

**Civil Litigation****Gavel game: Small but real differences between Canadian, U.S. legal systems**By **Ronald Davis and Teodora Prpa**

Ronald Davis

(March 23, 2021, 9:17 AM EDT) -- We call it the "Gavel Game." Try this at home, or wherever else COVID-19 allows you to roam with others. Ask any Canadian whether they believe our judges use gavels in their courtrooms. Litigators know that the answer is no, but almost everyone else will get it wrong, including non-litigator lawyers (as we learned when we recently gavel gamed a veteran Toronto securities lawyer).

What's going on here? It's no secret that — *Schitt's Creek* and *Kim's Convenience* aside — American media are an influential presence in the Canadian cultural landscape. One consequence: while most Canadians never see the inside of a home-country courtroom, they do see plenty of the stateside ones, populated by the likes of Perry Mason, Annalise Keating and Judge Judy.

Which explains the Gavel Game, and why many Canadians believe their judges use gavels, when they don't. Remember too, that Americans don't generally learn about Canada's judicial system. So, it's a fair bet that many U.S. friends would also strike out in the game.



Teodora Prpa

Funny that this should be the case. Canadian (excluding Quebec's *droit civil*) and American legal institutions have a shared ancestry: British common law. But as the neighbours' systems have evolved over time, even though they retain strong family resemblances, they have each developed their own distinct personalities. Their own practices. Their own vocabularies. As we like to say, with that touch of flippancy that betokens simple truths: the Canadian and American systems are *exactly* the same, but *totally* different.

This has led us to devise the following brief primer on some notable differences in the legal systems north and south of the 49th parallel. We've omitted many — many — details. We simply mean to impart a basic understanding of the Canadian system to those familiar with the American one. Vive la différence.

**Political system**

- Whereas the U.S. is a federal republic composed of states, Canada is a parliamentary confederation of provinces and territories. One federal *Criminal Code* applies universally. Bankruptcy, immigration and some other matters are governed by one federal law. Other areas are provincial, especially civil law.

**Structure of the court system**

- Provincial courts (e.g., the Ontario Court of Justice) deal with less serious criminal and civil matters.

- Superior courts (the Ontario Superior Court of Justice) deal with most remaining matters.
- Each province has a Court of Appeal (not, as in the U.S., Appeals) whose decisions are binding on the provincial and superior courts.
- There is no equivalent to the American Federal Court system. But Canada does have a Federal Court and Federal Court of Appeal. Their jurisdiction is limited and specialized. There is also a Tax Court. These courts are the domains of relatively few lawyers.
- At the top of all courts is the Supreme Court of Canada. Its decisions are binding on all courts. Subject only to Parliament and the Constitution, it has final authority over all public and private law throughout Canada. It is similar in that way to the Supreme Court of the United States (SCOTUS).

## Judges

- Provincial court judges are appointed and paid by provincial governments. All other judges, from the superior courts to the Supreme Court of Canada, are appointed by the federal government, or in the Supreme Court's case, via the governor general on the advice of the prime minister. However, judges are by provincial governments (Federal Court, Federal Court of Appeal and Tax Court excepted).
- No judges are elected in Canada, as they are in some American states.
- Canada's Supreme Court judges are not subject to legislative branch confirmation, unlike American ones who are subject to confirmation by the U.S. Senate.

## Death penalty

- There isn't one in Canada. There hasn't been one since the 1960s.

## Legal costs

- This is a big one. In almost all cases in Canada, if you lose, you ooze. The losing side in a case or on a motion normally pays part — a third to two-thirds, usually — of the successful side's costs, i.e. legal fees.

## Pretrial examinations

- The right to examine the other side before trial is limited in Canada. Each side must produce all relevant documents (paper and electronic) to the other, subject only to lawyer-client privilege (U.S.) / solicitor-client privilege (Canada). The process is more limited up north than in stateside.
- Canadians call it "examination for discovery." Americans call it "deposition." Deposition and depose have a somewhat different meaning in the Canadian system.

## International outlook

- Canadian courts are more open than American ones to examining the law and decisions of other common law countries to help formulate answers to legal questions, especially in human rights cases.

## Juries

- They are much less frequently used in Canada than in the U.S. Few civil trials have juries. In some cases, litigants may not even ask for a jury. Some criminal trials have juries. Many don't.

## Damages awards

- Civil damages awards tend to be significantly lower in Canada. General damages for “pain and suffering” cannot be higher than about \$350,000. Even then, that amount is reserved for the most severe cases.

## Bilingual courts

- Courts in Canada are officially bilingual. You are entitled to a trial in English or French.

## Media

- Cameras are generally not allowed in Canadian courtrooms, although there is a live video feed of Supreme Court of Canada hearings.
- After jury trials, jurors are forbidden to talk to the press (or anyone) about the case.

## Terminology

- There are many fine-grained differences here. We’ve flagged a few already. Here are some others, beginning with — in the spirit of the Canada’s niceness stereotype — this one: in the courtroom, Canadian lawyers call opposing counsel “My friend.” More terms:

## U.S. / Canada

- justice / judge
- attorney / lawyer or solicitor (almost never barrister, but see next line ...)
- attorney-at-law / barrister and solicitor
- opinion / judgment
- stipulation / consent or agreement
- continuance / adjournment
- grant of certiorari / leave to appeal
- Amicus curiae / intervener (amicus curiae means something different in Canada: a lawyer a judge appoints to help the court)
- *Bill of Rights / Canadian Charter of Rights and Freedoms* (there is a *Canadian Bill of Rights*, but it’s not constitutional and is of lesser legal relevance)
- DUI / impaired driving

## Wait, there’s more ...

Other Canada-specific differences include:

- Most judges, lawyers and some court personnel wear formal black robes (judges’ robes may have a sash) and white tabs and collars. But no wigs, ever.
- It is the practice to bow to judges while entering and leaving the courtroom.
- There are no “sidebars” in the courtroom.
- You cannot strike something from the record at a Canadian trial.
- When examining a witness, lawyers must remain at the lectern or counsel table. They cannot approach the witness in the stand.
- And, you guessed it, there is no gavel in the courtroom.

*Ron Davis is a litigation partner at Fogler, Rubinoff LLP where he specializes in litigation strategies,*

*issue analysis and written advocacy. Ron holds a Ph.D. in French linguistics and is also a JUNO Award nominated jazz pianist and composer. Teodora Prpa is an associate with the litigation group at Fogler, Rubinoff. She is developing a broad practice in commercial and civil litigation, with a focus on contractual disputes, debtor and creditor matters and bankruptcy and insolvency issues. You can e-mail Teodora at tprpa@foglers.com.*

Photo credit / merznatalia ISTOCKPHOTO.COM

*Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437- 828-6772.*

---

© 2021, The Lawyer's Daily. All rights reserved.