RECOVERY OF LEGAL RESEARCH COSTS

- Kenneth J. Peacocke

It is now common for judges, when fixing costs at the conclusion of a litigation matter, to award costs to the successful party for fees or disbursements incurred in respect of legal research.

Most judges have recognized the importance of legal research in the litigation process. In Gibb v. Jiwan (April 10, 1996 (Ont. Gen. Div.)) Ferguson J. noted, inter alia, that (a) counsel have a duty to inform the court of relevant material authorities regardless of whether they support or contradict the position they advocate; (b) counsel cannot fulfil their duties to the client or the court unless they conduct reasonable research on points of law which are known in advance to be contentious; (c) the court must rely on counsel to conduct reasonably complete research on points of law they raise (and that is part of counsel’s professional duty) and (d) the judicial system cannot function effectively unless counsel fulfil this duty because judges cannot possibly know the law on all issues which come before them.

There can be no question now that recovery for legal research costs is permitted. The Court of Appeal in Moon v. Sher (November 16, 2004 (Ont. C.A.), at para. 36-39) noted that since Quicklaw and similar search vehicles have become convenient aids to research, although not found in the Tariff, their costs should be recoverable as disbursements provided they are not excessive and have been charged to the client. Many cases decided since Moon v. Sher (see below) have awarded costs, not only in respect of disbursements for computerized research services such as Quiclaw, but also in respect of fees for legal research (incurred by the lawyers of record and/or contract research lawyers).

It must be recognized that lawyers are not walking legal encyclopedia. The old adage that “lawyers are presumed to know the law” was first questioned over three decades ago and no longer should be applied to prevent a litigant from recovering its counsel’s fees for conducting legal research: see Poole & Perrault and O’Connor, Re (July 30, 1982 McBride Tax O. (Ont. S.C.)). In Beneteau v. Young (January 8, 2010 (Ont.S.C.J.) at paras. 25-27) the losing party argued that lawyers must “be presumed to know the law”, and thus there should be no recovery in respect of legal research costs. Campbell J. dismissed the argument, noting that each case that a lawyer takes on

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possesses unique characteristics and issues and requires that counsel find out whether those particular issues have previously been determined in Ontario or any other related jurisdiction.

Thus, other than in simple matters, each party involved in litigation must now reasonably expect that the losing party will be assessed costs and that those costs will include time spent in reviewing and summarizing the law: Wellington Plumbing & Heating Ltd. v. Villa Nicolini Inc. (December 4, 2012 Boswell J. (Ont. S.C.J.), at paras. 35-37); Lee v. Talbot (March 21, 2006 Siegel J. (Ont. S.C.J.)); Den Haag Capital LLC v. Correia (November 12, 2010 Pepall J. (Ont. S.C.J.), at para. 6). In Suprun v. Bryla (December 21, 2007 (Ont. S.C.J.), at para. 44), Quinn J. permitted a claim for time spent prior to the commencement of proceedings, including legal research time, to advise the applicants as to their rights. Quinn J. noted that “not only is liability for those costs within the reasonable expectation of an unsuccessful litigant but, to some degree, the ability to recapture those costs discourages the sue-first-and-think-later approach to litigation”.

There are some decisions which have declined to award costs for legal research. For example, Belobaba J. in Brown v. Canada (Attorney General) (November 13, 2013 (Ont. S.C.J.)) opined that “customers should not have to pay anyone who charges by the hour, whether lawyers or plumbers, to learn on the job. Legal research is obviously essential, but it should not be a chargeable disbursement.” However, that statement runs contrary to the numerous decisions cited herein, and specifically conflicts with the Court of Appeal decision in Moon v. Sher, supra.

It has been noted that some experienced counsel prefer to do the majority of research and preparation on their own. Other equally experienced and competent counsel are comfortable delegating some of the work to more junior associates. With respect to a claim for costs for legal research, each of these approaches is equally valid: Cast-Con Group Inc. v. Alterra (Spencer Creek) Ltd. (July 22, 2008 Reilly J. (Ont. S.C.J.)), at para. 9). However, the fees charged by senior and experienced counsel are a factor the court must take into account in considering the amount of costs that an unsuccessful party might reasonably expect to pay. To choose an easy example, an unsuccessful party would not expect to pay the hourly rate normally commanded by very senior counsel on a simple motion for extension of time to file pleadings or for adjournment of a pending motion: Cast-Can, supra.
Where legal research is performed by the law firm of record, recovery of such fees has been permitted. Indeed, in complex matters, senior counsel rates have been allowed. For example, in *Dumencu v. 823827 Ontario Ltd.* (April 12, 2010 Howden J. (Ont. S.C.J.)), at para. 13, counsel rates of $325 and $225 (substantial indemnity and partial indemnity, respectively) were permitted for legal research conducted by successful counsel.

As with any other item for which recovery is sought, there should be an indication on the Bill of Costs or Costs Outline as to the issues researched, who did the research and their experience, the hourly rate billed to the client, and the docketed time in respect thereof. Furthermore, as with any other claim in respect of legal fees, reasonableness is the governing principle (*Moon v. Sher*, supra). As noted, in simple matters, one should not expect to have senior counsel spending substantial time on legal research at a senior counsel rate. On the other hand, complex matters may well demand that extensive research be conducted by experienced lawyers as part of the preparation for the case and the satisfaction of counsel’s duty to the Court. There is no principled basis for outright denial of such fees or disbursements.

**Outside Research Counsel**

Campbell J. in *Beneteau v. Young*, supra, recognized what has become common practice: contracting out legal research.

Indeed, numerous cases have permitted charges for outside legal research to be recovered from the unsuccessful party; see for example *Beneteau v. Young*, supra, at para. 25; *St. Elizabeth Home Society v. Hamilton (City)* (November 21, 2007 Crane J. (Ont. S.C.J.), at para. 24). In fact, the use of an outside research counsel who charge modest hourly rates for their services has been recognized as an efficient way in which to properly prepare for trial: *Ernst v. Quinonez*, (February 13, 2004 Henderson J. (Ont. S.C.J.)), at para. 11).

Amounts paid to outside counsel to conduct legal research have been recoverable either as a disbursement (*Beneteau*, supra., *Ernst*, supra.) or as counsel fees or agency fees (*Willowrun Investment Corp. v. Greenway Homes Ltd.* (September 2, 1987 Sutherland J. (Ont. H.C.J.)); *1258917 Ontario Inc. v. Daimler Truck Financial* (July 12, 2012 Smith J. (Ont.Div. Ct.)); *D’Elia Estate v. D’Elia* (February 4, 2009 Hoy J. (Ont. S.C.J.), at paras. 3, 11).
Similarly, amounts paid to outside counsel to draft written submissions to the Court are recoverable and reviewable in the same manner as any lawyer’s fees would be: see for example *Van Dyke v. Grey-Bruce Regional Health Centre* (January 26, 2004 Van Melle J. (Ont. S.C.J.), at para. 27) in which $20,000 was permitted for closing submissions drafted by outside counsel.

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- Graduated 1988 from University of Western Ontario Law School (LL.B.) Undergraduate attendance at Carleton University (B.A. Hons. 1983) and Dalhousie University
- Admitted to the Ontario Bar in March, 1990
- Founded law firm in 1990
- Particular interest and expertise in research and written advocacy
- Since 1990 has conducted over 3,500 research and appeal-related assignments for over 150 law firms throughout Ontario (e.g. London, Toronto, Ottawa, Kingston, Sudbury, Goderich, Stratford, Whitby, Kitchener, Chatham)
- Prepared legal submissions and facta for cases in the Supreme Court of Canada, Federal Court (Appeal and Trial Division), Ontario Court of Appeal, Divisional Court and Superior Court
- Argued appeals and significant motions at the Court of Appeal for Ontario, Ontario Divisional Court, Ontario Superior Court of Justice, and the Federal Court of Canada
- In addition to appellate work, has been retained as litigation counsel for significant actions (eg. Class proceeding, McLaren v. City of Stratford)
- Instructor for the Bar Admission Course (Legal Research, Professional responsibility) 1992 – 2005
- Established The Litigation Resource Centre, an on-line resource service for Ontario civil litigators, in 2000
- Author of The Judicial Fixing of Costs (looseleaf manual, 2004-2009)