



Researching Foreign Law

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This is a general overview of the subject matter and should not be relied upon as legal advice or opinion. For specific legal advice on the information provided and related topics, please contact the authors or any member of the Research and Opinions Group.

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RESEARCHING FOREIGN LAW

I. Why Would a Canadian Lawyer Need to Research Foreign Law?

In a global economy, fewer and fewer transactions and proceedings involve parties and issues linked to only one jurisdiction. Over the past few decades, we have seen accelerated mobility of people, technology, communication and knowledge. The liberalization of the rules for the recognition and enforcement of judgments in many jurisdictions gives litigants more choices of forums to litigate in. It is no wonder that researching foreign law has become an essential component of legal research courses in major U.S. and U.K. law schools.

Here are some examples of circumstances in which a B.C. lawyer will have to conduct research on foreign law:

- A B.C. resident was injured when she slipped on tiles at a resort in Mazatlan, Mexico. The resort is owned by an Alberta corporation. The B.C. resident brings suit in B.C. The defendant does not challenge the B.C. court's jurisdiction, but pleads that Mexican law applies to the matter as the *lex loci delicti* (the place where the activity occurred).
- Your client has obtained a monetary judgment in the B.C. Supreme Court against a mining company. The mining company's principal assets are located in Chile. The client wants to know whether a B.C. judgment can be enforced in Chile and the process for doing so.
- A client incorporated in Maine, but with a significant presence and extra-territorial registration in B.C., is entering into an agreement to supply software to a major government entity in Uzbekistan. The other side is proposing a choice of law clause and an exclusive choice of forum clause that select the law and courts of Uzbekistan. The client wants to understand the implications of agreeing to these clauses. It also wants your opinion on whether, if it wishes to make a counter proposal, it should propose the laws and courts of Maine (and whether it would be state or federal courts) or the laws and courts of British Columbia.
- You are looking for cases interpreting particular clauses in an insurance contract. You cannot find any Canadian cases on point. You know that the clauses are widely used not just in Canada, but in the U.S. and perhaps in Europe. You decide to look for foreign law cases on point.
- Your client is a construction company that is considering bidding on a project in Barbados. You have provided it with advice on labour and employment and human rights issues in relation to its projects in B.C. The client wants to get a basic understanding of the significant differences between B.C. law and Barbados law in these areas.

II. International Law vs. Foreign Domestic Law

Make sure you understand what it is you are researching. Public international law and foreign domestic law are entirely different things.

Public international law is the body of law that regulates the relations among sovereign states and international organizations. Foreign domestic law, by contrast, sets out a particular jurisdiction's legal rules, which operate territorially.

Private international law is a sub-category of domestic law containing principles and rules applicable to transborder cases involving private relationships that contain at least one legally relevant foreign element.

There is another paper in this binder that addresses researching public international law.

III. Preliminary Steps

A. What Do You Need to Know Before Wading into a Body of Foreign Law?

- What kind of legal system does the jurisdiction have?¹ It is important to note that because of the increasing convergence of legal systems worldwide, the characterization of legal systems is not an exact science. Nonetheless, from the perspective of a legal researcher, it is helpful to identify the type or types of systems the jurisdiction is most closely associated with since that knowledge will help you determine the likely sources of law and interpret them.
 - Does the foreign jurisdiction have a civil law system like Quebec and Mexico or does it have a common law system like Australia and Canada? Civil law is the dominant legal tradition in most of Europe, all of Central and South America and parts of Asia and Africa. If you need to glean a basic understanding of the civil law tradition and how a civil law system operates, there is an excellent article online published by the U.S. Federal Judicial Center.² If it is a civil law jurisdiction, what is the relative importance of doctrine³ and judicial opinions in that jurisdiction?
 - Does the foreign jurisdiction have a mixed⁴ legal system of civil and common law like Botswana?⁵

¹ For a primer on world legal systems, go to <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-presentation.php>.

² Go to:
http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DPublication!openform&parentunid=A18D33FC1E8F0EB085256CA30067C10B

³ Doctrine, comprising treatises and commentaries by legal academics, is not typically a formal source of law but is nonetheless highly valued and frequently referred to by judges in civil law systems.

⁴ This category includes political entities where two or more systems apply cumulatively or interactively but also entities where there is juxtaposition of systems as a result of more or less clearly defined fields of application.

- Does the foreign jurisdiction have a religious law system? For example, in Afghanistan there is a Muslim legal system, which is an autonomous legal system that is religious in nature and is predominantly based on the Koran. Is religious law a component of a system otherwise characterized as a common law or civil law system? If so, what subject areas does religious law govern?
- What is the form of government in the foreign jurisdiction? Does the foreign jurisdiction have a federal structure with central and provincial governments like Canada or does it have a unitary structure? What is the role of each of the executive, legislative and judicial branches of government?
- Does the foreign jurisdiction have a constitution? For example, The Constitution of the Republic of Hungary regulates two constitutional areas: state administration (national government, local government, and organizations for the protection of rights) and the listing of the basic rights of citizens. Does the foreign jurisdiction have a human rights code?
- Are there treaties or international conventions to which the foreign jurisdiction is a party and which have been implemented as part of its domestic law? For example, the Columbia River Treaty is a bilateral treaty to which Canada and the U.S.A. are parties.
- What is the court system in the foreign jurisdiction?
 - How is the court system divided? Are there federal courts, local state courts and other specialized courts (such as military courts)? In Mexico, for example, state courts consist of (i) the Superior Tribunal of Justice, which functions as the appellate court; (ii) courts of first instance, which resolve ordinary matters of certain economic significance usually divided into civil, family and criminal; (iii) minor courts that resolve controversies of small economic significance; and (iv) small claims courts.
 - Is the court system like a pyramid with the “highest” court at the top, or are there two or more distinct court systems with no bridge between them (the former being more prevalent in common law jurisdictions, the latter more common in civil law jurisdictions)?
 - Are there administrative tribunals or courts? Is there a system of judicial review of legislative acts?

B. What Resources are Available to Assist You in Understanding the Legal Processes and Structures of the Foreign Jurisdiction?

Fortunately, there are “guides” to the legal processes and structures of most nation states. Some useful resources are:

⁵ Israel may be the most complex mixed law system, combining common law, Ottoman law, French law, Jewish religious law and modern Israeli legislation.

- Foreign Law Guides – most are easily available online
 - GlobaLex is an electronic legal publication dedicated to international and foreign law research that is published by the Hauser Global Law School Program at NYU School of Law. The guides and articles published are written by scholars who are well known in their respective fields and are recommended as a legal resource by universities, library schools and legal training courses. If you were interested in researching the Albanian legal system you could review “A Guide to Researching the Albanian Legal System” published in July 2005.
 - LLRX.com works with nationally recognized law librarians, attorneys, information technology specialists and legal technology consultants to produce the site’s well-documented, up-to-the-minute columns, feature articles, topical research guides, and legal-tech and library related news resources. For example, if the foreign jurisdiction of interest is Mexico, you could review the guide to “Mexico and its Legal System” published in February 2008.
 - Thomas H. Reynolds and Arturo Flores, *Foreign Law: Current Sources of Codes and Legislation in Jurisdictions of the World*, loose-leaf (Littleton, Co.: F. B. Rothman & Co., 1989) (available at U.B.C. Law Library and the B.C. Courthouse Library). Sadly, the loose-leaf version of this source has not been kept up to date (updates ceased around 1999); the authors have chosen to update it only online. The cost to subscribe to the online version is close to \$2000 per year.
 - Jeanne Rehberg and Radu D. Popa, eds., *Accidental Tourist on the New Frontier: An Introductory Guide to Global Legal Research* (Littleton, Colo.: F.B. Rothcom, 1998) (available at U.B.C. Law Library).
 - Richard A. Danner and Marie-Louise H. Bernal, eds., *Introduction to Foreign Legal Systems* (New York: Oceana Publications Inc., 1994). Although this text is a bit dated, it contains chapters comparing and contrasting civil law and common law systems and traditions that will be helpful to comparative law neophytes.
- Textbooks written for law students or lawyers in the jurisdiction of interest.
- Foreign lawyers practising in the foreign jurisdiction of interest.
- Legal research handbooks containing chapters on researching foreign law such as:
 - Douglass MacEllven, Michael McGuire, & Neil Campbell, *Legal Research Handbook*, 5th ed. (Toronto, Ont.: Butterworths, 2003).

IV. Professional Responsibility Issues

There is a fine line between researching and assessing the law of a foreign jurisdiction as part of a comparative law analysis that forms part of the advice you are giving a client on Canadian law and giving advice on the foreign law as if one were a lawyer in that jurisdiction. Obviously, you cannot give advice on foreign law unless you are qualified in the particular jurisdiction. You will have to

consider, each time you embark on foreign law research, whether you could be perceived as practicing as a lawyer of that jurisdiction. You will have to consider the circumstances in which it will be appropriate to retain a foreign lawyer to give advice on foreign law to your client. Where foreign law has to be proven as part of a B.C. proceeding, you will necessarily have to retain a foreign lawyer to give evidence as to the content of the foreign law, which must be proven as fact.

The British Columbia Law Society Rules contain provisions dealing with practitioners of foreign law who wish to give legal advice on that law in B.C.: see Law Society Rule 2-18 to 2-22.⁶

A person with foreign legal qualifications who wishes to give legal advice in British Columbia respecting the laws of his or her home jurisdiction must first obtain from the Law Society a permit to act as a practitioner of foreign law.

To be eligible for a practitioner of foreign law permit, you must be a member of the legal profession in one or more foreign jurisdictions: see Law Society Rule 2-18. You must have practiced the law of such a foreign jurisdiction for at least three of the past five years, or undertake in writing to act as a practitioner of foreign law in B.C. only under the direct supervision of a practitioner of foreign law who has practiced law in that foreign jurisdiction for at least three of the past five years.

A person who, without a valid permit, acts as a practitioner of foreign law or holds himself or herself out as such, is engaged in the unauthorized practice of law and is subject to prosecution or to injunction proceedings by the Law Society.

A lawyer who is a member of the Law Society of B.C. (other than a retired or non-practicing member) and who is also qualified to practice law in a foreign jurisdiction may act as a practitioner of foreign law in British Columbia without obtaining a permit. To do so, the lawyer must hold liability insurance that specifically extends to the lawyer's activities as a practitioner of foreign law in B.C. and is in a form and amount at least reasonably comparable to that required of lawyers under Law Society Rule 3-21(1).

V. Finding Foreign Law

A. Basic Research Methodology and Secondary Sources

Once you have familiarized yourself with the legal processes and structures of the foreign jurisdiction, you will follow research methodology very similar to what you would employ when conducting Canadian legal research.

You should start by collecting and reviewing secondary sources, including textbooks, encyclopedias and journal articles. This step takes on increased importance when researching foreign law – it would be foolhardy to try to formulate search terms and conduct online research when you are not at all familiar with the way in which the foreign jurisdiction categorizes the issues and the terminology used in that jurisdiction to describe legal concepts and principles.

⁶ For more information, go to http://www.lawsociety.bc.ca/licensing_membership/practitioners_foreign_law.html#member.

The U.B.C. Law Library has a significant collection of foreign secondary sources that includes student textbooks from other countries. We find student textbooks helpful because they approach issues from the most fundamental level.

The B.C. Courthouse library has some foreign secondary sources, with a particular focus on the U.S. and U.K.

A source often overlooked by researchers is the LexisNexis Martindale-Hubbell publication, *International Law Digest* – many law firms have this set in their library, but it is also available on line at LexisNexis.com.

The publication by Reynolds and Flores noted above contains an impressive summary of foreign legislation by subject area. Be aware that the hard copy version is about ten years out of date.

Other secondary sources available at the U.B.C. Law Library are Claire M. Germain, *Germain's Transnational Law Research: A Guide for Attorneys* (Ardsley-on-Hudson, N.Y: Transnational Juris Publications, Inc., 1991) and Kenneth R. Redden, gen. ed., *Modern Legal Systems Cyclopedia* (Buffalo, N.Y.: William S. Hein, 1984) (neither of these sources is entirely up-to-date, although the Redden text is at least current to 2005).

One unique type of source that you may consult when researching foreign law is material on comparative law. There are textbooks and journals devoted to comparative law.⁷ Some sources described or catalogued as comparative law sources are simply collections of foreign law material, country-by-country. More typically, however, comparative law sources compare laws of two or more jurisdictions. Since these sources need to describe the law of a particular jurisdiction in order to compare it to the law of another jurisdiction, they can be helpful to a researcher seeking a summary of a particular jurisdiction's foreign law. Where one of the jurisdictions forming part of the comparison is a jurisdiction you are more familiar with (such as a common law jurisdiction in Canada), the comparison may give you a jumpstart to understanding a truly foreign law.

There are some foreign secondary sources online, but many are on databases requiring payment.

AustLII has a decent collection of journals from Australia online. Some law schools and law school libraries have made their journals accessible for free online. The University of Southern California maintains a very useful list of legal journals online, which includes foreign law journals; go to <http://law.usc.edu/library/resources/journals.cfm> (there is a link to this site on the B.C. Courthouse Library Society under "Journals").

HeinOnline, a full-text database of journal articles in English, is available free of charge at the B.C. Courthouse libraries.

⁷ Examples of comparative law journals include the "American Journal of Comparative Law" or "Comparative Law Yearbook of International Business." A comparative law encyclopedia is available in the reference section at U.B.C. Law Library – see *International Encyclopedia of Comparative Law* (Tubigen: J.C.B. Mohr).

LexisNexis has a large collection of journals and CCH publications available by subscription. Westlaw also has a large collection of journals available by subscription. Both these databases have a U.S. focus, although they have journals from some other jurisdictions.

B. Accessing Case Law and Legislation on Line

There is a vast amount of foreign case law and legislation on the internet. There are numerous portals, such as WorldLII, and GlobaLex, providing access to numerous links to other websites containing foreign law, eliminating the need to search independently for the information. Some examples of reliable websites for finding case law and legislation are:

Free Websites

- The LIIs, for example BAILII, AUSTLII, CANLII
- GlobaLex – <http://www.nyulawglobal.org/Globalex/>
- University of Chicago – <http://www.2.lib.uchicago.edu/~llou/foreignlaw.html>
- Harvard Law School – [http://www.law.harvard.edu/library/services/research/guides/international/web_resources/...](http://www.law.harvard.edu/library/services/research/guides/international/web_resources/)
- World Law Guide – <http://www.lexadin.nl/wlg/legis/nofr/legis.php>

Pay Websites

Both Lexis and Westlaw provide foreign law databases; however, their content and currency is variable. As such, it is important to check whether these companies have added new databases, archived or removed any of the databases.

- LexisNexis provides databases for, among others, Australia (cases); Brunei (cases); Canada (cases, laws); China (some cases, some laws); England and Wales (cases, laws); EU (cases, laws and other materials, mostly in English); France (laws, in French); Germany (some laws, in German); Hong Kong (laws); South Africa (laws); Scotland (cases, laws); Malaysia (laws); U.S.A. (cases, laws), Ireland (cases); Italy (selected laws, some cases, all in Italian); Singapore (cases).
- Westlaw provides databases for Australia (cases, financial codes); Bermuda and the Cayman Islands (insurance statutes and regulations); Canada (cases, laws), EU (cases, laws and other materials, mostly in English); Hong Kong (cases, laws); Mexico (laws in Spanish); Puerto Rico (cases, laws, other materials); UK (cases, laws). Westlaw also has English language environmental laws and arbitration laws for some countries.

VI. Cautionary Notes

- There are significant substantive law and procedural differences between individual civil law jurisdictions and individual common law jurisdictions due to the unique historical

background to the development of the law in any given state and due to the increasing cross-pollination of principles, concepts and procedures among legal systems. Do not assume that specific features or approaches routinely found in a standard common law or civil law system exist in the particular jurisdiction you are researching.

- Even if you familiarize yourself with the legal process and structures of the foreign jurisdiction, it will still be difficult to assess the precedential value of case law you locate.
- The terminology used in the foreign jurisdiction will be different from Canadian legal terminology. As a result, you will not be able to leap into online searching without first mastering the terminology of the foreign law by reviewing secondary sources. On-line searches you formulate using Canadian legal terminology will miss the mark.
- While the relationship between primary and secondary sources and between case law and legislation in common law jurisdictions will be clear to you, the relationship between sources in other systems will be less clear. In most civil law systems, legislation is paramount (and much of the law is typically codified). In most civil law systems, there is no formalistic notion of binding precedent; some nation's judges will rarely refer to case law in their decisions. On the other hand, in some civil law jurisdictions, doctrine (treatises and commentaries of legal writers) is a significant part of the system.
- Much of the foreign law you find will be in a language other than English, which is obviously a problem if you are not fluent in that other language. While some translated cases and legislation can be found on line, unless they are official translations by the court or legislative body in question, be sceptical about them since you cannot test the accuracy of the translation. You may have to retain the services of a translator with expertise in legal terminology.
- Law librarians in the foreign jurisdiction can be a great source of information and a conduit for accessing materials not available locally or online. Local law librarians frequently network with their counterparts in other countries, so enlist their help.
- It may be difficult to update foreign legislation without the assistance of a foreign lawyer or librarian.

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