

Correcting some misconceptions about online legal research costs

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The greatest revolution in law over the last 30 years has been the ability to access case law and secondary sources online. When I started law school at Osgoode Hall Law School in 1987, we were all given access to Quicklaw, an online research tool that at the time was promoted as allowing the legal research to retrieve unreported cases.

Today, there are competing commercial online research tools offered by LexisNexis, Thomson Reuters, Wolters Kluwer and others, and a publicly accessible online research tool managed by the Federation of Law Societies of Canada called CanLII. Conducting searches on CanLII is entirely free.

The ability to access a case for free certainly raises questions about online legal research disbursement costs that are sometimes claimed in an action. In the recent Nova Scotia case of *Kaehler v. System Care Cleaning & Restoration Ltd.*, 2020 NSSC 32, the issue of the defendant's ability to claim "e-Carswell search / Online Legal Research Fees" in the amount of \$1,193.70 was considered by Justice Muise. In His Honour's view, the cost was excessive and should be reduced by 50%.

Justice Muise explained that such costs had not been consistently allowed or disallowed by the courts and that they required a close examination for reasonableness. In the circumstances, there was no evidence providing any details explaining the reasonableness of the searches. The defendant's only justification for the disbursement was a bare statement that the online searches were "necessary."

Justice Muise also noted that the defendant's Book of Authorities included cases downloaded and printed from e-Carswell and that some of those cases could have been obtained from CanLII and from the Nova Scotia Courts Website for free. Accordingly, His Honour found that the claim for fees incurred for retrieving those cases from e-Carswell (Thomson Reuters) were unreasonable.

Justice Muise concluded that:

[o]nly those fees associated with conducting searches to discover pertinent cases, such as word or phrase searches, or a natural language search, would be reasonably necessary. Of course, simply printing or downloading those cases when discovered would be a reasonable expense as it would be the most efficient manner of retrieval. In the case at hand, more likely than not, some portion of the e-Carswell searches were for the purposes of discovering and retrieving, rather than only retrieving, pertinent cases.

Although I do not necessarily disagree that the simple retrieving of a known case can be easily made for free through CanLII or the websites of various courts, the above passage should not discourage the use of commercial online sources or the retrieval of cases from those sources. Indeed, the reason that a case may be retrieved from a commercial online source is because of research efficiency.

Commercial online sources contain more research tools than just case law or statutes. The e-Carswell source referenced in Justice Muise's decision is NextCanada, which contains The Canadian Abridgment Digests, the Canadian Encyclopedic Digests and other valuable sources, including access to looseleaf texts through ProView.

In my role as the current Chair of the Canadian Abridgment Editorial Advisory Board, the Board has worked with Thomson Reuters for years to ensure that all of these secondary tools are integrated such that the legal researcher can seamlessly access the primary sources from the secondary sources. A good legal researcher would start with the secondary sources and then access the case law from there. In the circumstances of the case before Justice Muise, it is perfectly reasonable that the defendant's lawyers might have accessed the primary law as a result of reviewing secondary sources on e-Carswell and simply efficiently

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

retrieved the necessary law rather than having noted the cases and then retrieved them for free from CanLII. The fault of the defendant, of course, was to not explain to the court the overall research strategy that was used.

As well, legal researchers should not be discouraged from using either LexisNexis or NextCanada even when they have retrieved a case from CanLII. The value of using these commercial online products is that they generally provide a more robust ability to note up a case.

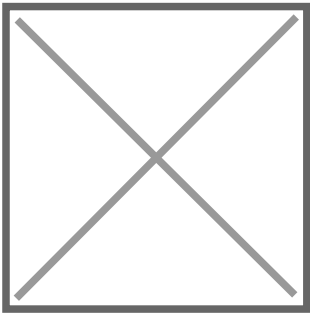
In my experience as a research lawyer for almost 30 years, I have found that retrieved cases are sometimes not carefully noted up by users and that on occasion litigants have trotted off to court relying on a decision that was overturned.

Like Justice Muise, in my view the nearly \$1,200 disbursement cost, which included tax, was likely excessive. However, the retrieval of a case from a commercial online source should never always be found to be unreasonable just because the case might have been accessible for free on CanLII or a court's website. Rather judges should approach the overall justification of a computer online research disbursement claim as a matter of evidence placed before the court by the party seeking the disbursement's recovery. Otherwise the legal researcher might be discouraged from using the valuable and necessary tools only available through commercial service providers. A PDF version is available to download [here](#).

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you. Please contact **Stephen Thiele** at 416.865.6651.

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Author



Stephen A. Thiele

Partner

416.865.6651

sthiele@grllp.com

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com