E-SPOLIATION

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I. The primacy and prevalence of electronic documents[2]

The annals of law are littered with nefarious examples of probative documents being trashed, shredded, burned, lost, and placed in limousines to be chauffeured away from seizure. For the past quarter-century in which computers have become ubiquitous at home and at work, wholesale destruction of evidence is no longer a sin requiring physical exertion, time, or tools. A keystroke, or application of hard-drive-scrubbing software can destroy key evidence in a millisecond. Evidence can be destroyed through the innocuous replacement of computers, computer systems, and software in the workplace.

At the same time, electronic evidence is created, changed, copied, distributed, stored, and deleted to a scale and in a manner inconceivable to the scriveners and judges of the *Peruvian Guano* era.[3] A medium-sized company involved in litigation might well possess potentially relevant electronic documents on a thousand computer hard-drives, not to mention on its back-up tapes and servers, and on the laptops, blackberries, portable drives, and home computers of its employees. Electronic data not only consists of the overt text and numbers that one sees on the screen and print-out, but includes invisible metadata, evidencing keystrokes, deletions, dates, and times, as well as the identity of creators, viewers, editors, senders, and recipients of a given piece of electronic evidence. And even where data is ostensibly deleted, the data may well be retrievable through simple or complicated forensic procedures. Electronic evidence is near-eternal, in both time and space. This creates unprecedented scope, and consequently cost, of discovery, as noted in a recent decision:

> … The volume of information now available electronically may well be the greatest challenge to face civil litigators in the coming years. If thousands of documents exist and must be reviewed by counsel on both sides, the cost of litigation will be driven to astronomical proportions.[4]

Further, while the proverbial paperless office is more theoretical than real, increasing numbers of documents will only see life in electronic form: in 2000 it was estimated that only one-third of

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1 The author would like to thank Eric Yeung, articled student, and Mica Donnelly, Research Librarian, Borden Ladner Gervais LLP, for their research assistance for this paper.

2 For useful articles on spoliation, please see Craig Jones, "The Spoliation Doctrine and Expert Evidence in Civil Trials" (1998) 32 U.B.C. L. Rev. 293; Ellen Vandergrift, "The Hazards of Pressing Delete: What you Need to Know about Electronic Records and Spoliation", (March 2006) Vol. 79 *The Barrister*, 14; British Columbia Law Institute, *Report on Spoliation of Evidence*, Report No. 34 (November 2004) ("BCLI").

3 *Compagnie Financiere et Commercial du Pacifique v. Peruvian Guano Co.* (1882) 11 Q.B.D. 55 at 62 (C.A.).

4 *Sycor Technology Inc. v. Kiaer*, [2005] O.J. No. 5395 (S.C.J. – Master).

electronically stored data is ever printed out and that percentage is presumably decreasing.[5] The destruction of such documents no longer represents the loss of a mere copy of an otherwise extant document, but rather represents the loss of evidence crucial to the just disposition of a legal dispute.

II. Spoliation: loss or destruction of evidence

This paper seeks to provide a brief overview to an issue that is already of great importance to litigation in Canada and British Columbia and that will continue to grow in importance: the destruction, or spoliation, of evidence and specifically, of electronic documents.

Spoliation is an etymological cousin of the verb 'spoil', both descending from the Latin verb *spoliare*. Its dominant non-legal meaning is an obscure but dramatic one: "The action of spoliating, despoiling, pillaging, or plundering; seizure of goods or property by violent means; depredation, robbery. Also, the condition of being despoiled or pillaged."[6] As a legal doctrine it dates back at least as far as Roman law, with the maxim *omnia praesumuntur contra spoliatorem:* "All things are presumed against the [wrongdoer] who despoils."

In most formulations of the doctrine, spoliation leads to a presumption that the documents destroyed or lost would have hurt the spoliator of those documents, or assisted the case of the party who is, through the loss or destruction, denied use of that evidence. It is well settled that the presumption is not absolute, but may be rebutted by the spoliating party through, for example, evidence that the documents were irrelevant or at least not contrary to the case of the spoliator. As stated by Taschereau J. in the leading case of *St. Louis v. The Queen*, "The destruction of evidence carries a presumption that the evidence destroyed would have been unfavourable to the party who destroyed it, but that presumption may be rebutted."[7]

Finally, it is also well settled that the remedy for spoliation is not limited to the presumption, and that a court has a flexible range of sanctions at its disposal.

Beyond these precepts, much concerning the doctrine of spoliation is uncertain. This uncertainty is more pronounced in British Columbia, where the case law is inconsistent with other jurisdictions, as set out below. This uncertainty is even more pronounced in the realm of electronic spoliation, as there is little Canadian case law on the subject: of the cases surveyed below, only *Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc.*,[8] *Ezzedine v. Dalgard*,[9] and *Western Tank & Lining Ltd. v. Skrobutan*[10] specifically consider electronic

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5 C.L. Giacobbe, "Allocating Discovery Costs in the Computer Age", 57 Wash. & Lee L. Rev. 257 (2000) at 259.
6 Oxford English Dictionary, *OED Online*, accessed 29 September 2007.
7 *St. Louis v. The Queen* (1895), 25 S.C.R. 649 at 652-3.
8 *Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc.* (2006) 202 Man. R. (2d) 278 (Q.B.).
9 *Ezzedine v. Dalgard* 2006 ABQB 826.
10 *Western Tank & Lining Ltd. v. Skrobutan* [2006] M.J. No. 357 (Q.B.).

spoliation. The vast potential sea of production represented by electronic documents also raises the possibility that different rules ought to apply for electronic spoliation.

Is spoliation a mere presumption or a substantive tort? Is it triggered automatically upon destruction of documents or does the aggrieved party bear the onus of establishing additional facts -- that the destruction was deliberate and in bad faith, or that the documents destroyed were relevant? Must the destruction be deliberate or will ignorant or negligent destruction lead to sanctions? What is the relevant time frame for the destruction of documents? This paper will review some of the competing theories and applications of the doctrine.

The paper will first very briefly review some of the more dramatic sanctions inflicted on parties that failed to preserve documents in US litigation. This paper will then return to first principles, reviewing British Columbian and Canadian jurisprudence on the doctrine of spoliation, noting the divergent tests for spoliation. This paper will turn to the different sanctions that courts can impose against a party guilty of spoliation. Finally, the paper will attempt to foresee the future of e-spoliation in British Columbia.

III. US jurisprudence provides significant sanctions

In contrast to Canadian jurisdictions, the United States has a well-developed spoliation jurisprudence, including much case law specific to the destruction of electronic evidence. The US case law is important for two reasons. First, it offers potential guidance to Canadian courts. Second, several prominent US cases impose dramatic and significant sanctions on the despoiling party, illustrating the seriousness and risk of deliberate or negligent spoliation. A full review of these cases is beyond the scope of this paper, but the most prominent cases follow.

Any discussion of electronic spoliation starts with *Zubulake v. UBS Warburg LLC.*[11] What began as, in the words of the trial judge, a "relatively routine employment discrimination dispute" has become the leading series of decisions on electronic spoliation in US.[12] In the final of five sets of reasons concerning electronic discovery, Judge Scheindlin granted the plaintiff's application for spoliation sanctions against the defendant based on its failure to preserve electronic documents.

The defendant's in-house counsel instructed employees to preserve material documents but failed to issue the warning with respect to back up tapes. Further, certain key employees of the defendants failed to retain relevant emails. Counsel for the plaintiffs was able to demonstrate that not only was a specific key email irretrievably lost, but that that email was likely material. The loss of back up tapes made it likely that other key emails were irretrievably lost. Many other

[11] *Zubulake v. UBS Warburg LLC*; *Zubulake III*: 216 FRD 280 (S.D.N.Y. 2003); *Zubulake IV*: 228 FRD 212 (S.D.N.Y. 2003); *Zubulake V*: 229 FRD 422 (S.D.N.Y. 2004). Despite its prominence in the sphere of electronic discovery, it appears that no Canadian court has cited any of the *Zubulake* decisions.

[12] *Zubulake V, supra,* at 424.

emails were deleted (although in some cases later recovered) after the start of litigation and after the receipt of specific instructions not to delete relevant emails.

In *Zubulake V*, the court usefully summarizes the applicable US law on spoliation. Spoliation may be committed before the start of litigation, and the parties have a duty not to destroy evidence where litigation is pending or reasonably foreseeable.[13] An appropriate sanction is left to the discretion of the trial judge, to be assessed on a case-by-case basis. The authority to sanction spoliation arises under the Federal Rules of Civil Procedure, as well as the court's inherent powers.

Generally, the destruction of relevant evidence "can support an inference that evidence would have been unfavourable to the party responsible for the destruction".[14] The party requesting that the court draw an adverse inference based on spoliation bears the onus of establishing the following three elements:

(1) that the party having control of evidence had an obligation to preserve at the time it was destroyed;

(2) that the records were destroyed with a "culpable state of mind"; and

(3) that the destroyed evidence was relevant to the party's claim or evidence such that a reasonable trier of fact could find that it would support that claim or defence.[15]

While US authorities differ on whether negligent destruction constitutes spoliation, in the judicial circuit of the *Zubulake* court, a "culpable state of mind" with respect to spoliation includes ordinary negligence.[16] Where the destruction occurs negligently, however, the applicant bears the onus of showing that the destroyed materials were relevant. Where the documents are destroyed in an act of deliberate bad faith, however, relevance may be presumed.

After reviewing the circumstances of the delay and destruction of material documents, caused both by company errors and the failings of counsel, the court turned to possible sanctions. The court imposed three significant sanctions. First, the court granted the plaintiff's request that the jury empanelled to hear the case would be instructed to draw an inference with respect to the deleted emails. Specifically, the court would advise the jury that the deleted emails would have been favourable to the plaintiff's case. Further, the defendant was ordered to pay for the costs of any depositions or re-depositions required by the late production, as well as the costs of the spoliation motion itself.

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13 *Zubulake V, supra,* at 430.
14 *Zubulake V, supra,* at 430.
15 *Zubulake V, supra,* at 430.
16 *Zubulake V, supra,* at 431.

The case was tried in 2005. On April 6, 2005, the jury awarded a total of $29,273, 910 to the plaintiff, which amount included $20,169,081 in punitive damages.[17]

Zubulake is not an outlying case: other judges and juries in the US have condemned even negligent lapses in document production through significant sanctions.

In *United States v. Philip Morris USA Inc.*, for example, the defendant continued with its policy of deleting emails more than 60 days old despite a court order that it retain all potentially relevant documents. As a result, key documents were likely lost or destroyed. The destruction continued for two years after the issuance of the court order. Philip Morris then delayed another four months before advising the Court of this breach of the order. The court fined Philip Morris US $2.75 million and excluded as witnesses at trial 11 persons who had failed to comply with Philip Morris's document preservation policies.[18] These excluded witnesses included senior executives whose testimony would likely have been important for the defence.

In *Coleman (Parent) Holdings Inc. v. Morgan Heating Stanley & Co.*, the court found that Morgan Stanley had failed to comply with several orders to preserve and produce electronic documents.[19] The court concluded that Morgan Stanley had falsely certified to the court that it had complied with those orders even though it had not yet completed its review of the electronic documents. The court condemned Morgan Stanley's failures through significant sanctions. It first granted partial default judgment against Morgan Stanley. The court also instructed the jury to draw an adverse inference that the contents of the undisclosed emails were adverse to Morgan Stanley's case. Finally, the court advised the jury that it could consider the spoliation when considering whether punitive damages were appropriate. In the end, the jury awarded US $850 million in punitive damages.[20]

IV. The leading Canadian case: St. Louis v. The Queen

While Canadian courts have recognized the doctrine of spoliation, in the majority of reported reasons the courts have declined to apply the doctrine on the facts before them. Further, the test and procedure for the drawing of a spoliation inference vary widely. This state reflects in part the reasons and result in the leading authority, *St. Louis v. The Queen*. In *St. Louis* the Supreme Court of Canada declined to impose a presumption that documents destroyed by the plaintiff would have harmed its case. As discussed below, the leading British Columbia authorities have also declined to evoke the doctrine when faced with lost and destroyed evidence.

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17 E. Porter, "UBS Ordered to Pay $29 Million in Sex Bias Lawsuit" (7 April 2005) *New York Times.*

18 *United States of America v. Philip Morris USA Inc.*, 327 F. Supp. 2d 21 (21 July 2004, USDC, DC).

19 *Coleman (Parent) v. Holdings Inc. v. Morgan Stanley & Co.*, No. CA 03-5045 AI, 2005 WL 674885; 2005 Extra LEXIS 94 (Fla. Cir. Ct. Mar. 23, 2005).

20 Stephen Taub, CFO.com, "Morgan Stanley's Legal Bill Hits $1.4B" (20 May 2005). The jury award was later reversed by the Court of Appeal of Florida, South District: 955 So. 2d 1124 (2007). Coleman is appealing that decision.

In *St. Louis* the plaintiff contractor sued the government for payment of a contract for construction of a bridge on the Grand Trunk Railway. The government refused to pay, claiming that the invoices contained inflated sums and claims for non-existent workers and time. The plaintiff had destroyed certain of its project documents, specifically the pay-lists on which the government invoices were based. The government defendant argued that the destruction must have occurred to prevent further enquiry into the legitimacy of the lists, and sought the adverse inference, without further evidence, that the pay-lists were fraudulent.

The Supreme Court of Canada found that no such inference should be drawn and, alternatively, if an inference were drawn, it had been rebutted by the affirmative evidence advanced by the plaintiff as to the contents of the documents and the lack of bad faith in destroying the documents.[21]

St. Louis appears to have turned on the fact that the accuracy and veracity of the missing documents were corroborated by witnesses, and that the government defendant failed to cast suspicion on the circumstances of the destruction of the documents, or the probity of the documents themselves. The court concluded that the inference could not arise unless the applicant could provide other evidence of the specific adverse inference the applicant asked the court to draw: that the contents of the documents would have harmed that party's case. As stated by Gwynne J.:

> If, as the learned judge says, he was of the opinion that the fair deduction to be drawn from the destruction by the appellant of the papers, &c., destroyed by him would be to show that the pay-lists upon which he makes his present demand and which he furnished to the government, and upon which he was paid what has been paid to him, did not constitute true and just accounts of the labour supplied under his contract, then those papers if forthcoming would of necessity prove that not only one but several of the witnesses who have given their testimony were perjured, and yet we have no hint in the learned judge's judgment that such an imputation has any other foundation upon which to rest save only this assumption.
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> This surely is not a presumption which is warranted by the maxim.[22]

V. Narrow application of spoliation in British Columbia

No British Columbia court has considered spoliation in the context of electronic documents, and the cases surveyed in this section concern destruction of non-electronic evidence. The case law to date suggests that spoliation will be narrowly applied.

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21 *St. Louis*, *supra*, at 652-3, 663, 665-66, 676, and 690.
22 St. Louis, *supra*, at 666.

On the present jurisprudence, largely based upon two motor vehicle decisions, the doctrine of spoliation will only apply in cases of clear, deliberate, and bad faith destruction of evidence. In the Yukon decision of *Trans North Turbo Air Ltd.* v. *North 60 Petro Ltd.* Justice Veale reviewed and distilled the British Columbia jurisprudence and set out the following test:

> . . . to draw a negative inference from spoliation the following is required:
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> i. relevant evidence has been destroyed;
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> ii. legal proceedings were pending;
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> iii. the destruction was an intentional act indicative of fraud or intent to suppress the truth.[23]

Dawes v. Jajcaj,[24] the leading British Columbia case, was a personal injury case arising from a automobile accident. After the accident the vehicle was examined and photographed and then returned to the salvage yard. Later that month counsel for the plaintiff wrote to ICBC specifically requesting that the vehicle not be destroyed. No steps were taken to either preserve the vehicle or to have it examined on the plaintiff's behalf. The vehicle was sold for salvage. Ten months later new counsel for the plaintiff obtained a court order that the vehicle be preserved, or, if destroyed, that ICBC's records, photographs and reports be provided to him.

At trial, the plaintiff did not seek the traditional remedy for spoliation – the presumption that the destroyed evidence would benefit his case – but instead sought to have the defendant's expert reports excluded at trial. The plaintiff argued that it was unfair for the defendant's expert to examine and then expound on the state of the vehicle, while the plaintiff was denied this opportunity.

The trial judge declined to exclude the evidence. The trial judge held that no bad faith or malice had been shown on the insurer's part, that all key data from both the vehicle inspection and the police were available to the plaintiff, and that there was no reasonable possibility that the destruction of the vehicle deprived the plaintiff of evidence favourable to his case.

The court reviewed case law, primarily older US case law,[25] and concluded that "… the court must at least be satisfied that the object in issue was intentionally destroyed through bad faith and not as a result of mere negligence on the part of the party or his expert …".[26]

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[23] *Trans North Turbo Air Ltd. v. North 60 Petro Ltd.*, 2003 YKSC 18 at para. 79.

[24] *Dawes v. Jajcaj* [1996] 3 W.W.R. 525 (B.C.S.C.); 1999 BCCA 237; leave to appeal denied: (2000) 255 N.R. 195 (note) (S.C.C.).

[25] The court was apparently not directed by the parties to the Supreme Court of Canada decision in *St. Louis*. Nor, importantly, was it provided with *The Ophelia* [1916] 32 T.L.R. 502 (P.C.), the leading English case, in which negligent destruction of documents was found sufficient to lead to a finding of spoliation. See Jones, *supra*, at 309-310.

[26] *Dawes (BCSC)*, *supra*, at para. 18.

The court also noted US authority for the proposition that the applicant "must also show a reasonable possibility based on concrete evidence that access to the objects in issue would have produced such evidence.[27] While the court expressly stated that this was *not* a condition precedent to the application of the doctrine of spoliation (some cases applying *Dawes* have taken it to be one, as set out below), the court noted the applicant's failure in this regard as another factor in denying the remedy.

Based upon the absence of these requirements, coupled with the totality of the evidence and the innocuous nature of the evidence destroyed and preserved, the doctrine of spoliation did not apply.

The Court of Appeal affirmed the trial decision in *Dawes*. The appellate court's reasoning is more in the nature of declining to disturb the evidentiary rulings below: ultimately, the court concluded that the plaintiffs' inability to inspect the vehicle made little difference to the outcome. The Court of Appeal did not attempt to set out general exposition of the law of spoliation in British Columbia. Ultimately, the court noted that it would be anomalous for the law to impose a common law duty not to destroy property by negligence, where the court has expressly rejected a common law tort for deliberate destruction of property in *Endean*.[28] The court expressly declined to consider remedies that might flow from a negligent destruction of evidence.[29]

Dyk v. Protec Automotive Repairs[30] also arose from a motor vehicle accident. As in *Dawes*, the plaintiff sought to exclude the defendant's expert report. The plaintiff argued that the defendant's expert's tests had irretrievably altered the brake system such that no other party could conduct tests, and that, further, the vehicle was later destroyed. The court applied *Dawes* in rejecting the doctrine of spoliation, as the destruction, although intentional, was not "indicative of fraud or an intent to suppress the truth".[31]

In its recent report on spoliation, the British Columbia Law Institute criticizes the limited application of the doctrine of spoliation in British Columbia jurisprudence. Specifically, as set out below, requiring the innocent party to show that the destroying party did so in bad faith imposes a very difficult burden, and greatly dilutes the utility of the doctrine.[32] It is thus not surprising that spoliation applications and reported decisions are rare in British Columbia. Nor is it surprising that no court in a reported British Columbia decision has imposed spoliation sanctions.

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27 *Dawes (BCSC), supra*, at para. 22.

28 *Endean v. The Canadian Red Cross Society*,(1998), 48 B.C.L.R. (3d) 90 (C.A.), lv. to appeal to S.C.C. granted, (1998) 235 N.R. 400 (note); notice of discontinuance of appeal filed (198) 165 D.L.R. (4) vii (S.C.C.) at para.22. *Endean* is discussed under "Sanctions for spoliation," below.

29 *Dawes (BCCA), supra*, at para. 69.

30 *Dyk v. Protec Automotive Repairs* (1997), 151 D.L.R. (4th) 374 (B.C.S.C.).

31 *Dyk, supra*, at p. 381.

32 BCLI, *supra*, at 9.

VI. Three issues

A. Must the plaintiff show that the destruction was in bad faith?

Must the evidence be destroyed deliberately, and in bad faith, or should merely negligent destruction lead to a finding of spoliation, with attendant sanctions? In *Zubulake*, above, the court held that the destruction need not be deliberate or in bad faith to constitute spoliation: in that jurisdiction, mere negligence can give rise to the doctrine.[33]

Dawes and *Dyk* show that in British Columbia, however, that negligent destruction will not suffice. Nor will deliberate destruction necessarily suffice. It is clear from *Dyk* and *Dawes* that the applicant deprived of the documents bears the difficult burden of proof of showing that the documents were destroyed deliberately, in bad faith, and in order to suppress the truth. As stated by the British Columbia Supreme Court in *Dawes:* "the court must at least be satisfied that the object in issue was intentionally destroyed through bad faith and not as a result of mere negligence on the part of the party or his expert."[34] In *Dyk*, the court further noted that deliberate destruction is not sufficient in itself to establish spoliation. The destruction must be both deliberate and with an intent to suppress the truth. In the case before it, the expert had deliberately destroyed the brake system through destructive testing. But that deliberate act was not committed in order to suppress the truth, but rather to illuminate the truth and discern the cause of the accident.[35]

Similarly, in *St. Louis* deliberate destruction did not lend to the application of the spoliation doctrine: the court exonerated the plaintiff who had destroyed its pay records in part because there was no evidence that the documents were destroyed for the purpose of preventing the verification of the accounts.[36]

Alberta courts may diverge on the issue. The court in *Osepchuk v. Tim Hortons 1645* cited the British Columbia jurisprudence in concluding that spoliation requires an intentional destruction of evidence.[37] The court in *Lamont Health Care Centre v. Delnor Construction Ltd.*, however, indicated that spoliation may be found where the destruction of evidence is intentional, reckless or even negligent.[38] The *Lamont* court cited the 1916 Privy Council decision of *The Ophelia* for the proposition that the doctrine of spoliation applies not only to a deliberate act by a party, but also to an unintentional act that results in the destruction of evidence.[39] Ultimately, however, as the defendants' demolition was found to be neither intentional, reckless, nor negligent, and as spoliation was rejected, any endorsement of a negligence standard is *obiter dicta* in *Lamont*.

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33 *Zubulake V*, supra, at 431.
34 *Dawes (BCSC), supra*, at para. 18.
35 *Dyk, supra*, at para. 11.
36 *St. Louis, supra*, at p. 676.
37 *Osepchuk v. Tim Hortons 1645*, 2003 ABQB 364 at paras. 43-45.
38 *Lamont Health Care Centre v. Delnor Construction Ltd.* 2003 ABQB 998 at 61. The case concerned a hospital fire. The relevant wings of the hospital were demolished after all parties were given access.
39 *Lamont, supra*, at para. 49. *The Ophelia* [1916] 32 T.L.R. 502.

The Manitoba decision in *Brandon Heating,* below, does not directly address the issue of whether negligent destruction suffices. In that case, however, the electronic hardware and software was destroyed not deliberately, but in the ordinary course of business.[40] Nonetheless the court levelled the most severe sanction: dismissal of the spoliating party's claim. It would appear that Manitoba, unlike British Columbia, does not require a finding of bad faith or deliberate misconduct.

Ontario may allow a finding of spoliation on a lower standard of negligence. The court in *Cheung v. Toyota Canada Inc.*, a case not involving electronic documents, suggests in *obiter* that negligence may be sufficient to ground a finding on spoliation:

> [a]s to whether any sanctions can be imposed for spoliation prior to trial in the absence of evidence of intentional destruction or alteration through bad faith, in reliance on the courts inherent jurisdiction, it seems to me that in appropriate circumstances the court should be able to impose sanctions.[41]

The court in a recent New Brunswick decision, *Spencer v. Quadco.,* noted the possible divergence between British Columbia and Ontario on the requirement of bad faith, but did not need to decide which approach was preferable, as bad faith was evident in that particular case: the court allowed a rebuttable presumption to be drawn that the evidence was harmful to the spoliator's case.[42] Interestingly, the *Spencer* court did not rest its decision on overt acts of bad faith but found it through the evasiveness and repeated refusal of the adjusters to respond to requests regarding evidence. Indeed, the court later acknowledged that the destruction was not intentional. Thus on the facts of *Spencer,* at least, negligent destruction can ground a finding of spoliation.

As indicated by *Zubulake*, above, in the US, bad faith is generally not required for the imposition of discovery sanctions.[43] Indeed, a recent survey of US spoliation sanction cases indicates that in most cases sanctions were imposed where documents were withheld or destroyed due to negligence, or some lesser standard of culpability.

The British Columbia Law Institute criticizes the limitations placed on spoliation by recent British Columbia jurisprudence.[44] The requirement that the applicant prove bad faith imposes a heavy burden on a party's successful evocation of the doctrine of spoliation. Further, this burden is an especially difficult one to discharge, as it requires the applicant to prove the state of the spoliator's state of mind at the time of destruction.

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40 *Brandon*, *supra,* paras. 18-19.

41 *Cheung v. Toyota Canada Inc*., [2003] O.J. No. 411 (Sup. Ct.) at para. 23.

42 *Spencer v. Quadco,* 2005 NBQB 2 at 18-20.

43 Shira Scheindlin and Kanchana Wangkeo, "Electronic Discovery in the Twenty-First Century", 11 Mich. Telecomm. Tech L. Rev. 71 (2004) at pp. 80-81. The survey period was 2000-2004, reviewing 45 federal cases and 21 state cases. The first stated author of this useful paper was the trial judge in the *Zubulake* series of decisions.

44 BCLI, *supra,* at pp. 31-32.

In the context of electronic documents, this burden is particularly difficult. To destroy electronic evidence, one does not need shredders, bonfires, or flatbed trucks; nor does one need much time. As a single keystroke can delete an entire incriminating hard-drive containing a roomful of data, it will be difficult in many cases for the innocent party to establish bad faith through the usual external evidence of the document destruction.

Accordingly, the Law Institute proposes a return to the historical principles of spoliation: the innocent applicant need only establish that relevant documents had been destroyed. The presumption arises that those documents would have helped the applicant and harmed the spoliator. The burden would then shift to the spoliating party to establish that the destroyed documents were inconsequential to the case, and thereby discharge the evidentiary presumption.[45]

B. Must the plaintiff show that the destroyed evidence was material or relevant?

Does the applicant also bear the burden of proving that the destroyed documents were relevant to the litigation? The weight of authority indicates that the plaintiff does bear that onus, although it may not be a formal *sine quo non* in British Columbia.

The Supreme Court decision in *Dawes* cited US authority that required the applicant to show a reasonable possibility, based on concrete evidence, that the destroyed evidence would have provided favourable evidence.[46] The court declined to endorse such proof as a condition precedent, but its absence in the case further bolstered the court's decision not to apply the doctrine of spoliation.

In the Alberta case of *Ezzedine v. Dalgard*, a vicarious liability tort claim against the defendant leasing company, the defendant deleted electronic receivable records relating to the vehicle in question. The electronic records were automatically and electronically purged within 90 days of the final lease payment, as per the company policy. The claimant applied for an adverse inference to be drawn. The court rejected the application of spoliation, as "[a]t the very least, it is incumbent on those alleging a destruction of relevant information or material by a party adverse in interest to show that the information or material was actually in the possession of the adverse party and was relevant."[47]

Relevance appears to be a condition precedent in some US jurisdictions. In the recent case of *Phoenix Four Inc. v. Strategic Resources Corporation*, for example, spoliation sanctions were rejected as the moving party failed to establish that a reasonable trier of fact could have found that the abandoned evidence, including computers, would have supported its claims.[48] In

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45 BCLI, *supra*, at p. 32.
46 *Dawes (BCSC), supra*, at para. 22.
47 *Ezzedine, supra*, at para. 25.
48 *Phoenix Four Inc., v. Strategic Resources Corporation*, 2006 US Dist.LEXIS 3221 at 15.

rejecting the application of the doctrine, the court cited back to the applicant its rhetorical submission that "it will never know whether there were favourable documents contained in the materials that the SRC Defendants destroyed." Similarly, even where documents were destroyed due to the other party's obvious failure to institute a litigation hold, a spoliation motion was denied, as there was no evidence that the documents were relevant or their destruction prejudicial.[49]

In contrast, the plaintiff in *Zubulake* was able to present a series of surviving emails that supported her argument that the destroyed emails were both relevant and harmful to the spoliating defendant.[50] That being said, the *Zubulake* court also noted that under the law of that jurisdiction, the fact of deliberate destruction was in itself sufficient to allow an inference of relevance.[51]

In this, *Zubulake* joins *Dawes* in not requiring the applicant to prove, conclusively, that the destroyed documents were relevant if the external facts of the destruction itself prompt an inference that the destroyed documents were relevant. Although this double inference – the inference of relevance leading to an inference that the documents would be harmful to the spoliator's case – can appear circular and confusing, it reflects the commonsensical weighing of evidence in its totality that is the hallmark of sound judgment. In this, it is more appropriate to contemplate the likely relevance of the destroyed documents based on the specific facts, rather than as a condition precedent for which the applicant bears the burden of proof. In some cases, it will be impossible for the innocent party to prove that the documents in question would have been material. The external evidence provided by the contents of similar surviving evidence, and the circumstances of the destruction, will in most cases guide the court in deciding whether the despoiled evidence was likely sufficiently relevant.

C. Is spoliation limited to documents destroyed during litigation?

Generally, delivery of a writ or express notice of a claim will require a party to preserve its potentially relevant electronic and other documents. But the weight of authority requires preservation *before* the start of legal proceedings: a party must take steps to preserve evidence when litigation is reasonably anticipated. Different authorities employ different terms, however, and it will not always be clear to litigants when the possibility of litigation has reached a sufficient state to require preservation of documents, such that a failure to do so may give rise to sanctions.

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[49] *School-Link Technologies, Inc. v. Applied Resources, Inc.*, 2007 U.S. Dist. LEXIS 14723 (28 February 2007 U.S. D.C., Kan.) at 12-13.

[50] *Zubulake, supra,* at pp. 427-28; 437.

[51] *Zubulake V, supra, a*t pp. 437. Were the destruction merely negligent then the burden would shift to the applicant to show that the documents were relevant.

The trial court in *Dawes* identifies the relevant period for the purpose of spoliation to be "pending or future litigation."[52] *Baldwin Jantzen* also sets out an elastic time-frame: the court stated that "when litigation is contemplated, reasonable steps should be taken to preserve relevant electronic documents."[53]

In the Yukon, the obligation not to destroy evidence arises when "it would be reasonable to assume that legal proceedings would be commenced.[54] In Alberta, the time frame has been described as "litigation that is pending or reasonably foreseeable."[55]

Leading Canadian electronic discovery guidelines use different terms to describe the time at which a party must take proactive steps to preserve evidence. The Ontario *Guidelines* identify the obligation to preserve relevant documents as arising when litigation is "contemplated or threatened."[56] The *Sedona Canada Draft Principles,* Principle 4 states that "[a]s soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information".[57] The *Sedona Canada Draft Principles* at 4.c. describes this point in a slightly different manner: "when it is reasonable to expect the evidence may be relevant to future litigation".

Zubulake IV sets out potentially the earliest trigger-point for the duty to preserve evidence: the duty to preserve "arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[58] The later *Zubulake V* describes the trigger-point more tightly: when litigation is "pending or reasonably foreseeable"[59] and "at the outset of litigation or whenever litigation is reasonably anticipated."[60]

The electronic spoliation case law does not provide much guidance, likely because the facts in the cases clearly fell on one side of the line or the other. In *Zubulake*, the emails were deleted during litigation, and after receipt of specific instructions about their preservation. In *Brandon Heating*[61] and *iTrade Finance*,[62] the destruction occurred well into the litigation, and after and in defiance of specific preservation orders.

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52 *Dawes (BCSC), supra,* at para.14.
53 *Baldwin Jantzen Insurance Services (2004) Ltd. v. Jantzen*, 2006 BCSC 554 at para. 28.
54 *Trans North, supra,* at para. 82.
55 *North American Road Ltd. v. Hitachi Construction Machinery Co.,* 2005 ABQB 847 at para. 16.
56 Ontario Bar Association Discovery Task Force Sub-Committee, *Guidelines for the Discovery of Electronic Documents in Ontario*, Principle 5: http://www.oba.org/en/pdf_newsletter/E-DiscoveryGuidelines.pdf, at p.11 (the "Ontario Guidelines")
57 *The Sedona Canada Principles Addressing Electronic Document Production* [Public Comment Draft] (February 2007): http://www.thesedonaconference.org/content/miscFiles/2_07WG7pubcomment.pdf, at p. 17 (the "*Sedona Canada Draft Principles")*
58 *Zubulake IV, supra,* at 216.
59 *Zubulake V, supra,* at 430.
60 *Zubulake V, supra,* at 433.
61 *Brandon Heating, supra.*
62 *iTrade Finance Inc. v. Webworx Inc.,* [2005] O.J. No. 1200 (Sup. Ct.).

In two of the leading cases, the timing of the destruction appears to have assisted in exonerating the spoliator. The trial decision in *Dawes* turned in part upon the understanding that the vehicle was destroyed before the plaintiff raised the possibility of tort proceedings.[63] In *St. Louis* the court noted that the documents were destroyed "long before" the institution of the litigation.[64]

Once again, although the elasticity of the various judicial pronouncements makes certainty elusive, this is probably appropriate given the fact-specific nature of the spoliation enquiry. The judicious imposition of retention policies and litigation holds, and the judicious early ascertainment of potential discovery sources, will in most cases insulate a party from later charges of spoliation.

VII. Proposed new approach to spoliation

Given the varying approaches to spoliation as set out above it may be more useful to abandon the language of tests, onuses, and presumptions and approach the loss, destruction, and non-production of documents, electronic or otherwise, on a case-by-case basis, with a view to the entire context of the document destruction. The present formulation of the test in British Columbia, requiring proof of bad faith, makes it very difficult for a party to establish spoliation. A party may not bother bringing a motion for spoliation in the face of document destruction that is blatant and harmful, but that is nonetheless inoculated as flowing from negligence. The paucity of the British Columbia case law on spoliation in the past eight years may be evidence that no spoliation is occurring, and that counsel and clients are flawlessly preserving and producing evidence. This paucity more likely shows that parties are not seeking remedies for spoliation that falls short of intentional bad faith destruction. As a result, such destruction is not addressed in the case law, and is not remedied in individual pieces of litigation.

A more contextual approach to spoliation, including negligent spoliation, would be especially appropriate with respect to electronic spoliation. On the present British Columbia law, a corporate party that has destroyed relevant evidence not through intentional bad faith acts but rather through a negligently insufficient document retention policy or litigation hold does not face the remedy of spoliation, and likely would face no sanction at all. If the current British Columbia test for spoliation were applied to *Brandon Heating*, where the key electronic evidence was destroyed not deliberately or in bad faith but through incompetent electronic retention procedures, there may well have been no sanction.[65]

In this, this paper agrees with the proposal set out in Sedona Canada Draft Principle 11:

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63 *Dawes (BCSC), supra*, at paras. 9 and 20.

64 *St. Louis, supra*, at 670. Note further that in both *Dawes* and *St. Louis* the facts concerning timing and notice of litigation are somewhat strained: in both cases the spoliating party knew that the evidence in question was subject to scrutiny. In *Dawes*, as noted by the Court of Appeal, ICBC did in fact have notice of potential litigation prior to the destruction of the vehicle: para. 67. In *St. Louis*, the pay-lists, account books, and cheques were destroyed – burned, in fact -- after the defendant government had announced a commission reviewing the construction payments: at 673.

65 *Brandon Heating, supra.*

> Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.[66]

The last sentence is ambiguous: but it does not purport to insulate negligent destruction from sanction, as does the current British Columbia approach. Instead, where documents are destroyed through negligence, the sanction may be adjusted appropriately:

> Not all non-production is intentional or the result of bad faith or recklessness. Given the continuing changes in information technology and the burdens and complications that will inevitably arise when dealing with growing volumes of electronically stored information, litigants may inadvertently fail to fully preserve and/or disclose all relevant material. The role of the court is to weigh the scope and impact of non-disclosure and to impose appropriate sanctions proportional to the culpability of the non-producing party, the prejudice to the opposing litigant and the impact that the loss of evidence may have on the court's ability to fairly dispose of the issues in dispute.[67]

Bad faith would no longer be a condition precedent for any spoliation remedy, but would merely be another factor for the court to assess in deciding the appropriate sanction. Such an approach would allow judicial scrutiny of document destruction that nonetheless falls short of the current test for spoliation. In turn, such judicial guidance through a developed jurisprudence would assist in the process of electronic (and general) discovery and thereby promote the truth-seeking process while bolstering the proper administration of justice.

VIII. Sanctions for spoliation

Courts employ a large arsenal of sanctions to address the destruction or loss of documents. These remedies are partially based upon the specific wording of each jurisdiction's rules of court. Superior courts may also draw upon their inherent jurisdiction to ensure the proper functioning of their judicial processes.[68] The sanctions set out below are thus not finite or closed.

The more fulsome US jurisprudence sets out principles for spoliation sanction. The court has wide discretion, to be exercised soundly, to craft the appropriate remedy on a case-by-case basis.[69] The main objective is to restore, as best as possible, the non-spoliating party to the

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66 *Sedona Canada Draft Principles, supra,* at p.35.
67 *Sedona Canada Draft Principles, supra,* at p.35.
68 See BCLI, *supra,* at pp. 16-19.
69 *Zubulake V, supra,* at 437.

position that it would be in had the spoliating party properly carried out its discovery obligations.[70] The sanction should fulfil three functions:

1. deter parties from engaging in spoliation;

2. place the risk of an erroneous judgment on the party who wrongfully created the risk; and

3. restore the prejudiced party to the same position it would have been in absent the spoliation.[71]

The recent case of *Brandon Heating* offers guidance to a court deciding the appropriate sanction for abusive behaviour such as document non-production or loss:

1. the quantity and quality of the abusive acts;

2. whether the abusive acts flow from neglect or intent;

3. prejudice generally, and specifically the impact of the abuse on the opposing party's ability to prosecute or defend the action;

4. the merits of the abusive party's claim or defence

5. the availability of sanctions short of dismissal that will address past prejudice to the opposing party; and

6. the likelihood that a sanction short of dismissal will end the abusive behaviour.[72]

A. Adverse inference

The primary remedy for spoliation is the rebuttable evidentiary presumption, or inference, that the destroyed evidence would have hurt the spoliator's case or assisted that of the innocent party. In *Dawes*, the Court of Appeal indicated that the evidentiary presumption is the primary, if not the sole remedy for spoliation: "At present therefore, the principle of spoliation remains simply an evidentiary presumption which can, as the cases indicate, be rebutted."[73]

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[70] *Zubulake V, supra,* at 437.
[71] *Zubulake V, supra,* at 437.
[72] *Brandon Heating, supra,* at para. 24.
[73] *Dawes (BCCA), supra,* at para.69.

As identified by the British Columbia Law Institute, and as illustrated by *St. Louis*, however, the process of presumption and rebuttal has never been developed clearly in the jurisprudence, and has become blurred with the issue of whether or not the doctrine of spoliation is applicable in the first place.[74]

B. Impugned credibility

Not unreasonably, where a witness destroys documents, it will likely reflect badly on that person when he or she gives testimony. In *Doust v. Schatz*, the Saskatchewan Court of Appeal confirmed that a trial judge may consider the witness's act of spoliation when assessing his reliability and credibility.[75]

C. Costs sanctions

Courts have crafted creative costs sanctions to address spoliation. In the United States, costs sanctions are the most frequently employed remedy for spoliation, being issued in 60% of the cases in which spoliation sanctions were imposed.[76]

A common remedy is to reverse the presumption that a successful party receive its costs of an application or an action in order to address spoliation.

Thus even where the court denies the non-spoliator's motion, the court may condemn the spoliation by giving costs to the unsuccessful party. In *Cheung*, for example, the court, while declining to grant the applicant the full relief claimed, awarded them their costs of the motion on a substantial indemnity basis.[77] In *Endean v. The Canadian Red Cross Society*, the British Columbia Court of Appeal confirmed that even if it is shown at trial that the destroyed documents were irrelevant, or of neutral effect on the disposition of the case, the spoliator may still be visited with an adverse costs award.[78] Conversely, the court may deny costs to a party that is successful at trial, to condemn that party's spoliation.[79]

Where the failings of counsel caused the destruction or non-production of documents, US courts have not hesitated to award costs against counsel personally, or on a joint-and-several basis with their clients. In a recent decision arising from September 11th liability insurance litigation, the court imposed a costs sanction of $500,000, to be bourne jointly and severally between the party and its two law firms.[80]

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74 BCLI, *supra*, pp.31-32.
75 *Doust v. Schatz*, 2002 SKCA 129 at para.29.
76 Scheindlin and Wangkeo, *supra*, at 77.
77 *Cheung*, *supra*, at para.27.
78 *Endean*, *supra*, at para.22.
79 *Farro v. Nutone Electrical Ltd.*, (1990) 72 O.R. (2d) 637 (C.A.) at 645.
80 *In Re September 11th Liability Insurance Coverage Cases*, 243 F.R.D. 114 (18 June 2007 U.S. D.C. S.D.N.Y.) at 60. The case did not concern spoliation but rather delayed discovery.

D. Striking of claim or defence

Brandon Heating represents the most severe judicial sanction for spoliation: the court dismissed the plaintiff's claim.[81] During the course of the action, the plaintiff replaced its computer hardware in the ordinary course of business, and relevant electronic documents were destroyed. The destruction appears to have been negligent, rather than deliberate or in good faith.

This serious order was based on two key facts. First, the software itself was the very subject of the litigation: the plaintiff claimed that the defendant had provided faulty software, while the defendant raised the defence that the plaintiff had used hardware that was known to be incompatible with its software. Therefore, the hardware was central to the outcome of the case and its destruction caused serious prejudice to the defendant. Second, the plaintiff had provided a specific undertaking to preserve computer hardware and make it available for inspection.

In *Spencer*, the third party applied to strike the third party claim due to prejudice from the act of spoliation. The court rejected this remedy: not only would the defendant be deprived of key evidence, but it would also lose also the right to seek indemnity from a third party.[82] The *Cheung* and *Dreco* courts also declined to strike the claim, at least at the interlocutory stage.[83]

US decisions have also condemned spoliation through granting full or partial default judgment.[84] Striking a claim or defence, and thereby depriving a party of a hearing on the merits, should be reserved for the most egregious of cases.[85] That being said, the US survey revealed that this remedy was granted in 23% of the cases in which spoliation sanctions were issued.[86]

Although no recent British Columbia judgments have gone to the lengths of *Brandon Heating*, in the electronic context or otherwise, such an order would be possible, based on the inherent power of the court, and Rule 2(5). Rule 2(5) contains two provisions on which a spoliation remedy could rest: (c) where a person "refuses or neglects to produce or permit to be inspected any document or other property"; and (d) where a person "refuses or neglects . . . to make discovery of documents". Spoliation could thus lead to a *Brandon Heating* remedy in the appropriate circumstances. The British Columbia Law Institute observes that the Rule would appear only to apply to destruction occurring during litigation.[87] As a party may have an obligation to obtain and produce records that have passed out of its control and possession, however, this Rule could possibly apply to the destruction of records prior to or at an early stage of litigation.

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81 *Brandon Heating, supra,* at paras. 32-33.

82 *Spencer, supra,* at 51. In *Werner v. Warner Auto-Marine Inc*., (1996) 3 C.P.C. (4th) 110 (Ont. C.A.), a non-electronic case, the remedy was considered excessive.

83 *Cheung, supra,* at para. 21; *Dreco* at paras.49-50.

84 See *Morgan Stanley, supra*; *Metropolitan Opera Association Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union,* 212 F.R.D. 178 (28 January 2003 U.S. D.C. S.D.N.Y.); *Krumwiede v. Brighton Assoc.*, No. 05C3003, WL 1308629 (ND Ill. 8 May 2006).

85 *In re: Kmart Corporation, et al., Debtors*, 371 B.R. 823 (31 July 2007 U.S. Bank. Ct., N.D. Ill., E.D.) at 39.

86 Scheindlin and Wangkeo, *supra,* at 77.

87 BCLI, *supra,* p.11

E. Exclusion of witnesses

As set out above, in *United States v. Philip Morris USA Inc.*, the court disqualified 11 witnesses from testifying at trial, on the basis that they had failed to follow Philip Morris's own "print and retain" document retention policies, and had continued to delete relevant emails.[88]

F. Exclusion of expert evidence

As set out above, this remedy was expressly rejected on the facts before the courts in *Dawes* and *Dyk.* In *Endean*, however, the Court of Appeal recognized that exclusion of expert reports could be a possible sanction.[89]

In contrast to British Columbia, other Canadian jurisdictions have regularly excluded expert reports where the testing underlying the report resulted in the destruction of the evidence. In *Werner v. Warner Auto-Marine Inc*. (Ontario),[90] *Cheung* (Ontario),[91] and *Spencer* (New Brunswick)[92] a party's expert had destroyed relevant evidence while conducting destructive tests. The courts in all cases excluded the resulting expert reports.

Exclusion is also a frequent order in the US, issued in 30% of the cases in which spoliation sanctions were applied.[93] In *United Med. Supply Co. Inc. v. United States*, for example, the court castigated the US Departments of Justice and Defence for failing to preserve relevant evidence, even during judicial inquiries into alleged spoliation.[94] In deciding on a just and proportionate sanction, the court imposed a two-part sanction. First, the defendant government was required to reimburse the plaintiff for any additional discovery cost, including attorneys' fees necessitated because of the spoliation, as well as the costs incurred in the spoliation applications. Second, the government was prohibited from cross-examining the plaintiff's expert with respect to aspects of the plaintiffs' experts' evidence aimed at correcting the gaps created by the spoliation, and from providing its own expert evidence seeking to fill in those gaps that it itself created through the spoliation.

G. Jury direction

As set out above, the US courts in *Zubulake* and *Coleman (Parent) Holdings Inc. v. Morgan Heating Stanley & Co.*, made specific instruction to the juries with respect to the spoliation and withholding of electronic evidence. The juries in those cases returned with significant punitive damages awards. *Zubulake V* sets out the specific jury instruction:

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88 *United States v. Philip Morris USA Inc., supra, a*t 12.
89 *Endean, supra*, at para.32.
90 *Werner v. Warner Auto-Marine Inc*. (Ontario), (1996) 3 C.P.C. (4th) 110 (Ont. C.A.) at para.24.
91 *Cheung, supra*, at para. 27.
92 *Spencer, supra*, at para. 52.
93 Scheindlin and Wangkeo, *supra*, at 77.
94 *United Med. Supply Co. Inc. v. United States*, 2007 W.L.R. 1952 680 (Fed. C.l. June 27, 2007)

> You have heard that UBS failed to produce some of the e-mails sent or received by UBS personnel in August and September 2001. Plaintiff has argued that this evidence was in defendants' control and would have proven facts material to the matter in controversy.
>
> If you find that UBS could have produced this evidence, and that the evidence was within its control, and that the evidence would have been material in deciding facts in dispute in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to UBS.
>
> In deciding whether to draw this inference, you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that UBS's failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all of the facts and circumstances in this case.[95]

The remedy was used in 23% of the cases surveyed by Scheindlin and Wangkeo.[96]

H. Orders for further searches

In *Kmart*, the court denied the applicant's motion for various spoliation sanctions, including a directed verdict in favour of the applicant.[97] Nonetheless, the motion had accentuated the haphazard nature of Kmart's document preservation and production. The court ordered that Kmart systematically search various hard-drives, imposing a tight deadline of 14 days to produce all documents from those hard-drives.

In contrast, in *Desgagnes v. Yuen*, the deletion of electronic documents "in the ordinary course" did not lead to the applicant defendant's desired remedy: direct access to the plaintiff's hard drive.[98] The court noted that there was no allegation that the plaintiff had deleted the electronic files for an improper purpose.

I. Interlocutory injunction

In *Western Tank*, the defendants' spoliation of electronic evidence influenced the court's decision in favour of granting an interlocutory injunction preventing them from soliciting or accepting business from the plaintiff's customers: "…their attempt to destroy evidence is also a factor to be considered when determining the appropriate remedy." In *Western Tank*, the plaintiffs accused the defendants, its former employees, of taking electronic work files and using

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95 *Zubulake V*, *supra*, at 439.
96 Scheindlin and Wangkeo, *supra*, at 77.
97 *In re: Kmart Corporation, et al., Debtors*, 371 B.R. 823 (31 July 2007 U.S. Bank. Ct., N.D. Ill., E.D.) at 84-85.
98 *Desgagne v. Yuen*, 2006 BCSC 955 at para.23.

them in competition. The "strong evidence" established that after the plaintiff requested the return of the files, two of the defendants attempted to destroy electronic evidence of their pre-resignation activities and information relevant to their employment. The court drew the inference that the deleted evidence would have supported the claim.[99]

J. Anton Piller order

An Anton Piller order, often likened to a civil search warrant, is a draconian remedy designed to preserve the subject matter of litigation from destruction or removal at the hands of the defendant.[100] Evidence of deliberate spoliation will weigh heavily in support of an Anton Piller order. The Supreme Court of Canada has recently set out the four-part test for the issuance of an Anton Piller Order:

(1) the plaintiff must demonstrate a strong *prima facie* case;

(2) the damage to the plaintiff by the defendant's alleged misconduct, potential or actual, must be very serious;

(3) there must be a convincing evidence that the defendant has in its possession incriminating documents or things; and

(4) it must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work.[101]

In *Yaghi v. WMS Gaming Inc.,*[102] the court noted the transitory nature of computer evidence and the ease of its destruction, coupled with the misbehaviour of the defendant, as factors in granting an Anton Piller order.

K. Judicial reprimand

It goes without saying that in almost every case of spoliation during actual or anticipated litigation counsel, whether in-house or external, will be subject to judicial scrutiny or criticism. No counsel wishes to be on the receiving end of the judicial castigation meted out in *Metropolitan Opera Association Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union:*

> The discovery process in this case, however, transcended the usual clashes between adversaries, sharp elbows, spitballs and even Rambo litigation

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99 *Western Tank, supra,* at 24.
100 *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189 at para. 1.
101 *Celanese, supra*, at para. 35.
102 *Yaghi v. WMS Gaming Inc.,* 2003 ABQB 680. See also *Canadian Derivatives Clearing v. EFA Software Services* (2001), 294 A.R. 182 (Q.B.) at para. 51.

> tactics. This case was qualitatively different. It presented the unfortunate combination of lawyers who completely abdicated their responsibilities under the discovery rules and as officers of the court and clients who lied and, through omission and commission, failed to search for and produce documents and, indeed, destroyed evidence – all to the ultimate prejudice of the truth seeking process. As confirmed by discovery into the Union's and its counsel's compliance with the Met's discovery requests, both the lawyers and the clients exhibited utter and complete disregard for the rules of the truth-seeking process in civil discovery.…[103]

L. Contempt of court

Although a finding of contempt of court generally requires the breach of a pre-existing order, the destruction of documents, either in the first instance, or in breach of a pre-existing order, could ground a finding of contempt of court. In the following two recent cases courts condemned the destruction of electronic documents as breaches of court orders constituting contempt, rather than as spoliation occurring in the normal course of litigation. That being said, the cases are instructive not only because they involve destruction of electronic evidence, but also in light of the flexible arsenal of sanctions wielded by a court to correct spoliation. Ultimately spoliation is not only harmful to the party opposite but is, like contempt, an attack on the proper administration of justice itself.

In *iTrade Finance Inc. v. Webworx Inc.*, the plaintiff brought an application to find the defendant in contempt of court for breaching a court order.[104] The plaintiff sued the defendant for fraud. The court had granted an Anton Pillar order and a Mareva injunction against the defendant. One provision of the Order required the defendant to refrain from destroying or tampering with any computer materials in his possession.

The evidence established that the defendant had used the unfortunately-named "Evidence Eliminator" software on its laptop after execution of the order. The software rendered the files on the hard drive unrecoverable, and destroyed evidence that was to be preserved pursuant to the Order. The trial judge held that he could not conceive of an "innocent" use of the Evidence Eliminator software, and that its use "indicates an intention to flout an order of the court."[105] In a separate ruling, the court considered the seriousness of the defendant's actions and the lack of any mitigating circumstances and held that these factors called for serious sanctions.[106] The court found that the appropriate sanction was to strike out the defendant's defence and counterclaim and awarded $30,000 in costs to the plaintiff.

The court in *Dreco Energy v. Wenzel* sets out a useful set of considerations for a court crafting the appropriate sanction for spoliation constituting contempt of court:

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[103] *Metropolitan Opera Association Inc., supra*, at 3-4.
[104] *iTrade supra.*
[105] *iTrade, supra*, at paras. 22 and 24.
[106] [2005] O.J. No. 3492 (Sup. Ct.).

1. The role of counsel, including the extent to which the actions of the respondents' counsel might have contributed to the respondents' contempt.

2. The motivation for the destruction/erasure of the computer records while the undertakings to produce them remained extant.

3. The consequences flowing from the destruction of those records and what redress should flow from that, including consideration of whether any adverse inferences should be drawn as a result thereof.

4. The entire context and history of the litigation.

5. The amount of reasonable thrown-away costs properly incurred.

6. The nature of the contempt.

7. The degree of culpability of the contemnors.[107]

Taking these factors into account, the *Dreco* court imposed a fine to condemn the defendant's contempt in failing to produce documents pursuant to its undertakings to produce certain emails.[108] The court found that the defendant had deliberately and wilfully destroyed that evidence and was in contempt for breaching those undertakings. The defendant was ordered to pay the plaintiff's throwaway costs of over $136,000 and to recover the destroyed emails at its own expense. If those emails could not be recovered, the defendant would be required to pay a fine of $75,000.[109]

M. Spoliation as tort

Canadian courts appear divided on whether to permit an aggrieved party whose case has been hindered by the destruction of evidence can sue based on spoliation as a tort. A full review of the jurisprudence is beyond the scope of this paper.

In *Endean*, the British Columbia Court of Appeal limited spoliation to the evidentiary rule raising a rebuttable presumption, rather than an independent tort giving rise to a substantive remedy. The court reviewed the key passages in *St. Louis* that limit spoliation to a mere evidentiary principle. The court concluded that the elevation of spoliation to the status of an independent tort was not an appropriate or necessary response to destruction of documents. If the destroyed documents are relevant, then the evidentiary presumption would apply. If the destroyed documents are not relevant, or if the spoliator rebuts the inference that the documents

[107] At para.10, as dictated by the Court of Appeal: 2005 ABCA 185 at para.12.
[108] [2006] A.J. No. 546 (Q.B.)
[109] At para. 52.

would be harmful to its case, then no further sanction is appropriate, save perhaps in costs. To permit an independent tort of spoliation would divorce the issue from the evidentiary context of the trial of the main action itself, and perhaps lead to consequences to the spoliator more drastic than are merited.

Ontario and Alberta courts, in contrast, have permitted several claims based on spoliation to proceed to trial.[110] The Ontario court in *Spasic* noted that the Supreme Court of Canada comments in *St. Louis* would be *obiter* if applied to the issue of spoliation as a tort, as that issue was not before the Supreme Court.[111]

The British Columbia Law Institute strongly advocates that British Columbia courts recognize the tort of spoliation.[112] To succeed in the tort, the claimant would have to establish the following:

(1) The existence of pending or probable litigation involving the plaintiff.

(2) Knowledge on the part of the defendant of the pending or probable litigation.

(3) Intentional spoliation by the defendant designed to defeat or disrupt the plaintiff's case.

(4) A causal relationship between the act of spoliation and the plaintiff's inability to prove its case.

(5) Damages.[113]

As a contrary argument to the tort of spoliation, the objectives of the tort can be achieved through sanctions reviewed above: costs penalties where the destruction caused greater expense in proving or defending a claim, and the striking of a claim or defence where the spoliation utterly deprives the other party of its case. Advancing the tort would also likely cause the plaintiff to waive privilege, insofar as it must show the alterative litigation costs incurred due to the spoliation, and the damages suffered.

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[110] *Spasic (Estate) v. Imperial Tobacco Ltd.*, (2000), 49 O.R. (3d) 699 (C.A.), lv. to appeal denied: (2001) 269 N.R. (note) (S.C.C.). A number of subsequent cases in Ontario have followed *Spasic* in permitting claims for the tort of spoliation to proceed to trial.: *Robb v. St. Joseph's Health Centre* (2001), 5 C.P.C. (5th) 252 (C.A.); *Robb Estate v. Canadian Red Cross Society* (2001), 20 C.C.L.T. (3d) 131 (C.A.); *Nunes v. Air Transat A.T. Inc.*, [2002] O.J. No. 4708 (S.C.); and *Miele (Litigation guardian of) v. Humber River Regional Hospital*, [2004] O.J. No. 831 (S.C.); and *Bigley v. Sanders* [2004] O.J. No. 1032 (S.C.J.); aff'd [2005] O.J. No. 5444 (Div. Ct.); lv. to appeal denied: [2006] O.J. No. 1391 (C.A.); *Kacperski v. Orozco* 2005 ABCA 179. None of these cases involve electronic evidence.

[111] *Spasic*, *supra.* at para. 12.

[112] BCLI, *supra*, pp. 38- 46.

[113] BCLI, *supra*, p.41.

N. Loss of privilege

Another rejected remedy for spoliation is the removal of a privilege claim made by the despoiling party. In *North American Road Ltd. v. Hitachi Construction Machinery Co.* the defendant sought the disclosure of the plaintiff's privileged documents as a sanction for the plaintiff's spoliation. The court declined to grant this order: "[a] review of the case law in this area however does not appear to indicate that piercing litigation privilege or otherwise altering the discovery process is an appropriate remedy for spoliation."[114]

O. Timing of sanctions

While certain US courts, as seen in the *Zubulake, Philip Morris,* and *Coleman v. Morgan Stanley* decisions, show no hesitation in imposing sanctions at the interlocutory stage, before trial, Canadian courts have been more restrained, deferring the proper sanction to be imposed by the trial court.[115] For example, the plaintiff asked the *Dreco* court to make an interlocutory ruling that the trial court make an adverse inference that the evidence deleted from the computer would be harmful to the defendants' case. The court acknowledged that the sanction was attractive, but deferred the issue to be assessed by the trial judge, based on the full evidence at trial.[116] The leading decisions governing British Columbia – *Dawes, Dyk,* and *St. Louis* – were based upon the full factual matrix at trial.

This reticence against pre-trial sanctions is generally sound. It is difficult to assess the prejudice caused by the missing evidence without considering the evidence tendered at trial in its totality. As noted in *Endean*, "[t]he fact of the destruction of evidence is only part of the evidence in the case and standing alone may very well be incomplete."[117] Further, it would be difficult for the court to assess on the basis of interlocutory affidavits the circumstances of and motivation for the destruction, central to the British Columbia test.

IX. The possible future of e-spoliation in British Columbia?

Although it may be naïve to do so, this paper foresees a pragmatic and measured future for judicial analysis of cases of lost or destroyed electronic documents. Four developments will likely reduce the risk of a party facing a *Zubulake* sanction in the future:

1. early case management of electronic discovery issues: new rules and conventions will require parties to identify and declare the sources of potentially relevant electronic evidence, thus lessening the risk that parties blithely continue deleting relevant documents during the course of litigation;

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[114] *North American Road Ltd. v. Hitachi Construction Machinery Co., supra,* at para.19
[115] *Cheung, supra,* at para. 23; *North American Road Ltd. v. Hitachi, supra,* para.21.
[116] At para. 43.
[117] *Endean, supra,* at para. 23.

2. proportionality: the principle that the scope of discovery will reflect the magnitude and nature of the litigation. In other words, if the parties are litigating over $100,000, it is unlikely that a party will be expected or compelled to spend $100,000 forensically retrieving electronic documents that hold only a scintilla of possible relevance;

3. guidance from jurisprudence and extra-judicial authorities;

4. increasing familiarity with electronic discovery in the profession.

The first three developments themselves largely arise from the threat in cost and complexity posed by electronic documents.

The most ready safeguard against spoliation is early investigation as to all potential sources of relevant electronic information in the control of the party, and early implementation of an effective litigation hold. Through effective coordination with the IT staff and management of the client, counsel can assist to craft an appropriate litigation hold. To avoid the perils of *Zubulake*, the parameters of the litigation hold, and the requirement to preserve information must be effectively communicated, and then constantly monitored by counsel.

Courts and authorities have directly encouraged such proactive efforts to identify, preserve, and, if necessary, produce electronic documents.

The Ontario *Guidelines*, Principle 6 requires counsel to come to grips with the issue of electronic document disclosure at an early stage. This process will, in the ideal form, keep under control the cost and scope of electronic document production, as well as avert the inadvertent destruction of electronic documents in the course of litigation.

Early exploration and discussion and orders concerning the sources and scope of electronic discovery also underlie the July 1, 2006 British Columbia Practice Direction on Electronic Discovery. Parties are to arrive at a protocol concerning the preservation and production of electronic records at an early stage of the proceedings, either by court order or by consent.[118]

The proposed new British Columbia rules of court follow on this example, requiring early discussions and determination of the scope of discovery, through the new means of a voluntary or judicially-issued case plan order.[119] In theory, this method will parallel the Practice Direction's requirement that electronic documents be identified and, if appropriate, preserved and protected, at an early stage of litigation.

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[118] http://www.courts.gov.bc.ca/sc/ElectronicEvidenceProject/Practice%20Direction%20-%20Electronic%20Evidence%20-%20July%201,%202006.pdf

[119] BC Justice Review Task Force Proposed New Rules of Civil Procedure of the British Columbia Supreme Court (23 July 2007): http://www.bcjusticereviewforum.ca/civilrules/downloads/conceptDraft.pdf

While these admonitions and requirements to come to grips with electronic discovery at an early stage may appear to increase the cost and complexity of discovery, this is offset, somewhat, by the rise in proportionality as a discovery principle, particularly with respect to electronic documents.

Ontario has led the provinces in setting out guidelines for electronic discovery. The Ontario *Guidelines* elected not to follow the requirement of wholesale discovery required by *Peruvian Guano*. Instead, as seen from the specific guidelines set out below, a party is presumptively entitled to focus on those electronic sources that are most accessible and most likely of relevance:

> 3. In most cases, the primary sources of electronic documents should be the parties' active data, and any other information that was stored in a manner that anticipated future business use, and that still permits efficient searching and retrieval.
>
> A responding party should not be required to search for, review or produce documents that are deleted or hidden, or residual data such as fragmented or overwritten files, absent agreement or a court order based on demonstrated need and relevance.
> …
>
> 5. As soon as litigation is contemplated or threatened, parties should immediately take reasonable and good faith efforts to preserve relevant electronic documents. However, it is unreasonable to expect parties to take every conceivable step to preserve all documents that may be potentially relevant.
>
> …
>
> 10. A party may satisfy its obligation to produce relevant electronic documents in good faith by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify the documents that are most likely to contain relevant data or information.

The *Sedona Canada Draft Principles* similarly sets out:

> 5. The parties should be prepared to disclose all relevant electronically stored information that is reasonably accessible in terms of cost and burden.

> 6. A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.
>
> 7. A party may satisfy its obligation to identify electronically stored information in good faith by using electronic tools and processes such as data sampling, searching and/or the use of selection criteria to collect potentially relevant electronically stored information.[120]

Of course, the issues in a given case may necessitate the expansion of the preservation and production of electronic documents, through consent or through court order.

British Columbia's draft new rules of court enshrine the proportionality principle as its stated objective:

> Object
>
> (1) The object of these rules is to ensure that each proceeding is dealt with justly, and (b) the amount of time and process involved in resolving the proceeding and the expense incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of:
>
> (i) the amount involved in the proceeding,
>
> (ii) the importance of the issues in dispute to the jurisprudence of British Columbia and to the public interest, and
>
> (iii) the complexity of the proceeding.[121]

The language can be seen to parallel that of the *Sedona Canada Draft Principles*:

> In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account:
>
> (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake;
>
> (ii) the relevance of the available electronically stored information;

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[120] *Sedona Canada Draft Principles, supra,* at p. vi.

[121] BC Justice Review Task Force Proposed New Rules of Civil Procedure of the British Columbia Supreme Court, *supra*.

(iii) its importance to the court's adjudication in a given case; and

(iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.[122]

In many ways, the potential tsunami of electronic information can be seen as the driving force away from broad *Peruvian Guano* discovery requirements, in which all documents must generally be produced, regardless of the tenuous relevance and significant cost and difficulty, and towards a focus on those documents that are truly necessary to determine the issues in dispute. In this, the proposed new rules reflect the jurisprudence from British Columbia and elsewhere that apply, directly or indirectly, proportionality principles in limiting electronic discovery.[123]

A quarter-century into the age of mass computerization, the legal profession still approaches electronic discovery on a tenuous, fearful, and improvisational basis. The judicial decisions, and the Ontario and Sedona guidelines set out above will assist parties to formulate defensible practices for preservation and production of electronic documents. These guidelines will in turn permit courts to offer further guidance through a developed jurisprudence. Coupled with these external guides, counsel will become increasingly familiar with the unique requirements of electronic discovery. These developments in turn will prompt a regime wherein spoliation, when it occurs, will occur not through ignorance or inadvertence, but through behaviour unambiguously deserving of condemnation.

[122] *Sedona Canada Draft Principles, supra,* Principle 2, p.vi.

[123] See, for example, *Park v. Mullin,* 2005 BCSC 1813; *Desgagne v. Yuen,* 2006 BCSC 955; *Roeske v. Grady,* 2006 BCSC 1975*; Ireland v. Low,* 2006 BCSC 393; *Spar Aerospace Limited v. Aerowerks Engineering Inc.* 2007 ABQB 543.