period and in many matters the law now in force can only be properly understood if it is set in its context of legal history. This is particularly the case with the law of arms. There may have been many changes in the constitutional law of a Commonwealth country, but it is unlikely that any of these changes will have affected the continued operation of the [English] laws of arms (if any) in operation in colonial times.'[2]

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[1] This article originally appeared in expanded form as 'The Reception of England's Armorial Law into Canada' *Coat of Arms* 3rd ser., 4 (2008), no. 216, p. 137. The 'reception' of law (also called adoption, migration, and introduction) refers to the acquisition of a legal system [Peter HOGG, *Constitutional Law of Canada* 2nd ed. (Toronto: Carswell Company Ltd, 1985), p. 21, n. 1 [HOGG 1985]). Thus, in the context of this article, 'reception' means Canada's acquisition of an armorial legal system from England. The author acknowledges the guidance in preparing this article of professors R. G. Howell, LL.M, and J. P. S. McLaren, LL.D, both of the University of Victoria. Thanks also to Bruce Patterson, Esq., F.R.H.S.C, Saint-Laurent Herald; Mr Brian Dillon, LL.B.; H. L. Molot, Esq., Q.C.; and Ms. Carron Rollins, Associate Law Librarian, University of Victoria. Any errors are, of course, the author's own. [Note: the citation-style of this article for legal materials is that normal among Canadian legal scholars, as set out in the *Canadian Guide to Legal Citation* (6th edn., McGill U.P.)]

[2] G. D. SQUIBB, Norfolk Herald Extraordinary, 'Heraldic Authority in the British Commonwealth' *Coat of Arms* 10 (1968), no. 76, p. 133 [SQUIBB, 'Heraldic Authority']. Note, however, that changes in Canada's constitution (particularly the adoption of its *Charter of Rights and Freedoms*, *i. e.* part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K), 1982, c. 11 [*Constitution Act,*

I consider this position below, but firstly, a review of the nature of England's armorial law is worthwhile.

Armorial law is part of what Blackstone called England's 'unwritten' law (that is *non*-statutory law), which encompassed

> (a) general or universal custom (*i. e.* the common law);
> (b) local custom; and
> (c) particular law used in certain courts (*e. g.* Roman law, Canon Law).[3]

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

Squibb wrote the most authoritative analysis of this particular law in the twelfth chapter of his book, *The High Court of Chivalry*.[5] He revealed that armorial law in England is an 'amalgam of English custom and [Roman] civil-law procedure'. That is to say, its procedure is the customs and usages of the High Court of Chivalry ('except in cases omitted', when Roman law guides – as it did in the law merchant and in admiralty law); and its substantive law is English and peculiar to England – ascertainable from the practice of the judges and counsel of England's High Court of Chivalry (just as one ascertained admiralty law from the practice of admiralty court).[6] This reliance upon custom parallels the predominant

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1982]) have affected the operation of England's law of arms in Canada. These changes will be dealt with in part II of this series of articles.

[3] *Commentaries on the Laws of England* with Barron Field's Analysis, vol. 1 (Philadelphia), pp. 68-79, cited in Gilbert SADLER, *The Relation of Custom to Law* (London: Sweet & Maxwell, 1919), p. 59. As to England's Canon Law, see *Ecclesiastical Law* (London: Butterworths, 1975) paras. 305-308: the Canon Law of England is, in origin, the Canon Law of papal Rome, subject to modifications by English custom, enforced by a separate system of courts, and later recognised by statute [35 Hen. 8c. 16 (Canon Law) (1543)] as part of the law of England. England's ecclesiastical law includes Canon Law along with those portions of the Civil Law of imperial Rome essential to the laws of England, and as such is as much the law of England as any other part of the law [*Edes* v. *Bishop of Oxford* (1667), Vaugh. 18 at 21].

[4] Properly, the law of arms is the *ius militare* (*i. e.* the unwritten laws and customs of military service and of war [William WINTHROP, *Military Law and Precedents* (Boston: Little, Brown & Co, 1896) c. IV]), of which coats of arms are only a part (but, formerly, an essential part) [Stephen FRIAR, *Heraldry* (London: Grange Books, 1992) p. 6]. It includes the rules, regulations and customs observed by both heralds and armigers, as a sort of *corpus juris heraldici* [Julian FRANKLYN, *Shield and Crest* (London: MacGibbon & Kee, 1960) p. 255].

[5] G. D. SQUIBB, *The High Court of Chivalry* (Oxford: Clarendon Press, 1959), pp. 162-190 [SQUIBB, *High Court*].

[6] *Ibid*., pp. 162-166. As for this 'fallback' on Roman Civil Law, compare the French reception of Roman Civil Law, which was partial, in the sense that jurists only looked to Roman law when it supported their cases and when individual

reliance upon unwritten usage in the related area of peerage law, which 'consists for the most part of rules evidenced by long-established usage – usage which has prevailed from time immemorial, or has at least the sanction of some centuries'.[7] And as one author observed, 'A custom existing in a State, which the State will enforce or has already recognised, is a law'.[8]

Any cause triable at common law is excluded from the jurisdiction of the High Court of Chivalry, which has 'absolute jurisdiction, by prescription, in matters of honour, pedigree, descent, and coat armour'.[9] Therefore common-law courts in England do not administer armorial law (or any law pertaining to dignities).[10]

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judges felt inclined to accept it: otherwise French custom or legislation prevailed [Alan WATSON, *Sources of Law, Legal Change, and Ambiguity* (Philadelphia: University of Pennsylvania, 1984), p. 69].

[7] Francis Beaufort PALMER, *Peerage Law in England* (London: Stevens and Sons, Ltd, 1907), p. 19. Peerages are a type of dignity [*Halsbury's Laws of England*, 4th ed, vol. 35 (London: Butterworths, 1994) at paras 901 & 902 (*Halsbury's* 4th ed)], and so 'peerage law' (like armorial law) is a branch of dignitary law. Incidentally, the Crown has bestowed 12 such dignities upon Canadians during the history of the Dominion (the first in 1891, the most recent in 2000), of which five are considered 'Canadian' peerages, in that they were bestowed after consultation with the Canadian government [Christopher MCCREERY, *The Canadian Honours System* (Toronto: Dundurn Press, 2005), pp. 23f]. During the colonial era, some felt life peerages ought to be bestowed on colonists by the Governor General at the advice of his ministers and parliament, and at different times in the history of the British Empire attempts were made (in vain) to establish colonial peerages [Arthur Berriedale KEITH, *Responsible Government in the Dominions* vol. 3 (Oxford: Clarendon, 1912), p. 1300, note; William MACPHERSON, *The Baronage and the Senate* (London: John Murray, 1893), pp. 292ff].

[8] Gilbert SADLER, *The Relation of Custom to Law* (London: Sweet & Maxwell, 1919), p. 33.

[9] *Atkin's Encyclopædia of Court Forms in Civil Proceedings*, 2nd ed, vol. 31 (London: Butterworths, 1993) at 190 [*Atkin's*]; and *A Digest of the Laws of England*, vol. 2 (N. p. 1764) *s. v.* 'Courts', at 485, cited in *Atkin's* vol. 31 at 192.

[10] SQUIBB, *High Court*, pp. 162 & 165. *Halsbury's* 4th ed, vol. 35 at paras 951 & 973. The reason for this unique jurisdiction is that parties relying upon armorial law were often alien to England or their dispute had arisen outside England, and so England's common law and courts were inappropriate to such international matters [Sir Anthony WAGNER, *Heralds of England* (London: H.M.S.O, 1967), p. 37; SQUIBB, *High Court*, p. 162]. The Federal Court of Canada [Federal Court] has opined, however, that it may have received the jurisdiction of the High Court of Chivalry [*Canadian Olympic Association* v. *Great Northern Ticket Services Inc*, [1997] F.C.J. □ 8, 71 C.P.R. (3d) 468, 126 F.T.R. 190, 68 A.C.W.S. (3d) 415]. And the prerogative by which the Crown grants arms is, however, an element of the common law, because the courts decide its existence and scope [*Case of Proclamations* (1611) 77 E.R. 1352 (K.B),12 Co. Rep. 74].

The prime tenet of English armorial law is that one may not independently assume arms for oneself: lawfully, one may only bear arms by right of birth, or by right of grant from a 'competent authority', *viz.* the Crown.[11] The authority to grant arms thus became one of the Crown prerogatives.[12] The claim of the Crown to be the sole authority to grant arms derives from a royal proclamation of 1418.[13] In it, the King forbade anyone from assuming arms and recognised the right to bear coat of arms only for:

> (a) those who inherited (or ought to have inherited) arms from their ancestors [who, however, may have assumed arms prior to this proclamation];(b) those who had arms 'by the gift of some person having adequate power for that purpose' [said person not exclusively the King, *e. g.* a prince or other lord, even a 'knyghte cheyfteyn in the felde']; and

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[11] SQUIBB, *High Court*, pp. 184f; and J. P. BROOKE-LITTLE, *An Heraldic Alphabet* (London: Robson Books, 1996), p. 27 [*Heraldic Alphabet*]. Note that right of birth originates either with a grant or with use before time of legal memory. Though the judge in *R.* v. *Sovereign Seat Cover Manufacturing Ltd* [1977] O.J. □ 1632, (1977) 38 C.P.R. (2d) 46, 126 F.T.R. 190 [*R.* v. *Sovereign Seat Cover* cited to C.P.R] saw 'no reason why any one who wishes to cannot either draw or prepare his own coat of arms in Canada or have somebody else prepare it for him', he was an inferior judge, and perhaps without the 'more than ordinary understanding' required by dignitary cases ['Abergavenny Peerage Case' in Arthur COLLINS, *Proceeding, precedents, and arguments, on claims and controversies, concerning baronies by writ, and other honours* (London: T. Wotton, 1734), p. 71, cited in SQUIBB, *High Court*, p. 165]. While the assumption of a coat of arms by prescription in England was outlawed, no machinery existed to prevent it [M. L. BUSH, *The English Aristocracy* (Manchester: Manchester University, 1984), p. 26]. It is true that no common-law court can prevent one from assuming arms, provided one does not interfere with rights of property, but to *lawfully* assume arms, one requires a grant from the Crown [*Re Croxon, Croxon* v. *Ferrers* [1904] 1 Ch. 252 at 258f (*Re Croxon*)]. Contrast the *R.* v. *Sovereign Seat Cover* decision with a later one by the Federal Court, *Insurance Corporation of British Columbia* v. *Canada (Registrar of Trade Marks*) [1980] 1 F. C. 669, (1979) 44 C.P.R. (2d) 1 (T. D), in which the court noted at 675, '…the adoption of bogus arms… is gradually being abandoned with a revived knowledge of heraldry… and grants are being sought by legitimate exercise of the Royal prerogative'.

[12] The Crown (or Royal) Prerogatives being those flexible but unordered residual powers, privileges and attributes *exclusive* to the Crown over and above all other persons, in right of the Sovereign's royal dignity and allowed by law [H. V. EVATT, *The Royal Prerogative* (Sydney: Law Book Co, 1987) at 11ff].

[13] Henry R, Proclamation, 1418 (5 Hen. V), Close Roll, men. 15. Generally, the connection of arms with the nobility gradually came to mean that by the thirteenth century, as only a prince could ennoble a person, only a prince could grant that person the right to bear arms (as the symbol of that ennoblement) [Robert GAYRE OF GAYRE AND NIGG, *The Nature of Arms* (London: Oliver & Boyd, 1961) p. 12].

(c) those 'who bore arms with us at the battle of Agincourt'.[14]

The effect of this proclamation (and of subsequent ordinances issued by the Constable of England empowering the Kings of Arms) was that thenceforth no one could lawfully assume arms, and any coats of arms previously assumed had to be recorded by the Kings of Arms if the arms were to remain valid.[15] The grounds for the proclamation appear to have been military (*e. g.* to prevent confusion in battle caused by combatants displaying the same or similar devices and to inhibit the keeping of private armies by magnates – through livery and maintenance); and commercial (*e. g.* to prevent fraud with use of seals bearing identical – or nearly identical – arms).[16] Furthermore, as the law came to recognise arms

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[14] Note, however, that this third class of right likely did not enable those who were not armigerous at Agincourt to later assume arms: rather, it probably absolved armigers at Agincourt from having to prove a right to the coats of arms they bore at that battle [SQUIBB, *High Court*, p. 182].

[15] H. C. B. ROGERS, *The Pageant of Heraldry* (London: Seeley Service, 1957) at 173. The Constable of England (later Lord High Constable) was one of two chief military officers of the Crown (the other being the Earl Marshal) and was roughly equivalent to a commander-in-chief. Formerly, the Constable acted with the Earl Marshall as judge in matters of armorial law [SQUIBB, *High Court*, p. 1f and Rodney DENNYS, *Heraldry & the Heralds* (London: Jonathan Cape, 1982), p. 130 (DENNYS, *Heralds*)]. In modern Canada, the Commander-in-Chief of Her Majesty's Canadian Forces (in the Queen's absence) is the Governor General, who also (in a coincidental parallel with the former rôles of England's Constable and Earl Marshall) 'heads' the Canadian Heraldic Authority [Robin BRASS, ed, *The Register of Canadian Honours* (Toronto: Canadian Almanac & Directory Publishing, 1991), p. 372]. King of Arms is the senior rank of officer of arms [*Heraldic Alphabet*, *s. v.* 'King of Arms']. In Canada, this rank is entitled Chief Herald, as 'King of Arms' was held to be exotic and 'ridiculous' in twentieth century Canada [Robert D. WATT, Chief Herald of Canada, 'A Bold, Successful National Cultural Experiment: The Canadian Heraldic Authority: Personal Reflections on its First Sixteen Years' *Canadian Monarchist News* (summer 2004), p. 12]. The law against assuming arms has since been altered in some of the Canadian provinces, where statute provides that some legal persons may lawfully assume arms [*e. g. Municipal Government Act*, S. N. S. 1998, c. 18, s. 63]. As noted above, no common-law court can prevent one from assuming arms, but to assume arms *lawfully*, one requires a grant from the Crown [*Re Croxon* at 258f].

[16] Thomas INNES OF LEARNEY, Albany Herald, 'The Nature of Armorial Bearings' *Notes & Queries* 177, p. 164. Note that some authors now consider the confusion-in-battle argument to be unrealistic [Thomas WOODCOCK, Somerset Herald, and John Martin ROBINSON, Maltravers Herald Extraordinary, *The Oxford Guide to Heraldry* (Oxford: Oxford University, 1988), pp. 2ff (*Oxford Guide*)]. The livery-and-maintenance system had contributed to the 'War of the Roses' [FRIAR, *ibid.*, p. 8]. Interestingly, when the High Court of Chivalry last sat, the matter of fraudulent use of an armorial seal was at issue, and emphasised as a legitimate subject of complaint [*Manchester Corporation* v. *Manchester Palace of Varieties* [1955] 1 All E. R. 387 at 394].

as a class of honour, and as the Crown is the fountain of all honour (for, as the law understands, no one but the Sovereign can be so good a judge of the merits and services of her subjects), the Crown naturally would seek to regulate their creation.[17]

The Crown enforced this regulation with its heralds' visitations of the sixteenth and seventeenth centuries. The visitations also detailed the right to arms by birth, admitting a right to arms 'by prescription and user' (perhaps subject to confirmation by the heralds), *i. e.* a right of gentlemen to bear arms if the arms had been used for at least 60 years (that is, two generations) before the visitation. Ultimately, however, the legal foundation of claim on 'ancient user' was the Crown's confirmation of this claim.[18]

Returning now to Squibb's position, in the case of Canada was he accurate? Is Canada's armorial law English?

Canada's foremost authority on constitutional law, Peter Hogg, C.C., Q.C., F.R.S.C., explains the reception of English law into Canada thus: 'In the case of a colony acquired by settlement [*e. g.* much of Canada], the settlers brought with them English law, and this became the initial law of the colony'.[19] This derives from the English common-law tenet set down by Blackstone: 'It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force'.[20] Blackstone went on, however, to denote a caveat…

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

[18] Starting in the eighteenth century and culminating in the twentieth, this period was extended to 100 years, and any such confirmed arms are not allowed as of old user, but differenced by the addition of a charge (the last arms England allowed of old user were in 1746) [L. G. PINE, *The Story of Heraldry* (London: Country Life, 1963), pp. 51, 56, 59 & 72f]. Note that evidence of user must be *coram publico*, *e. g.* arms graven on a tombstone, and not merely plate or silver bearing arms [SQUIBB, *High Court, p.* 189]. To be adduced, use before '1st Elizabeth' is required [INNES OF LEARNEY, *ibid.*, pp. 164f].

[19] HOGG 1985 at 21f. What became Québec, however, was acquired by conquest.

[20] *Blackstone's Commentaries*, vol. 1, 3rd ed. (London: John Murray, 1862) at 90f. Of course, Blackstone's conception of 'uninhabited' meant uninhabited by peoples he and his contemporaries equated with European civilisations.

> 'But this must be understood with very many and very great restriction. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance of the established Church, the jurisdiction of spiritual Courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the decision and control of the King in Council.'[21]

Thus, in the matter of 'the jurisdiction of spiritual Courts', jurists did not consider colonists as having carried with them the ecclesiastical law of England (assuming the colony in question had been settled, not conquered; and assuming it did not have an established church).[22] Even so, such law is still a guide for judges interpreting issues raised by it.[23] And one must also consider Blackstone's 'infant colony' theory in light of a subsequent decision by the highest possible Commonwealth authority, the Privy Council, *viz.*

> 'Blackstone, in that passage was setting right an opinion attributed to Lord Holt, that all laws in force in England must apply to an infant colony of that kind. If the learned author had written at a later date he would probably have added, that, as the population, wealth and commerce of the colony increase, many rules and

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[21] *Ibid*.

[22] *Re Lord Bishop of Natal* (1865) 3 Moo. P.C.N.S. 115 at 152. The 'essential mark' of an established church being its identification with the state, *i. e.* the church's officials are state officials; its governmental organs are state organs; its law can be interpreted by state courts and written by the state legislature [Garth MOORE and Timothy BRIDEN, *English Canon Law*, 2nd ed. (London: Mowbray, 1985) at 15f].

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

> principles of English law, which were unsuitable to its infancy, will gradually be attracted to it…'[24]

And so while originally the Canadian colonies may have received only rudimentary law, more and more English law came into force 'with the increase of population and the general development of [Canadian] political, social and economic life.'[25] This gives rise to a juristic principle that Canadian jurisdictions should not hold English law to be inapplicable 'without tangible grounds for doing so', *i. e.* English rules are in force in Canada unless there is some reason to the contrary.[26] As a result, courts rarely find a non-statutory English law – such as armorial law – unsuited to Canadian jurisdictions.[27]

As the High Court of Chivalry was the 'twin brother' of the Court of Admiralty, it is significant that Canada has received the law administered by the latter court.[28] As with armorial law, admiralty law originated outside England, and was administered by a separate court, yet was still part of the law of England received by her colonies. So too

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[24] *Cooper* v. *Stuart* (1889) 14 App. Cas. 286 at 292 (P. C) (N. S. W).

[25] *Hellens* v. *Densmore* 1 R.F.L. REP. 328, 10 D.L.R. (2d) 561, [1957] S.C.R. 768 at para. 40 [*Hellens* v. *Densmore* cited to S.C.R].

[26] J. E. COTE, 'The Reception of English Law' (1977) 15 Alta L. Rev. 29 at 69. *Uniacke* v. *Dickson* (1848) 2 N. S. R. 287 (S. C. N. S), in COTE, *ibid*. at 67. Compare *Leong Ba Chai* v. *Lim Beng Chye* [1955] A. C. 648 at 665.

[27] Robert G. HOWELL, 'Important Aspects of Canadian Law and Canadian Legal Systems and Institutions of Interest to Law Librarians and Researchers in Law Libraries', ed. Joan FRASER, *Law Libraries in Canada* (Toronto: Carswell, 1988) at 64; and Bruce ZIFF, *A Property Law Reader: Cases, Questions and Commentary* (Toronto: Thomson, 2004) at 83. The only instance in which a Canadian court has directly considered armorial law resulted in a ruling that arms are not actionable in any Canadian court [*R.* v. *Sovereign Seat Cover* at para. 6], as they are not cognizable by the common law (but more precisely, they are not within the *jurisdiction* of common-law courts in England: see above). Furthermore, any arms borne in Canada at the time of this decision would have been, as foreign immoveables, without the jurisdiction of Canadian courts [*Ross* v. *Ross* (1892) 23 O. R. 43 (H. C. J) and *British South Africa Company* v. *Companhia de Moçambique* [1893] A.C. 602. For earlier precedents, consider *Skinner* v. *East India Company* (1666) 6 State Trials 710 and *Doulson* v. *Matthews* (1792) 4 T. R. 503]. The court did not consider, however, whether armorial law had been received into Canada. Yet, tellingly, in deciding that arms are not actionable in Canada, the court relied upon the armorial law of England. Hogg also notes that where a court found an English law was unsuitable to a colony, it was normally an English *statutory* law (which the law of arms is not) [HOGG 1985, at 25].

[28] WAGNER, *Heralds of England*, p. 37, and Alfred HOWELL, *Admiralty Law, Canada* (Toronto: Carswell, 1893) at xv. Both the courts of Admiralty and of Chivalry came into existence at the same time, *viz.* about 1350; the Civil Law governed both; appeals from each lay with the King in Chancery; and a basic part of the business of both was disputes arising from contact with foreigners [*Atkin's*, vol. 31 at 189].

was the law merchant (noted above as comparable to armorial law in derivation and composition).[29]

To argue that an English law (*e. g.* the law of arms) was inapplicable to Canada, one must show that the law 'is based on or presupposes social or political conditions peculiar to the country of its origin.'[30] Were the social and political conditions upon which England's law of arms is based peculiar to England? No. Firstly, 'Heraldry is a phenomenon of European [*i. e.* not peculiarly English] history… It is alive not only in Europe but also in the other continents where it was introduced by migrating and colonizing Europeans.'[31] Many aboriginal peoples in North America also employed and regulated heraldic devices. As for the social and political conditions that resulted in arms and their law, there are convincing arguments that conditions in northern Europe in the late eleventh century gave rise to a desire by ruling families for 'personal family identification in a recognizably hereditary form' in order to perpetuate links with former rulers. [32] This form of identification began with seals, then in the following century spread to shields as social and political conditions in Europe resulted in a military upper class that sought thereby to declare its social status and display its vanity.[33] Conditions were by that time such that armory spread across Europe in less than thirty years.[34] As it spread, so did the idea that the law must regulate arms, so that no two persons bore the same arms, and thus laid

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[29] COTE, *ibid.* at 61f.

[30] *Re Ezrah* (1930) 1 L.R. 58 Cal. 761 at 765, in COTE, *ibid.* at 71.

[31] Carl-Alexander VON VOLBORTH, *Heraldry: Customs, Rules and Styles* (Poole: Blandford Press, 1981), p. vii.

[32] *Oxford Guide*, p. 3ff and FRIAR, *ibid., p.* 2ff. Compare DENNYS, *Heralds*, p. 31.

[33] *Oxford Guide*, p. 3ff. As the 'warrior aristocracy' extended down into the ranks of the lesser gentry, this latter group adopted armory 'as the primary expression of its rise to social acceptability', and then, in turn, those who did not go to war emulated their neighbours who did by acquiring arms of their own [see Maurice KEEN, 'Heraldry and Hierarchy: Esquires and Gentlemen' in Jeffrey DENTON, ed., *Order and Hierarchies in Late Medieval Europe* (n.p. Manchester, 1999), at pp. 98-100; and Maurice KEEN, *The Origins of the English Gentleman* (n.p. Stroud, 2002) c. 5 both cited in Peter COSS, *The Origins of the English Gentry* (Cambridge: Cambridge University, 2003), p. p. 243]. As for armory and seals, see FRIAR *ibid.* pp. 44f, *viz*: 'One of the principal functions of armory is on seals' and 'the use of the same sigillary devices by succeeding generations of the same family' consolidated the hereditariness of armory. Around the 1140s in England, lesser men began to imitate the great tenants-in-chief by adopting seals of their own, as seals became a symbol of lordship, and those who employed them viewed themselves as lords in their own right [COSS, *ibid.*, p. 36].

[34] These conditions included the cultural transformation of Europe at the time, parts of which were the expression of visual decoration and the ideals of chivalry [FRIAR, *ibid., p.* 2ff]. In England, there were more than 3,000 armigerous families by 1300 [SCOTT, *ibid., p.* 30].

claim to the same lineage and status denoted by those arms.[35] Older theory claims that the conditions of medieval warfare (*e. g.* the prevalence of face-concealing helmets on the battlefield) resulted in coats of arms, but even accepting this, such 'battlefield heraldry' would have expired by 1500. Yet arms persisted as 'a potent instrument of social mobility' (particularly for the emerging middle class) and as 'an indicator of blood lines, marriage connections and degree (status).'[36] Status was also a reason for civic bodies to desire arms, *e. g.* when a village achieved the status of a borough, or when settlers founded a new town, the community sought a grant of arms as recognition of this new status.[37]

Were such conditions peculiarly English? Examining the historical rôle of armory in North America, one sees circumstances paralleling those in England. The first regulation of armory by England in North America appears to have been as early as 1586, with a grant of arms to the City of Ralegh, in the Colony of Virginia. The sovereigns of France, England and Scotland employed armorial seals in regard to North America as early as the sixteenth century. The English Crown first granted arms to an American colonist in 1694, *viz.* William Nicholson, Governor of Maryland; while the French Crown granted arms to New French colonists beginning at least in the seventeenth century, *e. g.* the grant of arms to Charles de Moyne in 1668. Several of the Fathers of Confederation received arms from England soon after Canada's formation, as did the Crown in right of the four foundation provinces of Canada.[38] Plausibly,

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[35] Stephen SLATER, *The Complete Book of Heraldry* (London: Hermes House, 2003), p. 43; Rodney DENNYS, *The Heraldic Imagination* (Toronto: Anson-Cartwright, 1975), p. 32. The heraldic visitations in England can be seen as a suppression of the usurpation of status [SCOTT, *ibid., p.* 30]. Examples of such usurpation or alleged usurpation [*i. e.* arms of pretension] are the removal of differencing marks by the proud Henry, Earl of Surrey, from his arms (which, by his right of descent from King Edward I, were the Royal Arms). This suggested a claim to the throne, which may have added to the evidence for his execution for treason by a paranoid King Henry VIII [SLATER, *ibid.* 139; DENNYS, *Heralds*, pp. 123ff]. This king also executed the Duke of Buckingham, the Earl or Suffolk, the Marques of Exeter, and the daughter of the Duke of Clarence, all of whom bore arms indicating pretensions to membership in the Royal Family [DENNYS, *Heralds*, p. 121].

[36] SLATER, *ibid., p.* 21; VON VOLBORTH, *ibid., p.* vii; COSS, *ibid.*, p. 140; FRIAR, *ibid., p.* 7 & 21. There was undeniably, however, a real connection between battle and armorial display, but more practically the display was via flags rather than clothing or accoutrements (which could be rent and muddied in battle so as to render identification difficult or impossible). Thus, while arms may originally have been an 'occupational designation', by the close of the fifteenth century in England, they had become firmly recognised as a means of social distinction [BUSH, *ibid.*, pp. 26, 91 & 95].

[37] Jiří LOUDA, *European Civic Coats of Arms* (London: Paul Hamlyn, 1966), p. 14.

[38] *Oxford Guide*, p. 156; Ian CAMPBELL, *The Identifying Symbols of Canadian Institutions* (N. p. 1990) pt I, p. 183; Alan BEDDOE, *Beddoe's Canadian Heraldry*

one may suppose the conditions resulting in these arms and their regulation in North America to be comparable to those in England described above: it is likely that colonists desired arms for the display of familial connections and pride; and colonial settlements, for the display of newly-acquired corporate status. Summarising (and paraphrasing Squibb), it seems difficult to argue that the laws of arms were *not* applicable to the conditions in which colonial armigers found themselves.[39]

Another consideration for the reception of England's law of arms is whether a Canadian colony had the necessary local machinery to enforce the law, *i. e.* did the courts have jurisdiction to enforce armorial law? [40] In England, this machinery was the High Court of Chivalry, which, as noted above, had exclusive jurisdiction over armorial law. None of the Canadian colonies, however, established an equivalent court (as did the Lords Proprietors of Carolina in 1705 when they appointed one of England's heralds to be their 'Carolina Herald' and their president of the colony's Court of Honour).[41] One ought not to attribute much

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(Belleville: Mika Publishing, 1981), pp. 40-44 & 56; Henry BEDINGFIELD, York Herald, 'English Grants of Arms in North America' *Heraldry in Canada* 39.2 (2005), p. 11; Conrad SWAN, York Herald, *Canada: Symbols of Sovereignty* (Toronto: University of Toronto, 1977), p. 6 & 15ff. One of the first individuals in what-is-now Canada to receive a grant of arms from England was Major General Sir Isaac Brock, in 1812.

[39] SQUIBB, 'Heraldic Authority', p. 129.

[40] Compare this, again, with admiralty law in Canada. The commanders of fishing vessels entering Newfoundland harbours in the early seventeenth century were probably the first to exercise admiralty law in Canada, by virtue of their becoming 'judges' in disputes between fishermen *per* the 'Western Charter' issued by the Privy Council in 1633. By the eighteenth century, commissions from the Admiralty in England established Vice-Admiralty Courts in many parts of what is now Canada [Edgar GOLD, Aldo CHIRCOP and Hugh KINDRED, *Maritime Law* (Toronto: Irwin Law, 2003) at 107f (*Maritime Law*)].

[41] This could be argued as the court's reasoning in *R.* v. *Sovereign Seat Cover*, *i. e.* the Crown does not enjoy the exclusive right to grant arms because there is no authority in Canada (akin to the College of Arms) constituted to exercise this right [at para. 10]. If this is the case, then the establishment of the Authority in 1988 would have asserted the Crown's 'exclusive right in the preparation and issuing of coats of arms.' I write 'asserted', for in truth the Crown of Canada has had this right, as a Royal Prerogative, since its inception [*R.* v. *Bank of Nova Scotia*, (1885) 11 S.C.R. 1, 4 Cart. B.N.A. 391]. The Governor General received authority to exercise this right in the Queen's name in 1947, by virtue of the Letters Patent constituting the office of the Governor General of Canada, 1947, R.S.C. 1970, Appendix II, № 35 [Alan BEDDOE, 'The Historical and Constitutional Position of Heraldry in Canada' *Heraldry in Canada* 3.1 (1969), pp. 6-7]. The Crown of Canada did not exercise this right until 1967, with first grants of purely Canadian honours [Paul LORDON, *Crown Law* (Markham: Butterworths Canada, 1991) at 103]. And in 1988, the Government of the day decided that for greater certainty and for publicity, supplemental letters patent would be preferable to establish

significance to this, however, for as one Canadian jurist observed, under the circumstances during which the Canadian justice system arose the distribution of jurisdiction and the 'indulgence in the luxury of separate courts' that existed at the same time in England was neither applicable nor possible in the Canadian colonies.[42]

Yet some Canadian colonial courts appear to have *ipso jure* received jurisdiction of the High Court of Chivalry, *e. g.* in 1859 the Supreme Court of British Columbia received 'jurisdiction in all cases, civil as well as criminal' arising within the colony.[43] Later, at confederation, all the superior courts of Canada's provinces received jurisdiction (if they did not already have it) unlimited by subject matter, *i. e.* they received general jurisdiction over *all* causes of action.[44] As the Privy Council

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the Authority and 'assert' the Crown's exclusive right to grant arms [interview of H. L. MOLOT, Q.C, Senior General Counsel, Department of Justice [n. d. 2007]]. For an interesting proposition on the resurrection of Carolina's Court of Honour, see Duane GALLES, 'A Southern Call to Arms: An Armorial Compact' (1990) 16 Wm Mitchell L. Rev. 1281.

[42] Bora LASKIN, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969) at 10.

[43] *Watts* v. *Watts* [1908] A.C. 573 at 576. See addendum to this article for an examination of the armorial jurisdiction legislated for other Canadian provinces' courts.

[44] HOGG 1985 at 134 & 147. General jurisdiction is unrestricted and unlimited in all matters of substantive law, both civil and criminal (except in so far as that has been taken away in unequivocal terms by statute) [S. A. COHEN, *Due Process of Law* (Toronto: Carswell, 1977) at 344]. Any such reception of jurisdiction does not mean that a Canadian court had jurisdiction to determine matters concerning an English coat of arms: arms granted to a Canadian by an English herald remained English arms, over which only the High Court of Chivalry would have had jurisdiction. No Canadian court would have jurisdiction to entertain proceedings regarding immoveable property (as arms are) in England [*supra* note 27]. Only where a Canadian entity (lawfully exercising the Royal Prerogative) granted arms would those arms have come within the purview of a Canadian court of general jurisdiction [Sir Crispin AGNEW OF LOCHNAW, 'Conflict of Heraldic Law' (1988) *Juridical Review* 64f]. Similarly, had the Crown granted 'Canadian' arms prior to 1988 (perhaps the earliest this could have occurred would have been 1867, when the law could have treated the Crown as divisible in circumstances where a constitutional or statutory purpose required [LORDON, *ibid*. at 31; *St Catherine's Milling & Lumber Company* v. *R.* (1888), 14 App. Cas. 46, 4 Cart. B.N.A. 107, 2 C.N.L.C. 541, 58 L.J.P.C. 54, L.T. 197, 5 T.L.R. 125, affirming 13 S.C.R. 577 (P.C.) [Ont.]), the High Court of Chivalry would have had no jurisdiction over such arms – just as today, when that same court has no jurisdiction over arms granted by the Authority. And a Canadian seeking to assert rights to an English coat of arms today could only approach the High Court of Chivalry, not a Canadian court - *unless* he sought only to determine his title to those arms *incidental* to another matter properly within the jurisdiction of the Canadian court. In such a case, the Canadian court would apply the contemporary law of arms of England to determine title to those arms [*Stuart* v. *Baldwin* (1877) 41

decided, 'if the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the [Queen's] Courts of justice'.[45] Thus Canada did possess the necessary local machinery to enforce the law of arms. And if this law had been otherwise unsuitable to Canada (and thus dormant during its unsuitability), case authority and reason suggest that upon the courts receiving jurisdiction to enforce armorial law, 'it [then] springs into effectiveness'.[46]

Prior to the establishment of the Canadian Heraldic Authority in 1988, there was some debate among heraldists as to which body of armorial law the new Authority would administer: was it England's, or Scotland's?[47] This article resolves that, upon careful, legal examination,

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U.C.Q.B. 446 at 481 (C.A.), where the court decided it could incidentally rule on title to an immoveable without its territorial jurisdiction for the purposes of deciding the central issue at bar].

[45] *Board* v. *Board* [1919] A. C. 956 at 962. Also, 'where there is a law to be enforced the King's courts are *prima facie* the authority to enforce it' [*Board* v. *Board* 13 Alta. L.R. 362, [1918] 2 W.W.WR. 663, 41 D.L.R. 286 at 302, cited in *Re Michie Estate and City of Toronto* [1968] 1 O.R. 266, 66 D.L.R. (2d) 213 at 216f].

[46] COTE, *ibid.* at 72f; *Hellens* v. *Densmore* at 782-783; *Gloth* v. *Gloth* (1930) 154 Va. 511, 153 S.E. 879 at 888 (Va); and *Fitzgerald* v. *Luck* [1839] NSWSupC 73, 1 Legge 118. This denies the suggestion of one Scots officer of arms [CAMPBELL, *ibid., p.* 220] that, prior to the establishment of the Authority, the only arms recognised by Canadian law were those granted personally by the Sovereign and those recognised by the *Trade-marks Act* R. S. 1985, c. T-13.

A further argument in favour of the reception of armorial law is that, under the preamble of the *Constitution Act, 1867* (U.K), 30 & 31 Vict, c. 3, reprinted in R.S.C. 1985, App. II, □ 5 [*Constitution Act, 1867*], the constitution is 'similar in principle to that of the United Kingdom'; and just as that similarity can imply, for example, the Dominion receiving a bill of rights, so too could it imply the Dominion receiving armorial law (though there were several distinct armorial jurisdictions at that time within the United Kingdom) [HOGG 1985, at 636ff and Alan BEDDOE, 'The Historical and Constitutional Position of Heraldry in Canada', *Heraldry in Canada* 3.1 (1969), p. 6]. England's College of Arms may be considered an aspect of that part of 'the English Constitution which Bagehot classified as the "Dignified"' [*Oxford Guide*, p. 139]. At the very least, the Dominion received as part of its constitution the Royal Prerogatives by which the Crown creates arms, for the prerogatives of the Crown were as extensive in the colonies as in Great Britain [*Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* [1892] A.C. 437 (P.C.) at 441 and *A. G. B. C.* v. *A. G. Canada* (1889) 14 App. Cas. 295 at 302]. N. B. 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 [Peter HOGG, *Constitutional Law of Canada* (Scarborough: Carswell, 2002) at 111].

[47] D'Arcy Jonathan Dacre BOULTON, 'The Law and Practice of Cadency in Canada (Part II)' *Heraldry in Canada* 6.2 (June 1972), pp. 12-19, esp. pp. 15-17; K. W.

Canada's original law of arms is that of England. This law – like most laws received from England – will have changed since reception, and these changes shall be addressed in a later article.[48]

Addendum: Armorial Jurisdiction for the Provinces' Courts as Legislated

The constitution empowers the provinces to legislate for the administration of justice within their boundaries, which includes establishing, maintaining and organising civil and criminal courts for the provinces, as well as investing these courts with the power to administer provincial, federal and constitutional law.[49] Accordingly, Ontario's Superior Court of Justice 'has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario' [*Courts of Justice Act* R.S.O. 1990, c. 43, s. 11(2)]. 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. As for Québec, under part II, division I of *Courts of Justice Act*, R.S.Q. 1977, c. T-16 (*i. e.* Civil Jurisdiction of the Superior Court), the Superior Court continues in its jurisdiction under *An Act to amend the Laws relative to the Courts of Original Civil Jurisdiction in Lower-Canada*, S.Prov.C. 1849 (12 Vict), c. 38, s. 6, *viz.* original jurisdiction to determine *all* civil matters whatsoever (as well as those in which the Crown was a party). Nova Scotia's Supreme Court has original and appellate jurisdiction in both civil and criminal cases [*Judicature Act* R.S.N.S. 1989, c. 240, s. 4 (1)].

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

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GREAVES, 'The Canadian Heraldic Rules – Part I', *Heraldry in Canada* 21 (1987), p. 18.

[48] Note that while Canada has received England's law of arms into her own body of laws, this is not to suggest that the U. K. Parliament (or, for that matter, England's College of Arms) retains any legislative authority over Canada, which achieved full legislative autonomy in 1982 with the *Constitution Act, 1982* [HOGG 1985 at 48f]. Furthermore, the issuance of the letters patent of 1947 to the Governor General transferred only the prerogative powers to *grant* arms, not to legislate armorial law (as we be detailed in a future article). As to the date of reception, it is immaterial: only for the reception of statute law (*i. e.* acts of the U. K. Parliament) is the date important, and the only statutes directly related to English armorial law were merely fiscal [HOGG 1985 at 24; Ian DE MINVIELLE-DEVAUX, *The Laws of Arms in England, France & Scotland* (N. p: BookSurge, 2007) at 3].

[49] *Maritime Law* at 131; *Constitution Act, 1867*, s. 92 (14); and *Ontario (A. G)* v. *Pembina Exploration Canada Ltd*, [1989] 1 S.C.R. 206 at 217. A later article in this series will examine how Canada's law of arms may be considered federal law.

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.' [*The Court of Queen's Bench Act* C. C. S. M. 1988, c. C280, s. 32]. Section 9 (1) of Saskatchewan's *Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01 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.' Alberta's 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) [*Judicature Act*, R.S.A. 2000, c. J-2 s. 5 (1)].

The judicature of one province, however, may *not* have legislated armorial jurisdiction. '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";' [*Judicature Act* R.S.N.L. 1990 c. J–4, s. 3 (1)]. 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…' [*An Act for the better administration of justice in* Newfoundland*, and for other purposes* (U.K), 1824, 5 Geo. IV, c. 67, s. 1]. 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 confers armorial jurisdiction upon that province's courts.

Sommaire en français

Mackie traite des questions de l'existence, des origines et de la nature du Droit d'Armes (ou Droit armorial) au Canada. Il constate (d'après les grands juristes anglais et canadien Blackstone, Squibb, et Hogg) que le Droit d'Armes fait partie à la fois du Droit Civil international, et du Droit général anglais, introduit automatiquement aux colonies en Amérique du Nord par les premiers colons. Un aspect fondamental de ce Droit est le principe que la Couronne est la seule source légitime des armoiries, et qu'elle seule possède l'autorité de régler leurs usages. La pertinence de ce Droit dépend des conditions de vie de la colonie, mais elle grandit au fur et à mesure du développement de la civilization.

Mackie insiste qu'aucun principe légal anglais n'est inapplicable que si l'on le montre tel, et ce n'est pas le cas du Droit d'Armes. Par contre, l'évidence est claire que les colons des pays de l'Empire britannique en Amérique, et les citoyens et institutions des deux états-successeurs (le Canada et les États-Unis), utilisent depuis longtemps — même depuis l'établissement des premières colonies en 1586 — les armes et armoiries : ce qui indique que les conditions sociales nécessaires existent elles aussi dès le début. De plus, depuis la même année, la Couronne anglaise revendique de temps en temps son droit de régler l'usage armorial aux colonies par la donation formelle des armoiries aux corporations coloniales et (plus tard) aux sujets coloniaux.

Mackie montre ensuite que, malgré l'absence d'une cour spéciale équivalente à la Cour de la Chevalerie du comte-maréchal d'Angleterre, les cours canadiennes reconnaissent qu'elles ont reçu — comme partie de la juridiction sur toutes matières du Droit anglais leur concédée par les actes de création — une juridiction sur le Droit d'Armes au Canada. Par conséquent, il ne faut à présent qu'une cour canadienne s'assume cette juridiction inappliquée.