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The Royal Prerogative in the Realms

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Abstract

From 1840 the laws of New Zealand have comprised the common law and statute law, both of which – but especially the former – were originally based upon the laws of England, and which continued to draw upon England jurisprudence. Since New Zealand was regarded as a settled colony, the settlers brought with them such of the laws of England as were applicable to the circumstances of the colony. This included the royal prerogative.

Although elements of the royal prerogative are obsolete or have been subsumed in parliamentary enactments, there are a number of aspects which continue to be used by the Crown today. One is the honours prerogative. The changed nature of the Crown (and in particular its division among the realms) has, however, led to some uncertainties. In particular, there have been questions regarding the use of the royal prerogative in respect of armorial bearings, and the proper exercise and application of the Law of Arms. This has never caused serious difficulties in New Zealand – if indeed it can be said to be an issue at all – but the Canadian case of *Black v Chrétien* has shown that disputes over honours and dignities can arise, and can have serious political or constitutional implications.

This paper considers the introduction of the royal prerogative to the realms, and some of the implications and possible difficulties which this process may have led to.

Introduction

Once common to all Englishmen,¹ the common law is now one of the great world legal systems,² and spread across much of the globe.³ This legal

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¹The term Englishmen and women was rarely used since the legal rights of women were generally less full than those of men. The law of England covered, by extension, Wales, and Ireland, though not Scotland; An Act that the King of England, his Heirs and Successors, be Kings of Ireland 1541 (33 Henry VIII c 1) (Eng); Union with Scotland Act 1707 (6 Anne c 11) (Eng) (for Scotland); Sellar, W.D.H. (1988) *The Common Law of Scotland and the Common Law of England*, in: R.R. Davies (Ed) *The British Isles 1100-1500: Comparisons, Contrasts and Connections* (Edinburgh: J. Donald Publishers).

²Alongside the civil law, and Islamic Law. Indigenous laws, and Socialist laws, play a lesser role; See Edge, I. (Ed) (2000) *Comparative law in global*

expansion⁴ was a corollary of imperial growth, and the evolution of that empire in part mirrored and was in part determined by the evolution of the law.⁵ At the same time it has evolved, so that it is difficult to speak of a single common law, or perhaps even of a single royal prerogative. We will look at the examples of New Zealand and Canada, and the prerogative of honours, in an attempt to further understand this process of devolution.

From 1840 the laws of New Zealand have comprised the common law and statute law,⁶ both of which – but especially the former – were originally based upon the laws of England,⁷ and which continue, to some extent, to draw upon England jurisprudence.⁸ When the legal system was adopted in 1840, New Zealand was regarded in law and practice as a settled colony.⁹ It was the standard constitutional practice that the settlers brought with them such of the laws of England as were applicable to the circumstances of the colony at that time.¹⁰ This included the royal prerogative, which indeed has been said to

perspective: essays in celebration of the fiftieth anniversary of the founding of the SOAS Law Department (Ardsey: Transnational Publishers).

³Apart from in the majority of Commonwealth countries, the common law is found in Abu Dhabi and the other United Arab Emirates, along with Muslim Sharia law, and in Sudan. The major non-Commonwealth jurisdictions which retain the common law are those of the United States of America, although even here there are exceptions. California and Louisiana have mixed common law and civil law systems. Puerto Rico has adopted USA Federal law and US civil and criminal procedure. Real estate law is still influenced by civil law traditions.

⁴Or imperialism as it may be termed, though not necessarily in a pejorative sense.

⁵Just as the evolution of the Crown was partly the result of wider imperial development, and in turn influenced it; Cox, N (2001) *The Evolution of the Office of Governor-General of New Zealand*, *Mountbatten Journal of Legal Studies*, 5(1&2), pp. 51-77; Cox, N (2001) *The control of advice to the Crown and the development of executive independence in New Zealand*, *Bond Law Review*, 13(1), pp. 166-89.

⁶As well as miscellaneous laws, including the royal prerogative.

⁷English Laws Act 1858.

⁸The abolition of the right of appeal to the Judicial Committee of the Privy Council in 2004 may have an effect in this regard, but it is likely to be over the long-term; Supreme Court Act 2003; Cox, N (2003) *A New Supreme Court of New Zealand*, *The Commonwealth Lawyer*, 12(3)pp. 25-8; Cox, N (2002) *The abolition or retention of the Privy Council as the final Court of Appeal for New Zealand: Conflict between national identity and legal pragmatism*, *New Zealand Universities Law Review*, 20(2), pp. 220-38.

⁹See the *Report of the Privy Council on the project of a Bill for the better government of the Australian Colonies*, dated 1 May 1849; *R v Symonds* (1847) NZPCC 387 (SC). See also the English Laws Act 1858 and s 5 of the Imperial Laws Application Act 1988.

¹⁰Blackstone, Sir William (1978) *Commentaries on the Laws of England* ed E. Christian (New York: Garland Publishing) book I, para 107; as applied in, inter alia, *King v Johnston* (1859) 3 NZ Jur (NS) SC 94.

apply throughout the Commonwealth, even in countries where the common law proper is not itself in force.¹¹ Partly this was because of the pre-twentieth century doctrine of the indivisibility of the Crown, and partly because the royal prerogative encompasses powers, authorities, privileges and immunities which are important to any executive government.¹²

The royal prerogative has a number of aspects which continue to be of use today.¹³ One is the honours prerogative.¹⁴ This has been used to control the use of armorial bearings,¹⁵ and to regulate matters which, in England and Scotland, are the concern of specialist courts,¹⁶ as well as to bestow honours and decorations.¹⁷ Although the application of the common law and statute law of

¹¹For example, in Malta, which has a civil law system. Areas of public law, such as criminal procedure, and commercial and maritime law, display some influence of common law.

¹²The nature of these may of course differ between monarchy and republic, and all are subject to alteration after independence, if not earlier.

¹³Others include the diplomatic and military prerogatives, though some aspects of these are statutory, and there are some aspects which are better categories as akin to the authority vested in any natural or artificial person; Harris, B.V. (1992) The 'Third Source' of Authority for Government Action, *Law Quarterly Review*, 109, pp. 626; See also *Ex rel Victorian Chamber of Manufactures v Commonwealth (Clothing Factory Case)* (1935) 52 CLR 533, 562 per Rich J; 9 ALJ 76; *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 461; 28 ALJ 94; *Re KL Tractors Ltd (in liq)* (1961) 106 CLR 318, 337 per Fullagar J; 34 ALJR 481.

¹⁴For the prerogative generally, see *Calvin's Case* (1607) 7 Co Rep 156 16a; 77 ER 377; Chitty, J. (1978) *A Treatise on the Law, Classics of English Legal History in the Modern Era* (New York: Garland Publishing) (reprint of the 1820 edition published by Joseph Butterworth and Son, London, under the title: *A Treatise on the Law of the Prerogatives of the Crown; And the Relative Duties and Rights of the Subject*); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); Hadfield, B. (1999) Judicial Review and the Prerogative Power, in: M. Sunkin and S. Payne (Eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press).

¹⁵For a case describing the descent of arms, with due and proper differencing, in the first instance to male descendants of the grantee, and then through females as heraldic heiresses in the event of the failure of the male line, as quarterings, see *Wiltes Peerage Case* (1869) LR 4 HL, 126, 153 per Lord Chelmsford.

¹⁶In England the Court of Chivalry, and in Scotland the Court of the Lord Lyon; Squibb, G. (1959) *The High Court of Chivalry* (Oxford: Clarendon Press); *Royal College of Surgeons of Edinburgh v Royal College of Physicians of Edinburgh* 1911 SC 1054. The grant of arms by letters patent by Lord Lyon is an exercise of the delegated armorial prerogative of the Crown, and is not a judicial act: *Maclean of Ardgour v Maclean* 1941 SC 683, line 35, reaffirming *M'Donnell v M'Donald* (1826) 4 Shaw 371; Lyon King of Arms Act 1672 (24 Chas II c 47) (Scot); Lord Lyon Act 1867 (30 & 31 Vict c 17) (UK).

¹⁷Which in New Zealand are generally conferred under the authority of letters patents and royal warrants; See Cox, N. (1997) *The Review of the New*

England to New Zealand caused few practical problems (aside, that is, from its impact on pre-existing indigenous law),¹⁸ there remain a few areas of uncertainty with respect to the royal prerogative, which itself is related to, though not strictly part of, the common law.¹⁹

In particular, there have been questions regarding the use of the royal prerogative in respect of armorial bearings, and the proper exercise and application of the Law of Arms.²⁰ This has never caused serious difficulties in New Zealand – if indeed it can be said to be an issue worth examining at all²¹ – but the Canadian case of *Black v Chrétien*²² has shown that disputes over honours and dignities can arise, and can have serious political or constitutional implications.²³

This paper considers the introduction of the royal prerogative to the realms,²⁴ and some of the implications and possible difficulties which this process may leave us today. It will begin with a review of the arrival of English laws in New Zealand. It will then consider the specific details of the application of the royal prerogative to New Zealand. It will then examine some aspects of the nature of the royal prerogative which have been problematic. Finally, it will consider who the application of the royal prerogative in the United Kingdom and Canada has highlighted potential difficulties for New Zealand and other countries which retain Elizabeth II as their Queen.

It should be noted that some writers refer to the “prerogative” as those rights and capacities which the Crown alone enjoys as distinct from those it enjoys along with the public.²⁵ This narrower usage is here preferred, though generally

Zealand Royal Honours System, *New Zealand Numismatic Journal*, Proceedings of the Royal Numismatic Society of New Zealand, 75, pp. 17-21.

¹⁸Amounting to what Brookfield calls a revolutionary seizure of power; Brookfield, F.M. (1999) *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland: University of Auckland Press).

¹⁹The relationship of prerogative and common law will be considered later.

²⁰Cox, N. (1998) The Law of Arms in New Zealand, *New Zealand Universities Law Review*, 18(2), pp. 225-56; cf Macaulay, G. (2001) The law of arms in New Zealand: a response, *Otago Law Review*, 10(1), pp. 113-8.

²¹Though we should be aware of the legal basis of any governmental action.

²²(2001) 199 DLR (4th) 228, per Laskin JA (Court of Appeal of Ontario).

²³Cox, N. (2002) *Black v Chrétien: Suing a Minister of the Crown for Abuse of Power, Misfeasance in Public Office and Negligence*, *E-Law*, Murdoch University Electronic Journal of Law, available at <http://www.murdoch.edu.au/elaw/issues/v9n3/cox93.html>, 9(3).

²⁴The former dominions. For their evolution see, Cox, N. (2002) The Theory of Sovereignty and the Importance of the Crown in the Realms of The Queen, *Oxford University Commonwealth Law Journal*, 2(2), pp. 237-55.

²⁵Chitty, J. (1978) *A Treatise on the Law, Classics of English Legal History in the Modern Era* (New York: Garland Publishing) (reprint of the 1820 edition published by Joseph Butterworth and Son, London, under the title: *A Treatise on the Law of the Prerogatives of the Crown; And the Relative Duties and Rights of the Subject*) 4; *Davis v Commonwealth* (1988) 166 CLR 79, 108 per

any distinction between “prerogative” powers and “personal” powers is of relatively little practical significance, and both can be treated by the courts as aspects of the royal prerogative.

Arrival of English laws in New Zealand

The application of the laws of England to settled colonies is one of the touchstones of Commonwealth constitutional law.²⁶ The classic distinction, representing the common law doctrine of the seventeenth and eighteenth centuries²⁷ – though never entirely consonant with the facts and much altered in its application and shorn of its importance by subsequent legislation²⁸ – is that between settled and conquered or ceded colonies.²⁹ It differentiates colonies which had been added to the empire by the migration thither of British subjects,³⁰ who had entered into occupation of lands previously uninhabited or at least not governed by any civilised power,³¹ and therefore not subject to any

Brennan J; 63 ALJR 35; 82 ALR 633; but see Harris, B.V. (1992) The ‘Third Source’ of Authority for Government Action, *Law Quarterly Review*, 109, pp. 626; Wheeler, F. (1992) Judicial review of prerogative power in Australia: issues and prospects, *Sydney Law Review*, 14, pp. 432, 443-8.

²⁶Blackstone, Sir William (1978) *Commentaries on the Laws of England* ed E Christian (New York: Garland Publishing) book I, para 107.

²⁷In the course of what have been described as the First (seventeenth and eighteenth centuries) and Second British empires (nineteenth and twentieth centuries); See Keith, A.B. (1930) *Constitutional History of the First British Empire* (Oxford: Clarendon Press); Madden, F. and Fieldhouse, D. (Eds) (1985) *The Classical Period of the First British Empire, 1689-1783: The Foundations of a Colonial System of Government: Select Documents on the Constitutional History of the British Empire and Commonwealth* (Westport: Greenwood Publishing Group) vol 2; Halstead, J.P. (1983) *The Second British Empire: Trade, Philanthropy, and Good Government, 1820-1890* (Westport: Greenwood Press).

²⁸Such as the Foreign Jurisdiction Act 1890 (53 & 54 Vict c 37).

²⁹*Blankard v Gally* (1693) Holt 341; 90 ER 1089 (KB). The doctrine came too late to apply retrospectively to the American colonies, despite the insistence otherwise by colonial constitutionalists; McHugh, P. (1987) *Aboriginal Rights of the New Zealand Maori at common law*, University of Cambridge PhD thesis 123-32. It was only really clear after *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045 per Lord Mansfield, CJ (KB). Only cession, and occupation or settlement (and not conquest) are arguably relevant to the Australasian situation; Evatt, E. (1970) *The Acquisition of Territory in Australia and New Zealand*, in: C.H. Alexandrowicz (Ed) *Studies in the history of the law of nations* (The Hague: Nijhoff) Grotian Society papers 1968.

³⁰See, for example, Shaw, A.G.L. (Ed) (1970) *Great Britain and the Colonies, 1815-1865* (London: Methuen).

³¹See *Memorandum* (1722) 2 Peere Williams 75; 24 ER 464 (PC). The relatively clear distinction between deserted and uninhabited territories, and those which were inhabited, was eroded after the American Revolution. It became accepted that colonies occupied by a tribal society could be ‘settled’.

civilised legal system,³² and those which had been acquired by conquest or cession from some recognised power hitherto capable of governing and defending it.³³

The legal situation of the inhabitants of a settled colony presents one important initial difference from that of the inhabitants of a conquered colony. The former carried with them the law of England so far as applicable to the conditions of the infant colony,³⁴ and they continued to enjoy as part of the law of England all their public rights as subjects of the British Crown.³⁵ The prerogative of the Crown towards them was therefore limited.³⁶ The corollary of this was that the migration left these subjects still under the protection of the Crown and entitled to all the legal safeguards which secured the liberties of natural-born subjects.³⁷ Foremost among these was the right to a legislative assembly analogous to the imperial Parliament.³⁸

Lord Wensleydale, after observing that Newfoundland was a settled,³⁹ not a conquered, colony, added:

New Zealand has been cited as the example per excellence of this trend towards a legal fiction of a *terra nullius*; McHugh, P. (1987) *Aboriginal Rights of the New Zealand Maori at common law*, University of Cambridge PhD thesis 137-142.

³²Since the High Court of Australia decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 there is now no link between the concept of the settled colony and sparsely populated territory conceived (until that case) as *terra nullius*.

³³*Memorandum* (1722) 2 Peere Williams 75; 24 ER 464 (PC):

What if there be a new and uninhabited country found out by *English* subjects, as the law is the birthright of every subject so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England.

³⁴Blackstone, Sir William (1978) *Commentaries on the Laws of England* ed E Christian (New York: Garland Publishing) book I, para 107.

³⁵*Pictou Municipality v Geldert* [1893] AC 524; *Cooper v Stuart* (1889) 14 App Cas 286.

³⁶Just as it was limited in England, as was shown in such cases as the *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352 (KB); *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL); the *Bates' Case* (1606) 2 St Tr 371 "Case of Impositions"; *Darnel's Case* (1627) 3 St Tr 1 "Case of Five Knights".

³⁷See, for the nature of allegiance, *Ex parte Anderson* (1861) 3 El & El 487; 121 ER 525; *China Navigation Co v Attorney-General* (1932) 48 TLR 375; *Attorney-General v Nissan* [1969] 1 All ER 629; *Oppenheimer v Cattermole* [1972] 3 All ER 1106.

³⁸*Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045 per Lord Mansfield, CJ (KB).

³⁹Laws applying 31 December 1832, the day before the first legislature; Coté, J.E. (1977) *The Reception of English Law*, *Alberta Law Review* 15, pp. 29, 87.

To such a colony there is no doubt that the settlers from the mother-country carried with them such portion of its common and statute law as was applicable to their new situation, and also the rights and immunities of British subjects. Their descendants have, on the one hand, the same laws and the same rights, unless they have been altered by parliament; and on the other hand, the Crown possesses the same prerogative and the same powers of government that it does over its other subjects'.⁴⁰

For reasons which owed much to the reality of politics and the practical impossibility of an alternative, it was early established as a principle of imperial constitutional law that settled colonies took English law, rather than that of Scotland or Ireland.⁴¹ This was so whatever the dominant ethnic composition of the settlers.⁴²

The laws of New Zealand are based upon the reception of English laws in the middle of the nineteenth century,⁴³ when it was first settled as a colony.⁴⁴ New Zealand was, from the beginning, administered as a Crown colony.⁴⁵ It was held to be a settled colony, though not without conceptual difficulty.⁴⁶ From the contemporary British perspective the Treaty of Waitangi was a treaty of cession which allowed for settlement and for the purchase of land.⁴⁷ However, because the chiefs actually had little formal law – at least as understood by the

⁴⁰*Kielly v Carson* (1842) 4 Moo PC 63, 84; 13 ER 225 per Lord Wensleydale.

⁴¹Scots lawyers do not necessarily agree however: Smith, Sir Thomas (1987) *Pretensions of English Law as 'Imperial Law'*, in: *The Laws of Scotland* (Edinburgh: Butterworths) vol 5, paras 711-719.

⁴²Though it might be noted that Scotland played an important role in the creation of the British empire and a British imperial culture; Landsman, N.C. (2001) *Nation and Province in the First British Empire: Scotland and the Americas, 1600-1800* (Cranbury: Bucknell University Press).

⁴³English Laws Act 1858.

⁴⁴*R v Symonds* (1847) NZ PCC 387; *Veale v Brown* (1866) 1 CA 152, 157; *Wi Parata v Wellington (Bishop of)* (1877) 3 NZ Jur (NS) SC 72; *R v Joyce* (1906) 25 NZLR 78, 89, 112 (CA); *Re the Ninety Mile Beach* [1963] NZLR 461, 475-476 (CA).

⁴⁵Cheyne, S.L. (1975) *Search for a constitution*, University of Otago PhD thesis.

⁴⁶See the *Report of the Privy Council on the project of a Bill for the better government of the Australian Colonies*, dated 1 May 1849; *R v Symonds* (1847) NZPCC 387 (SC). See also the English Laws Act 1858 and s 5 of the Imperial Laws Application Act 1988. The decision as to which category a particular colony belongs once made by practice or judicial decision will not be disturbed by historical research; *Milirrpum v Nabalco Pty Ltd* [1972-73] ALR 65, 124, 153; 17 FLR 141, 202, 242 (NT SC); *R v Kojo Thompson* (1944) 10 WA CA 201 (West African CA); *Phillips v Eyre* (1870) LR 6 QB 1, 18 per Willes J; *Coe v Commonwealth of Australia* (1979) 24 ALR 118, 128-9 (HCA).

⁴⁷Brownlie, I. (1992) *Treaties and Indigenous Peoples: The Robb Lectures 1991* ed F.M. Brookfield (Oxford: Clarendon Press) 12.

settlers⁴⁸ – and because of the direct proclamation of sovereignty over the South Island,⁴⁹ New Zealand was treated thereafter as a settled colony.⁵⁰ This meant that the royal prerogative was limited in the same way as it was in England – if indeed the royal prerogative was applicable to the circumstances of the colony in 1840.

It has been established beyond reasonable doubt, by both colonial and imperial legislation and judicial decisions of that Canada,⁵¹ Australia,⁵² and New Zealand⁵³ each acquired English law as it existed at the various times of settlement.⁵⁴ But it was only those laws which were applicable to their new situation and to the condition of a new colony.⁵⁵ It is not always easy to apply the test.⁵⁶ English laws which were to be explained merely by English social or political conditions had no application in a colony,⁵⁷ yet the courts have generally applied the land law,⁵⁸ which has a feudal origin.⁵⁹ Rules as to real property and conveyancing have been held to be generally applicable in colonies, both settled and conquered.⁶⁰ The qualification is in fact to be taken as one of limited extent.

⁴⁸This was weakened both by the Europeanisation of land tenure, and by the prohibition of the *tohunga*, experts in Maori medicine and Maori spirituality; Kawharu, Sir Hugh (1977) *Maori land tenure; studies of a changing institution* (Oxford: Clarendon Press); *Tohunga Suppression Act 1908*.

⁴⁹(1970) *British Public Papers – Colonies, New Zealand* (Shannon: Irish University Press) Sessions 1835-42, 140-1.

⁵⁰See the *Report of the Privy Council on the project of a Bill for the better government of the Australian Colonies*, dated 1 May 1849; *R v Symonds* (1847) NZPCC 387 (SC).

⁵¹Coté, J.E. (1977) *The Reception of English Law*, *Alberta Law Review*, 15, p. 29.

⁵²*Cooper v Stuart* (1889) 14 AC 46 (PC).

⁵³*R v Symonds* (1847) NZPCC 387 (SC).

⁵⁴Though there might be an underlying stratum of indigenous laws surviving in each case; see for example *In re Southern Rhodesia* [1919] AC 211, 233-234 (PC).

⁵⁵*Kielley v Carson* (1824) 4 Moo PCC 63; 13 ER 225; *Lyons Corp v East India Co* (1836) 1 Moo PCC 175; 12 ER 782; *Phillips v Eyre* (1870) LR 6 QB 1; *Sammut v Strickland* [1938] AC 678 (PC); *Sabally and N’Jie v Attorney-General* [1965] 1 QB 273; [1964] 3 All ER 377 (CA).

⁵⁶*Whicker v Hume* (1858) 7 HLC 124, 161; 11 ER 50 per Lord Carnworth.

⁵⁷These might relate to specific institutions.

⁵⁸Maclaurin, R.C. (1999) *On the nature and evidence of title to realty*, *Victoria University of Wellington Law Review*, 30(1-2), pp. 655-59.

⁵⁹Generally, see Hinde, G.W., McMorland, D.W. and Sim, P.B.A. (1997) *Land Law in New Zealand* (Wellington: Butterworths) para 1.017.

⁶⁰*Lawal v Younan* [1961] All Nigeria LR 245, 254 (Nigeria Federal SC). In *Hihett v McDonald* (1878) 3 NZ Jur (NS) SC 102, Johnston J observed, in finding that the statute 24 Geo II c 40 (GB) (The Tippling Act) was in force in New Zealand, that provisions for the maintenance of public morality and the preservation of the public peace were, in their general nature, applicable to all the colonies.

Blackstone's statement that "colonists carry with them only so much of the English Law as is applicable to their own situation and the condition of the infant colony"⁶¹ is, like many generalisations, misleading. It would have been more complete if he had said "colonists carry with them the bulk of English law, both common law and statute, except those parts which are inapplicable to their own situation and the conditions of the infant colony". What was held to be applicable – in all the settled colonies – was far greater in content and importance than what had to be rejected.⁶² It is indeed a general rule that common law principles applied to a colony unless it is shown to be unsuitable.⁶³ However, in contrast, imperial statutes did not apply unless they were shown to be applicable⁶⁴ – and we may surmise that this owed much to the early constitutional nature of Parliament, and statutes as amendments to the body of the common law – amendments which might themselves be inapplicable.

In the early decades of the history of the new colony there were legal uncertainties which Parliament was eventually to be asked to resolve.⁶⁵ The English Laws Act 1858⁶⁶ was passed, in the words of the long title, "to declare the Laws of England, so far as applicable to the circumstances of the Colony, to have been in force on and after the Fourteenth day of January, one thousand eight hundred and forty".⁶⁷ The purpose of the statute was to clarify some

⁶¹Blackstone, Sir William (1978) *Commentaries on the Laws of England* ed E Christian (New York: Garland Publishing) book I, para 107. Allegedly based on Lord Mansfield's judgment in *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045 (KB).

⁶²*Williams v Attorney-General for New South Wales* (1913) 16 CLR 404, 439 per Isaacs J. See also *R v Symonds* (1847) NZPCC 387, *Veale v Brown* (1868) 1 NZCA 152, 157 per Arney CJ, *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, *Re the Bed of the Wanganui River* [1962] NZLR 600, 624 per Turner J (CA), and *Re the Ninety-Mile Beach* [1963] NZ 461, 475-476 per Gresson J (CA).

⁶³*R v Symonds* (1847) NZ PCC 387; *Veale v Brown* (1866) 1 CA 152, 157; *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72; *R v Joyce* (1906) 25 NZLR 78, 89, 112; *Re the Ninety Mile Beach* [1963] NZLR 461, 475-476; *Falkner v Gisborne District Council* [1995] 3 NZLR 622 ("nothing to suggest not that the law was not applicable to New Zealand circumstances"); *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 (CA).

⁶⁴*Uniacke v Dickinson* (1848) 2 NSR 287 (Nova Scotia); *Wallace v R* (1887) 20 NSR 283 (Nova Scotia); *R v Crown Zellerbach Canada Ltd* (1954) 14 WWR 433 (British Columbia). The issue was never authoritatively resolved in New Zealand (see, for example, *Re Lushington, Manukau County v Wynyard* [1964] NZLR 161), nor elsewhere; Roberts-Wray, Sir Kenneth (1966) *Commonwealth and Colonial Law* (London: Stevens) 544-47.

⁶⁵A representative Parliament was established by the New Zealand Constitution Act 1852 (15 & 16 Vict c 72) (UK).

⁶⁶21 & 22 Vict no 2, considered in *King v Johnston* (1859) 3 NZ Jur (NS) SC 94.

⁶⁷21 & 22 Vict no 2, s 1.

uncertainty as to whether or not all Imperial acts passed prior to 1840 were in force in New Zealand, if otherwise applicable. The principle of this Act has been followed in all relevant legislation passed by the New Zealand Parliament since then, with the original date of application unchanged.⁶⁸

The uncertainty had been specifically about statutes, which were not generally applicable in settled colonies⁶⁹ – which was perhaps the reason for the uncertainty.⁷⁰ But the 1858 Act went further than was strictly necessary, and defined applicable law more widely. It expressly stated that: “The Laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly.”⁷¹

Thus the laws of New Zealand were based upon the “laws of England” as applicable, borrowing from Blackstone’s phrase of a century earlier. It was left to the courts to determine precisely what was, and was not applicable. For the most part the applicable law was the statute and common law of England, and the royal prerogative.⁷² It did not however include the ecclesiastical law,⁷³ nor any particular local laws (whether statutory, common, or customary law).⁷⁴ The ecclesiastical law was inapplicable, largely because:

⁶⁸The decision as to which category a particular colony belongs once made by practice or judicial decision will not be disturbed by historical research; *Milirrpum v Nabalco Pty Ltd* [1972-73] ALR 65, 124, 153; 17 FLR 141, 202, 242 (NT SC); *R v Kojo Thompson* (1944) 10 WA CA 201 (West African CA); *Phillips v Eyre* (1870) LR 6 QB 1, 18 per Willes J; *Coe v Commonwealth of Australia* (1979) 24 ALR 118, 128-9 (HCA).

⁶⁹*Uniacke v Dickinson* (1848) 2 NSR 287 (Nova Scotia); *Wallace v R* (1887) 20 NSR 283 (Nova Scotia); *R v Crown Zellerbach Canada Ltd* (1954) 14 WWR 433 (British Columbia).

⁷⁰These Acts were generally commerce and navigation Acts, which were intended to have an imperial application.

⁷¹s 1.

⁷²The royal prerogative being included for every settled colony, and in ceded and conquered states, because of its essential executive nature – and because it was deemed indivisible (for the Crown was then indivisible); *R v Secretary of State for the Foreign and Commonwealth Office, ex parte Indian Association of Alberta* [1982] QB 892; Cox, N (2001) The control of advice to the Crown and the development of executive independence in New Zealand, *Bond Law Review*, 13(1), pp. 166-89.

⁷³*In re Lord Bishop of Natal* (1864) 3 Moo PCC NS 115; 16 ER 43, 57; approved in *Baldwin v Pascoe* (1889) 7 NZLR 759.

⁷⁴*R v Secretary of State for the Foreign and Commonwealth Office, ex parte Indian Association of Alberta* [1982] QB 892, 911, per Lord Denning, MR. A great deal of local law still survived in England in the early nineteenth century. Almost all was swept away over the course of the nineteenth and twentieth centuries.

It cannot be said that any Ecclesiastical tribunal or jurisdiction is required in any Colony or Settlement where there is no Established Church, and in the case of a settled colony the Ecclesiastical Law of England cannot, for the same reason be treated as part of the law which the settlers carried with them from the Mother-country.⁷⁵

The ecclesiastical law is a part of the laws of England,⁷⁶ but not part of the common law.⁷⁷ More importantly, an established Church is, by its very essence, of a territorial nature, and requires to be expressly transplanted from its native soil.⁷⁸ The royal prerogative is not territorially limited, nor is it unique to any particular social order or society, since it represents the residual executive authority of the country.⁷⁹ For this reason it was applicable to the

⁷⁵*In re Lord Bishop of Natal* (1864) 3 Moo PCC NS 115, 148, 152; 16 ER 43, 57; approved in *Baldwin v Pascoe* (1889) 7 NZLR 759, 769-770.

⁷⁶Sir William Blackstone had emphatically stated (quoting Sir Matthew Hale and citing *Ventris and Strange*), that “Christianity is part of the laws of England”; Blackstone, Sir William (1978) *Commentaries on the Laws of England* ed E Christian (New York: Garland Publishing) vol IV p 59. In 1767, Lord Mansfield qualified this only slightly by declaring, “The essential principles of revealed religion are part of the common law”; *Chamberlain of London v Evans* (1767) 2 Burn’s Eccles Law 218. Though this was modified somewhat by later developments, such as *Bowman v Secular Society* [1917] AC 406 (HL), the Church of England remains established by law in England.

⁷⁷The ecclesiastical law of England consists of the general principles of the *ius commune ecclesiasticum* (*Ever v Owen* Godbolt’s Report 432 (Whitlock J)); foreign particular constitutions received by English councils or so recognised by English courts (secular or spiritual) as to become part of the ecclesiastical custom of the realm; and the constitutions and canons of English synods. The Submission of the Clergy Act 1533 (25 Hen VIII c 19) (Eng) provided that only the canon law as it then stood was to bind the clergy and laity, and only so far as it was not contrary to common and statute law, excepting only the papal authority to alter the canon law, a power which ended in later the same year, when it was enacted that England was ‘an Empire governed by one supreme head and king’ (Appointment of Bishops Act 1533 (25 Hen VIII c 20) (Eng)). New canon law could only be created by Act of Parliament, and now by Measure, under the Church of England Assembly (Powers) Act 1919 (9 and 10 Geo V c 76) (UK).

⁷⁸Though the application of this principle has not been uniform; see Doe, N. (1998) *Canon Law in the Anglican Communion* (Oxford: Clarendon Press). Thus, despite *Long v Bishop of Cape Town* (1863) 1 Moo PCC NS 411; 15 ER 756 and *In re Lord Bishop of Natal* (1864) 3 Moo PCC NS 115; 16 ER 43, approved in *Baldwin v Pascoe* (1889) 7 NZLR 759, 769-770, holding that the ecclesiastical law of England is generally inapplicable in colonies, the Crown did possess the prerogative power to create a Bishopric – and this was exercised. See *R v Provost and Fellows of Eton College* (1857) 8 E & B 610; 120 ER 228.

⁷⁹See also Cox, N. (2002) The Theory of Sovereignty and the Importance of the Crown in the Realms of The Queen, Oxford University Commonwealth Law Journal, 2(2), pp. 237-55. This is not necessarily correct for federal states.

circumstances of any colony – or so it would seem (remembering that it is for the courts to determine whether a law is applicable or not).

The extension of the royal prerogative to New Zealand

There are several views as to what comprises the royal prerogative. Blackstone had a narrower definition. For him, a power held in common with the King's subjects ceased to be a royal prerogative, and was merely a freedom for action not prohibited by law.⁸⁰ Dicey had a wide view of the royal prerogative. To him, the royal prerogative was the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.⁸¹ The definition of prerogative powers is controversial⁸² but courts have generally accepted Dicey's broad definition of the royal prerogative – for what this may be worth.

For the most part, such a distinction is academic, since the courts will review executive action whether it purports to be based upon the royal prerogative, or any other basis, such as the personal powers of the Sovereign.⁸³ However, it may be unclear whether the royal prerogative or a statutory source of power has been exercised, and this may affect whether review is brought – in New Zealand – under the Judicature Amendment Act 1972 or at common law.⁸⁴

The royal prerogative has been classified as a branch of the common law, because it is the decisions of the common law Courts which determine its existence and extent.⁸⁵ This would appear, however, to be true only in the sense that there could be no extraordinary prerogative above the law.⁸⁶ It must be remembered that the royal prerogative applies even in countries where the common law does not.⁸⁷ It is, however, in some degree controlled by the common law courts, though only in determining its scope, and not necessarily

⁸⁰Blackstone, Sir William (1978) *Commentaries on the Laws of England* ed E Christian (New York: Garland Publishing) vol 1, p 239.

⁸¹Dicey, A. (1958) *Introduction to the Study of the Law of the Constitution* introduction & appendix by E.C.S. Wade (10th ed, London: Macmillan) 425.

⁸²See Lewis, C.B. (1991) *Judicial Remedies in Public Law* (London: Sweet & Maxwell) 13-14.

⁸³See Harris, B.V. (1992) The 'Third Source' of Authority for Government Action, *Law Quarterly Review*, 109, pp. 626.

⁸⁴See *Re Erebus Royal Commission* [1983] NZLR 662, 666, 667 per Mahon J; [1984] 1 AC 808; [1984] 3 All ER 201 (PC) and *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252, 258 (CA).

⁸⁵*Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352 (KB); *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL).

⁸⁶In particular, see Payne, S. (1999) The Royal Prerogative, in M. Sunkin and S. Payne (Eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press) 77-111, 106; Wade, E.C.S. and Phillips, G. (1971) *Constitutional Law* (8th ed, London: Longman) 183.

⁸⁷*Sammut v Strickland* [1938] AC 678 (PC).

its exercise.⁸⁸ The Crown may only exercise a royal prerogative which the common law has recognised,⁸⁹ and the royal prerogative may be said to consist of “the powers and privileges accorded by the common law to the Crown.”⁹⁰ In many respects the relationship between common law and prerogative parallels that between common law and ecclesiastical law.⁹¹

Prerogative powers are not, however, all of the same nature, and this factor may be important to understanding some of the difficulties which have arisen. Chitty drew a distinction between those prerogative powers which he defined as being minor (which were merely local to England), and those others, which were fundamental rights and principles on which the king’s authority rested,⁹² and which were necessary to maintain it.⁹³ Of the minor royal prerogatives it was said that they “might be yielded, where they were inconsistent with the laws or usages of the place, or were inapplicable to the condition of the people”.⁹⁴ The minor prerogatives would apply to the common law colonies (settled and where common law has been applied by prerogative or legislative action), except that they that they may be excluded or modified by local circumstances.

The major royal prerogatives were said to be those that were fundamental, or which other than local, in the words of Story:

⁸⁸*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

⁸⁹See the *Case of Proclamations* (1611) 12 Co Rep 74, 75; 77 ER 1352 (KB); *Entick v Carrington* (1765) 19 St Tr 1029.

⁹⁰Hogg, P. (1995) *Constitutional Law in Canada Loose-Leaf Edition* (Toronto: Carswell) 1.9; the *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352 (KB).

⁹¹For which see Cox, N. (2001-2002) *The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England*, Rutgers Journal of Law and Religion, 3(1), pp. 1-45 <<http://www-camlaw.rutgers.edu/publications/law-religion/cox1.pdf>>.

⁹²Thus, “[e]very where he was the head of the church, and the fountain of justice; every where he was entitled to a share in the legislation, (except where he had expressly renounced it); every where he was generalissimo of all forces, and entitled to make peace or war”; Story, J. (1994) *Commentaries on the Constitution of the United States: With a preliminary review of the Constitutional History of the colonies and states, before the adoption of the Constitution* ed Melville M. Bigelow (5th ed, Buffalo: William S Hein & Co) Book I, p 170, § 184.

⁹³Chitty, J. (1978) *A Treatise on the Law, Classics of English Legal History in the Modern Era* (New York: Garland Publishing) (reprint of the 1820 edition published by Joseph Butterworth and Son, London, under the title: *A Treatise on the Law of the Prerogatives of the Crown; And the Relative Duties and Rights of the Subject*).

⁹⁴Story, J. (1994) *Commentaries on the Constitution of the United States: With a preliminary review of the Constitutional History of the colonies and states, before the adoption of the Constitution* ed Melville M. Bigelow (5th ed, Buffalo: William S Hein & Co) Book I, p 170, § 184.

In every question, that respected the royal prerogatives in the colonies, where they were not of a strictly fundamental nature, the first thing to be considered was, whether the charter of the particular colony contained any express provision on the subject. If it did, that was the guide. If it was silent, then the royal prerogatives were in the colony precisely the same, as in the parent country; for in such cases the common law of England was the common law of the colonies for such purposes.⁹⁵

The presumption remains that the prerogatives applied in the colonies. Blackstone advocated a similar definition to that of Chitty, that of direct and incidental:

The direct are such positive substantial parts of the royal character and authority, as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending ambassadors, of creating peers, and of making war or peace.⁹⁶

These might be seen as the major prerogatives.

But such prerogatives as are incidental bear always a relation to something else, distinct from the king's person; and are indeed only exceptions, in favour of the Crown, to those general rules that are established for the rest of the community: such as, that no costs shall be recovered against the king; that the king can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects.⁹⁷

These could equate to the minor royal prerogatives, now more satisfactorily defined as incidental to normal legal relations. These incidental royal prerogatives, like Chitty's minor royal prerogatives, were indeed generally applied in the colonies. The key point is that neither definition fully explains the nature of the royal prerogative as applied to the colonies. But, like the common law, not all the prerogative powers that are exercised by Her Majesty in the United Kingdom necessary apply, nor are they necessarily exercised, in all her realms. For example, they do not include the royal prerogatives relating

⁹⁵*Ibid.*

⁹⁶Blackstone, Sir William (1978) *Commentaries on the Laws of England* ed E Christian (New York: Garland Publishing) Book I ch 7 p 232-233.

⁹⁷Blackstone, Sir William (1978) *Commentaries on the Laws of England* ed E Christian (New York: Garland Publishing) Book I ch 7 p 232-233. Interestingly, the definition relied heavily on the distinction between the King's political and private persons; Blackstone, Sir William (1978) *Commentaries on the Laws of England* ed E Christian (New York: Garland Publishing) vol I p 239 et seq.

to the established Church of England (a major prerogative) – though even here this was not always necessarily the case.⁹⁸

There are also other prerogatives in respect of which the Queen does not take advice⁹⁹ – but which are nonetheless extant, if unused, for they did apply to the colonies and so had survived till today, through several centuries of constitutional evolution. It has been held that disused prerogatives are lost,¹⁰⁰ though it is also said that disused prerogatives may be revived.¹⁰¹ The latter would seem to be the more historically probable view, and has been followed more recently,¹⁰² particularly to apply an old prerogative to new circumstances.

Whether a particular royal prerogative extends to a country depends upon the category to which it belongs and upon whether the legal system is based on English law.¹⁰³ Whatever the definition preferred, it is clear that the major royal prerogatives apply throughout the Commonwealth, and are applied as a pure question of law,¹⁰⁴ even in a country, such as Malta, where the common law is not otherwise in force.¹⁰⁵ Minor royal prerogatives apply in all common law countries, except that they may be excluded or modified by local circumstances. Given the general circumstances of New Zealand, it might be

⁹⁸See, for instance, Border, J. (1962) *Church and state in Australia, 1788-1872: a constitutional study of the Church of England in Australia* (London: SPCK).

⁹⁹See Blackburn, R.W. (1985) *The Queen and Ministerial responsibility*, Public Law, p. 361.

¹⁰⁰*Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL); *South Australia v Victoria (State Boundaries Case)* (1911) 12 CLR 667, 703 per Griffiths CJ.

¹⁰¹*Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101 per Lord Reid.

¹⁰²The Crown's ancient power to preserve the peace was revived in *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1988] 1 All ER 556 (CA), though arguably the prerogative was never fully disused.

¹⁰³Cox, N. (1998-99) *The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity*, *Australian Journal of Law and Society*, 14, pp. 15-42, 19, cited with approval in *Black v Chretien* (2001) 199 DLR (4th) 228, paras 27 per Laskin JA (Court of Appeal of Ontario), and *Copello v Minister of Foreign Affairs of Canada* [2002] 3 FC 24, para 61 per Heneghan J (Federal Court of Canada).

¹⁰⁴Cox, N. (1998-99) *The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity*, *Australian Journal of Law and Society*, 14, pp. 15-42, 19; *Black v Chretien* (2001) 199 DLR (4th) 228, paras 26 per Laskin JA (Court of Appeal of Ontario).

¹⁰⁵*Sammut v Strickland* [1938] AC 678 (PC). See also *Sabally and N'Jie v Attorney-General* [1965] 1 QB 273, 293; [1964] 3 All ER 377, 380, 381 (CA). The prerogative cannot however operate against an alien in an alien land; *Attorney-General v Nissan* [1970] AC 179, 229; [1969] 1 All ER 629, 654 per Lord Pearson.

supposed that the whole of the royal prerogative – except for the ecclesiastical prerogatives – extended to this country in 1840.

Indeed, it would seem that this was so. The prerogatives of executive government relating to the three branches of government;¹⁰⁶ prerogatives in the nature of rights, privileges, or immunities;¹⁰⁷ and the prerogatives personal to the Sovereign,¹⁰⁸ have all been held to have applied to New Zealand. It has also been said of New Zealand that “the undoubted prerogatives of modern government include the following powers: to pardon criminals; to summon, prorogue or dissolve Parliament; to appoint Ministers, Judges and other Crown officials; to confer honours; to assent to legislation; to conduct foreign affairs; and to control the armed forces.”¹⁰⁹ Most of these would constitute major or direct royal prerogatives. Incidental royal prerogatives, such as immunities and debt privileges, have also been held to apply. The royal prerogative in New Zealand would appear to be as full as that in England, with the qualification noted above.

The nature of the royal prerogative

It was long maintained that the royal prerogative was generally non-justiciable (or non-reviewable by the Courts),¹¹⁰ though it has always been the function of the courts to determine its existence.¹¹¹ The more usual view now is that the justiciability or non-justiciability depends not upon the nature of the power – as part of the royal prerogative – but upon its subject matter.¹¹² This has the

¹⁰⁶Such as the prerogative power of appointment; *Re Commission on Thomas Case* [1980] 1 NZLR 602 (PC).

¹⁰⁷Such as the Crown’s immunity from statute (more of a presumption than a true immunity); *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58 (PC); Interpretation Act 1999, s 27.

¹⁰⁸Such as the notion that the King never dies; In New Zealand, the death of the Sovereign perpetuates the succession under English law but otherwise has no effect under New Zealand law: Constitution Act 1986, s 5(1); Cox, N. (1999) *The Law of Succession to the Crown in New Zealand*, Waikato Law Review, 7, pp. 49-72. See *Hill v Grange* (1555) 1 Plowden 164, 177; 75 ER 253, 273; *Willion v Berkley* (1561) 1 Plowden 227, 243; 75 ER 339, 371; and *Wroth’s Case* (1572) 2 Plowden 452, 457; 75 ER 678, 685.

¹⁰⁹(2003) *The Laws of New Zealand* (Wellington: LexisNexis Butterworths) “Constitutional Law” para 145, from Joseph, P. (2001) *Constitutional and Administrative Law in New Zealand* (2nd ed, Wellington: Brookers) 622-45.

¹¹⁰For example, see *Barton v R* (1980) 147 CLR 75, 90 per Gibbs ACJ; *Chandler v DPP* [1964] AC 763; *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352 (KB).

¹¹¹*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 per Lord Roskill (obiter) (HL).

¹¹²*Ibid*; *Black v Chretien* (2001) 199 DLR (4th) 228 (Court of Appeal of Ontario); *Minister for Arts, Heritage & Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 277-278 per Bowen CJ, 280 per Sheppard J, 302-304 per Wilcox J; 75 ALR 218 (FC); *Macrae v Attorney-General of NSW* (1987) 9

potential effect of widened the scope of judicial review, though the Courts show deference to those who discharge royal prerogative powers, in the expectation that they will exercise such powers fairly, reasonably, and in accordance with law.¹¹³

Although the courts can now review the exercise of the royal prerogative in certain instances,¹¹⁴ as where there is a legitimate expectation, there is no general power of review.¹¹⁵ Having said that, in general terms, the exercise of royal prerogative powers is subject to judicial review, although there are exceptions – including the honours prerogative.¹¹⁶ These limits have been held to apply particularly to the exercise of what may be termed the political aspects of the royal prerogative. This will be important when we consider *Black's case*.¹¹⁷

There hasn't been a full systematic analysis of the scope and content of the royal prerogative, in part because of its fluidity. However, as generally categorised, the scope of the royal prerogative includes the foreign relations and defence aspects, including the making of treaties;¹¹⁸ and the defence of the realm.¹¹⁹ It has domestic applications, including keeping the peace;¹²⁰

NSWLR 268, 273, 277, 281 per Kirby P, 308 per Priestley JA (CA); *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 (CA); *Century Metals & Mining NL v Yeomans* (1989) 40 FCR 564, 587-588; 100 ALR 383; 22 ALD 730 (FC); *Blyth District Hospital Inc v South Australian Health Commission* (1988) 49 SASR 501, 509 per King CJ (FC).

¹¹³*Burt v Governor-General* [1992] 3 NZLR 672, 683 (CA).

¹¹⁴Such as when it relates to the honours prerogative; *Black v Chretien* (2001) 199 DLR (4th) 228, paras 27 per Laskin JA (Court of Appeal of Ontario)

¹¹⁵*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

¹¹⁶As was found in *Black v Chretien* (2001) 199 DLR (4th) 228 (Court of Appeal of Ontario).

¹¹⁷*Ibid.*

¹¹⁸*The Parlement Belge* (1879) 4 PD 129; (1880) 5 PD 197; *Blackburn v Attorney-General* [1971] 1 WLR 1037.

¹¹⁹Though the war prerogative has not analysed by the Courts for nearly 300 years; *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75; *Nissan v Attorney-General* [1970] AC 179 – and it is subject to the statutory prohibition in the Bill of Rights 1688 (1 Wm & M s 2 c 2) (Eng), s 1, preventing the Crown from maintaining a standing army in time of peace without Parliamentary consent; *Marks v the Commonwealth* (1964) 111 CLR 549, 564 per Windeyer J; *Chandler v DPP* [1964] AC 763.

¹²⁰*R v Secretary of State for Home Department; Ex parte Northumbria Police Authority* [1988] 1 All ER 556, 564, 573, 576; *Farey v Burvett* (1974) 131 CLR 477; 3 ALR 70; 48 ALJR 161. Police in England and Wales swear to uphold the Queen's peace:

I (NAME) of (TOWN) do solemnly and sincerely declare and affirm that I will well, and truly serve the Queen in the office of Constable, with

dissolution of Parliament (though this may not be so in New Zealand now¹²¹); the appointment of Ministers; grant of honours;¹²² and “other matters”.¹²³ The “other” royal prerogatives – those not yet fully enumerated – will be identified by the Courts on a case-by-case basis.¹²⁴

Despite its broad reach, the Crown prerogative can be limited or displaced by statute.¹²⁵ Once a statute occupies ground formerly occupied by the royal prerogative, the prerogative goes into abeyance. The Crown may no longer act under the prerogative, but must act under and subject to the conditions imposed

fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people; and that I will, to the best of my power cause the peace to be kept and preserved and prevent all offences against people and property; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law.

- Police Act 1996 (UK), Sch 4, as amended by the Police Reform Act 2002 (UK), s 83.

In New Zealand, the wording is more specific that it is the Queen’s peace which is to be kept:

I, A.B., do swear that I will well and truly serve our Sovereign Lady the Queen in the Police, without favour or affection, malice or ill-will, until I am legally discharged; that I will see and cause Her Majesty’s peace to be kept and preserved; that I will prevent to the best of my power all offences against the peace; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law. So help me God.

- Police Act 1958 (NZ), s 37(1).

¹²¹See Quentin-Baxter, A. (1980) *Review of the Letters Patent 1917 Constituting the Office of Governor-General of New Zealand* (Wellington: Prime Ministers Department) 13-14.

¹²²*The Prince’s Case* (1606) 8 Co Rep 481; 77 ER 496; Wagner, Sir Anthony and Squibb, G. (1973) Precedence and Courtesy Titles, *Law Quarterly Review* 80, p. 352.

¹²³Generally, see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 per Lord Roskill (obiter) (HL). The royal prerogative of mercy, one of the most important, is not reviewable by the courts; *Burt v Governor-General* [1993] 2 NZLR 672 (CA). There is also a prerogative right to conduct inquiries; *Lockwood v the Commonwealth* (1954) 90 CLR 177; 182 per Fullagar J.

¹²⁴*R v Secretary of State for Home Department; Ex parte Bentley* [1993] 4 All ER 443.

¹²⁵*Attorney-General for the United Kingdom v De Keyser’s Royal Hotel Ltd* [1920] AC 508; *Commonwealth v New South Wales* (1923) 33 CLR 1, 38 per Isaacs J; *Barton v Commonwealth* (1974) 131 CLR 477, 484 per Barwick CJ, 510 per Mason J; 48 ALJR 161; 3 ALR 70.

by the statute.¹²⁶ The royal prerogative may revive, however, in some circumstances. Equally importantly, it would seem that the royal prerogative is sufficiently flexible that it may be exercised in ways and circumstances different to those traditional to it – more on this when we consider *Black's case*.¹²⁷

The royal prerogative is thus reviewable by the courts, who also decide whether it exists or not. Clearly, all the royal prerogatives which relate to the executive role of the Crown as will be applicable in settled colonies, including the honours prerogative. This is the means by which the Crown rewards service, and honours achievement. But the precise scope of the prerogative is perhaps unclear, although the courts have long held that the honours prerogative is unfettered. The royal prerogative may however be altered to suit new circumstances.

The Law of Arms and the royal prerogative

The major royal prerogatives include the honours prerogative.¹²⁸ The royal prerogative remains undiminished in its scope with respect to honours,¹²⁹ including the control of armorial bearings, which has over been the subject of some controversy in Australia, New Zealand and until fairly recently, Canada.¹³⁰ The Crown has exclusive authority to regulate the use of arms,¹³¹ subject to any statutory regulation, such as the Local Government Act 1974¹³² and the Flags, Emblems, and Names Protection Act 1981 in New Zealand.¹³³ It is not only in respect of armorial bearings and the Law of Arms that the royal prerogative of honours may become controversial, however, and some of this controversy is due to the nature of the royal prerogative and its application to New Zealand in 1840.

¹²⁶*Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL).

¹²⁷*Black v Chretien* (2001) 199 DLR (4th) 228 (Court of Appeal of Ontario).

¹²⁸This is a major or direct prerogative because it is not dependent upon another legal relationship, but is a power derived from the role of the Sovereign as Head of State.

¹²⁹The Sovereign is the “fount of honour”, and alone possesses and exercises the prerogative to confer honours and decorations; *The Prince's Case* (1606) 8 Co Rep 1a, 18b; 77 ER 496.

¹³⁰Macaulay, G. (2001) *The Law of Arms in New Zealand: A Response*, Otago Law Review, 10(1), p. 113; Cox, N. (1998) *The Law of Arms in New Zealand*, New Zealand Universities Law Review, 18, p. 238.

¹³¹See Cox, N. (1998) *The Law of Arms in New Zealand*, New Zealand Universities Law Review, 18, p. 238.

¹³²ss 684 (1) (7) and 696.

¹³³It has always been assumed that this is the prerogative of the Crown: *Strathmore Peerage Case* (1821) 6 Pat 645, 655 (HL).

Another part of the “laws of England”, though not of the common law, is the Law of Arms.¹³⁴ In England the common law Courts will take judicial notice of it as such.¹³⁵ Whether it extends to New Zealand depended upon whether it could be said to be applicable to the circumstances of the colony in 1840, bearing in mind the particularly broad interpretation this phrase has attracted in the courts.¹³⁶ Whether it was applicable or not is an important question, since it is closely associated with the prerogative of honours – indeed it may be said to be inseparable from it. The Crown has for long exercised the prerogative of honours with respect to arms, by conferring coats of arms on New Zealand institutions and individuals, either directly or through the College of Arms (and Lord Lyon King of Arms).¹³⁷

It is axiomatic that any area of law which governs private property rights will be regarded as “applicable to the circumstances of the colony”.¹³⁸ 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 Crown¹³⁹ – they are therefore deemed a form of honour. Yet they are also a form of property, though admittedly of a special sort.¹⁴⁰ As with the royal

¹³⁴See Cox, N. (1998) *The Law of Arms in New Zealand*, *New Zealand Universities Law Review*, 18, p. 238.

¹³⁵*Paston v Ledham* (1459) YB 37 Hen VI, Pasch 18 per Nedham J.

¹³⁶Such as conveyancing and tenure laws; *Lawal v Younan* [1961] All Nigeria LR 245, 254 (Nigeria Federal SC).

¹³⁷Since 1978 there has been a New Zealand Officer of Arms Extraordinary (Mr Phillip O’Shea, Cabinet Office Adviser on Honours, and now Director of the Honours Secretariat), appointed to exercise the prerogative in New Zealand. Mr O’Shea was appointed by letters patent, rather than by the warrant normally used for extraordinary heralds. But his authority has been impugned by some; See, for the appointment generally, O’Shea, P. (1982) *The Office of the New Zealand Herald of Arms*, *New Zealand Armorialist*, 20, p. 7; Neither the warrant of appointment, nor any other mention of the existence of the position was ever been published in the *New Zealand Gazette*: Macaulay, G. (1994) *Honours and Arms: Legal and Constitutional Aspects of Practice concerning Heraldry and Royal Honours in New Zealand*, *Canterbury Law Review*, 5, p. 381, 385n; Innes of Edingight, Sir Malcolm (1979) *New Zealand Herald of Arms Extraordinary*, *Commonwealth Heraldry Bulletin*, 3, p. 2. Grants of Arms continue to be made by the kings of arms, under the authority of a warrant of the Earl Marshal. The Queen’s royal style in New Zealand is now used in grants to New Zealanders obtained through the agency of New Zealand Herald Extraordinary.

¹³⁸Blackstone, Sir William (1978) *Commentaries on the Laws of England* ed E Christian (New York: Garland Publishing) book I, para 107.

¹³⁹As in (1960) *Halsbury’s Laws of England* (3rd ed, London: Butterworths) vol 29, 239-270.

¹⁴⁰Armorial bearings are incorporeal and impartible hereditaments, inalienable, and descendable according to the Law of Arms; *Wiltes Peerage Case* (1869) LR 4 HL, 126, 153 per Lord Chelmsford; For a discussion of corporeal and incorporeal property, see Cox, N. (1997) *The British Peerage: The Legal*

prerogative, the common law courts will take judicial notice of armorial bearings, but will not intervene in their use.¹⁴¹

Although governed by a discrete system of law, heraldry was, and remains closely linked with the royal prerogative.¹⁴² Indeed, in its executive aspects (the granting of arms, and regulating such matters as precedence), it must properly be regarded as a part of the royal prerogative,¹⁴³ rather than a separate law. This is so although the substance of the Law of Arms (such as determining rights of use) is to be found in the customs and usages of the Court of Chivalry,¹⁴⁴ whose procedure (though not principles) was based on that of the civil law.¹⁴⁵

As a matter of construction of New Zealand legislation, if any Laws of Arms were inherited by New Zealand, it was the Law of Arms of England, in

Standing of the Peerage and Baronetage in the Overseas Realms of the Crown with Particular Reference to New Zealand, *New Zealand Universities Law Review*, 17, p. 379.

¹⁴¹*Paston v Ledham* (1459) YB 37 Hen VI, Pasch 18 per Nedham J.

¹⁴²Arms are granted by authority vested in the Officers of Arms.

¹⁴³Blackstone noted that:

The king is likewise the fountain of honour, of office, and of privilege: and this in a different sense from that wherein he is styled the fountain of justice; for here he is really the parent of them. It is impossible that government can be maintained without a due subordination of rank; that the people may know and distinguish such as are fet over them, in order to yield them their due respect and obedience; and also that the officers themselves, being encouraged by emulation and the hopes of superiority, may the better discharge their functions: and the law supposes, that no one can be so good a judge of their several merits and services, as the king himself who employs them. It has therefore entrusted with him the sole power of conferring dignities and honours, in confidence that he will bestow them upon none, but such as deserve them. And therefore all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the crown: either expressed in writing, by writs or letters patent, as in the creations of peers and baronets; or by corporeal investiture, as in the creation of a simple knight.

– Blackstone, Sir William (1978) *Commentaries on the Laws of England* ed E Christian (New York: Garland Publishing) book 1, 261.

¹⁴⁴*Puryman v Cavendish* (1397) Close Rolls 21 Ric II p 1 m 5. This was the view of the judges and lawyers. The opinion among lawyers is good evidence of what the law is: *Isherwood v Oldknow* (1815) 3 M & S 382, 396; 105 ER 654 per Lord Ellenborough; applied in *Manchester Corp v Manchester Palace of Varieties Ltd* [1955] 2 WLR 440, 448 per Lord Goddard.

¹⁴⁵*Puryman v Cavendish* (1397) Close Rolls 21 Ric II p 1 m 5. This was recognised by the common law Courts: *Paston v Ledham* (1459) YB 37 Hen VI, Pasch 18 per Nedham J.

1840.¹⁴⁶ The presence of numbers of Scots and other non-English settlers was legally immaterial, though this dominance of English law has caused jealousy in Scottish legal circles in particular.¹⁴⁷ Since 1840 the law may have evolved, but its origins remain the Law of Arms of England, just as the common law remains in origins the common law of England, though now clearly a distinct outgrowth.¹⁴⁸ The common law of New Zealand has departed from the parent, although mutual borrowing continues.¹⁴⁹ If the Law of Arms of New Zealand still resembles closely that of England, it is merely that, in the absence of a chivalric court in New Zealand, and its inactivity in England, there has been relatively little movement in the Law of Arms. Unlike in Canada,¹⁵⁰ there has been no specific delegation of the honours prerogative to the Governor-General, either in respect of honours generally, or heraldry specifically.¹⁵¹ This leaves the royal prerogative of honours vested in the Queen, subject to a regular delegation – though not an exclusive one¹⁵² – to the College of Arms, except where delegated (in Canada, to the Canadian Heraldic Authority).¹⁵³

¹⁴⁶Cox, N. (1998) *The Law of Arms in New Zealand*, *New Zealand Universities Law Review*, 18, p. 238.

¹⁴⁷For a layman's view of the law, reflecting this perspective, see also Macaulay, G. (2001) *The Law of Arms in New Zealand: A Response*, *Otago Law Review*, 10(1), p. 113.

¹⁴⁸In 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 1907 the Law Officers held that Garter had an imperial jurisdiction. However, neither then nor in 1913, was it expressly asserted that there was not an equally wide jurisdiction enjoyed by Lord Lyon: Opinion of the Law Officers of the Crown on Heraldic Jurisdiction, 13 August 1913 cited in Wagner, Sir Anthony (1967) *Heralds of England: a history of the Office and College of Arms* (London: HMSO) 530. 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. However, the directions of the Home Secretary have not been accepted by Scottish heralds; Agnew of Lochnaw, Sir Crispin (1988) *The Conflict of heraldic laws*, *Juridical Review*, pp. 61, 71.

¹⁴⁹See, for example, the extensive reliance of placed by members of the House of Lords on judgements of the Court of Appeal of New Zealand in *Three Rivers District Council v Governor and Company of The Bank of England* [2000] 2 WLR 1220 (HL).

¹⁵⁰Letters Patent authorising the granting of armorial bearings in Canada, 4 June 1988.

¹⁵¹Though there has been an heraldic appointment which implies a partial delegation to a ministerial officer, rather than to the Governor-General; See O'Shea, P. (1982) *The Office of the New Zealand Herald of Arms*, *New Zealand Armorist*, 20, p. 7.

¹⁵²The New Zealand official arms were granted by a direct royal warrant, signed 26 August 1911. This was directed to the Earl Marshal, stated that:

[F]or greater honour and distinction of the said Dominion of New Zealand certain Armorial Ensigns and Supporters should be assigned

But the royal prerogative of honours continues to be used, to confer honours and dignities, including coats of arms.¹⁵⁴ This has been challenged by some,¹⁵⁵ who also questioned the use of imperial honours – now an academic subject.¹⁵⁶ It might be asked how something as central to the executive government could be so uncertain. While the honours prerogative is unfettered, its exercise in respect of arms is disputed, with the result that the field is largely unregulated.

An opportunity to clarify matters arose in the 1980s, but was not taken up, presumably because it would be difficult reforming this without a careful look at the whole royal prerogative, and the law reform (if indeed it was more than a consolidation) task in hand was limited to the statute law and statutory regulations.¹⁵⁷ A review of the prerogative of mercy has been conducted recently,¹⁵⁸ but the royal prerogative as a whole has not been subject to the careful analysis it deserves, and which could lead to its wider and more effective use, both with respect to honours and otherwise.

The Imperial Laws Application Act and the royal prerogative

As part of a general tidying up of the statute law, a comprehensive survey was made in the 1970s and 1980s of all imperial statutes which might still have been in force in New Zealand. Many were clearly obsolete or had never had

thereto ... by these presents do grant and assign for the Dominion of New Zealand the Armorial Ensigns and Supporters following, that is to say ...

The New Zealand Coat of Arms were published in the New Zealand Gazette on 11 January 1912 (11 January 1912 p 52). The legal validity of this grant has been questioned – on the grounds either that there was no legal entity to which it was granted, or because of the involvement of the Earl Marshal; Macaulay, G. (1994) *Honours and Arms: Legal and Constitutional Aspects of Practice concerning Heraldry and Royal Honours in New Zealand*, Canterbury Law Review, 5, pp. 381, 382. But the efficacy of the grant cannot seriously be doubted.

¹⁵³Letters Patent authorising the granting of armorial bearings in Canada, 4 June 1988.

¹⁵⁴For example, the Royal Warrant establishing the New Zealand Army Long Service and Good Conduct Medal, signed 6 May 1985, countersigned by David Lange, published in the New Zealand Gazette 16 May 1985 (SR 1985/90).

¹⁵⁵For example, by a number of submissions to the inquiry by the Standing Committee on Law and Justice of the Legislative Council of New South Wales; (2002) *Report on the Proposed State Arms Bill* (Sydney: Standing Committee on Law and Justice) parliamentary paper no 326.

¹⁵⁶Imperial honours ceased to be awarded in 1996 – though they continue for the Cook Islands, a New Zealand Associated State; The New Zealand Order of Merit (Royal Warrant SR 1996/205) replaces most pre-existing awards.

¹⁵⁷Imperial Laws Application Act 1988.

¹⁵⁸Ministry of Justice (2003) *The Royal Prerogative of Mercy: A Review of New Zealand Practice* (Wellington: Ministry of Justice).

any particular significance in New Zealand. Others retained great constitutional or practical relevance.¹⁵⁹ Those which were to be retained were enumerated in the Imperial Laws Application Act 1988.¹⁶⁰ All others were deemed repealed.¹⁶¹ The Imperial Laws Application Act 1988 covers Imperial enactments, and Imperial subordinate legislation,¹⁶² but it does not affect the pre-existing common law, nor the royal prerogative, nor any special laws such as the Law of Arms.¹⁶³ It thus remains uncertain whether the royal prerogative includes a full prerogative of honours.

The application of the Act is clear. The long title is “An Act to specify the extent to which Imperial enactments, Imperial subordinate legislation, and the common law of England are part of the laws of New Zealand”.¹⁶⁴ “Imperial enactment” means any Act of the Parliament of England, or of the Parliament of Great Britain, or of the Parliament of the United Kingdom; but does not include any Imperial subordinate legislation:” and “Imperial subordinate legislation” means any Order in Council, regulation, or other legislative instrument made under any Imperial enactment; and includes the Letters Patent listed in the Second Schedule to this Act”.¹⁶⁵

Nothing is said of the royal prerogative, nor of any system of law other than the statute and common law. Of the common law it is said that “After the commencement of this Act, the common law of England (including the principles and rules of equity), so far as it was part of the laws of New Zealand immediately before the commencement of this Act, shall continue to be part of the laws of New Zealand.”¹⁶⁶ These special laws and jurisdictions remain as before.

It is neither correct nor relevant to claim, as has one writer, that the civil law of England was clearly deleted by that Act.¹⁶⁷ The Law of Arms of Scotland was regarded as a branch of the civil law of that country, or more properly of the

¹⁵⁹Such as Magna Carta 1297 (25 Edw I c 29); the Act of Settlement 1700 (12 and 13 Will III c 2); and the Bill of Rights 1688 (1 Will and Mar Sess 2 c 2).

¹⁶⁰s 3(1) and Schedules 1 and 2.

¹⁶¹s 4.

¹⁶²s 3.

¹⁶³Section 5 impliedly preserves the prerogative, and the wording of the Act as a whole clearly limits its application to the statutory law.

¹⁶⁴Indeed, arguably the most important difference between the Law Commission draft Bill and the final statute is that the Imperial Laws Application Act 1988 includes a provision (s 5) as to the applicability of the rules of common law and equity; the Bill was originally intended solely to cover legislation direct and subordinate; Finn, J. (1989) *The Imperial Laws Application Act 1988*, Canterbury Law Review, 4(1), pp. 93, 99; (1987) *Report on Imperial Legislation in Force in New Zealand* (Wellington: Government Printer).

¹⁶⁵s 2.

¹⁶⁶s 5.

¹⁶⁷Macaulay, G. (2001) *The Law of Arms in New Zealand: A Response*, Otago Law Review, 10(1), pp. 113, 115.

old common law of Scotland.¹⁶⁸ But in England the procedure of the Court of Chivalry,¹⁶⁹ which administered the Law of Arms, might have been based on that of the civil law,¹⁷⁰ but the substantive law was recognised to be English, and peculiar to the Court of Chivalry.¹⁷¹ The Law of Arms remains unreformed,¹⁷² but little known and subject to periodic controversy amongst the few who have given it any consideration.¹⁷³ More importantly, the royal prerogative is unaffected.

In the absence of courts competent to administer the Law of Arms, remembering that the Crown always exercised a great deal of the judicial as well as the executive control of honours and dignities,¹⁷⁴ the royal prerogative remains the avenue through which these matters are regulated.¹⁷⁵ The royal prerogative of honours remains in regular use, and since the seventeenth century not been the cause of much controversy until recently. The exact scope

¹⁶⁸*Macrae's Trustees v Lord Lyon King of Arms* [1927] SLT 285.

¹⁶⁹See *Manchester Corp v Manchester Palace of Varieties Ltd* [1955] 2 WLR 440.

¹⁷⁰Squibb, G. (1959) *The High Court of Chivalry* (Oxford: Clarendon Press).

¹⁷¹Cases were tried *secundum legem et consuetudinem curie nostre militaris*: *Puryman v Cavendish* (1397) Close Rolls 21 Ric II p 1 m 5. This was recognised by the common law Courts: *Paston v Ledham* (1459) YB 37 Hen VI, Pasch 18 per Nedham J.

¹⁷²Despite a call by Lord Goddard, CJ, that it be put on a statutory basis; *Manchester Corp v Manchester Palace of Varieties Ltd* [1955] 2 WLR 440.

¹⁷³Macaulay, G. (2001) *The Law of Arms in New Zealand: A Response*, Otago Law Review, 10(1), p. 113; Cox, N. (1998) *The Law of Arms in New Zealand*, New Zealand Universities Law Review, 18, p. 238.

¹⁷⁴See, for example, *King's Prerogative in Dignities* (c.1607) 12 Co Rep 112; 77 ER 1388; *Cowley (Earl) v Cowley (Countess)* [1901] AC 450; and *Black v Chretien* (2001) 199 DLR (4th) 228 (Court of Appeal of Ontario).

¹⁷⁵For instance, the Royal Warrant establishing the New Zealand Order of Merit (SR 1996/205) begins:

ELIZABETH THE SECOND, by the Grace of God Queen of New Zealand and Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith; to all to whom these Presents shall come,

GREETING!

WHEREAS We are desirous of signifying Our appreciation of important and meritorious services to Our Realm of New Zealand:

WE do by these presents for Us, Our Heirs and Successors, institute and create a new Order of Chivalry

of the royal prerogative remains unclear, even to whether it extends to the granting coats of arms or not.¹⁷⁶

In practical terms, it must be concluded that the prerogative of honours is as fully developed in New Zealand as in England – and that it was fully applicable in 1840. The difficulty lies with the form of delegation which is used, since this is to English officials. The first problem was thus consideration of the scope of the royal prerogative. The second is whether the royal prerogative applies even where the subject of the royal prerogative – in that case again honours – is not part of the law of the realm.

The exercise of the royal prerogative in the United Kingdom and Canada

The Crown of Canada also acquired the honours prerogative. In 1988 lingering uncertainties over the Law of Arms were settled with the specific delegation of the royal prerogative of arms to the Governor-General and through him or her to the Canadian Heraldic Authority.¹⁷⁷ But, like New Zealand, the honours (and therefore the associated royal prerogative) did not apparently include a peerage.¹⁷⁸

Peerage is the dignity to which is – or rather was – attached the right of a summons by name to sit and vote in Parliament.¹⁷⁹ Questions of dignity or honour cannot be tried by an ordinary court of law.¹⁸⁰ While the legal definition of a peer has varied over the centuries, English law has been reasonably settled for the last 500 years.¹⁸¹ The essential nature of a British peerage, unlike a foreign title of nobility, is that it is a personal dignity. This is clearly shown in the wording of modern letters patent for the creation of an hereditary peerage.¹⁸²

¹⁷⁶Direct grants by the Sovereign appear clear enough, it is the delegated grants which have caused difficulties.

¹⁷⁷Letters Patent authorising the granting of armorial bearings in Canada, 4 June 1988.

¹⁷⁸See, however, Cox, N. (1997) *The British Peerage: The Legal Standing of the Peerage and Baronetage in the Overseas Realms of the Crown with Particular Reference to New Zealand*, *New Zealand Universities Law Review*, 17, p. 379.

¹⁷⁹*Norfolk Earldom Case* [1907] AC 10, 17 per Lord Davey. With respect to ending of this right of hereditary peers, see the House of Lords Act 1999 (UK), which excluded hereditary peers from the House of Lords (s 1).

¹⁸⁰*Cowley (Earl) v Cowley (Countess)* [1901] AC 450. A peerage is, however, a form of real property, and the descent of a peerage is therefore in accordance with the ordinary rules of land law, modified, however, as outlined elsewhere in this article.

¹⁸¹That is, the dignity to which is attached the right of a summons by name to sit and vote in Parliament: *Norfolk Earldom Case* [1907] AC 10, 17 per Lord Davey.

¹⁸²The royal warrant to pass the Great Seal receives the royal sign manual superscribed, countersigned by the Secretary of State for the Home

Conrad Black, a prominent publisher and businessman in both Canada and United Kingdom, submitted his name for one of the peerages to be created for the new-model House of Lords following the House of Lords Act 1999. His ennoblement was approved by the relevant British authorities, and Tony Blair, the British Prime Minister, advised The Queen to confer the title upon Mr Black. However, Jean Chrétien, Prime Minister of Canada, intervened, and advised The Queen to not confer the peerage on Mr Black. The reasons given for this advice included the claimed long-standing Canadian opposition to titular honours, said to have been encapsulated in the Nickle declaration of 1919.¹⁸³ The Canadian appeared to rely on a generis honours prerogative, although there was no Canadian peerage – though there had been Canadian peers.¹⁸⁴

As a consequence Black sued the Prime Minister and the Attorney-General of Canada, for abuse of power, misfeasance in public office and negligence.¹⁸⁵ Although the Ontario Court of Appeal rejected Black's case,¹⁸⁶ this litigation has raised important constitutional questions. In particular, what happens when conflict occurs between Crown's advisors, and to what extent can the British and Canadian Crowns be disentangled, given the commonality of person and the historic legal continuity of the two constitutions?

Some of the grounds for Black's appeal were concerned with the way in which the Prime Minister of Canada intervened in the exercise of the royal prerogative. Mr Black's submitted that in Canada, only the Governor-General can exercise the prerogative. The Court could find no support for this proposition in theory or in practice. The 1947 Letters Patent Constituting the Office of the Governor-General empowers the Governor-General "to exercise all powers and authorities lawfully belonging to Us in respect of Canada".¹⁸⁷ By convention, the Governor-General exercises her powers on the advice of the

Department. The sealed letters patent are enrolled on the patent rolls. In some cases the patents have purported to give precedence, although this cannot alter precedence in the House of Lords, which is regulated by the House of Lords Precedence Act 1539 (31 Hen VIII c 10) (Eng): *Mountjoy's Case* (1628) 3 Lords Journals 774, cited in 8 State Tr NS 608n.

¹⁸³Though, as a resolution of the House of Commons it was not binding on the Crown, nor was it actually followed by all successive Canadian governments; For one example of many, Richard Bennett, Prime Minister of Canada 1930-35, was created a viscount in 1941. There are numerous examples of lesser honours both before and since then.

¹⁸⁴The Baron de Longueuil, a French creation, was recognised by the Crown in 1879. The present head of the family is Michael Grant, Baron de Longueuil.

¹⁸⁵*Black v Chretien* (2001) 199 DLR (4th) 228 (Court of Appeal of Ontario).

¹⁸⁶*Ibid.*

¹⁸⁷Letters Patent constituting the Office of Governor-General of Canada, effective 1 October 1947 (Canada Gazette, Part I, vol 81, p 3104).

Prime Minister or Cabinet.¹⁸⁸ Although the Governor-General retains discretion to refuse to follow this advice, in Canada that discretion has been exercised only in the most exceptional circumstances.¹⁸⁹ So far an unexceptional review of the constitution.

The Court continued: “As members of the Privy Council, the Prime Minister and other Ministers of the Crown may also exercise the Crown prerogative”.¹⁹⁰ This conclusion was based upon the judgement of Wilson J in *Operation Dismantle*¹⁹¹ that the prerogative power may be exercised by Cabinet Ministers and therefore does not lie exclusively with the Governor-General.¹⁹² This is perhaps an unfortunate choice of words. It does not mean that a Minister can exercise a royal prerogative power, but rather the exercise of the prerogative is on the advice of these Ministers.

Similarly, in England the royal prerogative “[was] gradually relocated from the Monarch in person to the Monarch’s advisers or Ministers. Hence it made increasing sense to refer to those powers as belonging to the Crown ...”.¹⁹³ This gradual relocation of the royal prerogative is consistent with Professor Wade’s general view of the Crown prerogative as an “instrument of government”.¹⁹⁴ The conduct of foreign affairs (what also involve acts of State),¹⁹⁵ for example, “is an executive act of government in which neither the Queen nor Parliament has any part”.¹⁹⁶ This latter contention is incorrect. It

¹⁸⁸See Cox, N (2001) The control of advice to the Crown and the development of executive independence in New Zealand, *Bond Law Review*, 13(1), pp. 166-89.

¹⁸⁹Relying on Lordon, P. (1991) *Crown Law* (Toronto: Butterworths) 70; *Black v Chrétien* (2001) 199 DLR (4th) 228, para 31 per Laskin JA (Court of Appeal of Ontario).

¹⁹⁰*Black v Chretien* (2001) 199 DLR (4th) 228, para 32 per Laskin JA (Court of Appeal of Ontario).

¹⁹¹*Operation Dismantle Inc v The Queen* [1985] 1 SCR 441 (SCC).

¹⁹²*Ibid.*

¹⁹³Hadfield, B. (1999) Judicial Review and the Prerogative Power, in: M. Sunkin and S. Payne (Eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press) 199.

¹⁹⁴Commentary on Dicey, A. (1948) *Introduction to the Study of the Law of the Constitution* introduction & appendix by E.C.S. Wade (9th ed, London: Macmillan).

¹⁹⁵Which is a matter for the prerogative; *R v Burgess, ex parte Henry* (1936) 55 CLR 608, 644 per Latham CJ, 683-684 per Evatt and McTiernan JJ; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 193 per Gibbs CJ. The appointment of diplomatic representatives is also a prerogative; Byers, “Opinions on Governor-General’s Instructions”, 5 September 1975, cited in Winterton, G. (1983) *Parliament, the Executive and the Governor-General: a constitutional analysis* (Melbourne: Melbourne University Press) 242.

¹⁹⁶Mann, F.A. (1986) *Foreign Affairs in English Courts* (Oxford: Clarendon Press) 2. See also *Barton v. Commonwealth of Australia* (1974) ALJR 161, 172.

is true that Parliament has no inherent role in foreign affairs,¹⁹⁷ but the Queen and the Governor-General do have a role, both legally and practically.¹⁹⁸ The Crown must be seen as a corporation,¹⁹⁹ in which several parts share of the authority of the whole, with the Queen as the person at the centre of the constitutional construct.

Statutes have tended to use the terms “Her Majesty the Queen” and “the Crown” interchangeably and apparently arbitrarily.²⁰⁰ There appears to have been no intention to draw any theoretical or conceptual distinctions. This may simply be a reflection of a certain looseness of drafting, but it may have its foundation in a certain lack of certainty felt by legal draftsmen as much as by the general public.²⁰¹

“The Crown” itself is a comparatively modern concept. As Maitland said, the king was merely a man, though one who does many things.²⁰² For historical reasons the king or queen came to be recognised in law as not merely the chief source of the executive power, but also as the sole legal representative of the State or organised community.

According to Maitland, the crumbling of the feudal State threatened to break down the identification of the king and State, and as a consequence Coke recast the king as the legal representative of the State.²⁰³ It was Coke who first

¹⁹⁷Though it may have assumed such a role, as by requiring treaties to be laid before it. In New Zealand these go before the Foreign Affairs, Defence and Trade Committee. In Australia, the Joint Standing Committee on Treaties has been appointed by the Commonwealth Parliament to review and report on all treaty actions proposed by the Government before action is taken which binds Australia to the terms of the treaty; see <<http://www.aph.gov.au/house/committee/jsct/index.htm>>. This does not limit the prerogative, however.

¹⁹⁸See Cox, N (2001) The control of advice to the Crown and the development of executive independence in New Zealand, *Bond Law Review*, 13(1), pp. 166-89.

¹⁹⁹See *Attorney-General v Kohler* (1861) 9 HL Cas 654, 671; 11 ER 885, 892; Maitland, F. (1901) The Crown as a Corporation, *Law Quarterly Review*, 17, p. 131.

²⁰⁰For example, the word “Sovereign” appears in New Zealand statutes only in the Sovereign’s Birthday Observance Act 1952. In the Constitution Act 1986 s 2 “Crown” is defined as “Her Majesty the Queen in right of New Zealand; and includes all Ministers of the Crown and all departments”.

²⁰¹For this conceptual uncertainty, see Hayward, J. (1995) In search of a treaty partner, Victoria University of Wellington PhD thesis; Interview with Sir Douglas Graham, 24 November 1999.

²⁰²Maitland, F. (1901) The Crown as a Corporation, *Law Quarterly Review*, 17, p. 131.

²⁰³He recast the king as a corporation sole, permanent and metaphysical. The king’s corporate identity also drew support from the doctrine of succession that the king never dies; Stubbs, W. (1906) *The Constitutional History of England* (Oxford: Clarendon Press) vol ii p 107.

attributed legal personality to the Crown.²⁰⁴ He recast the king as a corporation sole, permanent and metaphysical.²⁰⁵ The king's corporate identity²⁰⁶ drew support from the doctrine of succession that the king never dies.²⁰⁷ It was also supported by the common law doctrine of seisin, where the heir was possessed at all times of a right to an estate even before succession.²⁰⁸

Blackstone explained that the king:

is made a corporation to prevent in general the possibility of an interregnum or vacancy of the throne, and to preserve the possessions of the Crown entire.²⁰⁹

Thus the role of the Crown was eminently practical. In the tradition of the common law constitutional theory was subsequently developed which rationalised and explained the existing practice.

Whether we have a Crown aggregate or corporate, the government is that of the Sovereign,²¹⁰ and the Crown has the place in administration held by the State in other legal traditions. The Crown, whether or not there is a resident Sovereign, acts as the legal umbrella under which the various activities of government are

²⁰⁴Maitland, F. (1901) *The Crown as a Corporation*, *Law Quarterly Review*, 17, p. 131.

²⁰⁵It was as late as 1861 that the House of Lords accepted that the Crown was a corporation sole, having "perpetual continuance"; *Attorney-General v Kohler* (1861) 9 HL Cas 654, 671.

²⁰⁶A corporation is a number of persons united and consolidated together so as to be considered as one person in law, possessing the character of perpetuity, its existence being constantly maintained by the succession of new individuals in the place of those who die, or are removed. Corporations are either aggregate or sole. A corporation aggregate consists of many persons, several of whom are contemporaneously members of it. Corporations sole are such as consist, at any given time, of one person only; Hardy Ivamy, E.R. (1988) *Mozley and Whiteley's Law Dictionary* (10th ed, London: Butterworths) 109.

²⁰⁷It was at the time of Edward IV that the theory was accepted that the king never dies, that the demise of the Crown at once transfers it from the last wearer to the heir, and that no vacancy, no interregnum, occurs at all; Stubbs, W. (1906) *The Constitutional History of England* (4th ed, Oxford: Clarendon Press) vol ii 107.

²⁰⁸Nenner, H. (1995) *The Right to be King – The Succession to the Crown of England, 1603-1714* (London: Macmillan) 32.

²⁰⁹Blackstone, Sir William (1978) *Commentaries on the Laws of England* ed E Christian (New York: Garland Publishing) book 1, 470. That Blackstone was at least partly incorrect can be seen in the development of a concept of succession to the Crown without interregnum of the heir apparent. Since this concept had fully developed by the time of Edward IV, this cannot have been the principal reason for the development of the concept of the Crown as a corporation sole.

²¹⁰A concept which is alive today, in part as a substitute for a more advanced concept of the constitution; Interview with Sir Douglas Graham, 24 November 1999.

conducted. Indeed, the very absence of the Sovereign has encouraged this modern tendency for the Crown to be regarded as a concept of government quite distinct from the person of the Sovereign.²¹¹

It must be asked whether the right to advise the Crown is the same as the actual exercise of that royal prerogative. The Court of Appeal for Ontario has perhaps gone too far in saying, as Laskin JA did, that “I conclude that the Prime Minister and the Government of Canada can exercise the Crown prerogative as well.”²¹² The royal prerogative remains with the Queen and the Governor-General, though the right to advise the Crown is diffused.

Laskin JA continued: “In my view, however, whether one characterizes the Prime Minister’s actions as communicating Canada’s policy on honours to the Queen, giving her advice on Mr Black’s peerage, or opposing Mr Black’s appointment, he was exercising the prerogative power of the Crown relating to honours.”²¹³ Actually the Prime Minister was advising the Crown in the exercise of the royal prerogative, a nice distinction perhaps, yet an important one, for it is the Crown, and not the Prime Minister, to whom the honours prerogative belongs.

However, whether exercised by, or vest in, the Prime Minister, it was equally non-justiciable. Holding that the exercise of the honours prerogative is always beyond the review of courts is not a departure from the subject matter test espoused by the House of Lords in the *Civil Service Unions Case*.²¹⁴ Rather, as I wrote elsewhere, it is faithful to that test.²¹⁵

The basis for the continued non-justiciability of the honours prerogative appears to be founded in the absence of any legitimate expectation. As the court in the *Black* case observed, “The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of a passport or a pardon has real adverse consequences for the person affected. Here, no important individual interests are at stake. Mr Black’s rights were not affected, however broadly “rights” are construed. No Canadian citizen has a right to an honour.”²¹⁶

²¹¹Generally, see Cox, N. (2002) The Theory of Sovereignty and the Importance of the Crown in the Realms of The Queen, Oxford University Commonwealth Law Journal, 2(2), pp. 237-55.

²¹²*Black v Chrétien* (2001) 199 DLR (4th) 228, para 33 per Laskin JA (Court of Appeal of Ontario).

²¹³*Ibid.*

²¹⁴*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

²¹⁵Cox, N. (1998-99) The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity, Australian Journal of Law and Society, 14, pp. 15-42, 19, cited with approval in *Black v Chretien* (2001) 199 DLR (4th) 228, paras 59 per Laskin JA (Court of Appeal of Ontario).

²¹⁶*Black v Chrétien* (2001) 199 DLR (4th) 228, para 60 per Laskin JA (Court of Appeal of Ontario).

However, it would perhaps be more accurate to note that the surviving royal prerogatives which have been held to be non-justiciable have, in the approach adopted by the House of Lords in the *Civil Service Unions Case*,²¹⁷ a nature which is not amenable to judicial scrutiny. Honours clearly are of that nature. Indeed, they would probably be non-justiciable even if they were not of the royal prerogative proper, on the subject test.

The foregoing discussion may be taken to show that the honours prerogative, and by extension the other “political” prerogatives of the Crown, remains non-justiciable. But the royal prerogative is exercised by the Queen or Governor-General (in some instances Lieutenant-Governor) on the advice of responsible Ministers, and are not the exclusive preserve of Ministers – though they may sometimes appear to be.²¹⁸

Unfortunately, the court did not clarify the nature and extend of the honours prerogative – it contented itself in noting that it existed. It arguably sowed the seeds of further confusion, by speaking of the Prime Minister having the royal prerogative. More seriously, it did not address the scope of the prerogative with respect to honours. How was it that the Canadian prerogative of honours could have empowered the giving of advice on the award of a British peerage, something which the law of Canada apparently did not recognise? This conceptual difficulty and problems with the law of arms have been caused by the nature of the evolution of the Commonwealth.

Evolution of imperial prerogative into national prerogatives

The major question which is raised by *Black’s Case*,²¹⁹ and which was not addressed by the Court, was what happens when conflict occurs between the Crown’s advisers. British honours are principally the concern of British Ministers, and likewise Canadian Ministers can advise the Queen with respect to Canadian honours. Whether Canadian Ministers can advise the Queen with respect to Canadian citizens receiving British honours raises important constitutional questions.

Monarchy concentrates legal authority and power in one person, even where symbolic concentration alone remains.²²⁰ This was the logic underpinning the

²¹⁷*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

²¹⁸As when a Prime Minister call as election, he or she is advising the Governor-General to call an election, not doing so himself.

²¹⁹*Black v Chrétien* (2001) 199 DLR (4th) 228 (Court of Appeal of Ontario).

²²⁰“The attraction of monarchy for the Fathers of Confederation lay in the powerful counterweight it posed to the potential for federalism to fracture”; Smith, D. (1995) *The First Principle of Canadian Government* (Toronto: University of Toronto Press) 8 relying on W.L. Morton. Provincial powers grew as the provincial ministries were accepted as responsible advisers of the Crown in their own right.

belief in the eighteenth and nineteenth centuries in the unity of the Crown. The imperial Crown was one and indivisible. “The colonies formed one realm with the United Kingdom”, the whole being under the sovereignty of the Crown.²²¹ This sovereignty was exercised on the advice of imperial Ministers.

In his seminal work on the royal prerogative, Herbert Evatt showed how this unity of the Crown was the very means through which separateness of the Dominions was achieved. The indivisibility of the Crown meant the existence of royal prerogatives throughout the empire. The identity of those who could give formal advice to the Crown changed from imperial to Dominion Ministers – and little or no formal legal changes were needed for states to change from being colonies to being fully independent.²²²

By 1919 most of the powers of the Crown abroad were exercised on the advice of local ministries in all the Dominions and self-governing colonies.²²³ That this was not yet a complete transference can be seen by the argument of the New Zealand Prime Minister, the Rt Hon William Massey, at the Imperial Conference of 1921. He maintained the principle that “when the King, the Head of State, declares war the whole of his subjects are at war”.²²⁴ Dominions might sign commercial treaties, but not those concluding a war. Some external affairs were still a matter for the imperial authorities.

The right to advise the Crown in the exercise of the war prerogative was kept in the hands of British Ministers, and the right to advise the Crown excluded imperial concerns such as nationality, shipping, and defence.²²⁵ This was to change however, as the Dominions had been given membership of the League of Nations after the First World War, and came to be regarded in international law as independent countries.

The problem of the remaining limitations on Dominion independence was examined at the Imperial Conference in 1926. The Report of the Inter-Imperial Relations Committee to the Conference included the famous declaration that the Dominions:

²²¹*R v Secretary of State for Foreign and Commonwealth Affairs* [1982] QB 892, 911 per Lord Denning MR.

²²²Evatt, H. (1987) *The Royal Prerogative* commentary by Leslie Zines (Sydney: The Law Book Co) c1-3.

²²³See the Borden Memorandum 1919, in Keith, A.B. (1932) *Speeches and Documents on the British Dominions 1918-1931* (London: Oxford University Press) 13. The position was firmly established by the late nineteenth century that a Canadian Lieutenant-Governor was as much a representative of Her Majesty as the Governor-General was; *Maritime Bank of Canada v Receiver-General of British Columbia* [1892] AC 437, 443.

²²⁴Rt Hon William Massey, 20 June 1921, in Keith, A.B. (1932) *Speeches and Documents on the British Dominions* (London: Oxford University Press) 59-62.

²²⁵See the Report of the Inter-Imperial Relations Committee (1926) *Imperial Conference* (London: HMSO) Parliamentary Papers, vol xi 1926 cmd 2768.

are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.²²⁶

There had been uncertainty as to what precisely had been agreed in 1926, though initially most commentators simply assumed that British Ministers would continue to provide the king's only source of constitutional advice. The former Australian Prime Minister, the Rt Hon William Hughes, distinguished between sources of formal and informal advice, with the British government providing the former, the Dominion governments the latter.²²⁷ Arthur Berridale Keith thought however that

the suggestion that the King can act directly on the advice of Dominion Ministers is a constitutional monstrosity, which would be fatal to the security of the position of the Crown.²²⁸

However, the Irish government thought there was now only a personal union of the Crown.²²⁹ If this were so, then imperial Ministers could have no role in advising the king with respect to any matter internal to a Dominion. The Irish may not have reflected the majority view, but theirs made much more logical sense than that, for example, of Hughes.

Once the principle was established that the Dominions were equal with the United Kingdom, it was inevitable that the Dominions should acquire the exclusive right to advise the Crown. This was to be gained in the course of the 1920s and 1930s, and finally settled in the 1940s.²³⁰ As a logical consequence of the doctrine of equality, this was the only possible outcome.

It was the Second World War which finally settled the question of whether there was a complete transfer to Dominion Ministers of the right to advise the Crown, and therefore complete executive or political independence.²³¹ It would follow that in all matters with respect to British honours and British subjects the Queen relies upon the advice of British ministers, and similarly upon the

²²⁶*Ibid.*

²²⁷Commonwealth Parliamentary Debates (House of Representatives, 22 March 1927) vol 115 p 863. cf Jenks, E. (1927) Imperial Conference and the Constitution, Cambridge Law Journal 3, pp. 13, 21.

²²⁸Keith, A.B. (1928) *Responsible Government in the Dominions* (2nd ed, Oxford: Clarendon Press) vol 1 p xviii.

²²⁹Some support for this view can be found in remarks in *Roach v Canada* [1992] 2 FC 173, 177.

²³⁰See Cox, N (2001) The control of advice to the Crown and the development of executive independence in New Zealand, *Bond Law Review*, 13(1), pp. 166-89.

²³¹Cox, N. (2001) *The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity*, University of Auckland PhD thesis ch 5.

advice of Canadian Ministers for Canadian subjects and honours. Keith's feared conundrum has come to pass. The Queen should act solely upon the advice of British Ministers when awarding a British peerage.²³² If her Canadian Prime Minister offers her advice, it is as Queen of Canada. As Queen of Canada she is powerless to prevent the conferring of a British title, though she could consult with herself, wearing her other crown, as it were.²³³

Equally, to return for the moment to heraldry, the Queen of New Zealand is entitled to delegate to her Officers of Arms her prerogative of honours in respect of arms. But this must be a valid delegation. If the Officers are English, or Scottish Officers, and no such delegation has occurred, their actions may be improper – though probably not invalid, since the Queen can act through whatever agents she chooses.²³⁴

In reality, the solution must be for the respective Ministers, British, and Canadian (or New Zealand), to reconcile any difficulties and so prevent the Queen from being placed in an otherwise intolerable position. Doubtless, the British Prime Minister did not insist upon Conrad Black's peerage being conferred. Had he done so the Queen would have had little choice but to accede to his wishes. It is probably not coincidental that the 2001 Queen's Birthday honours list in the United Kingdom included two knighthoods for Canadians,²³⁵ both long resident in the United Kingdom. Perhaps it was a message to Jean Chrétien that he ought not interfere with the British honours system.

This is also a problem in the Law of Arms. The question is who is to exercise the royal prerogative, English, Scottish, or New Zealand officers, in the absence of express delegation. This case highlights the fact that although the realms of the Crown are now fully independent, the evolution of independence, having proceeded calmly and cautiously, did not present the necessity of reviewing the royal prerogative. Elements have been delegated, elements codified in statute, and elements forgotten or abandoned. There is no delegation of the law of arms to the Governor-General, except in Canada, which leads to the neglect of this field in Australia and New Zealand. Even where countries eschew the exercise of the royal prerogative in respect of titular honours, it is possible for a Prime Minister to advise the Queen in respect of them. What is clear is that the royal prerogative of the Queen is wider than had been imagined. It suggests she might equally have acted on advice to confer a peerage.

²³²As indeed, she did when creating the distinguished New Zealand judge Sir Robin Cooke a peer in 1996; Spiller, P. (1996) Lord Cooke of Thorndon, *New Zealand Universities Law Review*, 17, pp. 1-12.

²³³This did not occur because there was no clear distinction drawn by those involved.

²³⁴See Cox, N. (1998) *The Law of Arms in New Zealand*, *New Zealand Universities Law Review*, 18(2), pp. 225-56, Cox, N. (1998-99) *The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity*, *Australian Journal of Law and Society*, 14, pp. 15-42.

²³⁵*The Times* (London), 19 June 2001.

The history of the evolution of the Crown is of Ministers acquiring the right to advise the Crown over an increasingly wide range of subjects. But it also would appear to confirm that the royal prerogative of 1840 must indeed have been wide, though then exercisable by the Crown on the advice of Ministers in the United Kingdom rather than New Zealand (or Canada).

Conclusion

With respect to the laws other than statutory (and delegated legislation), the Imperial Laws Application Act 1988, far from leaving a clean slate, repeated wording which is essentially the same as in the English Laws Act 1908.²³⁶ If the Law of Arms applied in 1840, it remains in force today – though not necessarily unchanged, since the royal prerogative could be used to alter the Law of Arms, even if the Court of Chivalry never sat.²³⁷ Since there is no court empowered to administer the law, what changes there have been in New Zealand as in England are within the authority of the Crown, by virtue of the royal prerogative.²³⁸ Equally, the royal prerogative, in general as well as specifically with respect to honours, remains unaltered. While this is the position specifically for New Zealand, it is clear that analogous situations exist in other realms.

In its essential features the Law of Arms in the realms – excepting Canada, which since 1988 has had its own heraldic authority – is the same as the Law of Arms of England of 1840. But, just as the common law has evolved in New Zealand since then – so that no one would today claim that the common law administered by New Zealand courts is the common law of England – so the Law of Arms in force in this country is the Law of Arms of New Zealand, not that of England.²³⁹ In practice, and in most cases, “the Law of Arms is the same in each jurisdiction”,²⁴⁰ but it is the Law of Arms of New Zealand with which

²³⁶s 2.

²³⁷As was done during the abeyance of the Court of Chivalry; Squibb, G. (1959) *The High Court of Chivalry* (Oxford: Clarendon Press) 39-40.

²³⁸From 1521 to 1563 the Earl Marshal, and his deputies, and Commissioners appointed to exercise the jurisdiction of the office, appear to have purported to exercise the quasi-judicial jurisdiction over the College of Arms and the heralds, while the Court of Chivalry itself was inactive; Squibb, G. (1959) *The High Court of Chivalry* (Oxford: Clarendon Press) 39-40. After the Civil Wars of the next century this quasi-judicial jurisdiction was again revived; Royal declaration of 16 June 1673, confirmed by Order in Council 22 January 1674; College of Arms mss I 26 ff 55-56, cited in Squibb, G. (1959) *The High Court of Chivalry* (Oxford: Clarendon Press) 79-80. The Court itself, revived in 1622, had ceased to sit after 1641: Letters patent, 1 August 1622, College of Arms mss, SML 3 f 228, printed in Squibb, G. (1959) *The High Court of Chivalry* (Oxford: Clarendon Press) appendix III, 248.

²³⁹See, generally, Cox, N. (1998) *The Law of Arms in New Zealand*, *New Zealand Universities Law Review*, 18, p. 225.

²⁴⁰*Ibid*, 252.

we are here concerned. The system of law governing armorial bearings is that derived from the English parent law. The fact that its essential substance is the same as that of England does not mean it is the same law. The royal prerogative which allows the executive the privilege of conferring arms remains undoubted – it is simply the means by which this is done which is uncertain.

As the Crown has evolved, so the continued appropriateness of English Officers of Arms continuing to grant armorial bearings to New Zealanders may properly be questioned.²⁴¹ But their legal power to do so is undoubted, as the Crown has not delegated the task to anyone else.²⁴² The Crown may exercise the royal prerogative through whatever servants it chooses. Indeed, it has clearly chosen to continue to use these Officers, as the appointment in 1978 of a New Zealand Herald Extraordinary makes clear.²⁴³ However, there remained a significant lack of clarity, perhaps largely due to the low profile such questions warranted. This was not, however, destined to continue forever.

Conrad Black's wish to obtain a British peerage involved the Canadian Prime Minister seeking to advise the Queen with respect to an honour which did not belong to the Canadian honours system – it was part of the British system. This is clearly an unsatisfactory situation. It would have been appropriate for the Canadian Prime Minister to advise the Queen to create a peer in a new peerage of Canada – provided no powers or privileges were thereby conferred which required statutory authority. But it was not appropriate to purport to advise the Queen of Canada on a matter which was the responsibility of the Queen of the United Kingdom; nor for the Prime Minister of Canada to advise the Queen of the United Kingdom. There has been an at least partial division of the Crown.

The royal prerogative has now also divided. This may be axiomatic, yet the continued vesting of the authority of sovereignty in the one person has led, as in the circumstances which led to *Black's Case*,²⁴⁴ to controversy and legal difficulties. It would be possible to avoid this if Ministers were better advised in respect of the constitutional position of the Queen, as separately Queen of Canada, New Zealand, and the United Kingdom – bearing in mind, however, that arguably in some respects at least the sovereignty remains one and indivisible.²⁴⁵

²⁴¹Macaulay, G. (2001) *The Law of Arms in New Zealand: A Response*, Otago Law Review, 10(1), p. 113.

²⁴²As, for example, has happened in Canada in 1988, with the establishment of the Canadian Heraldic Authority.

²⁴³Cox, N. (1998) *The Law of Arms in New Zealand*, New Zealand Universities Law Review, 18(2), pp. 225-56, 251; O'Shea, P. (1982) *The Office of the New Zealand Herald of Arms*, New Zealand Armorer, 20, p. 7. Cf. Innes of Edingight, Sir Malcolm (1979) *New Zealand Herald of Arms Extraordinary*, Commonwealth Heraldry Bulletin, 3, p. 2.

²⁴⁴*Black v Chretien* (2001) 199 DLR (4th) 228 (Court of Appeal of Ontario).

²⁴⁵See Cox, N. (1998-99) *The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity*, Australian Journal of Law and Society, 14, pp. 15-42.