

# *Speaking Notes on Legislation and Legislative Research*

Presentation to the Regulatory State course (Law 160)

UBC Faculty of Law

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## Introduction:

- Background, experiences, and general nature of law practice.
- Purpose of presentation:
  - to provide a general over-view from a practitioner's perspective on the importance of legislation and legislative research in day-to-day practice, but...
  - not to provide details on how to undertake legislative research or how to apply the rules of legislative interpretation (these are topics that will be addressed by library staff and others).

## A practitioner's views on:

- The role of legislation and government regulatory systems in the practice of law (i.e. "it is not all about the common law").
- The interface between law (in particular legislation) and social policy<sup>1</sup> (i.e. sometimes policy research can be as important as legal research).
- The importance of understanding the hierarchy of legislation (e.g. statutes/acts, regulations, bylaws, etc.)<sup>2</sup>
- The importance of understanding the steps in the development of each type of legislation (e.g. bills, orders-in-council, ministerial orders, etc.)
- Understand which level of government may be involved.<sup>3</sup>
- Observation: Even for a barrister, good legal research and writing skills are important. Legal research helps to develop a practitioner's "legal acumen".
- Observation: Not all client problems are legal problems, and not all legal problems can best be solved by going to court.

## Researching legislation (preliminary steps):

1. Identifying/framing the legal issue(s) that need to be researched, but be prepared to reframe the issue as your research continues.<sup>4</sup>

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<sup>1</sup> May also need to learn about the physical, technological, political, social, psychological, economic, cultural, or medical aspects of a particular problem that needs to be solved.

<sup>2</sup> Best to refer to Acts rather than Bills!

<sup>3</sup> To ascertain the status of a Bill in BC, the Legislative Assembly's website has a table called Progress of Bills.

<sup>4</sup> Part of the development of a lawyer's "legal intuition" is the ability to identify a problem and possible solutions, and whether the law can assist or not.

2. Identifying which level of government (e.g. federal, provincial or municipal) may have jurisdiction over the identified issue, and – therefore – which level of government may have passed applicable legislation.<sup>5</sup>
3. Identifying if one or more areas of legislation may apply to the identified issue (e.g. use keyword searches).<sup>6</sup>
4. Consider using secondary sources (e.g. legal text books) to help to identify applicable legislation.
5. Identifying what type of legislation may apply to the identified issue, understanding its status within the legislative hierarchy, and know its correct title and citation reference (details below).

Researching legislation (secondary steps):

6. Recommend reading the entire statute/act, and – if the key legislation is a regulation, read both the regulation and the governing statute.<sup>7</sup>
7. Sometimes more than one type of legislative provision that may apply, so don't assume you've "found it!" until you've read other possible statutes/regulations, and (in particular) considered the reported cases on the identified provision (see below).
8. Caution: Some statutes work together, even if they don't expressly refer to each other; e.g. the *Interpretation Act*.

Researching legislation (next steps):

9. Ascertain whether the applicable legislation (or any amendment) is currently in force, will be coming into force on some identified future date, has yet to be proclaimed, or even if it may be amended in the future.<sup>8</sup>
10. General comments on electronic vs. paper research of legislation (e.g. the limits of on-line resources).

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<sup>5</sup> If both federal and provincial governments have similar legislation in place (e.g. environmental law, labour law, etc.), there could be a constitutional jurisdictional issue to also explore; ref. section 91 vs. 92 of the *Constitution Act, 1867*.

<sup>6</sup> You will learn that some areas of law are not directly regulated by legislation (for example, many areas of tort law).

<sup>7</sup> Caution: For long statutes, like the *Income Tax Act*, the *Elections Act*, and corporate or securities legislation, it may not be possible to undertake such a complete review.

<sup>8</sup> Difference between when a statute may come into force (e.g. on Royal Assent) and when a regulation comes into force.

Judicial interpretation of legislation (almost there):

11. Importance of researching court or tribunal cases interpreting a legislative provision and even a similar word or phrase that is used in other legislation (i.e. “noting-up”).<sup>9</sup>
12. Research both reported and unreported<sup>10</sup> cases, and for both courts and tribunals.
13. If little or no judicial/tribunal consideration of a legislative provision, may need to check the legislative history to see if past version of that provision were considered. Or even if substantial changes were made to a past provision because of earlier interpretations.
14. The importance of updating cases that have interpreted a legislative provision (i.e. keep asking yourself: “Do I really have the best case on point?”).
15. Caution: Make sure you’re not applying a reported case that has interpreted a provision that has been repealed, amended or replaced.

The importance of legislative history (final comments):

16. Legislation is not static – provisions can (and often do) change to reflect changes in social policy (“What was law last week may not be law this week!”).
17. Government can change legislation to respond to judicial interpretations.<sup>11</sup>
18. Depending on the nature of the issue being researched, it can be very important to track the various versions of a statute or regulation, and the cases that have interpreted them. A line of cases could well be “moot” if the legislative provisions there were based upon changes substantially.
19. Understanding the purpose legislation can also be obtained by reading (a) explanatory notes on first reading, (b) debates in the Legislature during second reading,<sup>12</sup> (c) government white papers, (d) Royal Committee reports/recommendations, (e) results of public consultations, etc.
20. Consider discussing the identified legislation or specific provisions (purpose, political challenges, drafting problems, etc.) with the government officials (not necessarily elected officials) who were responsible for developing it.

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<sup>9</sup> Using *Statutes of British Columbia Judicially Considered*, *Canadian Statute Citations* or *Canadian Abridgments* as well as electronic sources (e.g. QuickLaw’s noting-up, Westlaw’s key cite or CanLII’s note-up feature).

<sup>10</sup> Secondary sources (e.g. legal text books on the topic or a specific set of legislation) can sometimes be very useful sources for unreported cases.

<sup>11</sup> Discuss the example of CoPs v. Utendale.

<sup>12</sup> Usually documented in *Hansard*.