

Santa Ono: Broadcasting from the University of British Columbia where students run for the bus, this is Blue and Goldcast.

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Santa: I'm Santa Ono, the President and Vice-Chancellor of UBC. The podcast is being produced and recorded on our Vancouver Point Grey campus on the unceded, traditional and ancestral territory of the Musqueam people. This is Blue and Goldcast, a monthly podcast where I talk with people at the university about the big issues in higher education.

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Santa: Today's guest is Camden Hutchison. Camden is an Assistant Professor at the Peter A. Allard School of Law where his teaching focuses on business and corporate law. Before coming to UBC, Camden practiced corporate transactional law in the United States. Recently, his work has involved comparative research on the Canadian Supreme Court and the American Supreme Court in the area of business law. Thanks for joining me, Camden.

Camden Hutchison: Thank you.

Santa: Now the appointment of new justice's rulings made by the American Supreme Court frequently make headlines here in Canada. Meanwhile, Canada's own Supreme Court gets relatively little media attention. Before we dig into why this is, can you start out by telling me a bit of history on how the two courts came to be?

Camden: Sure. I guess I'll start off with the US Supreme Court. The US Supreme Court is provided for in the US Constitution. Article 111, Section 1, the US Constitution provides that there will be a Supreme Court. In fairly vague terms it doesn't really say much about the composition or the number of justices or anything like that. Shortly after the ratification of the Constitution, Congress went ahead and formally created the Supreme Court with the Judiciary Act.

Since the early 1800s, the Supreme Court has been the final arbiter of constitutional interpretation in the US, so it's the final Court of Appeal. It's also the tribunal which declares the interpretation and the meaning of the Constitution and has the power to strike down congressional legislation or executive action that's inconsistent with the Constitution.

In Canada, the Supreme Court today serves a very similar role, has a very similar function. It is also the final arbiter of constitutional interpretation and constitutional meaning in Canada. It's also the final court of appeal. It has the power to strike down legislation that's inconsistent with the Canadian Constitution, but the Supreme Court of Canada's role as this powerful institution that can strike down legislation is actually a relatively recent development.

For about the first 75 years or so, it wasn't actually supreme in that cases that went to the Supreme Court of Canada could be appealed to the judicial committee of the Privy Council, which is a tribunal in England which had jurisdiction over the English colonies and/or dominions or whatever the proper term for them is. It didn't even

have the final say in Canada. If you had a case that went to the Supreme Court of Canada and you didn't like the outcome, you could appeal it to the Privy Council in England, and then they could overrule. They often did overrule what the Supreme Court in Canada said.

That lasted until 1949. In 1949, the Supreme Court Act in Canada was amended stripping jurisdiction from the Privy Council, and so the Supreme Court formally became the final court of appeal in Canada.

Santa: You said that the Privy Council or the court in Britain often overruled the Supreme Court of Canada. That probably didn't go over very well, right?

Camden: No, and that's exactly why it was changed. In the 1930s in the 1940s, Canadian politicians became increasingly frustrated with this arrangement and basically lobbied the English government and the English parliament to change it, and England was willing to do that. The English parliament basically allowed Canada to kind of go its own way and emerge out from underneath the shadow of the Privy Council. It's part of this slow process of Canada becoming a truly independent country. Canada and the United States-- Like I said, I'm from the US, and I now live in Canada. I studied the legal system of both countries. I really think it's really fascinating comparing the two countries because they're so similar in so many ways, and yet they're very different in others. In the United States, you had this really sharp literally violent break from England. You had a revolution, so it's a very, very clear separation, whereas in Canada is a much slower and a much more gradual process.

Canada has traditionally had a parliamentary system of government, and there is traditional of parliamentary supremacy which is that parliament creates law. Parliament can overrule its own laws, and it's not really the role of courts to say a given act of parliament is unconstitutional. This changed in 1982 with the Constitution Act 1982 and the creation of the Charter Rights and Freedoms. Section 52 of the Constitution Act 1982 explicitly states that the Constitution of Canada is the supreme law of the land and that any legislation inconsistent with the Constitution of Canada is null and void to the extent that it's inconsistent.

After 1982 the Supreme Court has asserted this power to strike down parliamentary legislation if it's inconsistent with the Charter or if it's inconsistent with other aspects of the Canadian Constitution, and they have not hesitated to do that. In the 1980s, 1990s, the Supreme Court really asserted itself in a muscular way as the final arbiter of what's constitutionally permissible under Canadian law.

Santa: Now in 2020, with this evolution of the Supreme Court of Canada, would you say that the powers of the two courts, US and Canadian, are the same?

Camden: I would say that they're very similar. There's definitely some differences, but that's getting more into legal minutiae. Big picture, I would say that they're very similar, and they serve very similar roles in the two countries' legal systems.

Santa: That's interesting. With that being the case, there still are quite big differences in how they're appointed, wouldn't you say, in the countries?

Camden: Yes, the appointment processes are different. I can talk about how justices are appointed in both countries. In the United States, justices of the Supreme Court are nominated by the president with the advice and consent of the Senate. Both the executive branch and the legislative branch are involved. The president appoints somebody in the Supreme Court, and the president can basically appoint whoever they want, and then the Senate has to vote to confirm the appointment.

The Senate has the power to basically veto an appointee that they don't like. As we all know, this results in this highly public, highly contentious confirmation process in which appointees to the Supreme Court are questioned often quite aggressively by senators trying to suss out whether or not they'd be an appropriate person to put on the court.

In the US, we just saw it with the Barrett confirmation which was kind of an unusual confirmation. We saw it in the Kavanaugh confirmation which was an unusual confirmation in an unfortunate sense. By that I mean there's been this pattern over the last 30 years or so of the Supreme Court appointment process to the US becoming increasingly politicized, increasingly polarized, and increasingly toxic. So it seems like we're not heading in a great direction in terms of the institutional process by which justices are appointed.

In Canada, justices to the Supreme Court are selected by the governor and council, which essentially means in the discretion of the prime minister. It's a little bit more complicated than, but essentially, the prime minister has basically full discretion to appoint whoever he or she wants with the qualification that at least three of the justices on the Supreme Court of Canada have to be from Quebec. That's a legal requirement. That's a hard legal requirement.

Then there's a strong convention that three of the justices are from Ontario, one is from BC, one rotates through the Prairie provinces, and then one is from the Atlantic provinces. That's more of a tradition, and that's it. It's really up to the prime minister. There's no involvement by parliament. Parliament doesn't have the opportunity to veto an appointee the way that the Senate does the United States, so it's really up to the prime minister. That said, under the last few governments, including the current Liberal government, the Prime Minister's Office has established a formalized process for appointing justices and adding some transparency to the selection process. If there's an opening on the court and we need to appoint somebody, an ad hoc advisory board is created. That ad hoc advisory board is made up of members of the legal establishment. It's often retired judges, prominent academics, representatives of bar societies, particularly the bar society of the province that the person is going to be selected from, prominent legal minds, I guess. They get together on a board, and what they do is under the current processes, they solicit formal applications. It's different than the US.

In the US, the president just talks to his advisors and pick somebody. In Canada, it's like a job application. You have to apply. People have to fill out a job application and apply. The advisory board gets those applications, and then they make a determination based on objective criteria that's made public. Then they create a shortlist of three to five potential justices that's sent to the Prime Minister's Office, and then the prime minister chooses someone. It's less political and more technocratic. They've added a sort of Q&A period for appointees.

After the prime minister has chosen someone, that person is then subjected to public questioning by relevant committees of the House of Commons and the Senate. It's really nothing like the Senate hearings you have in the United States for two reasons. One is it's extremely low stakes because no one has the power to stop the appointment.

Santa: Aside from the prime minister who might hear something and change his mind or her mind, right?

Camden: Right. I guess that's a theoretical possibility, if there's some hugely unexpected development in the Q&A. I think that that's probably unlikely. The second reason, which I was just about to mention, is a lot of parameters are actually put around the questioning. The questioning is-- It's a lot of softball questions. People are told you can't ask about past cases that the appointee has decided. You can't ask about past Supreme Court cases. I think it's a good thing and that it provides a little bit more transparency to the process. It gives the Canadian people an opportunity to see who's going to be on the Supreme Court. It's not really substantive in terms of the questions that are asked.

Santa: Do you think that's why there's much more attention to the confirmation process for the American Supreme Court because there's a lot at stake and there's less attention to those questions and answers in the Canadian Supreme Court? Is that the reason?

Camden: I think that's one reason. The public Q&A aspect of it is a fairly recent thing. That's something that the current Liberal government started. That has not been the past practice. It's relatively recent. Yet it's low stakes in the sense that the politician asking the questions, they don't have the power to block the appointment, so it's low stakes in that sense. Whereas in the US confirmation process, it's extremely high stakes. We saw this with the Barrett appointment. We saw this with the Kavanaugh appointment, where it's just everyone.

Americans, in general, pay very close attention to what's going on in the Supreme Court, who's being appointed to the Supreme Court. You have this often week-long period of really, really intense questioning. A lot of senators use the hearing process as an opportunity to grandstand essentially, like to draw attention to themselves. Both parties leverage the hearings as a way to raise money, so they're out blasting emails and phone calls and direct messages to party members trying to get money from them. It really lends itself to partisan polarization. In the United States, there's this like really, really high stakes calculation around-- You saw this with Barret and you saw this with Kavanaugh where you need to get 50 votes because if even if it's a tie the vice president can make the deciding vote. You need to get 50 votes. It's been a huge, huge fuel for speculation in the last two confirmation hearings is whether or not marginal Republicans, so Republicans who are in democratically leaning states and who are potentially vulnerable to a Democratic challenger, like how they're going to come out. It's almost like kind of *Game of Thrones* level--

The politicization of it is just really, really intense, and that's because the stakes are so high, and it's because the Senate can actually block the appointment. In Canada, you don't have that. United States, you can change the number of justices on the Supreme Court through legislation. In Canada in 2013, there was a controversy over

an appointment to the court by the Harper government, and the Supreme Court of Canada decided that- it was Marc Nadon -that he didn't meet the qualifications to be on the Supreme Court. In that decision, they confirmed that the relevant provisions stating the composition of the Supreme Court were part of the Constitution and cannot be changed by legislation.

Santa: Without amendment.

Camden: Right. The amended processes is-- It's difficult to explain. There's actually different amendment processes depending on what in the Canadian Constitution you're trying to change. To change the number of justices of the Supreme Court, you have to get approval by the Senate, the House of Commons, and then every single province, so really, really difficult to change that. The nine justices of the Supreme Court were kind of locked in. In the US, that's something that potentially could change, and that would be a huge and very significant development in US constitutional law.

Santa: It could very well happen because of the number of justices that Trump actually has appointed. It's possible because Biden has been relatively not forthcoming with what his plans might be.

Camden: I don't want to speculate. The only way that the Democrats could increase the size of Supreme Court is if they win the presidency, which seems possible, and they also win control the Senate, which, again, seems possible, but we don't know if either or both of those things will happen. Both of them have to happen for this hypothetical to even be possible. Then once that happens, I think whether or not they actually want to pass legislation increasing the size of the Supreme Court that's a really, really difficult political question. There would be a lot-- I have no idea what they would do.

Santa: Sure, I understand. Beside the difference in the fact that it's less politicized here in the Canadian Supreme Court, my sense is that there's less attention to major decisions. Can you give an example of a major Canadian Supreme Court decision that may have received less attention than a similar decision in the US?

Camden: Yes. I agree with you. I think the landmark decisions in Canada receive less attention from the Canadian public in general. There's opinion research on this that backs up what I'm saying. A good example of this and the classic example of this is if you compare the Roe v. Wade decision in the United States to the R v Morgentaler decision in Canada. Both of those decisions, I'm not going to get into the constitutional doctrine of either decision, but both of them basically struck down laws criminalizing abortion in the respective countries. They're both decisions that said laws in each country criminalizing abortion were unconstitutional. Roe v. Wade was in 1973. R v Morgentaler was in 1988 so about 15 years later.

Roe v. Wade was and remains extremely controversial in the United States and has been central in American politics ever since. It's just been this hugely divisive, controversial issue in US politics. It has really been a rallying cry for both the right and the left in the United States. It's been at the center of a lot of the polarization around the appointment process in the United States. R v Morgentaler in Canada was certainly controversial to an extent, and I think you could even say maybe

remains controversial among certain people in Canada, but just so much less though. It just has not been at the center of Canadian politics in the same way.

Abortion remains a very, very divisive issue in US politics, whereas in Canada, a strong majority of Canadians support reproductive choice or a woman's right to choose to carry a pregnancy. So it's not been nearly as contentious in Canada. That's true of a lot of the really divisive social issues and Supreme Court cases that you see in the United States that really drive this polarization. The big difference is that in Canada, there's just a lot more consensus on those issues, and there's just a lot more agreement that the liberal positions that the court has taken are correct. One of the biggest differences between Canada and the United States, and this is a banal observation, but there is a significant minority of Americans who are very socially conservative. That's much less true in Canada. Of course, there's social conservatives in Canada, but there's fewer of them in terms of percentage of the population. They're really pretty marginalized in Canadian politics. They don't have nearly the political power that they have in the United States.

If you look at federal politics, even with the federal Conservative Party, social conservatives in the Conservative Party they have a seat at the table. They're there as long as they don't cause too much trouble, but they're sort of in the backseat. Whereas in the United States, social conservatives are in the driver's seat for the Republican-- They're really, really pushing the agenda and driving things forward.

A lot of times people talk about polarization in the United States. I completely agree that the United States is very polarized politically, and that's not a good thing. It's unhealthy. It's increasingly unhealthy. Sometimes people talk about polarization in the United States as if it were purely like an institutional problem distinct from people's actual beliefs. There's some institutional problem in US politics that drives polarization, or Americans are just really mean and hateful towards each other, or the society is just totally divided in some fundamental way that's independent from just people having genuinely different beliefs.

I think that there are institutional features of the American political system that do aggravate polarization, but at a fundamental level, I think that there's just a wider spectrum of acceptable political belief in the United States than there is in Canada. It's almost inevitable that you would have more polarization because people actually are more divided in their core views.

Santa: Being divided is one way to characterize it. In many cases, that is the case, but you could also say that there might be more diversity of thought as well. There's some advantages that in certain circumstances, right?

Camden: Yes, when I say that in the United States there's a broader spectrum of acceptable political belief, the flip side of that is I grew up in the US, and I'm a relative newcomer to Canada. I've lived in Canada for about three years now. There is a narrower spectrum of acceptable political belief in Canada which is-- I think that has positives and negatives. There's less of this polarization, less of this divisiveness, but there is also, I think, a culture of people not speaking their minds, people being silenced. This sound like I'm trafficking the stereotypes, but it's very nice. It's very polite. Those are all good things. I really admire that about Canada.

There's this push towards consensus. There is, I think, a real marginalization of minority views in Canada that people don't acknowledge maybe as much as they should.

Santa: Now beside the issue of polarization, the topic of the fact that there's less attention to Supreme Court decisions in Canada, do you think that Canadians should be paying more attention to these very important decisions that Supreme Court of Canada is making?

Camden: I do. Like I said, I would never want to see the polarization around court appointments or the divisiveness around court decisions that you see in the United States. I do think that that's reached an unhealthy level, but I've been struck living in Canada for three years. Granted, I'm a lawyer. I'm a law professor, so I probably pay more attention to legal and judicial issues than most people. But I've been surprised how nonchalant Canadians are.

The Supreme Court of Canada really mediates a lot of very, very central social issues in Canadian legal and political and social life, and it seems like Canadians just don't pay a lot of attention to it. It might be this kind of political consensus that I was describing. If you look at the United States and you look at Canada generically, the average Canadian is probably somewhat to the left of the average American like on average, but there's also in Canada, people are kind of more grouped towards the center. There's a lot of agreement over these really core issues, and so if the Supreme Court is making decisions that 75% of Canadians agree with, then you wouldn't expect people to be paying a lot of attention. One of the reasons people pay so much attention in the US is way more people disagree on both sides with these really important decisions. You would expect people to be paying attention. That's normal. That said, I do feel like Canadians should maybe wake up to the fact that the Supreme Court in Canada, it plays a really important role with respect to Canadians core rights. That's something that I think people should be paying attention to and engaging with a bit more.

Santa: Thank you. Now what role can, say, you or the university or media play in bringing that attention to Canadians? Canadians are busy. They're going about their everyday lives, and they may not be aware of an important decision. Part of it might be more attention is needed by the media on those decisions.

Camden: I don't know if I have a great answer to that question. Your point about the media, I think, is interesting. When we talk about polarization, there's a lot of reasons why politics is more polarized in the United States. I'm not a political scientist, so I'm not really the person to go into an in-depth analysis. There's a number of distinct characteristics of American society that I think contribute to polarization. One of them is the media environment. This gets back to your question before about, is the Canadian way of doing things necessarily better? I think it's mostly better.

In the United States, you have a much more free market for media. You have phenomena like Fox News, for example. Fox News produces news content for a particular audience. Fox News is a very profitable corporation because there's a huge appetite for that style of news, because there's a lot of conservative people in the United States. A majority of Canadians get most of their news from the CBC, which is a government-funded institution and provides a very sort of milk toast

center-left perspective on core issues. They're not really driving controversy. They're promoting the status quo.

I think a lot of people on the right in Canada have problems with the CBC. I think a lot of people on the left in Canada have problems with the CBC. I'm not saying the CBC is good or bad, but there's a less diverse and less contested media environment in Canada, I think. Is it really part of the agenda of the Canadian media to drive controversy and tell Canadians like, "Hey, you need to get riled up over these things"? It's a difficult thing. We don't want people to get riled up. Maybe there's a happy medium somewhere between the US and Canada.

Santa: We want them to pay attention. I get back to the question about what people like you who study this and what universities can do in bringing important decisions to the fore. We do have the ability through platform, such as the conversation to say, hey, this is a very important decision that's about to be made by the Supreme Court of Canada. What role do we have to bring the attention to Canadians?

Camden: I work in the Law Faculty. I certainly think at UBC, the law school definitely promotes engagement with Supreme Court decisions. Just recently, there's been really interesting cases that have come out of the Supreme Court that people have been giving research presentations on. Because my research focuses on business law and also because I do a lot of legal history, personally, I'm probably not the person who's going to be out promoting engagement with Supreme Court decisions, but a lot of legal academics in Canada do. Again, if these decisions are not controversial, you would not expect a lot of engagement. I don't really know what more we can do. You pose a really a really good question, a really important question. I wish I had a better answer for you.

Santa: Camden, you've been fantastic. Thank you so much for everything you've said. It's been a pleasure talking with you. Thanks for being on Blue and Goldcast today.

Camden: Thank you.

Santa: That does it for this month's episode. You can find links to our guest's work as well as previous editions of the show at blueandgoldcast.com. You can also find us on your favorite podcast app, like iTunes or Stitcher. Our email is blueandgoldcast@ubc.ca. You can tweet me at [@ubcprez](https://twitter.com/ubcprez). That's Prez with a Z. I'm Santa Ono. Thanks for listening.