2002

Ten Differences

Bowal, Peter

Legal Resource Centre of Alberta Ltd. (LRC)

Bowal, Peter, "Ten Differences", Law Now, Jun/Jul 2002, Vol. 26, Iss. 6.
http://hdl.handle.net/1880/48043
journal article

Ten differences (between Canadian and American law)

Bowal, Peter
LawNow 26.6 (June-July 2002): p9-11.

I recall in the 1980s in England that I felt so much more American than I did English. Four years ago, working in the United States, I felt so Canadian.

Some days I playfully suggest that selecting me, a Canadian, to work temporarily at the United States Supreme Court is the US judiciary's biggest contribution this year to international judicial relations. The Canadian and American legal systems must be the most similar of any two countries in the world as a result of language, history, economy, the common law, and culture. We enjoy the largest two-way trade relationship anywhere on the globe by far.

There exist, however, deeply embedded attitudes, assumptions, historical nuances, structures and terminologies that are unique to each of our countries.

Judges from both Canada and the United States are today recruited to consult in the development of legal systems in emerging democracies elsewhere. However, since the law and legal systems do not travel well, one must be aware of the limitations of exporting legal institutions (such as the jury), and even some constitutional principles. Peculiarities in legal systems are not replicable elsewhere. They are inimitable characteristics, as variable and profoundly attached to territory as each national anthem.

The following is a random collection of ten significant differences between the Canadian and American law and their respective legal systems. They are assigned to categories called Democracy, Courts, and The Law.

Democracy

1. Elections

Canadians who remember the 2000 presidential election in the US and the ensuing Bush v. Gore case learned that voting procedures and equipment in each county varies. In the US, the conduct of elections devolves to each county, which results in significant variations in election procedures even within the same state. The number of seats in the House of Representatives is capped at 435 so federal enumeration every ten years re-apportions them on the basis of population. Re-districting takes place every few years at the state level, which leads to serious partisan political wrangling and involvement of the courts.

Voters self-register and can declare preference for a political party. The US Senate is a triple-E senate (equal, effective and elected). Elections take place every two years for all of the House of Representatives and one third of the Senate. The President and Vice-President are the only ones directly elected (every four years) by the whole country. The US follows prescribed election dates.

Although the vote and democracy are very important to Americans, many states' governorships and the presidency have term limits. Political campaigns are much more expensive in the US. State political office is usually not a career track -- some state legislators may sit for only a few weeks each year to pass a budget and a few other pieces of legislation. Their salaries can be very low ($15,000 per year is not uncommon). This low pay is to emphasize the focus on public service and wide lay participation. For example, farmers can serve as legislators in the few weeks during the off-season of the farming schedule.

Courts

2. Integration of Canadian courts

Provincial courts in Canada deal with less serious criminal and civil matters. All courts above are superior courts in the same system, all the way through the Supreme Court of Canada, the jurisdiction of which is binding on each court in the country. About half of all judges, and all those sitting on superior courts, are appointed and paid by the federal government. We have a small federal court that operates as one travelling court for limited federal matters.

The US court structure is more complicated, reflecting the greater comparative historical and constitutional status enjoyed by the states. In short, the US has two parallel sovereign judicial systems: federal and state. Fifty independent state court systems have variable rules for the appointment and/or election of judges, tenure, etc. These state court systems are sovereign over the interpretation and application of their state's law.

The parallel federal court system in the US is sovereign over federal law, decides disputes between states and in state cases where one party is out of state. Trial courts are called "District Courts". The appeal level in the federal system consists of 12 regional "Circuit Courts of Appeals" who each generate their own regional jurisprudence. The apex of this system is the Supreme Court of the United States. As the final authority over the US Constitution, it also decides cases where state law is alleged to violate the Constitution.

Each court system will express deference to the other. In Stewart v. Smith, released in December, 2001 the Supreme Court of the United States wrote: "We respectfully request that the Arizona Supreme Court accept our certification petition. That court's answer to this question will help determine the proper state-law predicate for our determination of the federal constitutional questions raised in this case."

Accordingly, the Supreme Courts of Canada and the US have different roles. The Supreme Court of Canada has final authority over all public and private law throughout Canada. This includes all municipal, provincial, and federal law, all common law, legislation, and constitutional

interpretation. The Supreme Court of the United States has a more limited mandate: it deals only in federal legislation and the US Constitution. It plays no role over private law and relationships such as debt collection, family law, land, contracts, and negligence.

The federal public defender in the US, akin to legal aid in Canada for accused persons, is accessible to all, regardless of income level. American lawyers do not "article" to senior lawyers before admission to the bar, but become lawyers right after graduation from law school and passing the bar exam. Although there is no articling, the US has a large, formal law clerk program. Most federal judges hire several law clerks each year and some clerkships are permanent.

3. More judicial independence in the US

Judges who are self-governing, who cannot be fired or demoted for decisions unfavourable to government enjoy independence from government. Although judges are selected and paid by government, such independence is not only a constitutional standard; it is a prerequisite to justice. My sense is that at least the US federal judiciary manifests more judicial independence. Federal judges in the US enjoy lifetime tenure and they operate their courts to a greater extent than in Canada. They are more independent from government justice departments. American judges admit and sanction lawyers who bring cases before them, and deal with the unauthorized practice of law, not leaving this to state authority.

Public defenders and court staff are appointed and managed by the judges of that court, not by government departments as in Canada. Lower ranking magistrates and bankruptcy judges are appointed by appellate judges. The Chief Judge of the court is responsible for all administrative aspects of the court. The Chief Justice of the Supreme Court of the United States is the Chief Executive Officer for the whole federal judicial branch. A semiannual convention of the Circuit chiefs and an equal number of representative District Court judges in the "Judicial Conference" formulate judicial policy and the procedural rules of court.

Recently the Supreme Court of Canada has rendered several decisions that expand judicial independence for Canadian judges. One of these is the constitutional requirement to establish compensation commissions to periodically review and adjust judicial salaries. This is a big step ahead of the US where judicial salaries are increased only with the unfettered consent of Congress and of late this has regrettably led to accusations of political indifference or even payback.

4. US judiciary is more conservative

Perhaps reflective of a more conservative society and law, American judges overall are discernibly more conservative than in Canada. The ideological splits on some appellate courts are unknown in Canadian courts which have gone much further to extend rights and curtail state powers.

A recent example is the application of the death penalty. In Canada, the death penalty is not the law and that is unlikely to soon change. Even if we had the death penalty, we would likely never

charge, convict, or execute a mentally disabled person. We would never even refer in public discourse to the accused as "mentally retarded". All this describes the Virginia v. Atkins case that was argued before the US Supreme Court in February 2002. Another case before the US Supreme Court this term is whether an employer can paternalistically refuse to hire employees for work that will seriously injure or kill them. This type of question would be unthinkable in Canada, much less in the highest court in the country. In the 2002 term, the US Supreme Court will examine the constitutionality of the California three strikes law, another law that would not be envisaged in Canada. There is a broader ideological spectrum of debate and less so-called political correctness in American judicial speech.

The Law

5. Canadian open system:

Apart from the content of the law itself, Canada is much more open to looking at international law and the domestic law of other common law countries to answer its current legal questions. The law from these foreign jurisdictions is not binding on Canadian judges, but it is influential. American courts generally do not cite international law, or the domestic law of other countries. The US judicial system is self-contained and closed although several other countries, primary among which is Canada, have borrowed from the US Constitution and judicial decisions.

6. The jury

A centrepiece of American law is the jury. There is a constitutional right to a jury trial in the more serious criminal and civil cases. Most juries in Canada are found in criminal cases, but there are virtually no civil jury trials. The Americans have the petit and grand juries, which operate similarly to our preliminary inquiry by a Provincial Court judge in criminal cases. Most Americans have served on a jury at least once. Canadian law prohibits jurors from talking about their deliberations. On American television, by contrast, it is rare for jurors in a case not to describe the whole experience.

7. One criminal law in Canada

Being a criminal lawyer in Canada is easy because there is only one criminal law and procedure. It is a federal law and applies across the country. There may be some variations in sentencing across the regions. In the US, there are 50 individual state criminal laws and a federal criminal law (which also carries the death penalty). A recent example is the Oklahoma City bombing by Timothy McVeigh and Terry Nichols. Because the attack was against a federal building and agents, they were convicted by the federal criminal law. However Nichols was not sentenced to death. The state of Oklahoma has since laid murder charges under its state law in state court and is seeking the death penalty for Nichols. This illustrates both the applicable criminal law at both federal and state levels and the dual sovereignty of each court system in the US.

8. Employment "at will" and discrimination

Canadian employment law of dismissal (other than for cause) is based on reasonable notice. Although efforts have been made to change this, American workers are generally not covered by a contract and have no right to notice (or pay in lieu of notice) of a dismissal for which there is no cause. In other words, the employees work "at the employer's will". The employer can dismiss the employee for good reasons, no reasons, or bad reasons. There are some exceptions to this, but it still represents a marked difference between the employment law of the US and Canada.

Since employment security and remedies have been traditionally more tenuous in the US, great focus has been placed on the development of the law of discrimination in employment. This began with the enactment of the 1964 Civil Rights Act. Canadian law, especially since the 1982 Charter of Rights and Freedoms, has tended to follow and even extend the American principles of employment discrimination. This has occurred although long-existing Canadian law of employment did not require every legitimate claim to be framed as a discrimination claim in order to grant the employee an effective remedy (as was the case in the US).

9. Class actions and punitive damages

Americans were the first to devise class actions and to impose punitive damage awards in civil cases. These two constructs are related. Most people have heard about the litigation (and corresponding insurance) crisis and the call for tort reform in the US. The three largest Canadian provinces legislatively authorize class action lawsuits and the courts, most notably the Supreme Court of Canada in Whiten v. Pilot Insurance, are expanding the availability of large punitive damages awards. The impact of these trends has yet to be realized, but it is interesting to note that now the US appears to be looking for ways to reduce class action lawsuits.

10. Capital punishment:

Reference has already been made in this article to the death penalty. It is such a pervasive force in the entire legal system, and ultimately throughout society, that it must be included in any top ten list of differences. The Supreme Court of Canada has soundly condemned the death penalty as barbaric in a recent case and has imposed constraints on the extradition of accused persons in Canadian custody to death penalty jurisdictions. The US is the only remaining western democracy to retain the death penalty. Aside from the death penalty itself, criminal sentences are harsher in the US than in Canada. There are fewer alternatives to incarceration and less early release. The US has the highest per capita prison population in the industrialized world.

Postscript

There are many differences between the Canadian and American legal systems. It has been difficult to keep the list to ten. I have not begun to touch on the numerous constitutional differences. A partial list of honourable mentions for legal system differences between our two countries would include the following:

* the Canadian parliamentary system is not the same as the American republican model of the separation of three distinct branches of government;

* the business of political lobbying in the US has no comparison in Canada;

* the bi-juridical and bilingual (civil and common law systems co-existing) reality in Canada;

* Cameras in courtrooms are so common in the US that the exclusive purpose of some TV networks and whole television series is the coverage and re-broadcast of actual trials;

* there is no US equivalent of the Canadian government "reference" of a question to the court;

* Attempts to harmonize law subjects where states and provinces have jurisdiction. The US drafts codes in some areas of the private law that states are then encouraged to adopt. These include restatements of the law such as the Uniform Commercial Code. In Canada, there is de facto harmonization of laws across provincial borders through Law Reform Commissions and legislatures that read the reports and legislation of other provinces before enacting their own;

* Terminology (Canadian term is first): justice vs. judge; My Lord vs. Your Honor; judgment vs. opinion; leave to appeal vs. grant of certiorari; intervenor vs. amicus curiae; headnote vs. syllabus; examination for discovery vs. interrogatory, adjournment vs. continuance; lawyer vs. attorney, etc.

* No provincial constitutions like the US state constitutions.
