

The Courtroom in Canada

Before reading the article, "Canadian courts vs. Law and Order," record whether you agree or disagree with the following statements. Each statement begins with the phrase, "In Canada...."

Before reading

Lawyers often yell "objection" everytime they do not agree with something the judge says.

The court reporter sits directly in front of the judge.

Instead of sidebars, jurors often leave the room for 10-15 minutes.

Judges are the only people in the court that wear robes.

There are often issues of doctor-patient privilege.

If a search is illegal the judge will rule out using anything the police find as evidence.

Jurors can not talk about what happened in the jury room.

Jurors are hardly ever sequestered.

Trial by jury happens often.

Crown attorneys are not appointed, but elected by the public.

The Canadian court system is superior to the one in the United States.

After reading

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IN WHOSE CRIMINAL JUSTICE SYSTEM? | Lawyer James Morton addresses some misconceptions

Every time Jack McCoy, assistant district attorney on *Law & Order* (played by Sam Waterston) rises from his chair during a trial and barks, "Objection!" I suspect Canadian judges out there watching are wincing.

That's because *Law & Order* and its spinoffs have had an enormous impact on public perceptions about courtroom procedures. My Osgoode Hall law students have not been spared, and colleagues in the criminal bar often find themselves correcting a client's mistaken ideas about our justice system, too.

Law & Order, now in its 15th season, has already spawned *Criminal Intent* and *Special Victims Unit* spinoffs. And now a fourth series from the same team, *Law & Order: Trial by Jury* which premieres in Canada

Thursday (CTV, 10 p.m.), promises to compound the legal confusion by focusing on the courtroom. Because, despite vast areas of similarity, there are a lot of points in trial procedures where we differ from our neighbours to the south.

In terms of protocol, that "Objection, your Honour" is probably the biggest difference. In this country, Her Honour already knows the rules of admissibility and advocacy, thank you very much, and she will decide what's allowable. Got that? Repeated vociferous objections are seldom heard here. Standard behaviour for counsel is to be soft-spoken and understated, objecting only when it seems critically important.

Another reason there are so few objections in Canadian courtrooms may be the physical setup of the courtrooms themselves, and here, I have to say, the Americans have the better

idea. In the U.S., when procedural disputes arise — or other issues jurors shouldn't overhear — the lawyers come to the judge's bench, the judge leans in, and they whisper. It's called a sidebar. A transcript can be kept, because the court reporter, sitting to one side of the judge, can hear what the jury can't. But in Canada, by tradition, the court reporter and other court staff sit directly in front of the judge, making whispered sidebars physically impossible. When interruptions happen here, the jury has to leave the room, which never takes less than 10 or 15 minutes. Even without a lot of interruptions, jury trials in Canada last about twice as long as trials without juries.

Something similar to our jurors leaving the room does happen occasionally on *Law & Order*, of course, when the judge snarls "Chambers," and he and both sets of counsel disappear into a room behind the bench. But that happens mainly when the judge wants to tear a strip off someone.

Another stylistic difference: in a Canadian courtroom, Crown prosecutors (our district attorneys) and defence counsel wear black robes, like the judge's but less elaborate. In the U.S., only judges gown. We claim our way shows greater honour and deference, and if you look in at bail court, where no one wears robes, that might seem to be true. On the other hand, no court in Ontario is more respected than the Court of Appeal on motions, and no one there wears robes, either. The main reason for the gowns is tradition, though there is another theory.

A distinguished American

scholar, Charles M. Yablon, of the Cardozo School of Law at Yeshiva University, once delved into the history of judges' robes and found all the "honour and deference" rationales. He then wrote: "These struck me as vaguely familiar. I had heard them before in some other, different connection. After careful research I have determined that these are precisely the same reasons Batman gives for wearing his mask and capes — to strike fear into the hearts of criminals everywhere." As a corollary, he notes, Batman's cape and American judges' gowns also serve to "hide their secret identity, which is, in fact, their ordinary, everyday identity."

Caped crusaders aside, there are some significant substantive differences, as well as stylistic ones. For example, issues of doc-

tor-patient privilege arise fairly often on TV shows, but throughout Canada and in some U.S. states there is no such privilege. Medical records are not confidential.

Similarly, if *Law & Order's* detectives Joe Fontana (Dennis Farina) and Ed Green (Jesse L. Martin) make an illegal search of a criminal's home or car in the course of their investigations, the illegality of the search rules out using anything they find as evidence. Here that's not necessarily the case. Canadian judges can balance the public interest against the defendant's: It's also easier to incriminate yourself in Canada, where there's no precise equivalent to the so-called Miranda Warning: "You have a right to remain silent, anything you say may be used against you in a court of law."

It's our jurors — unlike those at the Martha Stewart or O.J. Simpson trials — who are supposed to keep their mouths shut. Forever. It's even an offence to ask a Canadian juror about what happened in the jury room. On the other hand, although it's standard practice in the U.S., juries in Canada are almost never sequestered. A summons to jury duty here does not mean weeks in a hotel room. That's one reason our judges used to get testy about media coverage of their trials, because those jurors might read or hear something about the case that had not come out in court. But judges have gotten a lot more relaxed about that lately. They seem to have decided that jurors are quite capable of sorting out evidence and testimony from talk-show babble — this despite the fact that our jurors are subjected to far less pre-trial examination than American ones about their backgrounds or possible biases.

But trial by jury is also rare in Canada compared with the U.S. Virtually all civil trials here — and most criminal ones — are heard by a judge alone, which may relate to my final point.

Arguably the biggest difference between the two systems is one that seldom comes up explicitly on *Law & Order* but underlies a lot of what happens there. Unlike in our system, U.S. district attorneys, like Jack McCoy's boss, Arthur Branch (Fred Dalton Thompson), are not appointed but elected. Every few years they have to face the voters, as do many state judges. If the public wants more criminals executed, prosecutors will tend to push for the death penalty, and judges might think, even unconsciously, about re-election before standing in the way.

Nora Lewin (Dianne Wiest), *Law & Order's* interim district attorney of a few seasons ago before Branch arrived, sometimes seemed to wince at that idea. Here in Canada, we wince, too.

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