

KEEPING CURRENT

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Costs for online legal research continue to be scrutinized by the courts

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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When I first entered law school in 1987, Quicklaw was the only online legal research tool available to lawyers. While this tool was available for free to students, law firms and lawyers were charged for its use based on time spent accessing the tool. Accordingly, the longer a user accessed the tool, the higher the charge to the user. Arguably, this model discouraged use.

In the early 1990s, Carswell (now referred to as Westlaw or Thomson Reuters) developed a competing online product which was offered to lawyers on a flat fee basis. This encouraged use and helped to level the legal research playing field between larger firms and smaller firms or sole practitioners.

Today, there are a number of commercial online legal research tools available to lawyers which, in general, are offered on a flat fee basis. Rates vary between law firms based on size as these products are sold based on the number of users or licensees within a law firm.

Lawyers and the public also have free online access to CanLII and many other websites that either post decisions, statutes or regulations.

The historical development of commercial online research tools and their associated costs and the free access to cases, statutes or regulations that can be found on the internet continues to cause courts to scrutinize claims for online legal research as a disbursement when rendering a costs award.

In [*Matthews v. Lawrence, 2022 ABQB 288*](#), an Alberta court was recently required to once again consider whether a winning party should be entitled to recover 100 percent of its claimed cost for online legal research.

The action involved a shareholder dispute that ultimately was dismissed as a result of a long delay. This entitled the defendants to costs. As part of their request to recover \$117,256 in costs, the defendants sought to recover slightly

more than \$1,100 for online legal research. The plaintiffs, among other items, contested this disbursement.

The court noted that the recovery for online legal research as a disbursement was controversial because "...most law firms are known to purchase these services on a flat-rate basis." This makes it difficult for a law firm to justify the disbursement on a case-by-case basis. However, this does not mean that the disbursement is unrecoverable and should never be sought.

In [*Fox Excavating & Grading Ltd. v. 2012299 Ontario Inc.*, 2021 ONSC 451](#), the court was required to determine whether the successful plaintiff should be entitled to recover slightly more than \$3,300 for "computer legal research" as a disbursement. The plaintiff's claim was disallowed. The reason for the disallowance was that the plaintiff did not support its claim with an explanation or invoice. This demonstrates that if a party wishes to recover its costs for online legal research, evidence should be filed to support the claim. At [paragraph 30](#) of this case, the court explained:

I agree with the analysis of Justice Mitrow in [*Furtney Estate v. Furtney*, 2014 ONSC 7259](#) at [para. 11](#). That is, companies such as Westlaw often sell online legal research to law firms at a flat annual rate. It may be reasonable for a law firm to distribute that cost across files requiring research and bill it as a file disbursement. If the firm wishes to recover that amount as reimbursement to their client as part of a cost award in the client's favour, however, it must file documentary evidence to show that the amount

claimed is a reasonable pro-rated fraction of the firm's online research overhead costs, and that the amount claimed was in fact billed to the client as a disbursement.

However, the court in [*Matthews*](#) took a more flexible approach to the issue.

Appreciating that it might be cost-prohibitive and/or disproportionately complex to provide detailed evidence to show that online research costs were being claimed proportionately, the court simply took into account the nature of the matter and that a novel issue was present in the case. In the result, the defendant was awarded \$500 of the claimed \$1,100 for online legal research.

The flexible approach adopted by the Alberta court in [*Matthews*](#) is refreshing. The strict approach adopted by the Ontario courts in [*Fox Excavating & Grading Ltd.*](#) and [*Furtney Estate*](#) would arguably require a law firm to disclose the flat fee it is being charged by a commercial supplier and potentially cause the firm to breach the confidentiality and privacy provisions contained in the contract between the firm and the supplier. To this end, at least, Carswell/Thomson Reuters has created a schedule of "notional" charges which can easily be attached to a Bill of Costs to support a claim for online legal research without breaching the contract between it and a respective law firm. While other commercial suppliers of online legal research products may wish to consider creating similar notional charges, perhaps the better approach is to discard a rigid approach in favour of a flexible exercise of the court's discretion when assessing a claim for online legal research disbursements. After all, for any litigation matter legal research is likely required at a certain stage in the proceeding and lawyers and firms should not feel constrained



to use products which are only freely available or which have a schedule of notional charges.

Contact us

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

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