

# Toronto Law Journal

## Who Cares about Legal Research?

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When you advise clients that legal research<sup>1</sup> is needed in their case, they might ask: “why? who cares about legal research?”. As elaborated below, you can tell them that judges and the law society care.<sup>2</sup>

### Judges Care

In various sources, including judgments, lectures and correspondence, judges have said that legal research is important. For example, in Ontario recently, members and former members of the bench have underscored this point.

In five class action cases<sup>3</sup> released together, Justice Belobaba recently wrote “legal research is obviously essential”. At a class actions symposium last year, former Chief Justice Winkler said: “Lawyers are supposed to research; otherwise you’ll get the wrong answer; it’s part of being a lawyer.”<sup>4</sup> In an email to me about research lawyers’ work, a senior Superior Court judge, after invoking the concept of *stare decisis*, bluntly stated: “The quality of the submissions made in reliance on research lawyers’ memos is only as good as the research itself and the quality of the resulting judgments is only as good as the submissions. So, if you mess up, the whole legal system breaks down and we end up with (more) stupid law and it’s all your fault!”<sup>5</sup>

The bench’s emphasis on a lawyer’s duty to perform proper legal research has a modern lineage. Probably the most comprehensive judicial comment on this duty, made by Ferguson J. a couple decades ago, remains apt. In *Gibb v. Jiwani*<sup>6</sup> he observed that the court must rely

<sup>1</sup> In practice legal research includes, but often means more than, finding authoritative law. Legal research broadly involves analyzing what you have found, reaching a conclusion, crafting an opinion, strategy or argument based on it and ultimately solving your client’s problem. The meaning of “legal research” as a noun can include both a skill and the product of exercising that skill.

<sup>2</sup> For the related venerable discussion about the importance of teaching legal research at law schools and beyond, see the plethora of articles in sources like SLAW - Canada’s Online Legal Magazine, <http://www.slw.ca>.

<sup>3</sup> *Crisante v. DePuy Orthopaedics Inc.*, 2013 ONSC 6351 at para. 5, fn. 7 (November 8, 2013); *Dugal v. Manulife Financial* (sub nom. *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*), 2013 ONSC 6354 at para. 5, fn. 7 (November 8, 2013); *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 6356 at para. 5, fn. 7 (November 8, 2013); *Brown v. Canada (Attorney General)*, 2013 ONSC 6887 at para. 5 (November 13, 2013); *Sankar v. Bell Mobility Inc.*, 2013 ONSC 6886 at para. 5, fn. 7 (November 13, 2013).

<sup>4</sup> The Honourable Mr Warren Winkler, “Now I Can Say What I Really Think: A Farewell Message”, Osgoode’s 11th National Symposium on Class Actions (April 25, 2014).

<sup>5</sup> This comment echoes Nathanson J.’s much earlier postscript in *Re Hanna*, 1988 CarswellNS 348, [1988] N.S.J. No. 435 at para. 15 (S.C.T.D.) as follows:

All counsel are expected to prepare properly. The trial courts rely upon the submissions of counsel; they do not normally have the time or resources to conduct their own legal research. If counsel do not do their job properly, the decisions of the courts and the quality of justice that Canadians have a right to expect may be affected adversely.

See also *Lougheed Enterprises Ltd v. Armbruster* (1992), 63 B.C.L.R. (2d) 316, 1992 CarswellBC 20 at paras. 32-38 (C.A.). More recently, in *Kelley-Frost v. MacQuarrie*, 2014 NSFC 13 at para. 16, William J. Dyer Fam. Ct. J. “stressed the importance of legal research” when suggesting to an unrepresented litigant to get a lawyer.

<sup>6</sup> 1996 CarswellOnt 1222, [1996] O.J. No. 1370 at paras 33-40 (Gen. Div.).

on counsel to conduct reasonably complete research on points of law they raise;<sup>7</sup> that counsel have a duty to note up cases upon which they rely to determine whether these cases are still good law;<sup>8</sup> that “the judicial system cannot function effectively unless counsel fulfil this duty because judges cannot possibly know the law on all issues that come before them”.<sup>9</sup> Ferguson J. revealed that in the case at bar he and the court’s law clerk had to do the research that counsel had neglected to do. He said this was “particularly annoying in view of the court’s scarce and dwindling resources”.<sup>10</sup> He lamented that counsel’s lack of preparation and research is “commonplace” on civil motions and at civil trials.<sup>11</sup>

Even the Supreme Court of Canada has weighed in that a lawyer is expected to discover rules of law that are not commonly known but may be found by standard research techniques.<sup>12</sup>

### The Law Society Cares

The Law Society of Upper Canada also addresses the importance of conducting legal research where the matter requires it. The LSUC’s *Rules of Professional Conduct* require a lawyer to “perform any legal services undertaken on a client’s behalf to the standard of a competent lawyer.”<sup>13</sup>

“Competent lawyer” is expansively defined to mean, in part, “a lawyer who has and applies relevant knowledge,<sup>[14]</sup> skills and attributes 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, ....”<sup>15</sup>

### Consequences of Not Caring

Failure to conduct proper research when the circumstances of the case require it can be found to be incompetent professional practice. This may give rise to disciplinary action and

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<sup>7</sup> *Id.*, at para. 36.

<sup>8</sup> *Id.*, at para. 37.

<sup>9</sup> *Id.*, at para. 38.

<sup>10</sup> *Id.*, at para. 39.

<sup>11</sup> *Id.*, at para. 42.

<sup>12</sup> *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at pp. 213-14, [1986 CarswellINS 40](#) at para. 67, LeDain J. A lawyer’s duty to know elementary principles and discover additional ones using research was stated in 7 Am Jur 2d, *Attorneys at Law*, para. 200, in a passage that was first quoted by Jones J.A., in the Appeal Division in *Central & Eastern Trust Co. v. Rafuse*, [1983 CarswellINS 119](#), [1983] N.S.J. No. 55 at para. 22 and repeated by LeDain J. This passage about the requirement of professional competence has been quoted at least ten times by courts across the country, including in Ontario by Greer J. in *Payne v. Carr*, [1996 CarswellOnt 4880](#), [1996] O.J. No. 4458, at para. 64 (Gen. Div.).

<sup>13</sup> Rule 3.1-2.

<sup>14</sup> The word “knowledge” was recently added (and “values” removed) from this rule in amendments that came into force October 1, 2014.

<sup>15</sup> Rule 3.1-1 This rule lists various skills, separately identifying legal research, from such other skills as analysis, application of the law to the relevant facts, writing and drafting, and problem-solving. In fact, in practice, capable research lawyers effectively integrate these and other abilities. See Mark Gannage, “The Roles of Research Lawyers in Private Practice in Canada” (2001) 24 *Advocates’ Quarterly* 202, and also, for e.g., Ted Tjaden, “The Role of Legal Research Lawyers in Law Firms” (SLAW, November 28, 2007) <http://www.slaw.ca/2007/11/28/the-role-of-legal-research-lawyers-in-law-firms/> and linked articles, Catherine Best, *Best Guide to Canadian Legal Research*, <http://legalresearch.org/essentials/importance-of-legal-research/>.

costs sanctions against counsel personally.<sup>16</sup> It might also be actionable for damages in negligence or contract.

### **Conclusion**

Hence, if clients ask why in suitable cases you have to research the law, you might consider asking them in return: “You want to win, don’t you?” You can tell them because not only is it in their best interest that you do proper legal research, but also that the courts and law society want you to. They care. So your clients should too.

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<sup>16</sup> See, e.g., *Gibb v. Jiwan*, 1996 CarswellOnt 1222, [1996] O.J. No. 1370 at paras. 39-42 (Gen. Div.), *World Wide Treasure Adventures Inc. v. Trivia Games Inc.* (1987), 16 B.C.L.R. 135, 1987 CarswellBC 219 at paras. 17-24 (S.C.).



## Who Cares about Legal Research? - An Update

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This is an update of my article [“Who Cares about Legal Research?”](#) published in this journal at the beginning of this year.<sup>1</sup> Since then, a couple of recent pertinent cases have underscored the importance of legal research and have said counsel may charge for it. In contrast to Belobaba J.’s controversial statements in a series of earlier decisions, these cases should exhilarate research lawyers and those using their services.

Recall that in five class action decisions<sup>2</sup> released together in November 2013, Belobaba J. acknowledged “legal research is obviously essential”. Belobaba J. also said:

In my view, lawyers (who are already billing very high, monopoly-based, hourly rates for their legal knowledge) should not be charging for “legal research.” Customers should not have to pay anyone who charges by the hour, whether lawyers or plumbers, to learn on the job. Legal research is essential, but it should not be a chargeable disbursement.

More recently an opposing view has been expressed by members of the same court, specifically, Perell J. and Newbould J., as follows.

In [Labourers’ Pension Fund of Central and Eastern Canada \(Trustees of\) v. Sino-Forest Corp.](#),<sup>3</sup> a multifaceted class action, Perell J. said:

### **6. The Exclusion of a Claim for Legal Research**

149 As noted above, Mr. Chan challenges the Plaintiffs’ assertion that they have not charged for legal research, and he has identified dockets, for instance, for reviewing case law.

150 I do not know why Class Counsel did not charge for legal research, which is an appropriate charge. While legal research charges may be reduced if they are excessive or unreasonable or unnecessary given what a lawyer may be assumed

<sup>1</sup> Toronto Law Journal, January 2015.

<sup>2</sup> [Crisante v. DePuy Orthopaedics Inc.](#), 2013 ONSC 6351 at para. 5, fn. 7 (November 8, 2013); [Dugal v. Manulife Financial](#) (sub nom. [Ironworkers Ontario Pension Fund \(Trustee of\) v. Manulife Financial Corp.](#)), 2013 ONSC 6354 at para. 5, fn. 7 (November 8, 2013); [Rosen v. BMO Nesbitt Burns Inc.](#), 2013 ONSC 6356 at para. 5, fn. 7 (November 8, 2013); [Brown v. Canada \(Attorney General\)](#), 2013 ONSC 6887 at para. 5 (November 13, 2013); [Sankar v. Bell Mobility Inc.](#), 2013 ONSC 6886 at para. 5, fn. 7 (November 13, 2013).

<sup>3</sup> 2015 ONSC 6354, 2015 CarswellOnt 15742 (October 15, 2015).

to already know about the law, legal research is a proper matter for a lawyer to charge to his or her client.

151 The law is constantly changing and developing and the law about class actions is very much a work in progress. In litigation, the court relies on the parties' lawyers to bring the relevant authorities to the court's attention and there is a professional duty on the lawyers to do so. The need to undertake legal research and the extent of it will be case-specific, but there certainly is legal research work that needs to be done in the area of securities class actions. There is nothing wrong in a lawyer charging a fee for undertaking necessary legal research, which is a valuable and often necessary service for the client.

Similarly, in 8527504 Canada Inc. v Liquibrands Inc.,<sup>4</sup> Newbould J. recently affirmed in a costs endorsement:

[5] 852 [the Plaintiff company] incurred a disbursement of \$1,363 for legal research required because of the issue I raised regarding credit bidding. As the case law on the subject in Canada was limited, research on U.S. law was done. Mr. Reider takes the position that time for legal research should not be permitted and cites *Brown v. Canada (Attorney General)*, 2013 ONSC 6887 (CanLII) in which Justice Belobaba stated that with lawyers charging “very-high, monopoly-based, hourly rates for the legal knowledge” should not be charging for legal research. I respectfully decline from such a view. It is unrealistic to expect lawyers to know all law on a subject and legal research is the stuff of all litigation. Courts rely on counsel providing the law on matter in issue and do not expect counsel to just cite legal principles off the top of their head. Clients would be ill served if their lawyers did no legal research in every case and if the work has to be done there is no reason why it should not be charged. The notion that hourly rates covers all legal research would reward those who do little legal research and would inevitably lead to higher hourly rates for those cases in which more legal research was required. I note that the position taken by Mr. Reider on this issue is inconsistent with the bill of costs of his lawyers who have included time for “researching and drafting factum”.

These recent decisions set the record straight: necessary research is valuable and recoverable. If questioned, you might wish to cite them when making costs submissions and explaining your bill to clients.

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<sup>4</sup> 2015 ONSC 6853 (CanLII) (November 5, 2015).