

SPOLIATION AND SANCTIONS FOR THE FAILURE TO PRESERVE RELEVANT DOCUMENTS IN CANADA¹

Marie-Andrée Vermette
WeirFoulds LLP

One of the greatest concerns at the preservation and collection stages of the discovery process is the destruction or loss of relevant documents, and the sanctions that can ensue from it. The expression "spoliation" is often used in connection with the destruction of documents. Spoliation "occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation."² Spoliation can occur in a number of ways:

Documents can be shredded. Computer files can be erased. Physical items can be disassembled, destroyed, or otherwise disposed of. Modifications can be made to the evidence. Evidence can be altered or destroyed in order to create other types of evidence, such as an expert report. Evidence can also be sold or transferred to a third party, and thereby rendered unavailable for discovery or trial. Finally, evidence can be suppressed in any number of ways. In each of these instances, a litigant, a potential litigant, or the justice system at large can suffer uncertainties, costs, and prejudice due to the actions of a spoliator.³

Once spoliation has been established, it is presumed that the evidence would have been unfavourable to the party who destroyed it.⁴ It is important to remember that spoliation is usually understood in Canada as referring only to the *intentional* destruction of evidence.

¹ A slightly different version of this paper is part of a chapter of the book *Electronic Documents: Records Management, e-Discovery and Trial* published by Canada Law Book.

² *McDougall v. Black & Decker Canada Inc.* (2008), 62 C.P.C. (6th) 293 (Alta. C.A.), at para. 18.

³ British Columbia Law Institute, *Report on Spoliation of Evidence*, November 2004, at p. 1, available at http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/372882/Spoliation_of_Evidence.pdf.

⁴ *McDougall v. Black & Decker Canada Inc.*, *supra*, footnote 2, at para. 18.

However, the unintentional destruction of evidence can also give rise to sanctions, as discussed further below.

The courts view the destruction of relevant documents as a serious matter. As explained by the Saskatchewan Court of Appeal:

Our system of disclosure and production of documents in civil actions contemplates that relevant documents will be preserved and produced in accordance with the requirements of the law [...]. A party is under a duty to preserve what he knows, or reasonably should know, is relevant in an action. The process of discovery of documents in a civil action is central to the conduct of a fair trial and the destruction of relevant documents undermines the prospect of a fair trial.⁵

In addition to interfering with the establishment and maintenance of a fair trial process, the destruction of relevant documents also interferes with another major policy goal of the legal system: the quest for the truth.⁶ Given the important role played by documentary discovery in the legal system, appropriate sanctions for intentional or reckless destruction or non-production of evidence is necessary in order to ensure that the advantages that a party may receive from such conduct are outweighed by the risk of a severe penalty being imposed.⁷ Sanctions for the negligent destruction of evidence may also be appropriate, depending on the circumstances.

Cases involving the destruction of electronic documents can be more difficult to deal with than cases involving the destruction of paper documents or real evidence. As two authors explain:

The proliferation of electronic record-keeping has further complicated this analysis. Oftentimes, the degree of fault and intent of the spoliator is difficult to discern when the evidence at issue is in electronic form. The

⁵ *Doust v. Schatz* (2002), 32 R.F.L. (5th) 317 (Sask. C.A.), at para. 27.

⁶ *Report on Spoliation of Evidence*, *supra*, footnote 3, at p. 1.

⁷ *The Sedona Canada Principles: Addressing Electronic Discovery*, January 2008 (Sedona, Arizona: The Sedona Conference, 2008), at p. 36, available at www.thesedonaconference.org.

how, when, and why of spoliation of electronic evidence can be a complicated inquiry. It may be unclear whether the destruction occurred automatically or at the behest of a specific individual. In addition, crafting an appropriate remedy for the victim of electronic spoliation can be difficult. The costs involved in re-creating spoliated evidence may be prohibitive.⁸

Canadian jurisprudence on the issue of sanctions for the failure to preserve relevant documents is limited, even more so with respect to electronic documents,⁹ but has been developing at a faster rate in recent years. This may be due, in part, to the American influence. The U.S. case law on the issue of sanctions is voluminous and often makes headlines. We now turn to the Canadian experience, including the relevant rules, principles and case law.

I. Applicable Rules and Principles

The destruction or non-production of relevant documents and the imposition of sanctions for this type of conduct are not new occurrences that are exclusively related to electronically stored information. Rather, courts have been dealing with these issues for a very long time. For example, the Supreme Court of Canada analyzed the issue of spoliation in 1896 in *St. Louis v. Canada*,¹⁰ and the principles set out in this decision are still relied upon today.¹¹ The powers that the courts have traditionally exercised to sanction or provide a remedy for the destruction of paper documents and real evidence can also be exercised in relation to the destruction of electronic documents. These powers may arise from rules of civil procedure, the

⁸ Adam I. Cohen & David J. Lender, *Electronic Discovery: Law and Practice* (Frederick, Maryland: Aspen Publishers, 2009) at p. 3-61.

⁹ *Sedona Canada Principles*, *supra*, footnote 7, at p. 36.

¹⁰ (1896), 25 S.C.R. 649.

¹¹ See, e.g., *McDougall v. Black & Decker Canada Inc.*, *supra*, footnote 2, at paras. 18-19, 22.

court's discretion with respect to costs, and the court's inherent jurisdiction and duty to control abuse of process.¹²

The Ontario *Rules of Civil Procedure*, for instance, provide for a number of potential sanctions that can be imposed where a party fails to disclose or produce a document, including: (a) allowing a cross-examination on the party's affidavit of documents, (b) ordering the preparation of a further and better affidavit of documents, (c) prohibiting the party from using a document at trial, (d) revoking the party's right to initiate or continue an examination for discovery, and (e) dismissing the action or striking out the statement of defence.¹³ The relevant rules also state that the court may make such other order as is just. In addition, the *Rules of Civil Procedure* provide for sanctions for a party's failure to abide by a court order (such as an order relating to the production of documents), including penalties for contempt.¹⁴ British Columbia's *Supreme Court Rules* grant similar powers to courts in that province, including the power to order the production of a document, to prohibit the use at trial of a document that was not produced, to dismiss the proceeding or strike out the statement of defence and grant judgment, and to make any other order the court thinks just.¹⁵

In contrast to the other provinces' rules of civil procedure, Nova Scotia's new *Civil Procedure Rules*¹⁶ contain a rule -- Rule 16 -- that applies specifically to the disclosure of

¹² *Ibid.* at para. 22. See also *Cheung v. Toyota Canada Inc.* (2003), 29 C.P.C. (5th) 267 (Ont. S.C.J.), at para. 23. Although the destruction of relevant documents prior to the commencement of litigation may not be caught by the applicable rules of civil procedure, the court's power to control abuse of process is broad enough to address this situation.

¹³ See, e.g., Rules 2.01 (Effect of Non-Compliance), 30.06 (Where Affidavit Incomplete or Privilege Improperly Claimed) and 30.08 (Effect of Failure to Disclose or Produce for Inspection) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

¹⁴ See, e.g., Rules 30.08(2) (Effect of Failure to Disclose or Produce for Inspection), 60.11 (Contempt Order), and 60.12 (Failure to Comply with Interlocutory Order) of the *Rules of Civil Procedure*, *ibid.*

¹⁵ See, e.g., Rules 2 (Effect of Non-Compliance), 26(10) (Order to Produce Document), 26(14) (Party May Not Use Document), and 56(4) (Contempt of Court) of the *Supreme Court Rules*, B.C. Reg. 221/90.

¹⁶ Available at <http://www.courts.ns.ca/Rules/toc.htm>.

electronic information. Rules 16.13 and 16.15 deal with the deletion or destruction of electronic information. They provide that: (1) deliberate or reckless deletion of relevant electronic information, expunging deleted information, or destruction of anything containing relevant electronic information may be dealt with under Rule 88 – Abuse of Process; (2) failure to comply with an order directing the preservation of electronic information may be dealt with under Rule 89 – Contempt; and (3) "[a] party who acts in good faith and who loses relevant electronic information as a result of the routine operation of a computer or database does not commit an abuse of process."¹⁷ Rule 88 lists various remedies for abuse of process, including an order for dismissal or judgment, an order to indemnify the other party for losses resulting from the abuse, and an injunction. Rule 89 states that the remedies for abuse of process are also available in cases of contempt, in addition to fines, sequestration, imprisonment, and the imposition of other penal terms such as house arrest, community service or reparations.

In addition to Nova Scotia's *Civil Procedure Rules*, provisions dealing specifically with the issue of sanctions for the destruction of electronic documents (as opposed to documents in general) can be found in certain of the e-discovery guidelines that have been adopted. Although the *Ontario Guidelines* do not expressly deal with the issue of sanctions,¹⁸ the *Sedona Canada Principles* do. Principle 11 states as follows:

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.¹⁹

¹⁷ Rule 16.15(2), *ibid.*

¹⁸ *Guidelines for the Discovery of Electronic Documents in Ontario*, available at http://www.oba.org/en/pdf_newsletter/E-DiscoveryGuidelines.pdf.

¹⁹ *The Sedona Canada Principles: Addressing Electronic Discovery*, January 2008 (Sedona, Arizona: The Sedona Conference, 2008), at p. 36, available at www.thesedonaconference.org.

The suggestion that all sanctions could be avoided if the party in default shows that its failure to preserve documents was not intentional or reckless is peculiar. Although the most severe sanctions should be reserved to cases where the destruction or non-production of documents was intentional or reckless, lesser sanctions could be appropriate in cases where such destruction or non-production was merely negligent. For example, such sanctions might take the form of an award of costs or the granting of additional discovery rights to the prejudiced party.

The Comments to Principle 11 elaborate on its contents. Comment 11.a states that "[t]he 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."²⁰ An exhaustive list of sanctions is not included, but reference is made to the following possible sanctions: costs, contempt proceedings, prohibition from using evidence at trial or from examining a witness at discovery or at trial, and dismissal of a claim or defence.²¹

In addition, the *Sedona Canada Principles* adopt in Comment 11.d the following factors, which were set out in *Zelenski v. Jamz*²² and cited in *Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc.*,²³ as the factors to be considered in determining the appropriate sanction for non-disclosure:

- (a) the quantity and quality of the abusive acts;
- (b) whether the abusive acts flow from neglect or intent;

²⁰ *Ibid.*

²¹ *Ibid.* at p. 37.

²² *Zelenski v. Jamz* (2004), 189 Man. R. (2d) 151 (Q.B.), at para. 19.

²³ *Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc.* (2006), 42 C.P.C. (6th) 267 (Man. Q.B.), at paras. 23-24.

- (c) prejudice generally, and specifically the impact of the abuse on the opposing party's ability to prosecute or defend the action;
- (d) the merits of the abusive party's claim or defence;
- (e) the availability of sanctions short of dismissal that will address past prejudice to the opposing party; and
- (f) the likelihood that a sanction short of dismissal will end the abusive behaviour.²⁴

This list of factors was applied in both *Zelenski v. Jamz* and *Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc.* in the context of motions to dismiss a claim. It is questionable whether this is the appropriate test to apply -- and whether it provides the necessary guidance -- in instances where less serious sanctions are sought, such as the imposition of costs sanctions. The appropriate factors to consider will become clearer as the case law develops on the issue of sanctions.

Finally, comment 11.e of the *Sedona Canada Principles* refers to records management policies. It states that adherence to a reasonable records management policy should not lead to the imposition of sanctions, but cautions that adherence to such a policy in the face of reasonably contemplated or actual litigation is not appropriate.

Principle 11 of the *Sedona Canada Principles* and its Comments are inspired, in part, by Principle 14 of the U.S. *Sedona Principles*.²⁵ Principle 14 reads as follows:

Sanctions, including spoliation findings, should be considered by the court only if it finds that there was a clear duty to preserve and produce relevant

²⁴ *Sedona Canada Principles*, *supra*, footnote 19, at p. 37.

²⁵ *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, 2nd ed., June 2007 (Sedona, Arizona: The Sedona Conference, 2007), at p. 70, available at www.thesedonaconference.org.

electronically stored information, and a reasonable probability that the loss of evidence has materially prejudiced the adverse party.²⁶

The Commentary to Principle 14 reviews the law in the United States with respect to spoliation and sanctions. It states that spoliation findings or other sanctions should not be imposed without proof of intentional, reckless or grossly negligent violations of preservation obligations.²⁷ In cases where relevant information is negligently lost, but without the level of culpability that would justify the imposition of sanctions, the court can order remedial measures such as further discovery or the payment of costs. The purpose of such remedial measures is to put the parties in a position similar to the one they would have been in but for the negligence of the party who lost the information.²⁸ The Commentary also refers to the destruction of electronic documents pursuant to a records management policy and states that such destruction should not be considered sanctionable conduct if the policy is reasonable, and if the destruction was carried out in good faith, at a time where there was no duty to preserve the documents.²⁹

II. Canadian Case Law³⁰

(a) Evidentiary Presumption / Adverse Inference

The presumption *omnia praesumuntur contra spoliatorem* (all things are presumed against the wrongdoer) is a rule of evidence³¹ which is not new to litigation and comes

²⁶ *Ibid.* at p. 70.

²⁷ *Ibid.* In many cases, however, it was held that discovery sanctions can be imposed where a party has breached a discovery obligation through ordinary negligence: see, e.g., *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2nd Cir. 2002), at p. 101.

²⁸ *Sedona Principles, ibid.* at p. 71. The distinction that the *Sedona Principles* appear to draw between "sanctions" and "remedial measures" is not reflected in the case law. Among other things, the payment of costs is usually referred to as a sanction, not as a remedial measure. See, e.g., *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. 2008), at p. 17, and *United Medical Supply Com, Inc. v. The United States*, 77 Fed. Cl. 257 (2007), at p. 275.

²⁹ *Sedona Principles, ibid.* at p. 73.

³⁰ The majority of the cases discussed in this section do not deal with the destruction of electronic documents, but concern, rather, the destruction of paper documents or real evidence. This is because there are still relatively few reported cases dealing with the issue of spoliation in relation to electronic documents. However, the principles developed in relation to "traditional" documents and real evidence are presumptively applicable in the context of electronic discovery.

down to us from the Romans.³² In 1896, the Supreme Court of Canada discussed the presumption in detail in *St. Louis v. Canada*.³³ This case has been said to stand for the following proposition:

Spoliation in law does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him.³⁴

More recently, in the 2008 case *McDougall v. Black & Decker Canada Inc.*,³⁵ the Alberta Court of Appeal reviewed in detail the law of spoliation in Canada and the circumstances in which an adverse inference can be drawn. The facts of that case are as follows. After the McDougalls lost their house to a fire, the local fire department concluded that the fire was caused either by the improper disposal of smoking materials, or a malfunctioning cordless electric drill manufactured and distributed by Black & Decker. The McDougalls subsequently sued Black & Decker. By the time they did so, however, what remained of the house had been razed, and certain parts of the suspect drill had gone missing. The expert retained by the McDougalls had previously been given a chance to examine the scene of the fire and the remnants of the drill. As a result, Black & Decker moved for, and was granted in first instance, the dismissal of the action on the basis of spoliation, alleging that it was unable to defend itself as it could not properly

³¹ As the maxim *omnia praesumuntur contra spoliatorem* is a rule of evidence and states no principle of law, it does not need to be pleaded: see *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 49 O.R. (3d) 699 (C.A.), at para. 25; application for leave to appeal dismissed: [2000] S.C.C.A. No. 547 (S.C.C.).

³² *St. Louis v. Canada* (1896), 25 S.C.R. 649, at p. 667; *McDougall v. Black & Decker Canada Inc.* (2008), 62 C.P.C. (6th) 293 (Alta. C.A.), at para. 15.

³³ *St. Louis v. Canada*, *ibid.*

³⁴ *McDougall v. Black & Decker Canada Inc.*, *supra*, footnote 32, at para. 18.

³⁵ *Ibid.*

investigate the fire scene or the drill, and, therefore, could not determine the probable cause of the fire.

The Alberta Court of Appeal allowed the appeal and restored the claim. It noted that *St. Louis* was the leading case in Canada on the issue of spoliation, and that Canadian courts had been slow to expand the law of spoliation beyond the principles set out in that case.³⁶ It also pointed out that there was a semantic problem in the case law concerning the meaning of the word "spoliation". It stated that spoliation should not be confused with the unintentional destruction of evidence. Although the latter may also give rise to a remedy, the remedy is to be founded on other principles than the Latin phrase *omnia praesumuntur contra spoliatores*; this is because it is not appropriate to presume that missing evidence would tell against the person who has destroyed it where the destruction is not intentional.³⁷ The Alberta Court of Appeal also expressed the view that the determination of whether spoliation (i.e. the intentional destruction of evidence) has occurred should generally be left for trial, and that full pre-trial applications to determine this issue should not be encouraged.³⁸

After reviewing the Canadian law on the issue of spoliation, the Alberta Court of Appeal gave the following helpful summary:

1. Spoliation currently refers to the intentional destruction of relevant evidence when litigation is existing or pending.
2. The principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator. The presumption can be rebutted by evidence showing the spoliator did not intend, by destroying the evidence, to affect the litigation, or by other evidence to prove or repel the case.

³⁶ *Ibid.* at paras. 16, 19.

³⁷ *Ibid.* at paras. 22, 24-25.

³⁸ *Ibid.* at para. 28.

3. Outside this general framework other remedies may be available – even where evidence has been unintentionally destroyed. Remedial authority for these remedies is found in the court's rules of procedure and its inherent ability to prevent abuse of process, and remedies may include such relief as the exclusion of expert reports and the denial of costs.
4. The courts have not yet found that the intentional destruction of evidence gives rise to an intentional tort, nor that there is a duty to preserve evidence for purposes of the law of negligence, although these issues, in most jurisdictions, remain open.
5. Generally, the issues of whether spoliation has occurred, and what remedy should be given if it has, are matters best left for trial where the trial judge can consider all of the facts and fashion the most appropriate response.
6. Pre-trial relief may be available in the exceptional case where a party is particularly disadvantaged by the destruction of evidence. But generally this is accomplished through the applicable rules of court, or the court's general discretion with respect to costs and the control of abuse of process.³⁹

Applying these principles to the facts of the case, the Alberta Court of Appeal found that determining whether the destruction of the evidence was intentional, and to what extent Black & Decker might be prejudiced by such destruction, required a greater evidential foundation than could be found in an affidavit and should, therefore, be left for trial.⁴⁰ However, the Court of Appeal ordered the McDougalls' expert to attend an examination to give evidence regarding his observations of the fire scene and his care of the drill.⁴¹

The principles set out in *McDougall v. Black & Decker Canada Inc.* are consistent with most of the Canadian case law on the issue of the spoliation inference. Many decisions have held that the issue of spoliation is best left for trial, where all the evidence is

³⁹ *Ibid.* at para. 29.

⁴⁰ *Ibid.* at paras. 33-37.

⁴¹ *Ibid.* at para. 39.

available to be considered by the trial judge.⁴² Further, there are numerous cases where courts refused to find spoliation and to apply the evidentiary presumption in the absence of evidence of wilful, intentional misconduct, as opposed to mere negligence or carelessness.⁴³ However, there are a few cases where the intentional element of spoliation was questioned. In *Dickson v. Broan-NuTone Canada Inc.*,⁴⁴ Justice Himel expressed the view that the spoliation inference could be applied in Ontario even in the absence of evidence of a fraudulent intention or an intention to suppress the truth.⁴⁵ In the case before her, however, she found that the adverse inference had been rebutted because the evidence in issue had been disposed of several years before the action was initiated.⁴⁶ Similarly, in the Alberta case *Lamont Health Care Centre v. Delnor Construction Ltd.*, Macklin J. stated that the doctrine of spoliation applied to unintentional acts which resulted in the destruction of evidence, but he did not apply the evidentiary presumption in this case because there was no evidence that the destruction was intentional, reckless or even negligent.⁴⁷ Macklin J.'s conclusion that the spoliation presumption could be applied even if evidence was destroyed through negligence or carelessness, however, was subsequently criticized, and effectively overturned, by the Alberta Court of Appeal in *McDougall v. Black &*

⁴² See, e.g., *Dreco Energy Services Ltd. v. Wenzel*, [2006] A.J. No. 546 (QL) (Q.B.), at paras. 43, 49-50; *North American Road Ltd. v. Hitachi Construction Machinery Co.*, [2005] A.J. No. 1862 (QL) (Q.B.), at paras. 20-23; *Cheung v. Toyota Canada Inc.* (2003), 29 C.P.C. (5th) 267 (Ont. S.C.J.), at paras. 20-21, 23; *Douglas v. Inglis Ltd.* (2000), 45 C.P.C. (4th) 381 (Ont. S.C.J.), at para. 21.

⁴³ See, e.g., *Dyk v. Protec Automotive Repairs* (1997), 151 D.L.R. (4th) 374 (B.C. S.C.), at paras. 11-12; *Enterprise Excellence Corp. v. Royal Bank of Canada* (2002), 20 C.P.R. (4th) 34 (Ont. S.C.J.), at paras. 74-75; *Thandi v. Burnaby (City)*, [2005] B.C.J. No. 2285 (QL) (S.C.), at paras. 130-135; *Burrill v. Ford Motor Co. of Canada Ltd.*, [2006] O.J. No. 4059 (QL) (S.C.J.), at paras. 125-126; *Vescio (Litigation guardian of) v. Garfield*, [2007] O.J. No. 2624 (QL) (S.C.J.), at paras. 234-237; *Universal Printed Circuit Co., Canada v. Omni Graphics Ltd.*, [1999] B.C.J. No. 157 (QL) (S.C.), at para. 32. In contrast, the spoliation inference has been applied in few cases in the last years: see, e.g., *Doust v. Schatz* (2002), 32 R.F.L. (5th) 317 (Sask. C.A.), at paras. 21, 24-30, 34; *Phillips v. Phillips* (2005), 19 E.T.R. (3d) 103 (Alta. Q.B.), at para. 44; *Drouillard v. Cogeco Cable Inc.*, [2005] O.J. No. 3166 (QL) (S.C.J.), at paras. 63-70; aff'd (2007), 86 O.R. (3d) 431 (C.A.); and *Trans North Turbo Air Ltd. v. North 60 Petro Ltd.*, [2003] Y.J. No. 47 (QL) (S.C.), at paras. 79-84; aff'd [2004] Y.J. No. 55 (QL) (C.A.).

⁴⁴ *Dickson v. Broan-NuTone Canada Inc.*, [2007] O.J. No. 5114 (QL) (S.C.J.); aff'd [2008] O.J. No. 4197 (QL) (C.A.).

⁴⁵ *Ibid.* at paras. 40-42.

⁴⁶ *Ibid.* at para. 47.

⁴⁷ *Lamont Health Care Centre v. Delnor Construction Ltd.* (2003), 349 A.R. 309 (Q.B.), at paras. 49-64.

*Decker Canada Inc.*⁴⁸ Finally, in *Elliot v. Trane Canada Inc.*, Glennie J. of the New Brunswick Court of Queen's Bench appears to draw an adverse inference based on the negligent destruction of documents, although his analysis is neither detailed nor clear.⁴⁹

The Alberta Court of Appeal's decision in *McDougall v. Black & Decker Canada Inc.* was subsequently followed by two provincial courts of appeal (Manitoba and Prince Edward Island), although in cases where the striking of the statement of defence, and not the application of the spoliation inference, was sought.⁵⁰ In addition, less than 20 days after the Alberta Court of Appeal released its decision in *McDougall v. Black & Decker Canada Inc.*, the British Columbia Court of Appeal also commented on the application of the spoliation inference in *Holland (Guardian ad litem of) v. Marshall*.⁵¹ It referred to the criticism voiced by some regarding the failure of British Columbia courts (and other Canadian courts) to recognize negligent spoliation. After reviewing a number of authorities, however, the Court stated that it did not have to decide, for the purpose of the case before it, whether the authorities relied upon by the motions judge had placed unwarranted limits on the spoliation inference and its application.⁵² The British Columbia Court of Appeal did not refer to *McDougall v. Black & Decker Canada Inc.* in its reasons, presumably because this case was not mentioned in argument, the matter having been argued before the *McDougall* decision was released.

In light of the foregoing, it remains unclear whether, in provinces other than Alberta, the spoliation presumption can be applied in cases where the destruction of documents

⁴⁸ *McDougall v. Black & Decker Canada Inc.* (2008), 62 C.P.C. (6th) 293 (Alta. C.A.), at paras. 23-25.

⁴⁹ *Elliot v. Trane Canada Inc.*, [2008] N.B.J. No. 68 (QL) (Q.B.), at paras. 222-227.

⁵⁰ *Commonwealth Marketing Group Ltd. v. The Manitoba Securities Commission*, [2009] M.J. No. 77 (QL) (C.A.); *Jay v. DHL Express (Canada), Ltd.* (2009), 65 C.P.C. (6th) 58 (P.E.I. C.A.). See also *Muskoka Fuels v. Hassan Steel Fabricators Ltd.*, [2009] O.J. No. 4782 (QL) (S.C.J.).

⁵¹ *Holland (Guardian ad litem of) v. Marshall* (2008), 301 D.L.R. (4th) 371 (B.C. C.A.).

⁵² *Ibid.* at paras. 76-80.

was negligent or careless as opposed to intentional. Given the decision of the Supreme Court of Canada in *St. Louis v. Canada*, the detailed and reasoned analysis of the law of spoliation in Canada by the Alberta Court of Appeal in *McDougall v. Black & Decker Canada Inc.*, and the fact that other remedies are available for the unintentional destruction of evidence, it is likely that the courts in the other provinces will follow suit and find that the spoliation presumption only applies in cases of intentional destruction.⁵³

Although the issue of whether an adverse inference is appropriate is usually left to the trial judge to decide, it is noteworthy that the spoliation inference played a role in the granting of an interlocutory injunction in *Western Tank & Lining Ltd. v. Skrobutan*.⁵⁴ In that case, Scurfield J. was satisfied that the plaintiff would probably be able to prove that two of the defendants attempted to erase from their business computers evidence of their pre-resignation activities that conflicted with their duties to their past employer.⁵⁵ He stated:

At this stage, proof of spoliation supports the court drawing a negative inference. That inference in this case is that both Burkard and Sitarz were probably involved in the direct solicitation of the plaintiff's customers before leaving the employment of the plaintiff. They may also have sent out other competitive quotations in a manner that was designed to convert the plaintiff's corporate opportunities to their own account. This last inference is supported by proof that they actually sent out at least one such quotation.

In the present context, their attempt to destroy evidence is also a factor to be considered when determining the appropriate remedy.⁵⁶

⁵³ See, however, the 2004 *Report on Spoliation of Evidence* of the British Columbia Law Institute in which the Institute recommended, among other things, that: (1) the non-spoliator should simply have to prove the destruction of evidence (as opposed to the intentional destruction of documents) in order to raise the evidentiary presumption; (2) the spoliator should have the burden to adduce evidence as to his or her state of mind to rebut the presumption; and (3) demonstrating that the destruction occurred negligently should not, in most cases, be enough to rebut the presumption. See British Columbia Law Institute, *Report on Spoliation of Evidence*, November 2004, at pp. 34-37, available at http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/372882/Spoliation_of_Evidence.pdf.

⁵⁴ *Western Tank & Lining Ltd. v. Skrobutan*, [2006] M.J. No. 357 (QL) (Q.B.).

⁵⁵ *Ibid.* at paras. 20-21.

⁵⁶ *Ibid.* at paras. 23-24.

Scurfield J. ultimately granted an interlocutory injunction preventing the defendants from directly soliciting the plaintiff's private customers, and from accepting business from the plaintiff's private customers either directly or on behalf of another employer for a period of time. His conclusion that an adverse inference would probably be drawn at trial supported his assessment of the merits of the case and his finding that there was a serious issue to be tried. Thus, evidence of spoliation can potentially assist a party in any pre-trial motion involving a consideration of the merits of the case.

(b) Dismissal of Action / Striking of Statement of Defence

In addition to dealing with the spoliation inference, the decision of the Alberta Court of Appeal in *McDougall v. Black & Decker Canada Inc.*⁵⁷ also discusses the circumstances where the dismissal of an action is an appropriate sanction for spoliation. The Alberta Court of Appeal set a very high threshold for the imposition of this sanction. It stated that while a court has the inherent jurisdiction to strike an action to prevent an abuse of process, it should not do so unless: (1) it is beyond doubt that the destruction or loss of evidence was a deliberate act done with the clear intention of gaining an advantage in litigation; and (2) the prejudice is so obviously profound that it prevents the innocent party from mounting a defence.⁵⁸ Again, the Alberta Court of Appeal's view is that the issues of: (1) whether spoliation has occurred, and (2) what remedy should be given if it has, are matters that are generally best left for trial.⁵⁹

⁵⁷ *McDougall v. Black & Decker Canada Inc.*, *supra*, footnote 48.

⁵⁸ *Ibid.* at para. 4.

⁵⁹ *Ibid.* at para. 29. The *McDougall* decision is discussed further in the previous section.

McDougall v. Black & Decker Canada Inc. was followed by the Manitoba Court of Appeal in *Commonwealth Marketing Group Ltd. v. The Manitoba Securities Commission*.⁶⁰ In that case, the motions judge's decision to: (1) dismiss a motion to strike the statement of defence; and (2) remit the issue of spoliation to the trial judge to be dealt with in the course of the trial, was upheld. The Manitoba Court of Appeal stated that determining whether spoliation has occurred and what relief should follow was, as a general rule, a matter best left to the trial judge because he or she could consider all of the surrounding facts.⁶¹

McDougall v. Black & Decker Canada Inc. was also followed by the Prince Edward Island Court of Appeal in *Jay v. DHL Express (Canada), Ltd.*,⁶² which involved the non-production of electronically stored information. In that case, Jay sued DHL for damages for breach of the contract under which Jay had been providing courier services to DHL. Jay made several motions for production of DHL's waybills and invoices. According to Jay, he needed these documents to establish his claim for damages because such documents would show what other contractors had earned after DHL breached its contract with Jay. The requested documentation was not all produced. DHL explained that a computer crash in 2005 had destroyed the paths to retrieving the electronic waybills requested by Jay. However, the motions judge was not impressed with DHL's efforts to retrieve the documents, and dismissed DHL's statement of defence for failure to produce documents for inspection.

The Court of Appeal reinstated DHL's Statement of Defence because it found that the motions judge had not taken into account or given sufficient weight to the following considerations:

⁶⁰ *Commonwealth Marketing Group Ltd. v. The Manitoba Securities Commission*, [2009] M.J. No. 77 (QL) (C.A.).

⁶¹ *Ibid.* at para. 2.

⁶² *Jay v. DHL Express (Canada), Ltd.* (2009), 65 C.P.C. (6th) 58 (P.E.I. C.A.), at paras. 37-38.

- (a) DHL's intention, especially in the absence of any finding of bad faith, or contumacious or contemptuous conduct;
- (b) The documents sought being relevant to only one segment of the proceeding, namely the assessment of damages, and regarding only one of two claims for breach of contract;
- (c) The relative prejudice to the plaintiff and to the defendants.⁶³

The Court found that the preferred course was: (1) to leave the issue of non-production for the trial judge to consider, in the context of the overall proceeding, and with the benefit of all the evidence; and (2) to consider alternative remedies that would remediate Jay's prejudice or potential prejudice.⁶⁴ After discussing possible alternative remedies, the Court ordered that: (1) if any unproduced waybills documentation becomes available that is favourable to DHL's case, DHL may not use the document at trial, except with leave of the trial judge; (2) if some evidence is produced on which the trial judge can make an assumption of damages, then Jay may ask the trial judge to make a presumption as to the amount of damages, and the presumption would be favourable to Jay; and (3) DHL pay Jay's costs of the motion and the appeal, even though DHL was successful on the appeal.⁶⁵

Healey J. of the Ontario Superior Court of Justice similarly followed *McDougall v. Black & Decker Canada Inc.* in *Muskoka Fuels v. Hassan Steel Fabricators Ltd.* where it was found that the remedies sought by the defendant should not be imposed at the pre-trial stage in the absence of a more complete record of evidence.⁶⁶

Prior to the Alberta Court of Appeal's decision in *McDougall v. Black & Decker Canada Inc.*, courts were also reluctant to dismiss an action or grant judgment based on

⁶³ *Ibid.* at para. 27.

⁶⁴ *Ibid.* at para. 65.

⁶⁵ *Ibid.* at para. 73.

⁶⁶ *Muskoka Fuels v. Hassan Steel Fabricators Ltd.*, [2009] O.J. No. 4782 (QL) (S.C.J.), at paras. 4-5, 7.

spoliation or the destruction of evidence before trial.⁶⁷ However, there are instances where these drastic sanctions were imposed. In *iTrade Finance Inc. v. Webworx Inc.*,⁶⁸ Karakatsanis J. found that the defendant was in contempt of court for breaching an Anton Piller Order and a Mareva Injunction. The finding of contempt was based, in part, on the defendant's failure to disclose his laptop computer at the time of the execution of the Anton Piller Order, and his use of the computer software "Evidence Eliminator" to delete files from his laptop computer. As a sanction for contempt, Karakatsanis J. ordered, among other things, that the Statement of Defence, Counterclaim and Crossclaim be struck out without leave to amend.⁶⁹ Although he recognized that it was an extreme penalty which denied the defendant an opportunity to have the claim determined on the merits, he found that it was proportionate to the degree of wrongdoing and was necessary for deterrence and to control the court's processes.⁷⁰ Contrary to the approach adopted by the Alberta Court of Appeal in *McDougall v. Black & Decker Canada Inc.*, Karakatsanis J. did not spend a lot of time assessing the prejudice to the plaintiff and did not find that the destruction of evidence prevented the plaintiff from proving its case. However, a different test with less emphasis on prejudice may be appropriate in cases of contempt because the failure to impose significant sanctions for the intentional breach of a court order could bring the administration of justice into disrepute.

Similarly, the plaintiff's claim was dismissed in *Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc.*⁷¹ In that case, changes were made to the plaintiff's hardware and

⁶⁷ See, e.g., *Cyr v. Royal & SunAlliance Co. of Canada*, [2007] O.J. No. 5411 (QL) (S.C.J.), at para. 19; *Spencer v. Quadco Equipment Inc.* (2005), 6 C.P.C. (6th) 152 (N.B. Q.B.), at paras. 35-36; *Dreco Energy Services Ltd. v. Wenzel*, [2006] A.J. No. 546 (QL) (Q.B.), at paras. 49-50; *Cheung v. Toyota Canada Inc.* (2003), 29 C.P.C. (5th) 267 (Ont. S.C.J.), at para. 21; *Werner v. Warner Auto-Marine Inc.* (1996), 93 O.A.C. 145 (C.A.), at para. 23.

⁶⁸ *iTrade Finance Inc. v. Webworx Inc.* (2005), 255 D.L.R. (4th) 748 (Ont. S.C.J.).

⁶⁹ *Ibid.* at para. 23.

⁷⁰ *Ibid.* at paras. 20-21.

⁷¹ *Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc.* (2006), 42 C.P.C. (6th) 267 (Man. Q.B.).

software after the examinations for discovery, contrary to undertakings to provide certain disks and to retain the hardware. Mykle J. enumerated the following relevant factors to consider when determining whether a proceeding should be dismissed or a defence struck out:

- (a) the quantity and quality of the abusive acts;
- (b) whether the abusive acts flow from neglect or intent;
- (c) prejudice generally, and specifically the impact of the abuse on the opposing party's ability to prosecute or defend the action.
- (d) the merits of the abusive party's claim or defence;
- (e) the availability of sanctions short of dismissal that will address past prejudice to the opposing party; and
- (f) the likelihood that a sanction short of dismissal will end the abusive behaviour.⁷²

Mykle J. did not find that the destruction of evidence was a deliberate act done with the clear intention of gaining an advantage in the litigation (i.e. the test later set out in *McDougall v. Black & Decker Canada Inc.*). On the issue of intent, he stated that the destruction of the hardware required a wilful act, and was a clear breach of the undertaking given. He concluded that, at the very least, the destruction of the hardware showed "a careless disregard for the undertaking given."⁷³ Mykle J.'s decision to dismiss the plaintiff's claim appears to be based on the prejudice suffered by the defendant. In his view, given that the merits of the claim would be largely determined by the things which were no longer available (i.e. hardware and operating systems), the sole remedy available was the dismissal of the claim.⁷⁴ It is open to question whether the same order would have been made had it been decided after *McDougall v. Black & Decker Canada Inc.* In addition to the absence of finding of bad faith, Mykle J. decided the

⁷² *Ibid.* at para. 24.

⁷³ *Ibid.* at para. 27.

⁷⁴ *Ibid.* at paras. 30-33.

issue of spoliation and the appropriate remedy for it before trial. However, *Brandon Heating & Plumbing (1972) Ltd. v. Max Systems Inc.* might be one of these exceptional cases where pre-trial relief is appropriate in light of the very serious prejudice suffered by the defendant as a result of the destruction of relevant evidence.

(c) Other Sanctions

Aside from the spoliation inference, the dismissal of an action and the striking of a defence, courts have a broad discretion to impose other, less serious sanctions in cases where documents have been destroyed, whether intentionally or not. As stated above, the power to impose such sanctions is derived from the various rules of civil procedure and the court's inherent jurisdiction.⁷⁵

Two examples of other sanctions are the exclusion of evidence (including expert reports) and costs sanctions.⁷⁶ In *Spencer v. Quadco Equipment Inc.*,⁷⁷ Grant J. found that the master disconnect switch that was alleged to be the cause of a fire (the "most critical piece of evidence", according to Grant J.⁷⁸) was destroyed by the plaintiff's expert as a result of the bad faith dealings of the plaintiff's adjusters. Although Grant J. refused to strike out pleadings, he made an order excluding the report of the plaintiff's expert, and precluding the expert as a witness at trial.⁷⁹ Grant J. refused to defer the issue of the exclusion of the expert report to the trial judge because he found that putting the parties to the expense of preparing for trial before

⁷⁵ See, e.g., *McDougall v. Black & Decker Canada Inc.* (2008), 62 C.P.C. (6th) 293 (Alta. C.A.), at para. 22; *Cheung v. Toyota Canada Inc.*, *supra*, footnote 67, at para. 23; and British Columbia Law Institute, *Report on Spoliation of Evidence*, November 2004, at pp. 10, 18-20, available at http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/372882/Spoliation_of_Evidence.pdf.

⁷⁶ *Endean v. Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465 (B.C. C.A.), at paras. 32-33; application for leave to appeal granted, but appeal subsequently discontinued: [1998] S.C.C.A. No. 260 (S.C.C.).

⁷⁷ *Spencer v. Quadco Equipment Inc.* (2005), 6 C.P.C. (6th) 152 (N.B. Q.B.).

⁷⁸ *Ibid.* at para. 29.

⁷⁹ *Ibid.* at para. 52.

knowing whether the expert report would be admitted would prejudice the fair trial of the action.⁸⁰

Similarly, the Court of Appeal for Ontario ordered in *Werner v. Warner Auto-Marine Inc.* that certain parties were prohibited from relying on expert evidence obtained as a result of a breach of a preservation order (i.e. through destructive testing).⁸¹

With respect to costs sanctions, courts may award special costs to approximate the actual expense to which a party may have been put due to the destruction of evidence,⁸² or costs on a higher scale.⁸³ Further, if parties responsible for the destruction of evidence are ultimately successful at trial, they can be deprived of their costs,⁸⁴ or can even be ordered to pay the costs of the other side.⁸⁵ If lawyers are found to have played a role in the destruction of evidence, they may also be ordered to pay costs personally.⁸⁶

Although the court's discretion to fashion a remedy in cases of destruction of evidence is a broad one, it is not unlimited. In *North American Road Ltd. v. Hitachi Construction Machinery Co.*,⁸⁷ for example, Clarke J. stated that piercing litigation privilege was not an appropriate remedy for spoliation.⁸⁸

⁸⁰ *Ibid.* at para. 47.

⁸¹ *Werner v. Warner Auto-Marine Inc.* (1996), 93 O.A.C. 145 (C.A.), at para. 24. See also *Cheung v. Toyota Canada Inc.* (2003), 29 C.P.C. (5th) 267 (Ont. S.C.J.), at paras. 27, 31.

⁸² *Endean v. Canadian Red Cross Society*, *supra*, footnote 76, at para. 33.

⁸³ See, e.g., *Cheung v. Toyota Canada Inc.*, *supra*, footnote 81, at para. 31; *Werner v. Warner Auto-Marine Inc.*, *supra*, footnote 81, at paras. 13, 25, 26.

⁸⁴ *Farro v. Nutone Electrical Ltd.* (1990), 72 O.R. (2d) 637 (C.A.), at p. 645.

⁸⁵ See *Doust v. Schatz* (2002), 32 R.F.L. (5th) 317 (Sask. C.A.), at para. 70, and *Doust v. Schatz*, [2003] S.J. No. 409 (QL) (Q.B.), at para. 4.

⁸⁶ See *Werner v. Warner Auto-Marine Inc.*, *supra*, footnote 81, at paras. 13, 22, 23, 25, 26.

⁸⁷ *North American Road Ltd. v. Hitachi Construction Machinery Co.*, [2005] A.J. No. 1862 (QL) (Q.B.).

⁸⁸ *Ibid.* at paras. 19-20. The situation appears to be different in the United States. See, e.g., *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81 (D.N.J. 2006) and *Rambus Inc. v. Infineon Technologies AG*, 222 F.R.D. 280 (E.D. Va. 2004).

(d) Tort of Spoliation

The state of Canadian law on the issue of whether spoliation is an independent tort is unsettled. In 1998, the British Columbia Court of Appeal, relying in part on the Supreme Court's decision in *St. Louis v. Canada*,⁸⁹ held that an action for damages was not an appropriate response to the destruction of documents. It found that spoliation gave rise to a rebuttable presumption, and that such presumption could not give rise to a separate tort.⁹⁰ In contrast, two years later, the Ontario Court of Appeal set aside an order striking a claim for spoliation, and allowed the claim to proceed to trial.⁹¹ According to the Ontario Court of Appeal, the Supreme Court of Canada did not address in *St. Louis v. Canada* whether the tort of spoliation existed in Canada.⁹² Borins J.A. stated that if the plaintiff could establish that, as a result of the conduct of the defendants, it was impossible for her to prove her claim, then it would be for the trial judge to decide, in the context of a complete record, whether she should have a remedy.⁹³ Although he did not deal with the issue of the elements of a potential tort of spoliation, Borins J.A. stated the following:

As I stated earlier, I view the plaintiff's claim based on the tort of spoliation as an additional, or alternative, claim to be considered only if it is established that the destruction or suppression of evidence by the respondents results in the inability of the plaintiff to establish the other nominate torts pleaded in the statement of claim. This, as well, is a good reason why trial efficiency commends that the pleading of the tort of spoliation remain intact so that all of the issues may be considered by the same trial judge.⁹⁴

⁸⁹ *St. Louis v. Canada* (1896), 25 S.C.R. 649.

⁹⁰ *Endean v. Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465 (B.C. C.A.), at paras. 20-25; application for leave to appeal granted, but appeal subsequently discontinued: [1998] S.C.C.A. No. 260 (S.C.C.).

⁹¹ *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 49 O.R. (3d) 699 (C.A.), at para. 15; application for leave to appeal dismissed: [2000] S.C.C.A. No. 547 (S.C.C.).

⁹² *Ibid.* at paras. 12, 24.

⁹³ *Ibid.* at para. 22. See also *Bigley v. Sanders* (2005), 34 C.C.L.I. (4th) 127 (Ont. Div. Ct.), at para. 5.

⁹⁴ *Spasic Estate v. Imperial Tobacco Ltd.*, *supra*, footnote 91, at para. 21. See also *L & L Tool Inc. v. General Motors Corp.*, [2004] O.J. No. 2785 (QL) (S.C.J.), at paras. 29-31.

Since the decision of the Ontario Court of Appeal in *Spasic Estate v. Imperial Tobacco Ltd.*, there have been a number of cases in Ontario in which courts have refused to strike a spoliation claim or have allowed amendments based on the tort of spoliation, stating that this novel cause of action should proceed to be determined at trial.⁹⁵ Claims based on the tort of spoliation were also allowed to proceed in other provinces.⁹⁶ In 2008, the British Columbia Court of Appeal revisited the issue of the existence of the tort of spoliation.⁹⁷ After noting that the respondents had conceded that recognition of a free-standing tort of spoliation had not been foreclosed in Canada, it reviewed at length both Canadian and U.S. case law and authorities on the issue.⁹⁸ It then stated that the question of whether an independent tort of spoliation could or should be recognized in British Columbia was not squarely before the court, and that there was no need for an opinion to be given on that issue.⁹⁹ In the end, the British Columbia Court of Appeal agreed with the respondents' submission that regardless of whether an independent tort of spoliation might be recognized, there was no foundation or support for any such remedy to be granted in this case.¹⁰⁰

Although the issue of whether there is an independent tort of spoliation remains open in Canada, the trend appears to be toward recognizing such a tort. However, given the uncertain state of the case law on the issue of the existence of the tort, and the fact that most cases dealing with this issue were decided in the context of a motion to strike a pleading, it is

⁹⁵ See, e.g., *Bigley v. Sanders*, *supra*, footnote 93; *Nunes v. Air Transat A.T. Inc.*, [2002] O.J. No. 4708 (QL) (S.C.J.); *Zahab v. Salvation Army*, [2008] O.J. No. 3250 (QL) (S.C.J.); *Hi-Tech Group Inc. v. Sears Canada Inc.*, [2001] O.J. No. 2740 (QL) (S.C.J.).

⁹⁶ See, e.g., *Kacperski v. Orozco*, [2005] A.J. No. 575 (QL) (C.A.), at paras. 3-4, 9; *Cummings v. MacKay*, [2003] N.S.J. No. 338 (QL) (S.C.), at para. 16; varied (but not on the spoliation issue) by [2004] N.S.J. No. 149 (QL) (C.A.), at paras. 9, 36. See also *Western Tank & Lining Ltd. v. Skrobotan*, [2006] M.J. No. 357 (QL) (Q.B.), at para. 22, where Scurfield J. commented that "[a]cts of spoliation can constitute an independent tort."

⁹⁷ *Holland (Guardian ad litem of) v. Marshall* (2008), 301 D.L.R. (4th) 371 (B.C. C.A.).

⁹⁸ *Ibid.* at paras. 67-72.

⁹⁹ *Ibid.* at para. 73.

¹⁰⁰ *Ibid.* at para. 74.

unclear what the elements of such a tort would be.¹⁰¹ A claim for spoliation was recently determined in *Tarling v. Tarling*,¹⁰² but, except for the statement that spoliation is the intentional destruction of evidence, the reasons for judgment do not address the issue of the essential elements of the tort. In that case, an estate matter, a spoliation claim was made as a result of the destruction of some of the deceased's e-mails and papers by one of his sons. The son's evidence was that he had only shredded what he thought was not needed, and nothing that could be used in a lawsuit. He also explained that his father's computer had been cleaned out and reprogrammed in order to be fixed.¹⁰³ Herman J. dismissed the claim for damages for spoliation as he was unable to conclude that the son had intentionally destroyed relevant evidence. He noted that a significant volume of documents had been produced, and that the only e-mail that had been identified as having not been produced was no more unfavourable to the son than other e-mails that he did produce. Herman J. also declined to impose any other sanction for the destruction of documents.¹⁰⁴

A claim based on the tort of spoliation was also previously dismissed in *Robb v. St. Joseph's Health Centre*.¹⁰⁵ Again, the claim was dismissed summarily, and there was no discussion of the elements of the tort. The claim was said to have no merit because there was no evidence that the defendant (as opposed to a third party over which the defendant had no control) had destroyed evidence.¹⁰⁶

¹⁰¹ *Nunes v. Air Transat A.T. Inc.*, *supra*, footnote 95, at para. 13; *Zahab v. Salvation Army*, *supra*, footnote 95, at paras. 21-23; *L & L Tool Inc. v. General Motors Corp.*, *supra*, footnote 94, at paras. 24, 28-31.

¹⁰² *Tarling v. Tarling* (2008), 43 E.T.R. (3d) 177 (Ont. S.C.J.).

¹⁰³ *Ibid.* at paras. 160-161.

¹⁰⁴ *Ibid.* at paras. 167-168.

¹⁰⁵ *Robb v. St. Joseph's Health Centre* (2001), 152 O.A.C. 60 (C.A.); application for leave to appeal dismissed: [2002] S.C.C.A. No. 44 (S.C.C.).

¹⁰⁶ *Ibid.* at paras. 206-208.

In its 2004 *Report on Spoliation of Evidence*, the British Columbia Law Institute conducted a detailed analysis of the issues related to an independent tort of spoliation. It explained as follows the need for a tort of intentional spoliation of evidence:

The evidentiary rule and various procedural sanctions can effectively restore accuracy to trials, punish spoliators, and provide for the compensation of those harmed by spoliation in most circumstances. A gap exists in their coverage, though. The presumption can only be applied at trial; procedural sanctions may be applied before trial, but still require the maintenance of a proceeding. A litigant whose underlying cause of action has been wholly destroyed by a thoroughgoing spoliator will not receive assistance from the evidentiary presumption or any of the procedural sanctions contained in the *Rules of Court* or developed under the inherent jurisdiction of the court. A victim of such thoroughgoing spoliation may be left without a remedy and without compensation for his or her injuries. Ironically, procedural sanctions and the evidentiary presumption may act as a deterrent to less thorough spoliators, whose actions do not completely frustrate the ability of an opposing litigant to maintain a proceeding, while failing to deter those spoliators whose actions completely destroy a person's underlying cause of action.¹⁰⁷

The British Columbia Law Institute also summarized the competing policy reasons against the creation of a new tort:

Creating an additional remedy will encourage litigation. Much of this litigation could needlessly duplicate the underlying cause of action. The finality of court judgments could be undermined as unsuccessful litigants attempt to use the tort remedy to re-litigate the original cause of action. A tort remedy would also impose burdensome costs on individuals, government bodies, and businesses. People would not know when documents or property could be destroyed without breaching their duties under the tort. This uncertainty could impose significant storage costs on businesses and public bodies, such as hospitals. It would be very difficult for a court to quantify damages suffered by claimants. This exercise would be speculative in most cases. Finally, there is a perception that victims of spoliation are adequately protected by the availability of procedural sanctions and the evidentiary rule.¹⁰⁸

¹⁰⁷ British Columbia Law Institute, *Report on Spoliation of Evidence*, November 2004, at p. 39, available at http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/372882/Spoliation_of_Evidence.pdf.

¹⁰⁸ *Ibid.* at p. 43.

Noting that the policy reasons in favour of and against the creation of a new tort of intentional spoliation "are not so directly opposed that the favouring of one set necessarily entails the rejection of the other",¹⁰⁹ the British Columbia Law Institute recommended the creation of a new tort. It expressed the view that the scope of such a tort could be controlled by selecting the elements of the tort so as to achieve only the purposes of: (a) allowing for compensation of victims of egregious cases of spoliation, and (b) deterring those who would engage in such practices.¹¹⁰ It set out as follows the proposed element of the tort of intentional spoliation:

- (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.¹¹¹

Although the British Columbia Law Institute recommended the creation of a tort of intentional spoliation, it did not recommend the creation of a general tort of negligent spoliation.¹¹² There does not appear to be support in the case law for the creation of such a tort.¹¹³ However, since the categories of negligence are not closed, it is possible that the duty of

¹⁰⁹ *Ibid.* at p. 44.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* at pp. 44-45.

¹¹² *Ibid.* at pp. 25-26.

¹¹³ See, e.g., *Dawes v. Jajcaj* (1999), 66 B.C.L.R. (3d) 31 (C.A.), at paras. 68-69; application for leave to appeal dismissed: [1999] S.C.C.A. No. 347 (S.C.C.), where the British Columbia Court of Appeal declined to find a common law duty of care to preserve property which may possibly be required for evidentiary purposes, and stated that "[i]t would be anomalous for our law to recognize a common law duty of care not to destroy property by negligence, when this Court has declined to recognize a common law tort for intentional destruction of property."

care could be extended in particular circumstances to include a duty to preserve evidence.¹¹⁴ Further, in appropriate circumstances, it could be argued that the destruction of evidence constitutes a breach of a fiduciary duty (in particular, a breach of the duty of disclosure applicable in fiduciary relationships)¹¹⁵ or a breach of contract.¹¹⁶

It will be interesting to see how the case law develops on the issue of an independent tort of spoliation and how the courts deal with the numerous difficulties associated with such a tort. Further, it remains to be seen whether the courts will seek to develop existing theories of liability, such as the law of negligence, fiduciary duty and contracts, to address some of the problems created by the destruction of evidence.

III. Conclusion

There will likely be further developments in the judicial treatment of spoliation and sanctions for the failure to preserve relevant documents in the near future. As the opportunity to destroy electronic documents and the ease with which this can be done increase, the number of cases dealing with spoliation and sanctions will also increase. The principles applicable to the imposition of sanctions for the intentional and the unintentional destruction of documents should be clarified in the process. While the recent decision of the Alberta Court of Appeal in *McDougall v. Black & Decker Canada Inc.*¹¹⁷ clarifies to some extent the principles applicable to the imposition of sanctions such as an adverse inference and the dismissal of an action, it remains to be seen whether the principles set out in this decision will be adopted in other provinces. Among other things, the *McDougall* decision could be criticized for setting a

¹¹⁴ *Report on Spoliation of Evidence, supra*, footnote 107, at pp. 21-26.

¹¹⁵ *Ibid.* at pp. 26-29. See *Leblanc v. Canada*, [2004] F.C.J. No. 984 (QL) (F.C.), at paras. 27-29; varied on the ground of issue estoppel: [2005] F.C.J. No. 1065 (QL) (C.A.).

¹¹⁶ *Report on Spoliation of Evidence, supra*, footnote 107, at pp. 30-32.

¹¹⁷ *McDougall v. Black & Decker Canada Inc.* (2008), 62 C.P.C. (6th) 293 (Alta. C.A.).

very high threshold for the imposition of serious sanctions, and for leaving very little room for the imposition of such sanctions before trial. The dismissal of an action at trial as a sanction for the plaintiff's destruction of evidence may constitute a pyrrhic victory for the victim of spoliation who spent a lot of time and money preparing for trial and trying to compensate for the absence of important documents. However, it is questionable whether pre-trial motions for sanctions should be encouraged. As the U.S. *Manual for Complex Litigation* states:

Sanctions proceedings can be disruptive, costly, and may create personal antagonism inimical to an atmosphere of case management. Moreover, a resort to sanctions may reflect a breakdown of case management. Close judicial oversight and a clear, specific, and reasonable management program, developed with the participation of counsel, will reduce the potential for sanctionable conduct because the parties will know what the judge expects of them.¹¹⁸

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¹¹⁸ *Manual for Complex Litigation*, 4th ed. (Federal Judicial Center, 2004), § 10.151, available at [http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/\\$file/mcl4.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/$file/mcl4.pdf).