Recovering eDiscovery costs in Canada is the rule, not the exception

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Introduction

A series of recent cases in Canada have affirmed that eDiscovery costs are generally recoverable, so long as they are properly incurred in the conduct of the proceeding and the amount claimed is reasonable in the circumstances.

The latest in this line of reasoning, *LeRoy v. Timberwest Forest Corp*., 2021 BCSC 2346 recognizes the ubiquity of electronic document management and eDiscovery services in modern litigation, and alleviates any doubt that a law firm can provide such services internally.

Facts

Rebecca and Ted LeRoy (the Plaintiffs) claimed against Timberwest Forest Corp. and related parties (Timberwest) for fraud and conspiracy, claiming amounts that ranged between $100 million and $1 billion in the course of the litigation.

The Plaintiffs demanded production of over 92 categories of documents and Timberwest collected over 3.4 million documents related to the action, which resulted in the production of 57,930 documents. The Plaintiffs produced a further 2,092 documents and 13 boxes of paper records, and third parties produced thousands of additional documents.

Timberwest included disbursements for eDiscovery totalling $216,000 in its Bill of Costs.

The Plaintiffs conceded that the case supported the use of electronic document management, but disputed the disbursements on the basis that they were incurred by MT/3, a company wholly owned by the law firm representing Timberwest. The Plaintiffs argued that a law firm should not be permitted to profit from document production, while Timberwest's counsel argued that eDiscovery costs are not in the nature of a law firm's overhead, but rather are specialized costs necessarily incurred for specific files.

Decision

The British Columbia Supreme Court noted that there was nothing to suggest that the amount claimed for the eDiscovery costs was unreasonable in the circumstances. The dispute involved serious allegations and the review of millions of records, which spanned the course of many years. Further, certain processing fees, loading fees, and hosting fees claimed by Timberwest were charged by software providers (Nuix and RelativityOne), which were incurred by MT/3 and passed on to Timberwest.

The court concluded that these costs were not part of "a typical law firm's tool kit which comprise overhead costs." Instead, the costs arose inherently and directly from, and were properly incurred in the conduct of, the litigation. Accordingly, the court allowed Timberwest's costs in full.

Related Case Law

Similar conclusions have been reached in other Canadian provinces.

In Ontario, the Ontario Superior Court allowed disbursements for electronic document production and eDiscovery costs in at least two reported cases. In *Harris v. Leikin* Group Inc., 2011 ONSC 5474, the court confirmed that any disbursement made to a third party or billed to a client that is "reasonably necessary for the conduct of the proceeding" is permissible. The court recognized that most documents in modern litigation are created, stored and retrieved electronically and that "the efficient conduct of litigation involving large numbers of documents requires the use of electronic document management systems." Citing the *Sedona Principles*, the court held further that "[p]arties should now litigate knowing that, as part of any cost award, they reasonably should expect to be called upon to indemnify an opposite party for its reasonable electronic document management disbursements."

In *Inzola Group Ltd. v. City of Brampton*, 2019 ONSC 3490, the court approved a $430,000 disbursement for third-party document review as well as document hosting costs. The court held that while the eDiscovery costs were high, there was nothing to suggest that they were unreasonable.

In Alberta, the Court of Queen's Bench allowed a claim for security for costs related to eDiscovery costs in *PM&C Specialist Contractors Inc. v. Horton CBI Limited*, 2018 ABQB 842. The parties' approaches to eDiscovery were very different – the defendant's law firm embedded the cost of eDiscovery in its retainer, while the plaintiff engaged a third-party provider. The court allowed the defendant's application in part, commenting that the decision adds to the growing body of case law in support of recoverable third-party disbursements for eDiscovery. However, in reducing the quantum of costs, the court highlighted the importance of documenting specific eDiscovery costs and providing the court with sufficient evidence upon which to assess reasonableness.

Comment

Canadian courts continue to signal their support for electronic document management and review, this time in the form of costs awards.

Parties investing in eDiscovery can be confident that those costs will be allowable as disbursements regardless of the provider, so long as they are reasonable.

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