AN AMERICAN VISITOR TO A CANADIAN COURT

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An American lawyer entering a Canadian courtroom would immediately feel at home. As a result of their common colonial past, both Americans and Canadians have inherited English common law and the English system of courts and procedure. Despite this common history and despite the superficial similarity, there are differences between the judicial systems of the two nations. These differences may be reflected in the symbols displayed within the courtroom, the organization of the courts and the legal professions, the procedure of the court and the origin and nature of the laws being enforced.

An American's first impression upon visiting a Canadian courtroom would be a sense of familiarity. A familiar bar divides the public area from the professional area of the courtroom. Familiar counsel tables stand within the bar. The judge sits on a raised dais or bench. The clerk sits at a lower level in front of the judge. The witness box is to one side of the judge. A jury box with twelve chairs is located along one wall.

After this first sensation of familiarity, the American visitor would notice distinct differences. Except in the lowest courts, counsel wears robes. The visitor might recognize these robes from having watched English barristers on English TV and movies. But there is a difference. Canadian lawyers have discarded the jacket. Most wear a white shirt, wing collar with bands or "tabs" around the neck, black waistcoat, striped pants and a black gown. This gown has wide sleeves and is open at the front. A narrow liripipe, a tube of material about two inches wide, extends over the left shoulder, running from a strange little pouch located between the shoulder blades. Legend has it that this was a medieval purse. According to this legend, when the barrister required a "refresher", an addition to his fees, he would cast the liripipe over his shoulder so the client could deposit the appropriate amount. The truth is much more prosaic. This appendage is the remnant of a hood specifically a mourning hood. "It is sad to relate that in more recent times the shape of the appendage has been distorted, no doubt because no one knew what it was supposed to be, and is no longer immediately recognizable as a hood."[1]

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[1] Baker: "History of the Gowns Worn at the English Bar" published in (1975) "Costume" the Journal of the Costume Society, page 15. The entire barristers' regalia is mourning dress. It is said that the bar of England went into mourning on the death of Charles II in 1685 and never came out. Previously the barristers' gown was much more colourful.

Some counsel might wear waistcoats with wide heavy-buttoned cuffs on the sleeves. The gown that is worn over this waistcoat is made of silk. It has a square collar or mantle on the shoulders and sleeves that dangle below the knees, the arm actually emerging from the sleeve about a quarter of the way down. These lawyers are Queen's Counsel, senior members of the Bar.

(While the Canadian legal profession is fused as in the United States, with all lawyers having audience before the courts, the old forms are maintained. A Canadian lawyer is both a Barrister and a Solicitor although he or she might voluntarily restrict his or her practice to one brand of the profession.)

Between the bar and the counsel tables the visitor would notice a box, the prisoner's dock. An accused person sits in the prisoner's dock. Only counsel sit at the counsel tables. In a civil case the clients sit safely behind the bar in the public area, where they can't bother their lawyers.

The observant visitor might notice that there is no gavel on the judge's bench. A Canadian judge who cannot control the court with a nod of the head should consider some other line of work! The visitor would probably notice that there are no flags flanking the judge. Instead, the American might see the royal arms or a picture of the Queen above the judge or on one of the other walls.

In the United States the authority of the judge comes from the people. Prosecutions are carried out in the name of the people. Americans use national and state flags to denote the origin of that authority. In Canada, the authority of the judge comes from the Crown. Prosecutions are brought in the name of the Crown. Canadians use royal portraits or the royal coat of arms to denote the origin of that authority.

The fact that the Canadian court is a royal court is brought home during the course of the trial.

Jurors are sworn:
You swear that you shall well and truly try and true deliverance make between our Sovereign Lady the Queen and the accused at the bar whom you shall have in charge and true verdict give according to the evidence. So help you God.

A witness is sworn:
You swear that the evidence to be given by you to the court between our Sovereign Lady the Queen and the Accused at the bar shall be the truth, the whole truth and nothing but the truth, so help you God.

This language and the portrait of the British monarch might suggest to the foreign visitor that Canada is subservient to Britain. In fact Canada is no more subservient to Britain than is the Unite States. Each has cut its legal ties to the mother country, one by revolution, the other by evolution.

When Canadians display the portrait of Queen Elizabeth, accept Patents of Appointment issued in her name and swear oaths of allegiance to her they do so in her capacity as Queen of Canada, not as Queen of the United Kingdom. The British could oust the monarchy and become a republic tomorrow but Canadians would continue to function in the name o their own Queen.

This adherence to the old forms discloses a basic difference between American and Canadian society. While the American Declaration of Independence extols "Life, Liberty and the pursuit of Happiness", the Canadian Constitution Act extols "Peace, Order and Good Government."

Both countries owe their origin to the American Revolution, but while American mythology celebrates that event as a triumph of the people over despotism, Canadian mythology mourns that event as the triumph of the mob over duly constituted authority. The English-speaking portions of eastern Canada owe their beginnings to the Loyalist refugees who were driven into the northern wilderness simply because they had not embraced the revolutionaries' desire to overthrow the legal government.[2]

This difference is reflected in some strange ways. On ceremonial occasions scarlet-coated policemen of the national police force are very much in evidence. What other liberal democracy has a policeman as a national icon?

Canada, like the United States, is a federation. There are both federal and provincial governments. But Canadians have discouraged the growth of the two sets of courts. Although Canadian have a court styled the Federal Court of Canada, it is a court of limited jurisdiction, the primary function of which is to supervise the application of law by federal administrative tribunals and to hear cases involving the federal government.

The provincial superior courts are the basic constitutional courts of the nation giving plenary common law jurisdiction. In a typical compromise, most courts are created by the provinces, are administered by the provinces and sit in courthouses built by the provinces. However, the superior court judges sitting in those provincial courthouses, presiding over those provincial superior courts are federally appointed and paid, and they administer both provincial and federal law.

The visitor might be surprised to learn that there are no elected judges in Canada.[3] They are all appointed by the executive branch.

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[2] The Treaty of Paris, which granted the Rebellious Colonies their independence, also contained provisions for restitution and compensation of the Loyalists by the Americans. Members of the United Empire Loyalists Association are still waiting for payment.

[3] "Letting the people choose the judges would be as unconstitutional as letting the Crown name the juries in all civil and criminal cases, but such laws would violate most grievously the whole spirit of our constitution." (1890) 10 Canadian Law Times, p.203. The Canadian penchant for appointing erstwhile politicians to the Bench is caught by former Prime Minister John Diefenbaker's comment "In the U.S. they elect their judges. In Canada, a prime requirement is that the nominee have been defeated."

The Queen on the advice of the provincial Executive Council (the cabinet) appoints the lowercourt judges, while the Queen on the advice of the federal Executive Council appoints the judges of the superior courts, the courts of appeal and the Supreme court of Canada. Of course, the Queen does not appoint judges personally. This function is exercised on her behalf by the Governor General at the federal level and the Lieutenant-Governors at the provincial level. Both of these offices are filled by appointments made by the Canadian Prime Minister. The Governor General or Lieutenant-Governor has no discretion in such mattes but must accept the "advice" of the cabinet. In practise puisne (pronounced "puny") judges are appointed by the provincial Attorney-General or the federal Minister of Justice. Chief Judges or Chief Justices are appointed by the provincial Premier or federal Prime Minister as the case may be. Superior court judges have tenure to age 75, lower court judges have tenure to at least 65 with various provisions for extension in different provinces.

No Canadian judge is exposed to the humiliation of public questioning prior to appointment.

The American visitor might be surprised to learn that criminal law is within federal jurisdiction. The Criminal code is enacted by the federal government but enforced by the provinces using the services of municipal police, provincial police and the national police force, the Royal Canadian Mounted Police. As already noted, criminal law is applied at the lower levels by judges appointed by the provincial government and at the higher levels by judges appointed by the federal government.

The foreign visitor might be shocked at how few Canadian cases proceed before a jury. Some provinces have eliminated juries in civil trials entirely. A Canadian accused is entitled to trial by jury only in those cases where the potential penalty is five years of imprisonment or more. Even then, except in a few cases such as Treason, Sedition (yes, we still have Sedition, but we abolished Writs of assistance recently), Piracy and Murder, the accused may elect to be tried by a judge sitting without a jury. The majority do so.

Anecdotal evidence suggests that a preponderance of jury notices served in civil actions are served by the defendants, specifically, those being defended by their insurers. There is a feeling amongst the defence Bar that juries are more likely to bring back a favourable verdict than are judges.

Until the past ten years or so, jury notices in actions based upon professional negligence were regularly struck out on the ground that the issues were too complex for trial by jury. Even though more such actions are now being allowed to proceed, the trial judge retains his or her discretion to discharge the jury and continue with the trial alone if the issues prove to be inappropriate for a jury. Of course, with fewer jury trials being conducted the standard of jury advocacy is lower. There appear to be greater restrictions upon counsel's use of demonstrative evidence in Canada.

The foreign visitor might also be shocked at the speed with which a Canadian jury is usually empanelled. Ina jury trial each side has a limited number of "peremptory" challenges-typically

four per accused. The "challenge for cause" is infrequent although its use is increasing. No fishing expeditions are allowed. There must be some basis for suggesting that the potential juror may not be indifferent between Her Majesty the Queen and the accused at the bar before the juror is questioned. Even then the judge must vet the questions in advance.

During the course of the trial the American visitor might notice that there are no "side bar motions" in the presence of the jury. Canadian counsel do not "approach the bench" for whispered discussions with the judge in the presence of the jury. Either the issue is discussed in the hearing of the jury or the jury is excluded from the courtroom while the issue is argued or a voir dire is conducted. Everything is transacted in the open although not necessarily in the presence of the jury. Nor are there motions "to strike from the record". If something happens it is a matter or record.

The Canadian motion to exclude evidence in criminal cases would be familiar to our visitor. These are relatively new to Canadians. Prior to 1982, with the exception of admissions and confessions, evidence was admissible regardless of the manner in which it was obtained. In 1982 Canada implemented the *Canadian Charter of Rights and Freedoms,* sec. 24(2) of which states:

> *(2) Where a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.*

In one of the small ironies of life, during the past decade when Americans were debating resiling from an absolute exclusionary rule, Canadians were moving, through judicial pronouncement, form a discretionary exclusionary rule towards an absolute exclusionary rule.

> *"It is noteworthy that it was proposed to ask the first juror whether he had expressed or did entertain opinions unfavourable to the prisoners. The questions was not allowed; … It is very rarely that in our court [such a question] is even suggested, though the proceeding is very common, indeed almost universal, in many states of the Union. In my own experience of over thirty years I have heard such a question only once and that by a very young barrister (who never did it again)." Riddell, J.: 35 Can Law times p.35.*

In fact our law does permit a restricted Challenge for Cause.

The rights guaranteed by our Charter are not absolute. My understanding is that if an American law restricts a person's right to free speech, for example, that law will generally be struck down. If a Canadian law is found to restrict a person's right to free speech the judge must then pass on to consider whether this is a reasonable restriction that can be demonstrably justified in a free and democratic society.

During the course of the judge's summing up the visitor might be startled to hear the judge summarizing the evidence for the jury and expressing his or her opinion on that evidence. Canadian judges are not just referees in a match between two adversaries. Canadian judges have an obligation to assist the jury by going through the evidence for them, relating the evidence to the law, suggesting conclusions that might be drawn from certain evidence and warning the jury of the inherent unreliability of certain types of evidence. In civil jury trials the judge might express an opinion on the range within which a reasonable assessment of damages would fall. The final decision is always that of the jury of course.

Law judicial procedures are constantly changing to meet local conditions. Like Darwin's Finches that evolved differently on neighbouring islands in the Galapagos, the common law and its institutions have evolved differently in our neighbouring countries while retaining their basic attributes.

Having said this, the all-pervasive nature of American culture which is now disseminated even unto the most remote arctic community by satellite TV has led to the appearance of flags in some Canadian courtrooms, demands for greater freedom to challenge for cause and even requests that the client be allowed to sit at the counsel table.

O tempora, O mores!