

July 2013

The Top 10 Differences Litigating in Canada versus the U.S.A.

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An American organization that finds itself involved in litigation in Canada, or an American attorney advising such an organization, will find most aspects of the Canadian civil justice system to be familiar. The legal systems of the two countries are comparable in many respects, they share common historical antecedents, and their core values are the same. However, there are some significant differences that American litigants and attorneys should bear in mind when navigating their way through a Canadian civil proceeding. The French civil law tradition of the province of Quebec is one striking example, but even among the common law provinces of Canada there can be some surprises. The following are ten of the most striking differences that Americans will encounter when litigating north of the 49th parallel.

1. A Three Court System

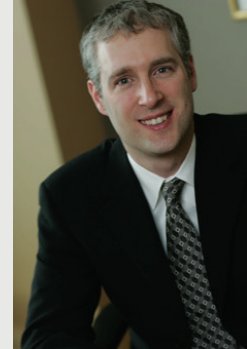
There are three court systems in Canada: superior, provincial and federal courts. Superior courts have the broadest jurisdiction, and there is one in each province and territory. Provincial courts deal solely with matters given to them by provincial statutes (e.g., small claims courts). Federal courts are limited to matters within the exclusive jurisdiction of the federal government such as immigration and patents, and they play a less important role in dispute resolution in Canada than do their counterparts in the U.S.

2. Less Forum Shopping

Most civil litigation in Canada falls within the jurisdiction of superior courts. There is no procedure in Canada for referring related actions in different jurisdictions to a single court, as can be done in the U.S. Strategic advantages to litigating in one system versus another are less prominent in Canada.

3. Judges Appointed, Not Elected

Judges in Canada are not elected but rather are appointed by the federal government (or, for provincial courts, by their respective provincial governments). Political influences on judges in Canada are not seen as significant.



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4. Judges Not Assigned by Case

In the U.S. judges are assigned by case and that judge presides over all aspects of the case. Conversely, in Canada most claims are assigned to one court, and any judge who sits on that court can hear a related matter. As a result, several different judges will hear and decide procedural motions during the course of a typical civil action.

5. Limited Depositions

Depositions, which are called examinations for discovery in Canada, are more limited in number and scope than in the U.S. Generally, each party can conduct one, time-limited examination of an adverse party. However, document disclosure requirements can be broader.

6. Civil Jury Trials are Rare

Except for some types of civil litigation (e.g., libel and some personal injury matters), jury trials in Canada are rare. They are most commonly used in criminal prosecutions when the accused has been charged with a serious offence.

7. Foreign Jurisprudence

Canadian courts are more likely than their U.S. counterparts to look to international judgments to help answer legal questions. This practice includes reliance on American authorities, particularly in areas such as insurance, securities law and corporate governance. Foreign law is not considered binding but can be persuasive.

8. Excessive Damages Awards are Rare

Punitive damages are given less frequently and in smaller amounts in Canada than in the U.S., even where the losing party's conduct is egregious. Compensatory damages for pain and suffering are also often lower.

9. Costs and the Loser Pays Principle

In Canada the winning side typically is awarded costs, which include disbursements and a portion of the lawyer's fees payable on a tariff. If the losing party's behavior warrants rebuke or if it refused a reasonable settlement offer, the award of costs may be increased.

10. Cultural Differences

Courtroom conduct is more formal in Canada than in the U.S. For example, counsel call opposing counsel "my friend" and informal communication between counsel and the judge (who is referred to as "My Lord" or "My Lady") is not tolerated. When appearing in trial before superior and federal courts, lawyers wear black robes or gowns. Pleadings are also drafted in a more neutral and reserved style.

About the author: Marko Vesely, a partner with Lawson Lundell LLP in Vancouver, practices civil and commercial litigation, with a focus on defamation, copyright, securities litigation, class actions, products liability, and arbitrations. Marko was recognized as a "Litigation Lawyer to Watch" in the *Expert 2011 Guide to the Leading US/Canada Cross-border Litigation Lawyers in Canada*. Marko can be reached at 604.631.9260 or mvesely@lawsonlundell.com.