THE LAW OF ARMS

Noel Cox

Abbreviated version of paper originally published (1998) 18 (2) New Zealand Universities Law Review 225-256

Introduction

The Law of Arms is an area of law which has, for centuries, been largely the preserve of the antiquary. It is part of the law of the realm, though not of the common law. With the settlement of the overseas territories of the Crown, this law was apparently extended to these shores, though its administration abroad appears problematic, for reasons which will be developed.

Coats of arms are conferred by the Crown upon New Zealanders, and upon New Zealand corporations and public authorities. Whilst most of these grants are by Garter King of Arms, the chief English herald, through his New Zealand deputy, some are from Lord Lyon King of Arms, the Scottish herald. Whether these latter grants are proper is a matter which deserves some attention.

The nature of the Law of Arms

According to the usual description of the Law of Arms, coats of arms, armorial badges, flags and standards and other similar emblems of honour may only be borne by virtue of ancestral right, or of a grant made to the user under the authority of the Crown. The power to grant armorial bearings is delegated by the Crown to the kings of arms.

In England, the Law of Arms is regarded as a part of the laws of England, and the common law courts will take judicial notice of it as such. These dignities, as they are called, have legal standing. But the Law of Arms is not part of the common law and the common law courts have no jurisdiction over matters of dignities and honours, such as armorial bearings, or peerages.

The legal protection for coats of arms

Mediæval writers generally believed that, in some circumstances at least, one could assume arms. In England (and Scotland) the Crown's exclusive prerogative prevailed, as it did in many, though not all, European countries. This prerogative is exercised on the Queen's behalf by her heralds, members of the College of Arms. These are the ministers of the Crown in relation to the Law of Arms, but what of the court in which that law in administered?

The Court of Chivalry

The High Court of Chivalry has power to protect the lawful use of arms, but has been singularly inactive. Some legislative protection for certain categories of arms is provided however. In New Zealand Local Government Act 1974, and the Flags, Emblems, and Names Protection Act 1981 both provide protection to some types of official arms. In the former case, the statute also empowers local councils to define their own coats of arms, an action which is tantamount to assuming legally valid arms. Neither statute has general application however, and there is no generally available legal protection for coats of arms.

A prerogative act cannot confer upon any body the jurisdiction to administer the Law of Arms. The jurisdiction of the Court of Chivalry, which administers the Law of Arms and not the common law, must be exercised by that Court or by none, unless Parliament enacts otherwise.

The applicability of the Law of Arms in New Zealand

It was early established as a principle of imperial constitutional law that settled colonies took English law. The laws of New Zealand are based upon the reception of English laws in the middle of the last century, when it was first settled as a colony. The English Laws Act 1858 provided that the laws of England as existing on 14 January 1840 were deemed to be in force in New Zealand. If any laws of arms were inherited by New Zealand, it was the Law of Arms of England, in 1840.

The proper authority responsible for the grant of arms in New Zealand

There has been significant rivalry between Garter King of Arms and Lord Lyon as regards their proper jurisdiction. In 1907 and 1913, in a joint opinion, the Law Officers of England, Scotland and Ireland advised that Garter King of Arms was the proper authority for granting arms overseas. In 1908 and 1914 the Home Secretary gave the Kings of Arms directions on the exercise of the royal prerogative, on the basis of these opinions.

Authority vested in Garter

The jurisdiction of the Earl Marshal, the inherent right of the kings of arms to regulate arms, and the power expressly delegated by the Sovereign to the kings of arms to grant arms, constitute the authority of the College of Arms. While the two subordinate English kings of arms (and in Scotland, Lord Lyon King of Arms) exercise a jurisdiction which is territorially limited, Garter King of Arms has for long been held to have an imperial jurisdiction. He has granted arms in the Empire and Commonwealth, and to foreigners of British ancestry, for many centuries.

The Crown in right of the United Kingdom undoubtedly has executive authority over British subjects wherever domiciled. Grants are valid irrespective of the petitioner's place of residence. Although the English heralds claim extends to an exclusive right to grant arms to all Commonwealth citizens, in reality they restrict the claim to the old dominion countries.

By virtue of the fact that the laws of New Zealand are legally based upon those of England, the only proper authority for the grant of arms in New Zealand is the College of Arms, now exercising the prerogative delegated by the Sovereign in right of New Zealand.

Authority vested in Lord Lyon

It is widely believed that the Court of the Lord Lyon King of Arms has authority to grant arms to New Zealanders and other subjects of Her Majesty abroad, specifically for those who are of Scottish ancestry. This however is incorrect in both Scots and New Zealand law. Lord Lyon may have authority to grant arms overseas which are valid in Scots law, but they are not recognised by the Law of Arms of England, nor in any country in the Commonwealth, nor recognised by local laws unless by the rules of private international law.

Advent of Dominion status

Whatever their original position, since independence all Commonwealth countries are recognised by international law as sovereign states. However, where the Queen is head of state, it is in a different capacity from that in which she is Queen of the United Kingdom. Garter is appointed by the Sovereign of the United Kingdom, but this does not necessarily invalidate any exercise by him of the royal prerogative in those countries.

New Zealand

New Zealand Herald Extraordinary is the representative in New Zealand of the College of Arms. As an extraordinary herald, he is not a member of the College, and has the same (limited) authority as any Herald Extraordinary. However, in practice much of the work in New Zealand of the College of Arms is delegated to him.

.

Australian situation

The Law of Arms is as applicable in Australia as elsewhere in the Queen's realms. The laws of Australia are based upon the reception of English laws at various dates from the end of the eighteenth century, when parts of the continent were first settled as a colony. The states each have their equivalent of the New Zealand English Laws Act 1858, which provide that the laws of England as existing on a certain precise date are deemed to be in force in the state. As in New Zealand, in Australia the Law of Arms of England has been incorporated into domestic law, though not the law administered by the common law Courts.

A significant distinction which must however be drawn between the situation in New Zealand and Australia is that whereas New Zealand is a unitary state, with one set of laws for the whole country, Australia has a federal system of government, with a division of powers and responsibilities.

The authority to grant armorial bearings is a part of the royal prerogative. Like the Law of Arms itself, the royal prerogative is generally non-justiciable (or non-reviewable by the Courts), though their extent is. It is a judicial rule that the royal prerogative is as extensive overseas as it is in the United Kingdom. It is clear that the major prerogatives apply throughout the Commonwealth. These are applied as a "pure question of .... common law" even in a country, such as Malta, where the common law is not in force.

No prerogatives are expressly delegated to the federal or state governments. In practice some prerogatives were retained by the Sovereign, others delegated to the Governor-General. Yet others may be exercised by the state Governors, either exclusively, or jointly with the Governor-General.

Coats of arms, armorial badges, flags and standards and other similar emblems of honour may only be borne by virtue of ancestral right, or of a grant made to the user under the authority of the Crown. As such they are akin to honours, though this status should not be exaggerated. Yet, even in Canada, the prerogative to grant arms was not delegated until 1988, it having been regarded as not covered by the 1947 letters patent (though not expressly excluded). Nothing was done before 1988 about the heraldic prerogative, probably because it was either overlooked, or because it was not personally exercised by the Queen in any case.

The situation in Australia now is that armorial bearings remain the only aspect of the royal prerogative not delegated to the Australian Governor-General and state governors. Had the prerogative been exercised by the Queen personally, it is probable that it would have been delegated.