

Disappearing Drills in the Dominion

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American litigants faced with a product liability claim in Canada need to be aware of general principles that can create different risk profiles than those typically encountered in some American jurisdictions.

Cross-Border Evidentiary Considerations When Confronting Loss or Destruction of Evidence in Canada

Canada is the United States' largest trading partner. While both countries share a common legal heritage, differences do exist between the two legal systems. American manufacturers and distributors that do business in Canada will

be confronted with unique cross-border litigation risks when faced with a Canadian product liability claim.

Canadian and American product liability law differ in terms of how Canadian courts treat the concept of the loss or destruction of evidence—spoliation. Issues surrounding spoliation often arise in the context of product liability litigation. Many times, a defendant manufacturer is presented with a claim involving allegations about a product, years after the fact, and years after key pieces of evidence

have been intentionally, or unintentionally destroyed or lost.

In Canada, spoliation is dealt with primarily at trial, rather than during pre-trial procedural stages. The remedy Canadian courts will apply in the face of destroyed evidence varies depending on the intent of the party that destroyed the evidence, and the prejudice arising from that destruction.

Canadian courts have historically expressed an unwillingness to grant significant pre-trial remedies, preferring to deal with the issue at trial, based on a full re-



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cord. As such, even very significant acts of spoliation are unlikely to result in the early end to a product liability lawsuit in Canada. American litigants involved in this type of litigation should be aware of the different approach taken to spoliation in Canada, and the type of remedies that are generally available.

Potential remedies for destroyed evidence in Canada often mirror those found in certain American jurisdictions: an adverse inference; the exclusion of evidence; and the striking of claims. Some remedies employed by Canadian courts are unique to the Canadian legal context: costs, and Orders allowing for the deposition of experts. Unlike some American jurisdictions, Canadian courts have yet to recognize an independent cause of action for the tort of spoliation.

Some Canadian appellate courts have indicated that the only remedy available for the intentional destruction of evidence is a rebuttable adverse inference. This creates an unusual inconsistency, in that there is a broader range of available remedies for the unintentional destruction of evidence—many of which have harsher consequences than the creation of a rebuttable presumption.

The Rebuttable Presumption

Canadian courts have traditionally held that spoliation gives rise to a rebuttable presumption that the destroyed evidence would tell against the destroying party. This remedy is only available in circumstances where there has been intentional destruction of evidence, rather than negligent or inadvertent destruction.

This is the approach set out by the Supreme Court of Canada over 118 years ago in *St. Louis v. Canada* (1896), 25 S.C.R. 649 [*St. Louis*].

St. Louis involved a claim brought by a contractor against the Canadian government for payment allegedly owing under a public works contract. The government, suspecting fraud because of significant differences between the original estimate and the final bill, withheld payment.

Time-sheets and other original accounting documents had been destroyed by the contractor prior to the trial. The trial judge concluded that the evidence had been spoliated, and drew a presumption that the

destroyed documents would have been unfavorable to the contractor. The contractor appealed, and the Supreme Court of Canada reversed the trial judge's decision.

Girouard J., writing for the majority, held that no spoliation occurred, as the documentation was destroyed not intentionally, but through "the innocent doings of the time-keepers." The destruction occurred long before the action began, and "at a time when [the appellant] did not have any cause to suspect that the government would contest his claim." (*St. Louis* at paras 38 and 58).

He explained that spoliation generally gives rise to a rebuttable presumption that the evidence would have told against the spoliating party. However, this was a presumption "of fact left to the determination of the trial judge or jury, according to the circumstances of the case" (*St. Louis* at para 37). Girouard J. held that the facts of *St. Louis* established that the appellant had "fully rebutted the presumption resulting from that alleged fact by express and positive evidence to the contrary" (*St. Louis* at para 101).

In his concurring judgment, Taschereau J., explained how other, independent records corroborated the contractor's claim that "conclusively" established the claim. Therefore, the contractor had rebutted any presumption that the evidence destroyed would have been unfavorable to its position (*St. Louis* at para. 1).

Canadian courts have been reluctant to modify this traditional approach. As recently as 2008, the Alberta Court of Appeal reaffirmed *St. Louis* in *McDougall v. Black & Decker Canada Inc*, 2008 ABCA 353 [*Black & Decker*]. Similarly, the British Columbia Court of Appeal relied on *St. Louis* to conclude that spoliation "is an evidentiary rule which raises a presumption" (*Endean v. Canadian Red Cross Society* (1998), 157 D.L.R. (4th) 465 (B.C.C.A) [*Endean*] at para. 9).

In *Black & Decker*, the Alberta Court of Appeal held that spoliation in law "does not occur merely because evidence has been destroyed", but "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" (*Black & Decker* at para. 18).

The holding in *Black & Decker* has been subsequently adopted by courts of appeal in Manitoba, and Prince Edward Island, and relied on as the leading decision in the trial courts in Ontario (Canada's largest jurisdiction). Most recently, the Ontario Superior Court of Justice relied on *Black & Decker* to support the conclusion that unintentional destruction of evidence is not

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spoliation (*Leon v. Toronto Transit Commission*, 2014 ONSC 1600).

The Canadian focus on intention results in significant challenges in establishing a true case of spoliation "in law." The *St. Louis* presumption is not available "if documents are simply destroyed through negligence or carelessness" (*Black & Decker* at para. 24).

Some Canadian courts have gone so far as indicating that proof of fraud, or an intent to suppress the truth is a requirement to give rise to the presumption. (*Trans North Turbo Air Ltd. v. North 60 Petro Ltd.*, 2003 YKSC 18 at para. 79). As such, litigants can face significant evidentiary problems in establishing the presumption.

Further, in cases where spoliation in law does occur, the presumption is "rebuttable by other evidence through which the alleged spoliator proves that his actions, though intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him" (*Black & Decker* at para. 18).

Even if the presumption is raised, the non-spoliating party is still exposed if the claim of the spoliating party can be established through other means, and the presumption rebutted.

The availability of other remedies for the intentional destruction of evidence is still an open issue in Canadian law, with conflicting appellate authority on both sides. On the one hand, the Court of Appeal for British Columbia has held that *St. Louis* provides authority to grant a “flexible remedy that can be fashioned to compensate the plaintiff for any loss it has suffered by

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reason of the destruction of any evidence” (*Endean* at para. 32).

On the other hand, the Alberta Court of Appeal held that there was “nothing in *St. Louis* to suggest that remedies beyond the evidentiary presumption flow from the intentional destruction of evidence” (*Black & Decker* at para. 22). The Alberta view has created an unusual inconsistency. As will be discussed below, the Alberta Court of Appeal recognized a broad range of remedies that would be available in the face of the unintentional destruction of evidence. Some of those remedies—such as the exclusion of evidence, or the striking of a claim—have consequences that are much more severe than the creation of a rebuttable inference.

The traditional Canadian approach to spoliation has significant limits. It will often be the case that the spoliating party will be the only party involved in the act of spoliation, and the only party with evidence of the reasons behind that destruc-

tion. A party that is brazen enough to destroy evidence intentionally will often be brazen enough to hide its intent. As such, finding proof of intent may pose challenges on the part of the non-destroying party.

The focus on intent (and sometimes on the intent to suppress the truth, or affect the outcome of the litigation) also gives rise to uncertainties as to what type of other remedies may be available. The Alberta Court’s holding that there are no “remedies beyond the evidentiary presumption” for the intentional destruction of evidence suggests that more substantial remedies would be available only for unintentional destruction of evidence.

Further, the rebuttable presumption is a trial, and not a pre-trial remedy. If there are no “remedies beyond the evidentiary presumption” for intentional destruction, then a party faced with intentional spoliation will be faced with the risk of proceeding to trial in the hope that the court will draw the presumption, and that the opposing party will be unable to rebut it.

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Procedural Remedies for Non-Intentional Destruction

While the rebuttable *St. Louis* presumption is available only for true spoliation—in cases involving the intentional destruction of evidence—Canadian courts have recognized the need for flexible procedural remedies to deal with other circumstances involving the unintentional destruction of evidence.

Canadian, appellate authorities are in disagreement over which principles give rise to these other remedies. As discussed above, the Court of Appeal for British Columbia, has recognized that *St. Louis* gives rise to “flexible remedy” for the destruction of evidence (*Endean* at para. 32).

On the other hand, the Alberta Court of Appeal has held that “spoliation should not be confused [...] with the unintentional destruction of evidence,” which gives rise to a remedy “founded on other principles” (*Black & Decker* at para. 25). The Alberta

Court identified the basis for the other non-presumption remedies as arising from procedural rules of court, the court’s discretion on costs, and on the general ability of a trial judge to control abuse of process (*Black & Decker* at para 22).

Despite disagreement over the basis of the non-presumption remedies, Canadian courts have recognized that they have “the ability to provide remedies for destroyed evidence, even where the evidence is not intentionally destroyed” (*Black & Decker* at para 22). The goal of any of these non-presumption remedies is to “even the playing field” in order to “assist the parties in ensuring trial fairness” (*Black & Decker* at para. 25).

Based on existing jurisprudence, the types of remedies available for unintentional destruction include: (i) striking pleadings; (ii) the exclusion of expert reports; (iii) remedies related to procedural rules surrounding the preservation and production of evidence; and, (iv) cost penalties.

Presently, an argument could be made that the above list is exhaustive. While these remedies are focused on fairness, Canadian courts have opined that “not all litigation is equal” and as such it is “important not to attempt to expand pre-trial remedies beyond those already recognized” (*Black & Decker* at para 28).

The classic example of unfairness relied upon by the Alberta Court of Appeal is the examination of the scene of a motor vehicle collision. Often, the scene of collision is investigated only by the police, and quickly cleared up so that traffic can proceed. The accident reconstruction experts of the various parties are then left with second hand accounts of the actual scene of the accident, cleared up long before their involvement.

The availability of any given remedy will be highly fact and context specific. While certain pre-trial relief may be available, Canadian courts have expressed an overall wariness in that regard. For example, the Alberta Court of Appeal has held that pre-trial remedies are available only in “exceptional cases where a party is particularly disadvantaged by the destruction of evidence” (*Black & Decker* at para. 29)

In most non-exceptional cases, questions of spoliation, evidence destruction, and the prejudice arising therefrom are

“issues best left to a trial judge” (*Black & Decker* at para. 27). This, of course, forces the non-spoliating party to proceed with the expense of engaging in litigation without recourse to significant pre-trial relief, with only the risky possibility that some type of relief will be granted at trial. In the writers’ opinion, the lack of substantial pre-trial remedies for spoliation results in settlement pressures that favor the spoliator to the disadvantage of the non-spoliator.

Striking Claims

The most severe pre-trial remedy available to deal with unintentional destruction is striking the claim (or defense) of the destroying party. Arguably, given the outcome when a claim is struck, this remedy is even more severe than the rebuttable presumption that arises when evidence is intentionally spoliated.

Canadian courts have “the inherent jurisdiction to strike an action to prevent an abuse of process,” and can exercise that jurisdiction in rare circumstances involving the destruction of evidence (*Black & Decker* at para. 4). However, this is a rarely granted remedy, and the authors are not aware of any reported Canadian decisions in which a Canadian court has struck a claim on the basis of spoliation alone.

While there are no decisions in which a claim was struck solely on the basis of spoliation, some guidance over when this remedy might be available can be found in the case law.

In Alberta, the court of appeal held that a claim involving lost or destroyed evidence will only be struck “unless it is beyond doubt that this was a deliberate act done with the clear intention of gaining an advantage in litigation, the prejudice is so obviously profound that it prevents the innocent party from mounting a defence” (*Black & Decker* at para. 4). In all but the rarest of cases, the Alberta court observed that proof of intention and prejudice will require a full trial (*Black & Decker* at para. 27).

Similarly, in the Ontario decision of *Muskoka Fuels v. Hassan Steel Fabricators Ltd.*, 2009 CarswellOnt 7008 (Ont. S.C.J.) [*Muskoka*], the Ontario Superior Court of Justice refused to strike a claim during a pre-trial application. The Ontario court refused to do so, as this was not a case deal-

ing with a deliberate act of destruction of evidence, and not a case in which the defendant was obviously and profoundly prevented from mounting a defense (*Muskoka* at para. 5).

Likewise, a Manitoba court refused to strike a defense on the basis that the appropriate time to deal with unintentional destruction was at trial, when the circumstances of the destruction and prejudice to the affected party could be assessed (*Commonwealth Marketing Group Ltd. v. Manitoba (Securities Commission)*, 2008 CarswellMan 602 (Q.B.) aff’d by 2009 CarswellMan94 (Man. C.A.)).

Cheung v. Toyota Canada Inc., 2003 CarswellOnt 481 (Ont. S.C.J.) [*Cheung*] is the Canadian decision that has come the closest to having a claim struck during a pre-trial application.

In *Cheung*, an expert, acting for one of four defendants, conducted destructive testing on a piece of evidence, prior to one of the other defendants having notice of the accident or the claim. The destroying defendant’s expert also failed to preserve other evidence (missing tires), in breach of a court order that the evidence be preserved.

The three non-destroying defendants made a pre-trial application to have the destroying defendant’s defense and cross-claim struck. Ultimately, the court refused to do so, as it was not “convinced the two spoliation events before me have substantially denied the moving defendants the ability to cross-claim or the plaintiffs the ability to proceed against the Estate” (*Cheung* at para. 21).

The applications judge arrived at this decision after reviewing the destroying defendant’s expert’s own theory, and concluding that the two “spoliation events” had actually undermined that theory. Notably, had the destroying party not undermined its own theory, it appears likely that the applications judge would have granted the application to strike. This conclusion arises from the applications judge’s comment that “if the estate had not discredited the theory of its case” then the loss of the crucial evidence “would have significantly prejudiced the moving defendants” (*Cheung* at para. 19).

However, as the spoliating party had undermined its own case, the applica-

tions judge held that “the severe sanction of dismissing the Estate’s cross-claim and defence is in my view not appropriate at this stage” though “the trial judge may of course have a different view based on all the evidence before him” (*Cheung* at para. 19).

In sum, the pre-trial striking of a claim (or defense) in Canada is a rare and

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exceptional remedy, requiring evidence of “significant” and “obviously profound” prejudice. In most circumstances, such evidence will only become apparent during the course of a trial, after the factual record has been fully revealed. While it is possible that unintentional destruction might provide the basis for a pre-trial application to strike, a Canadian court is more likely to wait to do so until trial, so as to have a complete record in which to determine what, if any, prejudice might have arisen.

Excluding Expert Reports and Other Evidence

The exclusion of expert evidence, or other evidence derived from unintentional destruction, is also an available remedy. This is one of the remedies recognized as being capable of “levelling the playing field” by the Alberta Court of Appeal in *Black & Decker* (at para. 29). Though not as severe as striking a claim, this remedy can have a similar devastating effect, if the only evidence capable of establishing an essential element of the party’s case is excluded.

Canadian courts will sometimes exclude expert evidence following a pre-trial application, but are more likely to wait until trial to rule on the issue.

The *Spencer v. Quadco Equipment Inc.*, 2005 NBQB 002 decision of the New Brunswick superior trial court is a good example of a case in which expert evidence was excluded before a trial. *Quadco* involved a logging machine fire, where the plaintiff's insurance adjuster failed to tell its own expert to preserve the evidence, despite being requested by the de-

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fendants to do so. The evidence was then destroyed, in circumstances which the New Brunswick court found were in bad faith, but unintentional.

The New Brunswick court ruled that the most equitable disposition would be to exclude the plaintiff's expert report, and provided five factors that it relied on (*Quadco* at para. 32):

1. The defendant was prejudiced by the destruction of the evidence;
2. The prejudice could not be cured (in particular, only photographs remained which the court found were "a poor substitute for the ability to inspect the evidence itself" *Quadco* at para. 30);
3. The evidence had practical importance;
4. The plaintiff had acted recklessly and not in good faith; and,
5. There was potential for abuse if the plaintiff's evidence was not excluded.

The trial judge in *Quadco* relied on a New Brunswick procedural rule that required the

party who intended to call an expert to produce any records, documents, or other materials on which the report is based. In the later decision of *Stone v. Sharp*, 2008 CarswellNB 393 (N.B.C.A.), the New Brunswick Court of Appeal approved of *Quadco* as an example of how a party that is unable to produce materials upon which its expert's report is based "may suffer the consequences, which may include the exclusion of the expert's report and testimony" (para. 36).

A similar pre-trial outcome occurred in the Ontario decision of *Cheung*. While the court refused to grant an order to strike, it did rule that the destroying party would be unable to rely on any reports or other evidence "to the extent that it relates to or is in any manner based upon the missing" evidence (*Cheung* at para. 27). The *Cheung* court had earlier concluded that the missing evidence would have "significantly prejudiced" the other parties had the destroying party not already undermined its case (at para. 19).

The Ontario Superior Court of Justice provided another similar set of factors to those used in *Quadco* regarding the exclusion of expert reports in *Muskoka*, which were (at para. 9):

1. The extent to which physical examination would be required;
2. In what way would an expert's opinion be constrained by not being able to examine the evidence;
3. If the information that is being sought requires more than just what has already been produced;
4. How the information that is being sought would not be available from other sources; and,
5. What makes the evidence that is missing so important that the defendant cannot allegedly make its case.

The *Muskoka* case involved an application at the commencement of trial seeking to have the plaintiff's claim struck, or alternatively, to have the plaintiff's expert's report excluded. The case involved allegations about a faulty storage tank. The plaintiff's expert had not kept the tank, nor had it retained any samples of the tank materials. There was no evidence that the destruction was intentional or deliberate, as the matter had not yet proceeded to the point where such evidence would have been called.

The *Muskoka* court refused to grant what amounted to a pre-trial application excluding the destroying party's expert evidence on the basis that the appropriate time to do so would be after trial. The court explained that after trial it "would be in a position to evaluate the strength of the arguments that the Defendant is currently placing before the Court", so as to be "able to fully evaluate the alleged prejudice to the Defendant, and the conduct of the Plaintiff's expert" (*Muskoka* at para 10).

Interestingly, the *Muskoka* matter proceeded to trial with reasons set out in *Muskoka Fuels v. Hassan Steel Fabricators Ltd.*, 2009 CarswellOnt 8726 (Ont S.C.J.). The trial judge made note of how the defendant never renewed its motion to exclude the plaintiff's reports, as the evidence came out at trial that showed that there was no prejudice arising from that destruction (at para. 21).

The above decisions illustrate how the exclusion of expert reports is an available remedy in the face of the unintentional destruction of evidence. The focus of the court's inquiry will be on the degree of prejudice suffered by the non-destroying party, and the ability of the non-destroying party to make its case.

This determination will be highly fact-specific. Canadian courts will often wait until the full record has developed after trial before granting an order excluding an expert report. However, if a party can show that it has suffered significant prejudice in support of a pre-trial application, then a pre-trial order excluding an expert report might be possible.

Preservation and Inspection of Evidence

A further remedy—which would appear unusual to American litigants—arising from unintentional destruction is an order that the destroying party make its expert available for deposition (or in the Canadian parlance, discovery). That is, while expert depositions are common in America, their general unavailability in Canada is what makes this remedy unusual.

Unlike most American jurisdictions, it is highly unusual for a Canadian party to be permitted to depose an opposing party's expert. This type of expert discovery is generally unavailable to Canadian litigants. For example, the *Alberta Rules of Court* only permit the deposition of

experts if the parties agree, or in “exceptional circumstances.”

In the vast majority of Canadian litigation, expert opinions are produced in the form of written opinions, in accordance with rule imposed timelines shortly before trial. Experts then testify as to their opinions at trial, with cross-examination being the first chance a party has to test that expert’s evidence. Even then, with the exception of medical reports, a party need only produce expert reports outlining opinions that it will rely upon at trial.

Unintentional destruction provides a Canadian litigant with the type of “exceptional circumstances” that could permit the deposition of an expert well in advance of trial.

This type of remedy was granted in the Alberta *Black & Decker* decision. There, the plaintiff’s expert was the only expert to have inspected the scene of a fire before it was razed. He was also the only expert to have looked at parts of the product suspected to have caused the fire (a drill), before they were lost.

The court of appeal ordered that expert to “submit to an examination to give evidence regarding his observations of the fire scene (including the state of the drill at the scene) and his care of the drill” (*Black & Decker* at para. 39). The expert was also ordered to produce any photographs of the fire scene, and to produce any engineering reports prepared. Procedural rules governing the production and inspection of evidence were used by the court to justify this unusual outcome.

This discovery remedy was viewed by the court as a measure to “assist the parties in preparing properly for the trial” to deal with the merits of both the action, and the issue of spoliation (*Black & Decker* at para. 39). This was presumably on the basis that access to the other expert’s factual observations about the scene of the fire, and the lost evidence, would provide sufficient information for arriving at an opinion as to the cause of the fire, or for arriving at an opinion as to the prejudice caused by the destruction of the evidence.

Importantly, the court of appeal placed limitations on the scope of the ordered expert discovery. The non-destroying parties were not permitted to ask questions about the expert’s opinion as to the cause

of the fire. The Alberta court held that “production of that evidence can be done in the usual fashion, prior to trial according to the rules dealing with expert opinions.”

The court of appeal’s decision limiting the scope of expert discovery was based on the Canadian view of the privilege attaching to an expert’s opinion. In Canada, parties can maintain privilege over their expert’s opinion up to the point in time that the procedural rules require the production of any testifying expert’s reports (usually a few months in advance of any trial).

Hence, even in a case involving clear (though unintentional) destruction of evidence, Canadian courts are unwilling to order an expert to submit to a wide ranging discovery.

Costs

A further remedy available to parties faced with unintentional destruction is costs. This is also a remedy that would be unusual to most American litigants.

Canada has a “loser pays” costs system, in which the successful party is generally entitled to recover costs from the unsuccessful litigants. Those costs do not usually fully indemnify a party for all of its legal expenditures, but rather provide fractional recovery based on rules of court or other regulation.

A party put to the task of having to prove its case through the use of alternative evidence might be entitled to an elevated costs award. In addition, a successful party found to have engaged in spoliation can be denied its costs, or even ordered to pay the losing party’s costs.

For example, in *Farro v. Nutone Electrical Ltd.* (1990), 72 O.R. (2d) 637 (Ont C.A.), a plaintiff was successful in an appeal that resulted in a finding of negligence against a bathroom fan manufacturer.

By the time of the litigation, the product at issue was no longer available for inspection by the defendants. The Ontario Court of Appeal ruled that if the product “had been available for inspection [...] it is probable that the appellants’ claim would have been settled without the necessity of litigation.” The court therefore deprived the successful party of their trial and appeal costs.

As with other remedies, costs awards primarily play a role at the end of trial, once the issue of spoliation or uninten-

tional destruction of evidence has been fully explored. Nevertheless, costs, and the unusual types of costs awards that can arise in situations involving the destruction of evidence, can play a role in the pre-trial risk assessments of the parties, and provide the victim of spoliation with the ability to impose settlement pressures on the destroying party.

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A New Tort of Spoliation

Unlike certain American jurisdictions (some of which have, like California, over time, both recognized and then rejected the notion), Canadian courts have yet to recognize an independent tort of spoliation. While no such tort currently exists, Canadian appellate courts have not foreclosed the possibility of such a claim.

Interestingly, some appeal courts that initially outright rejected the notion of an independent tort have reversed course, expressing receptiveness to the potential development of this novel type of claim.

The best example of this is in British Columbia, where the court of appeal initially rejected the possibility of an independent tort of spoliation in *Endean*. There, a plaintiff sought to advance a class action on the basis that a blood bank intentionally destroyed evidence related to infected blood. The British Columbia Court of Appeal refused to allow the class action to proceed, finding that no such cause of action existed, and that “to proceed would indeed amount to an abuse of process” (*Endean* at para 34).

The court held that “an action for damages—being punitive or otherwise—is not an appropriate response to the destruction of documents” (*Endean* at para. 20). The

court warned that creating a tort of spoliation would replace the flexible “remedy of the presumption, the effect of which may be suited to the circumstances of the case in question” with an “inflexible rule of law which could have consequences disproportionate to the particular act of spoliation” (*Endean* para. 25).

Endean was decided in 1998. In 2008,

In sum, the law of spoliation in Canada has been slow to change.

the British Columbia Court of Appeal was again faced with the issue of whether a tort of spoliation could exist in *Holland v. Marshall*, 2008 BCCA 468. Rather than closing the door, as it did in *Endean*, the court of appeal left it open for future litigants to argue that an independent tort of spoliation might exist.

In *Holland*, a plaintiff advanced an argument that an independent tort of spoliation existed so as to prevent the operation of a limitation period. While the court of appeal rejected the plaintiff’s argument, it availed itself of the opportunity to provide a detailed review on the potential that an independent tort of spoliation could develop in Canada.

Importantly, the court of appeal refused to make a definitive finding that no tort of spoliation existed. Rather, it observed that the “question of whether an independent tort of spoliation can or should be recognized in British Columbia is not squarely before us... and no opinion need be given on that question” (*Holland* at para. 73).

The court of appeal referred to the American experience, while making observations about the possibility that a tort of spoliation might exist. It noted that while some states had initially recognized a tort of spoliation; that the majority of recent American decisions were now tending to find that value of the tort was outweighed by negative policy considerations.

The most significant negative consideration raised by the British Columbia court was the “inherently speculative” nature

of the tort (*Holland* at para. 71). A tort of spoliation would involve speculation with respect to injury, causation and damages, as the “tort attempts to place a value on evidence that no longer exists” and requires the trier of fact to “guess how probative the absent piece of evidence might have been” (*Holland* at para. 71).

In addition to recognizing the negatives, the court of appeal also referred to Canadian law reform reports that called for the creation of a new tort of intentional spoliation. In *Holland* the court referenced a British Columbia Law Institute report on spoliation (*Report on Spoliation of Evidence* BCLI Report No. 34, 2004, British Columbia Law Institute), which suggested that a new tort of intentional spoliation ought to be created, which would involve the following elements (*Holland* at para. 72):

1. The existence of pending or probable litigation;
2. Knowledge on the part of the spoliator of the pending or probable litigation;
3. Intentional spoliation designed to defeat or disrupt the case;
4. A causal relationship between the spoliation and the inability of the plaintiff to prove its case; and,
5. Damages

The British Columbia Law Institute proposed the new tort to address the concern that “a litigant whose underlying cause of action has been wholly destroyed by a thoroughgoing spoliator will not receive assistance” from the traditional spoliation remedies (*Report on Spoliation of Evidence* BCLI Report No. 34, 2004, British Columbia Law Institute).

Whether a new tort of intentional spoliation will arise in Canada is still an open question. In addition to British Columbia, both the Ontario and Alberta Courts of Appeal have also expressed receptiveness to the possible development of the tort.

However, until a case arises where these issues arise directly from the facts, it remains open as to whether a new tort of intentional spoliation in Canada will come into existence.

Conclusions

In sum, the law of spoliation in Canada has been slow to change. The general principles relating to the destruction of evidence in Canada are:

- Spoliation at law arises when a party intentionally destroys evidence. Intentional destruction of evidence gives rise to a rebuttable presumption that the evidence destroyed would tell against the destroying party.
 - There is conflicting appellate authority as to whether the only remedy for intentional destruction of evidence is the rebuttable presumption. If so, an unusual inconsistency arises, in that the unintentional destruction of evidence gives access to a more robust set of pre-trial remedies, compared to the rebuttable presumption, which only has application during trial.
 - Remedies available for the unintentional destruction of evidence are broadly based on fairness. Courts will grant these remedies to “even the playing field.” Pre-trial remedies in Canada include (i) striking of claims; (ii) the exclusion of expert reports; (iii) remedies arising from the preservation and production of evidence (like orders that an expert be deposed); and (iv) costs penalties.
 - Which remedy is available will be a highly fact and context specific exercise. Canadian courts are generally unwilling to grant significant pre-trial remedies, preferring to wait until trial, when the full factual matrix has been developed.
 - The unwillingness of Canadian courts to grant significant pre-trial remedies—be it for the intentional or the unintentional destruction of evidence—adds to the litigation risks in product liability cases involving destruction of evidence. Parties will often have to proceed to trial before an answer will be provided as to what type of relief, if any, might arise from the destruction of evidence.
 - Canadian courts have not yet recognized an independent tort of spoliation. However, appellate courts in Canada’s three largest common law provinces (Ontario, British Columbia, Alberta) have all expressed receptiveness to the potential development of such a tort.
- In sum, American litigants faced with a product liability claim in Canada need to be aware of these principles, as they can create different risk profiles than those typically encountered in some American jurisdictions.

