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Claim for online research costs rejected in Ontario commercial proceeding

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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As we have previously written, many courts are extremely reluctant to grant a winning party recovery for online legal research disbursements when making a costs award. A party who seeks the recovery on such disbursement must do more than simply present a monetary figure for this disbursement. Without more, a court will be compelled to determine that the costs of online legal research are part of a law firm's overhead and thereby unrecoverable.

This was the result in [Crosslinx Transit Solutions General Partnership v. Ontario Infrastructure and Lands Corp., 2021 ONSC 4364 \(CanLII\)](#).

In this case, the successful applicant sought costs in the total amount of \$430,000 in connection with a two-day application. The respondent opposed this request and also contended that a \$4,000 disbursement for online legal research was not compensable.

The respondent relied on the decision of [Lloyd v. Bush, 2020 ONSC](#)

[2892 \(CanLII\)](#) wherein Justice Mew determined that disbursements for computerized legal research are generally no longer recoverable in the absence of special circumstances. The reason for this is that computerized legal research is viewed as part of a law firm's ordinary overhead expense.

The applicants countered this argument relying on the decision of [Moon v. Sher, 2004 CanLII 39005 \(ON CA\)](#) wherein the Court of Appeal for Ontario held that where the amount is reasonable and has been charged to the client, and the charge does not fall within standard office overhead the disbursement is recoverable. The party seeking to recover this disbursement bears the onus of meeting these criteria.

Justice Koehnen agreed with the sentiments expressed in [Lloyd v. Bush](#) and found that the applicants had failed to meet the criteria that the online searches did not fall within standard office overhead. The search fees were unsupported by any evidence or any

description and Justice Koehnen noted that a flat rate was charged by the service provider. In Justice Koehnen's view, a flat rate fell into general overhead.

While I do not disagree that the costs incurred for online legal research platforms are capital costs for a law firm, the annual increases for these platforms in general are outstripping the annual increases in legal fees charged by lawyers and therefore are not necessarily easily absorbed in a firm's overhead. It is for this reason that years ago Thomson Reuters created the notional charge in connection with retrieving cases or statutes or conducting global searches on their online NextCanada platform. The notional charge is intended to reflect a reasonable cost that can be charged back to a client and to offset the significant subscription flat fees that law firms are contracted to pay in order to access a virtual law library. In the age of COVID, many law firms are being compelled to purchase more and more online legal research products and to bear increasing costs as lawyers and students work remotely. These costs cannot be easily transferred into higher billable rates, which, like legal research disbursements, clients object to paying. The general standard annual increase for accessing online products is 5 percent, where the annual increase to hourly rates in some years is nil or barely more than 1 percent.

In these circumstances, the view that a flat fee rate falls into general overhead should at best be only a presumption that can be rebutted.

Based on the foregoing, it is incumbent that where a law firm seeks to recover online legal research disbursements on a matter that they obtain weekly or monthly reports from their online service providers and track the real and/or notional costs in their accounting software

so that those costs are particularized and cross-referenced to client matters. This will assist a client in potentially obtaining recovery for online legal research disbursements in a court action. As stated by Justice Koehnen, the sentiments expressed in [Lloyd v. Bush](#) do not contradict the views expressed in [Moon v. Sher](#), and thus the law remains that the amounts disbursed for online legal research are recoverable provided that the party seeking recovery can show that the costs are reasonable and have been charged to the client and the costs do not fall within standard office overhead.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact the Chair of our dispute resolution group, **Stephen Thiele**, at 416.865.6651 or via email at sthiele@grllp.com.

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