



## Legal Research Judicially Considered

By John Davis

In March of 2006, *Biggin v. Maloney*,<sup>1</sup> decided in London, Ontario, caused something of a stir in the Toronto law librarian and research lawyer communities.<sup>2</sup> Biggin had been represented as "agent" by Hopkins, a solicitor, in custody proceedings against Maloney. In assessing the costs to be paid by Maloney to Biggin, Grant A. Campbell J. said:

¶ 10 This motion was not at all complicated. Although some case-law research was necessary and although Mr. Hopkins did indeed produce several relevant and persuasive cases relating to the circumstances of one parent's removing children to another locality before trial, I cannot understand how Mr. Hopkins could invest 10<sup>0</sup> hours obtaining and reading the essence of those cases. Surely in this electronic age, Mr. Hopkins would perform the same task that I, or any other legally trained person, would and "click" the word "mobility" into the QuickLaw website. His computer would then have given him the relevant case law. I decline to award costs for the amount of time claimed for this part of the preparation for the argument.

Dawn Urquhart,<sup>3</sup> Connie Crosby,<sup>4</sup> and Simon Chester<sup>5</sup> each observed that a search as simple as that described by the judge returned an unmanageable number of cases, and not a well-organized, concisely written, research paper. One supposes (or hopes) that the judge, in order not to seem pedantic, had chosen to be misleadingly brief instead. Indeed, both Simon Chester<sup>6</sup> and Neil Campbell<sup>7</sup> noted that the same judge had elsewhere commented articulately on the importance of legal research.

It is natural for judges to value legal research. In reasons for judgment, they are expected to cite relevant authorities. How do the judges locate those authorities? How do they verify the citations? Well obviously, at some stage of the proceedings, someone did some research. Judges may personally do research, depending on their need or personal inclination, but they are also assisted by their

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clerks, their librarians and, most significantly, by counsel for the parties to the litigation. Counsel, in turn, are assisted by their librarians, associates and students. Legal research pervades the process, and the judges know it.

It is true nonetheless that judges seldom specifically comment in their reasons on the costs and processes involved in legal research. That is why those of us who take a special interest in legal research notice the exceptional cases in which they do. I have been collecting these cases for a number of years and bringing them to the attention of my students in the hope that they could be persuaded that research really did matter in the "real" world. The response to *Biggin v. Maloney*<sup>8</sup> suggested that a brief review would be of interest to others as well. It is, then, the purpose of this paper to bring together, and comment upon, some of the more interesting cases in which judges have discussed the legal research process and the associated costs.<sup>9</sup>

One of the fullest discussions of the importance of legal research is found in *Gibb v. Jiwan*.<sup>10</sup> Gibb had purchased land from Iona Avalon Inc. The municipal address included two parcels. By mistake, the agreement of purchase and sale, and the transfer under the *Land Titles Act*, R.S.O. 1990, Chap. L.5, only mentioned one of the two parcels. This was discovered seven years later, when Gibb attempted to resell the property. In the meantime, Jiwan had registered an execution against Iona. Donald S. Ferguson J., upon Gibb's application, declared that Gibb was the equitable owner of the second parcel, and that the interest of an execution creditor was subject to all the equities, whether registered or not.

In giving reasons, the judge commented at length<sup>11</sup> on the inadequacy of the research done by counsel. He said that it was part of counsel's professional duty to conduct reasonably complete research,<sup>12</sup> and that the judicial system could not function effectively unless this duty was fulfilled.<sup>13</sup> The judge noted how annoying it was that he and his law clerk had had to do the research

and analysis themselves, instead of it being done by counsel.<sup>14</sup> He noted that this had delayed his decision for three months,<sup>15</sup> and that a decision based on counsel's unresearched urgings would have contradicted a rule of law which had been established in Ontario for over 50 years.<sup>16</sup> The judge lamented that, though this had been a "particularly egregious example", the failure to do proper research had been commonplace in his court.<sup>17</sup> The judge indicated his intention to sanction counsel through an appropriate award of costs.<sup>18</sup>

The report does not indicate how the court ultimately dealt with the issue of costs, but the discussion below will indicate some of the options open to a judge.

### Fee Dispute Terminology

They typical case in which legal research is discussed does involve a fee dispute. These disputes arise between solicitor-and-client, of course. Disputes also arise between party-and-party, when one litigant is ordered to pay some or all of the costs of another litigant.

Some of the terminology used in such fee disputes may be unfamiliar to readers. Indeed, the traditional terminology was arcane and potentially misleading, especially to clients. As a result, some jurisdictions, e.g. Ontario, have modernized the statutory language. Of course, this wasn't meant to help those of us who need to read cases, both old and new, from a number of jurisdictions.

In disputes between party-and-party, costs are "awarded" when one litigant is ordered to pay some or all of the costs of another. Costs are "fixed" when the judge decides the actual dollar amount. Sometimes, instead of fixing costs, the judge refers the amount of costs to another officer to be "assessed" (or, historically in Ontario, and currently in some other jurisdictions, "taxed".) Similarly, in disputes between solicitor-and-client, it is typically the duty of an assessment officer to assess (or tax) the solicitor's bill of costs.

Recalling that there are these two types of fee dispute (party-party and solicitor-client) helps one to understand the terminology used by

judges in awarding costs according to different scales. Some litigants keep their lawyers on a very tight budget. Others are willing and able to pay more for a higher level of service. This is a matter for negotiation between solicitor-and-client. Of course, there can be no such negotiation between a solicitor and an opposing litigant. Consequently, when one litigant is ordered to pay the costs of another litigant, the amount is, by default, the amount that a tight-budget client would pay. The items and amounts allowed are normally governed by regulatory tariffs. The basic scale is called "partial indemnity" (or historically, "party-and-party costs", and in some jurisdictions, "ordinary costs"). When a judge, for whatever reason, decides to award costs at a higher scale, it is called "substantial indemnity" (or, historically, "solicitor-and-client costs" and in some jurisdictions, "special costs".) Naturally, this does not exhaust the possibilities.<sup>19</sup>

As noted above, the typical case in which legal research is discussed involves a fee dispute. First, however, some atypical cases.

### Damages for Negligence

At least one fully-argued Supreme Court of Canada case has involved a solicitor's obligation to identify the need for legal research. In *Central Trust Co. v. Rafuse*,<sup>20</sup> two solicitors, Rafuse and Cordon, were found liable for over \$400,000 in damages. They had advised Central Trust to advance funds to the purchaser of the shares of Stonehouse, a Nova Scotia corporation. These funds were advanced on the security of a mortgage upon the property of the corporation being sold. The solicitors' research (if they did any at all) had not revealed that such a mortgage was void under the provisions of s. 96(5) of the *Nova Scotia Companies Act*, R.S.N.S. 1967, c. 42. Mr. Justice Le Dain, for a unanimous court, wrote that a solicitor was "not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his 'working knowledge', without the need of further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable

him to perceive the need to ascertain the law on relevant points."<sup>21</sup>

There can be faster, simpler remedies than an action for a client whose solicitor has been negligent. This is because solicitors are officers of the court, and can therefore, sometimes, be proceeded against summarily. In *World Wide Treasure Adventures Inc. v. Trivia Games Inc.*,<sup>22</sup> for example, the plaintiff in a copyright dispute had applied for relief pending trial, including an injunction and an order that the defendant pay royalties. The application had been "so hopelessly deficient" that, in addition to it being dismissed, an award of solicitor-client costs had been made against the plaintiff. Upon application by the plaintiff, the court ordered the plaintiff's solicitors to pay those costs personally. The court decided that it had jurisdiction to make such an order, and that in a clear case it was pointless to require the plaintiff to pay the costs and bring a second action in order to recover damages from its solicitors. In oral reasons, Reginald J. Gibbs J. said that "research should have been undertaken", and that plaintiff's solicitors had been negligent in the performance of their duty to him.<sup>23</sup>

### Law Society Discipline

*Mercieca v. Merciera*<sup>24</sup> illustrated a very different principle involving legal research. In fixing the costs awarded to a successful respondent in a family law dispute, D. Roger Timms J. noted that counsel had been aware of a direct authority from the Court of Appeal which said that her client could not proceed under the *Divorce Act*, and had deliberately withheld that authority from both the court and the respondent.<sup>25</sup> He thought her conduct had been a contravention of various aspects of Rule 4 of the *Code of Professional Conduct of the Law Society of Upper Canada*.<sup>26</sup> Portions of Rule 4 read as follows:

#### Relationship To The Administration Of Justice

##### 4.01 THE LAWYER AS ADVOCATE

###### ... Advocacy

...  
4.01 (2) When acting as an advocate, a lawyer shall not: ...

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority;

...

(h) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent;

...

Because counsel on both sides of a litigated matter are obliged to disclose relevant authorities, and because judges, as in *Mercieca*,<sup>27</sup> also do research when they perceive the need, litigants will not always suffer, in the ultimate outcome of a case, from the failings of their own counsel. Such failings may, however, limit what such a lawyer can legitimately claim in a bill of costs, as we shall see below.

In extreme cases, such a lawyer may also be disciplined for failing to perform to the standard of a competent lawyer. Portions of Rule 2 read as follows:

### **Relationship To Clients**

#### **2.01 COMPETENCE**

##### **Definitions**

**2.01 (1)** In this rule, "competent lawyer" means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client including:

...

(c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including:

- (i) legal research,
- (ii) analysis,
- (iii) application of the law to the relevant facts,

(iv) writing and drafting,

...

#### **Competence**

**2.01 (2)** A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

...

Of course, a failure to perform competently normally involves a number of factors besides legal research. For example, in *Law Society of the Northwest Territories v. Seebaran*,<sup>28</sup> a Nunavut lawyer was reprimanded, under a comparable rule, for "inexcusable delay and failure to follow his client's instructions". The lawyer had attempted to justify his delay in filing documents on the basis of a concern that his client's move from Kugluktuk to Edmonton with her children would affect the court's jurisdiction to deal with child custody proceedings. In fact, there was no such impediment, and the lawyer admitted to not having conducted any legal research on the issue. In *Law Society of British Columbia v. Taschuk*,<sup>29</sup> the solicitor was found to have "incompetently carried out duties undertaken by him". He had, among other things, given an incorrect legal opinion to a client without having done any research. He was reprimanded, ordered to take courses in corporate/commercial law, and conditions were imposed on his practice.

At the opposite extreme was *Nova Scotia Barristers' Society v. Jordan*.<sup>30</sup> The lawyer in that case had billed, as trustee of an estate, for 200 hours of legal research. The Panel (W.M. Penfound, Chair, D. Boudreau, D.W. Giovannetti, L.A. MacPhee and E.C. Walsh) found that the amount of research conducted "was unreasonable in the circumstances and that the fees charged by Mr. Jordan in this matter were so excessive as to offend one's sense of what is fair and reasonable." The lawyer was reprimanded. The panel said that a lawyer "should not consider his retainer or appointment to give him boundless freedom to conduct research." The panel said that if a lawyer did not have the expertise to adequately deal with a particular situation, the lawyer should retain another lawyer who had the proper expertise. Alternatively, the panel said, if a lawyer chose

to treat the situation as an opportunity to learn, "it should not be entirely at the expense of the client." There were, said the panel, many situations where a lawyer should conduct research, and where this would be within the scope of the retainer. Even in such cases, however, "the remuneration claimed by the lawyer must be fair and reasonable in the circumstances."

Jordan had previously been ordered by the court to repay a third of the fees he had charged to the estate.

### Reduction of Fees Billed for Research

Of course, the themes noted above also appear regularly, as they did in *Jordan*,<sup>31</sup> in the ordinary fee dispute cases. Any discussion of these cases needs to be prefaced with the observation that one seldom finds extended analyses of issues and authorities in such cases, nor does one even find consistency on occasion. Fee dispute proceedings are meant to be summary and relatively inexpensive to clients and litigants, and this may explain why the reasons delivered by judges and assessors occasionally seen cursory, or even abrupt. One often gets a sense in reading a case that, although clear and thorough reasons for a decision were not articulated, they were most likely present notwithstanding.

One of the nicest, simplest examples to be found of research being found inadequate to justify the fee was *Merklinger v. Jantree No. 3 Limited Partnership*.<sup>32</sup> Alan W. Bryant J., assessing the costs to be paid by the defendants to the plaintiff, noted that the plaintiff had claimed the costs of conducting legal research. The judge noted that Mr. Dingwall, for the plaintiff, had submitted just a copy of the headnote and a two-page excerpt from a recent case. There had been "no references to any other case law or to any texts on partnership law or fiduciary duties."<sup>33</sup> The judge noted as well that Mr. Dingwall had failed to cite a particularly relevant authority, even though Dingwall had himself been counsel in that case.<sup>34</sup> The judge considered that the claim for legal research was not substantiated.

### What is Legal Research and Who is Being Asked to Pay?

The case of *Jeff (Guardian ad litem of) v. Kozak*<sup>35</sup> raised an interesting question. The plaintiff was awarded damages and costs against Kozak for negligence resulting in a motor vehicle accident. Upon Kozak's application, Registrar Douglas Baker assessed the plaintiff's costs, but disallowed one item of research. He noted that counsel, upon learning which judge would be hearing the trial, had searched Quicklaw to determine if that judge had heard any similar cases. The judge found that this had not been "legal research per se."<sup>36</sup> The judge said: "While it may well be good counsel work to anticipate and attempt to determine a judge's experience with a particular issue or cause of action, the cost of doing so is not attributable to the other party."<sup>37</sup>

It is important to note the phrase "attributable to the other party". As the judge hinted, the item might well be treated differently in an assessment between solicitor-and-client.

### Who Pays for a Legal Education?

Comments which distinguish research done to advance a client's cause from research done for the education of the lawyer have been made in a number of cases besides *Jordan*.<sup>38</sup> In *Hullmark Developments Ltd. v. Ontario (Minister of Transportation)*,<sup>39</sup> for example, Assessment Officer Ray Brzyski, assessing the party-and-party costs of expropriation proceedings, noted that a student (whom he named) had not added any value to the services rendered: "His research on costs of assessment appears to have fallen between the cracks of this proceeding. I do not see how it helped to advance the assessment hearing, other than being a learning curve for the student."<sup>40</sup>

I find that students particularly appreciate this case.

A more recent example of the disallowance of "learning curve" research was *Huff v. Dailey*.<sup>41</sup> On the other hand, there is *Kawartha Feed Mills (1980) Inc. v. Goldie*.<sup>42</sup> In that case, James M. Farley J., in fixing the party-and-party costs of litigation, said that concerns about paying for a legal education would have validity "if counsel

were inexperienced in a particular field."<sup>43</sup> He added, however, that it was "disingenuous to think that counsel should be expected to know all the law of every case before getting involved in any case."<sup>44</sup>

### The Relevance of Experience and the Hourly Rate

Because senior counsel (hopefully) have less to learn than juniors and students, the amount of time allowed for research may depend on experience and the hourly rate that goes with it. In *Chown, Cairns v. 601039 Ontario Ltd.*,<sup>45</sup> Roger E. Salhany J. confirmed the report of an Assessment Officer who had reduced a law firm's account rendered to a client. He said he had "some difficulty with [a] submission that the solicitor should be entitled to charge the client for research of the law."<sup>46</sup> In his view, "a client who retains a solicitor of many years experience and who is prepared to pay for that solicitor's higher hourly rates because of that experience is entitled to assume that the solicitor will be aware of all of the relevant law."<sup>47</sup> He said he "would doubt very much if a client would be prepared to pay a higher hourly rate to an experienced solicitor on the basis of that experience only to find that the solicitor is also charging him to do research."<sup>48</sup>

When several lawyers are involved in a case, their time may be allowed at different rates. In *Phasecom Systems Inc. v. Systems 2 Communications Inc.*,<sup>49</sup> plaintiff applied for an interim injunction, alleging fraud and other impropriety, but then abandoned the application before witnesses were examined. Defendant sought, and was awarded, its costs of the application. In fixing the amount of costs, Todd Ducharme J. discussed the different hours and rates of a team including three lawyers, law students, and a law clerk, and expressed concern about "unnecessary overlap between the work of the various individuals doing legal research."<sup>50</sup>

It isn't necessary for the entire team to be in-house either. In *Ernst v. Quinonez*,<sup>51</sup> the plaintiff, Ernst, had been awarded damages and costs against the defendants. In fixing the amount of costs, Joseph R. Henderson J. allowed a disbursement of \$3,242.10 for legal research which had been conducted by another lawyer. He noted

that counsel for the plaintiff had not employed a junior counsel to prepare for trial, or at trial.<sup>52</sup>

### Fees, Disbursements, and Overhead

I haven't yet explicitly acknowledged the vexed fee-or-disbursement question with respect to computer-assisted legal research, but the *Ernst v. Quinonez* case does illustrate why the fee versus disbursement distinction isn't always the right one. Sometimes, fee-versus-disbursement is just a question of form, not of substance. The disbursement to a research lawyer was allowed as an efficient alternative to a junior counsel fee in that case.<sup>53</sup>

In *Osmar v. Osmar*,<sup>54</sup> David Aston J., assessing the party-and-party costs of family law proceedings, noted that, since three different lawyers had worked on behalf of the wife, the husband should not have to pay for all the time taken for each to become familiar with the case, nor for all the time spent on legal research by the more junior lawyer.<sup>55</sup> Aston J. adjusted the amount for legal research, because it had "a value to the lawyer beyond the value to the individual client."<sup>56</sup> He also did not allow the cost of copying caselaw, because that was "part of a lawyer's overhead and included in the hourly rates."<sup>57</sup>

The remarks quoted provide a nice illustration of the frequent need to assess a number of factors in combination in order to arrive at a just amount. I draw particular attention, however, to the remarks on photocopy charges as overhead. Mark M. Orkin, *The Law of Costs*<sup>58</sup>, says (omitting notes):

The court allowed a per page charge of 25¢. A claim for photocopying charges was reduced to reflect overhead costs which an unsuccessful party should not be required to pay.

It would be nice if at least the photocopy disbursement question were settled. Alas, it appears not to be. The only Ontario case cited by Orkin was *Pilon v. Janveaux*,<sup>59</sup> in which George T. Valin J. reduced<sup>60</sup> a 35¢ per page charge to 25¢ per page as a party-and-party disbursement item.

## The Tariff and Party-Party Fee Disputes

Item 31 of Tariff A (part of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194) allows: "For copies of any documents or authorities prepared for or by a party for the use of the court and supplied to the opposite party, a reasonable amount." Item 35 allows: "Where ordered by the presiding judge or officer, for any other disbursement reasonably necessary for the conduct of the proceeding, a reasonable amount in the discretion of the assessment officer." Again, it is worth noting that the Tariff applies directly only to party-and-party fee disputes, i.e., concerning what a litigant against whom costs have been awarded pays to another litigant. There is much more flexibility in solicitor-and-client fee disputes.

In *Schumacher v. Toronto-Dominion Bank*,<sup>61</sup> Assessment Officer Elizabeth Moquin, in assessing the party-and-party costs of an action for constructive dismissal, disallowed disbursement items for faxes and Quicklaw research. She noted that, although "the cost of faxes and computer based legal research are not only necessary expenses of modern day litigation but also serve to reduce amounts which would otherwise fall to be assessed under the disbursement provisions of the Tariff,"<sup>62</sup> she was nevertheless bound, as an Assessment Officer, by Rule 58.05(1), which provided:

Where party and party costs are to be assessed, the Assessment Officer shall assess and allow,

(a) solicitors' fees and disbursements in accordance with the Tariffs; and

(b) disbursements for fees paid to the court, a court reporter, an official examiner or a sheriff under the regulations under the Administration of Justice Act

and no other fees, disbursements or charges shall be assessed or allowed unless the court orders otherwise.

The provision, "unless the court orders otherwise", is clearly needed if judges, as in *Ernst v.*

*Quinonez*,<sup>63</sup> are to be able to decide when the difference between a fee and a disbursement is merely form, not substance. In general, however, it does seem right in principle that any allowance for disbursements should be exceptional in party-and-party fee disputes. It is reasonable to suppose that lawyers will be best motivated to work cost-effectively when the costs of their work will be borne as overhead, i.e. as part of the allowances for fees. As always, some clients, duly consulted and advised, will wish to pay for premium service, knowing that the associated costs will not be recoverable from other litigants.

In *Sellors v. Total Credit Recovery Ltd.*,<sup>64</sup> Assessment Officer Ray Brzyski assessed the costs, awarded on a solicitor-and-client scale, to a defendant by counterclaim who had succeeded on a motion for summary judgment. The other party argued that expenses for Quicklaw were overhead items, like postage, telephone, library and software purchases.<sup>65</sup> The assessment officer said: "I could be tempted in calling the charges items of overhead consumed in the time-keeper's hourly rate and simply the cost of doing business. It is an interesting argument."<sup>66</sup> He found, however, that the particular expenses had been "created for a specific client in a specific proceeding touching on issues and law specifically relating to that client's case,"<sup>67</sup> and that the expense was "neither unreasonable nor unnecessary."<sup>68</sup> He said: "All reasonable and necessary disbursement expenses within the four corners of this litigation should be assessable. Quick Law research disbursement expense is not overhead expense within the meaning and intent of a solicitor-and-client award of costs."<sup>69</sup>

### The Obsolete Solicitor-Client Scale in Party-Party Fee Disputes

The qualification, "within the meaning and intent of a solicitor-and-client award", was significant. The "solicitor-and-client" scale, however, no longer exists in Ontario. It has been replaced by "substantial indemnity costs". Rule 1.04(5) provides: "If a statute, regulation or other document refers to solicitor-and-client costs, these rules apply as if the reference were to substantial indemnity costs."<sup>70</sup> Rule 1.03 currently defines "substantial indemnity costs" as "costs awarded in an amount that is 1.5 times what

would otherwise be awarded in accordance with Part I of Tariff A ..."<sup>71</sup>

*Deloitte, Haskins & Sells Ltd. v. Bell Canada*<sup>72</sup> was a case that Orkin<sup>73</sup> cites for the proposition that the Tariff was "essentially irrelevant" in determining party-and-party costs on a solicitor-client scale. The plaintiff in that case had been awarded solicitor-client costs in an action for breach of contract. Although the solicitor had billed the client at \$237.50 per hour for 65 hours of trial and 55 hours of written argument, the assessment officer had awarded only \$135 per hour against the defendant. On appeal, Sandra Chapnik J. allowed the rate billed. She said: "I accept the concept of full indemnity as expressed in [various cases]. In coming to a determination of quantum when costs are awarded on a solicitor-and-client basis, the tariff is therefore essentially irrelevant. Any limits on the indemnity are not related to discretion but to the exclusion of services that are not reasonably necessary for the proper presentation of the client's case."<sup>74</sup> Another useful case cited by Orkin<sup>75</sup> was *Magee v. Bd. of Trustees of Roman Catholic Separate Schools for City of Ottawa*.<sup>76</sup> The claimant in expropriation proceedings had been awarded solicitor-client costs in an arbitration. The Taxing Officer allowed witness fees of only \$48 for expert valuers, in accordance with the tariff, even though the valuers had actually been paid \$1,860. James C. McRuer, C.J.O., allowed the claimants appeal, and referred the bill back to the Taxing Officer. He said:<sup>77</sup>

The distinction that is to be drawn between a case where the costs taxed on a solicitor-and-client basis are to be paid by an opposite party and one where they are to be paid by the client is this: if the client instructs the solicitor to do certain things or to take certain action, which is unnecessary for the proper presentation of the case, the client is liable to pay, providing the solicitor has properly safeguarded himself with full and fair advice. On the other hand, where the costs are to be paid by a third party, only those costs that are necessary for the proper presentation of the case may be recovered.

Notwithstanding the change in the definition of "solicitor-and-client" costs, these cases may still be relevant when a court awards "full indemnity" costs pursuant to Rule 57.01(4)(d)<sup>78</sup>. In other party-party fee disputes, however, the Tariff should continue to be relevant.

### Disbursement versus Overhead in Other Jurisdictions

It may be of interest to note how the disbursement/overhead distinction has been viewed in other jurisdictions. In *Sandhu v. Insurance Corporation of British Columbia*,<sup>79</sup> Master Douglas Baker, as Registrar, assessed the party-and-party costs of the plaintiff's personal injury claim. He noted that since the cost of accessing a case in a printed law report was not allowed as a disbursement, neither should the cost of "ordinary or conventional legal research" conducted online.<sup>80</sup> He did, however, allow disbursements for the retrieval of cases which were only available on Quicklaw.<sup>81</sup> He predicted, nonetheless, that "as more and more counsel use computer legal research as a common tool the expense of such research is likely to become one more item of overhead, much as subscriptions to conventional law reports or texts have become overhead items. In such an eventuality, computer aided legal research is less likely to be allowed as a disbursement."<sup>82</sup>

The eventuality predicted by Master Baker was recently taken account of in Nova Scotia, where party-and-party costs are assessed in the Small Claims Court. In *Bank of Montreal v. Binder*,<sup>83</sup> the plaintiff Binder had commenced actions against several banks. The banks obtained summary judgment striking out the claims, and were awarded costs. In assessing these costs, Adjudicator W. Augustus Richardson canvassed the issue at length,<sup>84</sup> and disallowed a disbursement for electronic legal research. He noted that the nature of electronic research and its cost had changed.<sup>85</sup> Formerly, each minute of online research time was billed. Now, however, many services negotiated flat rates with users on an annual basis. The result was that the "bills" issued to law firms in respect of any particular file were "illusory".<sup>86</sup> He said: "In ordinary course such a flat monthly charge would be overhead borne by the entire firm rather than a disbursement in respect of a particular file or client. Such

an expense would be akin to that associated with having a law library, and such expenses have traditionally been seen as overhead and hence not normally a taxable disbursement."<sup>87</sup> He conceded that "searches made in respect of legal materials that would not normally be found in a law firm's library could constitute a reasonable disbursement."<sup>88</sup> In this case, however, having reviewed the appeal factum, he concluded that all the cases cited "could be expected to be found in a major law firm's library."<sup>89</sup>

### Recent Ontario Court of Appeal Decision

This approach may be precluded in Ontario by the decision of the Court of Appeal in *Moon v. Sher*.<sup>90</sup> Moon had brought an action against the Guy Lombardo Orchestra, claiming breach of contract. The motions judge found that the dispute should have been resolved in accordance with the arbitration clause in the contract. The court stayed the action, and awarded costs to the defendants. The Ontario Court of Appeal dismissed an appeal from the stay.<sup>91</sup> With respect to the costs, however, the court allowed the plaintiff's appeal, and reduced the amount of costs awarded to the defendant. Stephen Borins J.A. (Lang and Juriensz JJ.A. concurring) allowed Quicklaw charges as a disbursement item. He said:<sup>92</sup>

[A]mounts disbursed for Quicklaw services, courier services, stationary and postage may be recoverable under Tariff item 35 if the service or expense is 'reasonably necessary for the conduct of the proceeding', the amount is reasonable and has been charged to the client, and the disbursement does not fall within standard office overhead. Indeed, as 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. It is for the party seeking recovery of the disbursements to satisfy these criteria.

*Moon v. Sher* was followed in *Mandic v. See-Me Auto Leasing Ltd.*<sup>93</sup> Assessing the plaintiff's costs against the defendant, C. Stephen Glithero J. al-

lowed a disbursement for Quicklaw, saying: "In this day and age, it likely represents the most cost effective way to locate and copy cases."<sup>94</sup>

The individual litigant who has been awarded party-and-party costs wants the total to be as large as possible, and this happens if the disbursement amount is made larger without the fee amount being reduced. One way to accomplish this is to shift overhead costs into the disbursement category. The overall decision in *Moon v. Sher*,<sup>95</sup> however, reduced the amount of costs awarded. That case has most frequently been cited for the following points: first, that "the client, in whose favour a costs award is made, should not expect the court in fixing costs to require the losing party to pay for over-preparation, nor should the losing party reasonably expect to have to do so;"<sup>96</sup> and second, that, in fixing costs, a judge should not be driven by "the hours actually spent by counsel and the rates provided by the grid," but by "the need to reach a fair and reasonable result."<sup>97</sup> With respect, judges are just as likely to be distracted from the ultimate goal of an overall "fair and reasonable result" by invitations to add new categories of disbursement to the concise list provided by the Tariff, as they are by lengthy lists of docketed hours. If the goal is to increase the overall quantum of cost awards in party-and-party fee disputes, there are simpler and cleaner ways to do so than by adding items to the tariff, for example, the 150 percent gross-up for "substantial indemnity" noted above.<sup>98</sup> In solicitor-client fee disputes, on the other hand, the bottom line is what really matters. Discussions of the characterization of expenditures are primarily addressed, as in *Chown, Cairns v. 601039 Ontario Ltd.*,<sup>99</sup> to overall cost-effectiveness in legal work, the prevention of double-billing, and good client communications with regards to fee arrangements.

The Court of Appeal in *Moon v. Sher* did indicate that it had thoughts about what "standard office overhead" might or might not be.<sup>100</sup> The Court's thoughts were anything but fully articulated, however, and the remarks on disbursements as they stand, in my submission, only add complexity and doubt. Is the use of computer-assisted legal research services not "standard"

now, rather than rare or unusual? Is the test now that *any* spending which would otherwise be overhead is now recoverable under a partial indemnity award of costs if it was "reasonably necessary", "cost-effective", a "convenient aid" in the litigation, and "charged to the client"?

To characterize payments for computer-assisted legal research services, especially those made on an annual subscription basis, as disbursements rather than as overhead would, as noted above, tend to make legal research *less* cost effective overall, not more so, at least from the point of those ultimately paying for it, i.e. litigants on all sides viewed collectively. This is because, if the ordinary costs of research were treated as overhead regardless of medium, lawyers (and their librarians) would be motivated to assess the relative cost-effectiveness of research tools not on the basis of their characterization under the *Rules of Civil Procedure*, but simply on their individual merits. Allocating the ordinary subscription costs of computer-assisted legal research services to individual files would be no different in principle than allocating the costs of other library subscriptions (or monographs) to individual files would be. This is what management accounting (or cost accounting) does, and the purpose is to assess cost-effectiveness. Awards of party-and-party costs, however, are made for different reasons.

## Conclusion

It is difficult, reviewing the cases, to escape the conclusion that the courts still have work to do in clarifying the law of costs as it applies to legal research expenditures. It is perfectly clear, however, that the judges do value and depend upon effective legal research in their work, notwithstanding the occasional oversimplified description of the methods and details.

## Footnotes

<sup>1</sup> *Biggin v. Maloney*, 2006 CanLII 7511 (ON S.C.), [2006] O.J. No. 975, 2006 CarswellOnt 1494, 2006 ON.C. LEXIS 943

<sup>2</sup> The discussion on CALL-L can be found at <https://listserv.unb.ca/archives/call-l.html> using the search "Judge questions legal research." The comments on SLAW are at <http://www.slaw.ca/2006/04/10/715/>.

<sup>3</sup> CALL-L, *ibid.*, April 7, 2006

<sup>4</sup> CALL-L, *ibid.*, April 7, 2006

<sup>5</sup> SLAW, *supra*, note 2, April 10, 2006, citing John Swan

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*, April 10, 2006

<sup>8</sup> *supra*, note 1

<sup>9</sup> There are other notable reviews in Ted Tjaden, "Recovery of Costs and Disbursements for Legal Research", i.e. pages 4 to 9 of *Legal Research and Writing*, 2nd ed. (Toronto: Irwin Law, 2004), and in Lisa A. Peters, "Recovery of Legal Research Expenses in Taxations and Assessments of Costs", *The Advocate*, 55(1):79-87 (January 1997).

<sup>10</sup> *Gibb v. Jiwan*, [1996] O.J. No. 1370, 1996 CarswellOnt 1222, 1996 Ont. Sup. C.J. LEXIS 2961

<sup>11</sup> *ibid.*, para. 21-43 O.J.

<sup>12</sup> *ibid.*, para. 34

<sup>13</sup> *ibid.*, para. 36

<sup>14</sup> *ibid.*, para. 37

<sup>15</sup> *ibid.*, para. 38

<sup>16</sup> *ibid.*, para. 39

<sup>17</sup> *ibid.*, para. 40

<sup>18</sup> *ibid.*, para. 41

<sup>19</sup> Readers who want more should consult the two-volume looseleaf by Mark M. Orkin, *The Law of Costs*, 2nd ed. (Canada Law Book).

<sup>20</sup> *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, 34 B.L.R. 187, 37 C.C.L.T. 117, 42 R.P.R. 161, 75 N.S.R. (2d) 109, 186 A.P.R. 109, 69 N.R. 321, [1986] R.R.A. 527, 1986 CanLII 29 (S.C.C.), [1986] S.C.J. No. 52, 1986 CarswellNS 40; reversing 147 D.L.R. (3d) 260, 25 C.C.L.T. 226, 28 R.P.R. 185, 57 N.S.R. (2d) 125, 120 A.P.R. 125, [1983] N.S.J. No. 55, 1983 CarswellNS 119

<sup>21</sup> *ibid.*, at 1986 CanLII 29 (S.C.C.), para. 59

<sup>22</sup> *World Wide Treasure Adventures Inc. v. Trivia Games Inc.*, 16 B.C.L.R. (2d) 135, [1987] B.C.J. No. 2619, 1987 CarswellBC 219 (S.C.)

<sup>23</sup> *ibid.*, at para. 17 CarswellBC

<sup>24</sup> *Mercieca v. Merciera*, 2003 CanLII 2184 (ON S.C.), [2003] O.J. No. 539, 2003 CarswellOnt 537, 2003 Ont. Sup. C.J. LEXIS 297

<sup>25</sup> *ibid.*, para. 10

<sup>26</sup> The *Rules of Professional Conduct* are available at <http://www.lsuc.on.ca/regulation/a/profconduct/>

<sup>27</sup> *supra*, note 24

<sup>28</sup> *Law Society of the Northwest Territories v. Seebaran*, [2001] L.S.D.D. No. 42

<sup>29</sup> *Law Society of British Columbia v. Taschuk*, [2000] L.S.D.D. No. 21

<sup>30</sup> *Nova Scotia Barristers' Society v. Jordan*, [1995] L.S.D.D. No. 258

<sup>31</sup> *ibid.*

<sup>32</sup> *Merklinger v. Jantree No. 3 Limited Partnership*, 2004 CanLII 54552 (ON S.C.), [2004] O.J. No. 5996, 2004 CarswellOnt 6660, 2004 ON.C. LEXIS 6464

<sup>33</sup> *ibid.*, para. 47

<sup>34</sup> *ibid.*, para. 48

<sup>35</sup> *Jeff (Guardian ad litem of) v. Kozak*, 2002 BCSC 103 (CanLII), [2002] B.C.J. No. 179, 2002 CarswellBC 108, 2002 B.C.T.C. LEXIS 342

<sup>36</sup> *ibid.*, at para. 15

<sup>37</sup> *ibid.*

<sup>38</sup> *supra*, note 30

<sup>39</sup> *Hullmark Developments Ltd. v. Ontario (Minister of Transportation)*, [2002] O.J. No. 3885, 2002 ON.C. LEXIS 705 (S.C.J.)

- <sup>40</sup> *ibid.*, at para. 37
- <sup>41</sup> *Huff v. Dailey*, [2005] O.J. No. 4022, 2005 ON.C. LEXIS 5054; at para. 62. The decision was varied, without reference to this point, at [2006] O.J. No. 913, 2006 CarswellOnt 1391, 2006 ON.C. LEXIS 887 (S.C.J.).
- <sup>42</sup> *Kawartha Feed Mills (1980) Inc. v. Goldie*, [1992] O.J. No. 3739, 1992 CarswellOnt 2817, 1992 Ont. Sup. C.J. LEXIS 2421 (Gen.Div.).
- <sup>43</sup> *ibid.*, at para. 13 CarswellOnt
- <sup>44</sup> *ibid.*
- <sup>45</sup> *Chown, Cairns v. 601039 Ontario Ltd.*, [1994] O.J. No. 2982, 1994 CarswellOnt 3809, 1994 Ont. Sup. C.J. LEXIS 2277 (Gen.Div.).
- <sup>46</sup> *ibid.*, at para. 13 CarswellOnt
- <sup>47</sup> *ibid.*
- <sup>48</sup> *ibid.*, at para. 14
- <sup>49</sup> *Phasecom Systems Inc. v. Systems 2 Communications Inc.*, 2005 CanLII 380 (ON S.C.), [2005] O.J. No. 46, 2005 CarswellOnt 56, 2005 ON.C. LEXIS 83
- <sup>50</sup> *ibid.*, para. 15, 18 and 19
- <sup>51</sup> *Ernst v. Quinonez*, 2004 CanLII 14273 (ON S.C.), [2004] O.J. No. 556, 2004 CarswellOnt 568, 2004 ON.C. LEXIS 548
- <sup>52</sup> *ibid.*, at para. 11
- <sup>53</sup> *ibid.* Concerning the recovery of fees for multiple counsel under the old cost grid, see the remarks (para. 50) of Borins, J.A. in *Celanese Canada Inc. v. Canadian National Railway Co.*, 196 O.A.C. 60, 2005 CanLII 8663 (ON C.A.), [2005] O.J. No. 1122, 2005 CarswellOnt 1124, 2005 ON.C. LEXIS 1219; leave to appeal refused [2005] S.C.C.A. No. 245; adopted at para. 102 of *Walker v. Ritchie*, 197 O.A.C. 81, 12 C.P.C. (6th) 51, 31 C.C.L.T. (3d) 205, 25 C.C.L.I. (4th) 60, 2005 CanLII 13776 (ON C.A.), [2005] O.J. No. 1600, 2005 CarswellOnt 1574, 2005 ON.C. LEXIS 1798, leave to appeal granted [2005] S.C.C.A. No. 297. Significant changes to the grid were made by O. Reg. 42/05.
- <sup>54</sup> *Osmar v. Osmar*, 8 R.F.L. (5th) 387, [2000] O.J. No. 2504, 2000 CarswellOnt 2343, 2000 Ont. Sup. C.J. LEXIS 1292
- <sup>55</sup> *ibid.*, at para. 22
- <sup>56</sup> *ibid.*, at para. 23
- <sup>57</sup> *ibid.*
- <sup>58</sup> *supra*, note 19, para. 219.6(7) (Photocopy charges)
- <sup>59</sup> *Pilon v. Janveaux*, 2004 CanLII 22089 (ON S.C.), [2004] O.J. No. 3648, 2005 CarswellOnt 56, 2005 ON.C. LEXIS 83
- <sup>60</sup> *ibid.*, para. 40. The decision was varied without reference to this point on appeal: 2006 CanLII 6190 (ON C.A.), [2006] O.J. No. 887, 2006 CarswellOnt 1211, 2006 ON.C. LEXIS 809.
- <sup>61</sup> *Schumacher v. Toronto-Dominion Bank*, [2001] O.J. No. 2997 (S.C.J.)
- <sup>62</sup> *ibid.*, at para. 11
- <sup>63</sup> *supra*, note 51
- <sup>64</sup> *Sellors v. Total Credit Recovery Ltd.*, [2001] O.J. No. 2337 (S.C.J.)
- <sup>65</sup> *ibid.*, at para. 55
- <sup>66</sup> *ibid.*, at para. 56
- <sup>67</sup> *ibid.*, at para. 57
- <sup>68</sup> *ibid.*
- <sup>69</sup> *ibid.*, at para. 58
- <sup>70</sup> The change was made by O. Reg. 284/01.
- <sup>71</sup> The current definition was enacted by O. Reg. 42/05.
- <sup>72</sup> *Deloitte, Haskins & Sells Ltd. v. Bell Canada*, 10 O.R. (3d) 761, [1992] O.J. No. 2026, 1992 Ont. Sup. C.J. LEXIS 2545, *sub nom. Unified Technologies Inc. (Trustee of) v. Bell Canada*, 1992 CarswellOnt 702 (Gen. Div.)
- <sup>73</sup> *supra*, note 19, at para. 103
- <sup>74</sup> *supra*, note 72, at para. 16 CarswellOnt
- <sup>75</sup> *supra*, note 19, at para. 103
- <sup>76</sup> *Magee v. Bd. of Trustees of Roman Catholic Separate Schools for City of Ottawa*, [1962] O.W.N. 83, 32 D.L.R. (2d) 162, [1962] O.J. No. 10, (H.C.J.)
- <sup>77</sup> *ibid.*, at para. 7 O.J.
- <sup>78</sup> enacted by O. Reg. 42/05<sup>79</sup> *Sandhu v. Insurance Corporation of British Columbia*, 45 C.P.C. (4th) 266, 23 B.C.T.C. 303, 1999 CanLII 5883 (BC S.C.), [1999] B.C.J. No. 2479, 1999 CarswellBC 2441, 1999 B.C.T.C. LEXIS 2038
- <sup>80</sup> *ibid.*, at para. 18
- <sup>81</sup> *ibid.*
- <sup>82</sup> *ibid.*, at para. 19
- <sup>83</sup> *Bank of Montreal v. Binder*, [2005] N.S.J. No. 378, 2005 CarswellNS 412, 2005 NS.C. LEXIS 472 (Small Claims Ct.)
- <sup>84</sup> *ibid.*, para. 48-58
- <sup>85</sup> *ibid.*, para. 52
- <sup>86</sup> *ibid.*, para. 53
- <sup>87</sup> *ibid.*, para. 54
- <sup>88</sup> *ibid.*, para. 56
- <sup>89</sup> *ibid.*
- <sup>90</sup> *Moon v. Sher*, 246 D.L.R. (4th) 440, 192 O.A.C. 222, 2004 CanLII 39005 (ON C.A.), [2004] O.J. No. 4651, 2004 CarswellOnt 4702, 2004 ON.C. LEXIS 5119
- <sup>91</sup> See 2004 CanLII 31721 (ON C.A.), [2004] O.J. No. 3942, 2004 CarswellOnt 3936, 2004 ON.C. LEXIS 4377.
- <sup>92</sup> *supra*, note 90, at para. 15
- <sup>93</sup> *Mandic v. See-Me Auto Leasing Ltd.*, 2004 CanLII 47806 (ON S.C.), [2004] O.J. No. 5104, 2004 CarswellOnt 5260, 2004 ON.C. LEXIS 5596
- <sup>94</sup> *ibid.*, para. 39
- <sup>95</sup> *supra*, note 90
- <sup>96</sup> *ibid.*, para. 33
- <sup>97</sup> *ibid.*, para. 43
- <sup>98</sup> *supra*, note 71
- <sup>99</sup> *supra.*, note 45
- <sup>100</sup> *supra.*, note 92. ■