

KEEPING CURRENT

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Legal research in costs awards

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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Despite its importance, legal research is often a line item that comes under close scrutiny when a court awards costs to a successful litigant. Two recent cases demonstrate why legal research comes under such scrutiny.

In [*Fox Excavating & Grading Ltd. v. 2012299 Ontario Inc.*, 2021 ONSC 451](#), Justice McSweeney was required to assess whether costs claimed for online legal research should be allowed in a case where the plaintiff had brought three actions arising out of the same contract. Two of the actions were a Lien Action and a Trust Action.

At the start of the trial, the defendant conceded that it was no longer challenging the validity, quantum and timelines in the Lien Action, that it would not be pursuing its counterclaim, and that it would no longer allege that the plaintiff had breached or repudiated the contract between the parties. In turn, the plaintiff discontinued the Trust Action, subject only to costs submissions.

The court determined that the plaintiff was entitled to pre-trial costs of the Lien Action and Trust action, costs

on a motion to amend, and costs of the trial. The plaintiff sought costs of \$286,789.40. Within that amount, the plaintiff sought \$3,352.01 for "computer legal research".

Although a lot of legal research today is conducted by accessing virtual libraries through online commercial legal research platforms to which access is sold to lawyers at an annual cost, the court in this case dismissed the entire disbursement on the grounds that the cost was unsupported by an explanation or an invoice.

As explained by Justice Mitrow in [*Furtney Estate v. Furtney*, 2014 ONSC 7259](#) the courts understand that there is a cost incurred by law firms for online legal research and that it is reasonable for a law firm to distribute that cost across files and to bill it as a disbursement. However, when seeking recovery for the disbursement, the party doing so must file documentary evidence to show that the amount claimed is a reasonable pro-rated fraction of the firm's online research overhead cost and that the amount was in fact billed to the client.



This can be done, particularly where the online commercial service provider generates weekly reports that capture a reasonable notional charge for access to primary or secondary sources. Through regular tracking of these reports, a law firm can transfer the data found on the reports to the files for which computer legal research was done and allocate the notional charge as a disbursement to the client's file. From such a report, it would have been easily determined whether the \$3,352.01 disbursement in [Fox Excavating](#) was excessive, which in my experience it probably was.

In [Slavern v. Azadian, 2021 ONSC 845](#), the amount claimed for legal research related to time spent by a lawyer, student and law clerk on a construction lien matter came under scrutiny. The successful party had claimed 116.2 hours of senior counsel's time on the file, plus a fee at a motion, plus another 46.4 hours for student and law clerk time. The Costs Outline included many references to time spent for legal research and review of the law.

In a costs assessment courts are guided by the principle established in [Boucher v. Public Accountants Council, 2004 CanLII 14579](#) wherein it was stated that "the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceedings, rather than the amount fixed by the actual costs incurred by the successful litigant."

Although Justice Henderson acknowledged that it was appropriate for a student to have been directed to do legal research, he found that the case was not complex. The court also noted that the senior lawyer should have been fully aware of the law in the area and that only a modest amount of legal research should have been necessary.

Accordingly, the time spent by the senior lawyer was reduced to 100 hours, with \$7,000 added for student and law clerk time and the counsel fee at the motion.

Again, in my experience, the time claimed for legal research was probably excessive. Spending 40 or more hours on legal research, which may have included producing a legal memo is a week's worth of work. For a matter that the court viewed as not being complex, this is simply too much.

In fairness to the lawyer and the student in this case, legal research today is becoming more time-consuming because there is a greater ability to access more law now than in the past. However, in my view the key takeaway from Justice Henderson's decision is that legal research must be judicious and efficient. To achieve this result it is important to not forget the value of secondary sources when conducting legal research. Those secondary sources have already filtered out the most relevant cases on a topic and are incredibly valuable in permitting a lawyer or a student to find relevant law relatively quickly and to permit an analysis and update of the law in short order. In the area of construction liens those kinds of secondary sources readily exist.

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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