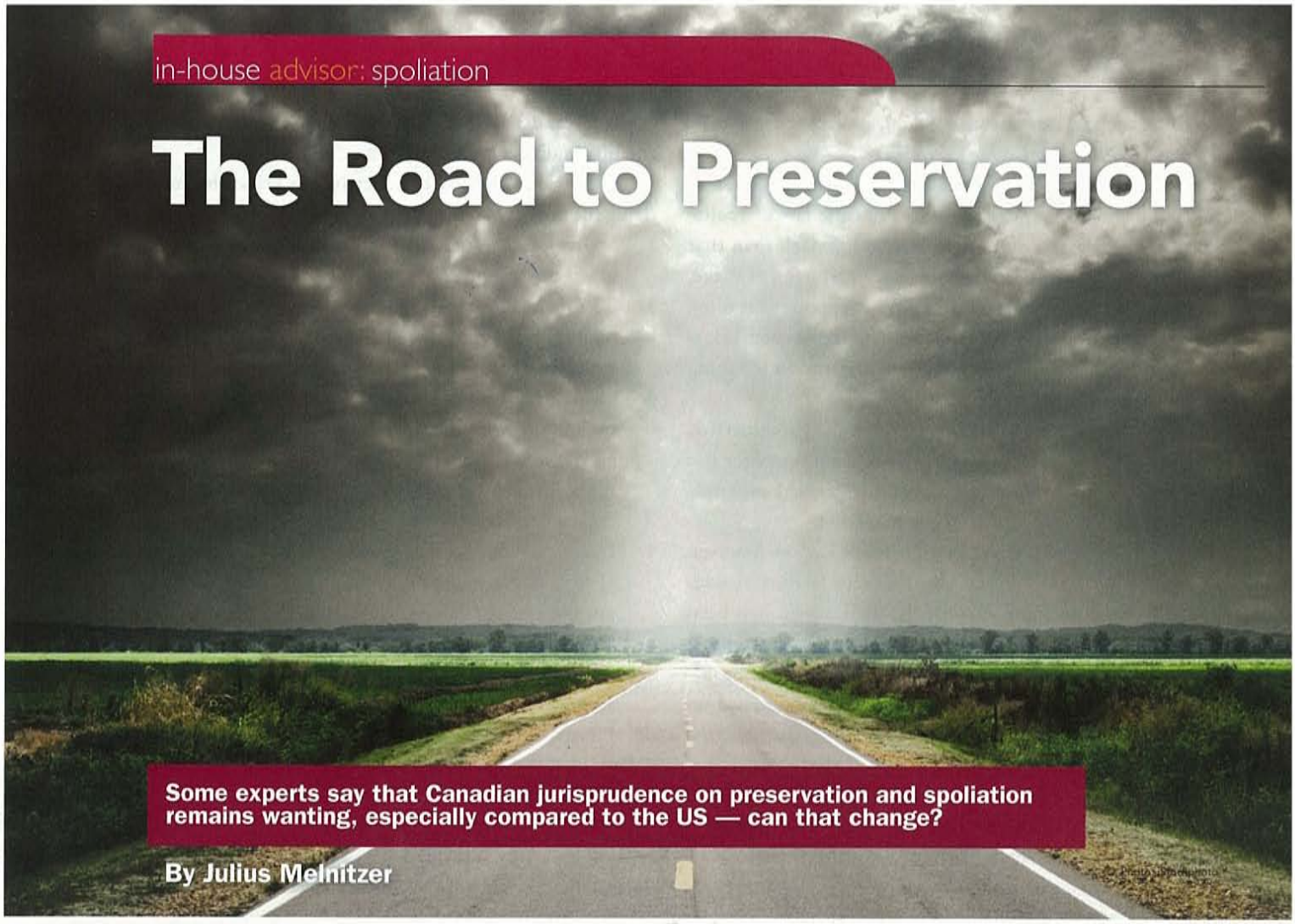
The Road to Preservation



Some experts say that Canadian jurisprudence on preservation and spoliation remains wanting, especially compared to the US — can that change?

By Julius Melnitzer

Where evidence has been lost or destroyed, courts may resort to the doctrine of spoliation to remedy prejudice that flows from the absence of that evidence. Unfortunately, the last time the Supreme Court of Canada dealt with spoliation issues was in 1896.

In-house counsel have had no such relief, because the obligation to produce relevant evidence has been a longstanding bulwark of our civil justice system. The extent of the duty to preserve such documents in anticipation of litigation, however, has to some extent been in jurisprudential limbo.

To a degree, this uncertainty may account for the inherent tensions that exist between inside and outside counsel about the breadth and expense of discovery. It's an issue that has until recently flown under the radar. But the focus on electronically stored information that has emerged over the last few years has returned it to the fore.

"Spoliation has become a more important concern because of the degree to which e-records are amenable to deletion and the need to track these records," says Jeffrey Kaufman of Fasken Martineau DuMoulin LLP.

Naturally, the leading edge is in the US, where the world of what has become known as evidence-based discovery litigation – embracing the painstaking documentation of how evidence is preserved, collected, reviewed and produced – is now a common feature of legal proceedings.

Indeed, a Kroll Ontrack Inc. study reports that one-quarter of the electronic discovery opinions released in the first 10 months of 2008 involved sanction issues. Of the 138 cases analyzed, 13 per cent concerned preservation and spoliation and 12 per cent involved computer forensics protocols and experts.

"It is clear that [US] courts are no longer allowing parties to plead ignorance when it comes to [electronic discovery] best practices," Michele Lange, Kroll's director of legal technologies product line management, told media.

As might be expected, the leading edge in Canada is somewhat more distant from the cliff than its counterpart in the US. This is

according to the Alberta Court of Appeal's recent decision in *McDougall v. Black & Decker Canada Inc.*

"*Black & Decker*, which is the first comprehensive look at the law in more than a century, clarifies the law of spoliation and articulates a more conservative approach than that found under American law," says Jeffrey Landmann of Blake, Cassels & Graydon LLP. "The decision is important reading when companies decide when and how to implement 'litigation holds' and other preservation policies, and in weighing the consequences of their decisions."

After Gordon and Lolita McDougall lost their house to fire, the local fire department investigated and determined the fire was caused either by an unextinguished cigar or a malfunctioning drill manufactured by Black & Decker.

By the time the McDougalls sued Black & Decker, however, the remains of the house had been razed to facilitate reconstruction. As well, some parts of the drill, which had been retained by an expert hired by the McDougalls' insurer and who had visited the house after the fire, had gone missing.

Black & Decker applied to have the action dismissed on the basis of spoliation, and a chambers judge granted the application.

The McDougalls appealed. The Court of Appeal allowed the appeal, finding that there was no evidence that the McDougalls had intentionally destroyed evidence to affect the litigation. In these circumstances, the trial judge would be in the best position to determine whether and to what extent the defendants were prejudiced and how that prejudice could best be remedied. The court did, however, allow Black & Decker to examine the expert as to his observations about the house before it was demolished, his observations regarding the drill, and his conduct with respect to it.

In its reasons, the court enunciated six principles summarizing the law of spoliation in Canada:

1. Spoliation is the intentional destruction of evidence to affect existing or anticipated litigation;
2. The main remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator;
3. Other remedies may be available even where evidence has been unintentionally destroyed, which remedies are based on the court's rules of procedure and its inherent ability to prevent abuse of process. The remedies may include the exclusion of expert reports and costs sanctions;
4. Intentional destruction of evidence is not an intentional tort, nor is there a duty to preserve evidence for the purposes of the law of negligence, though these issues remain open;
5. Whether spoliation has occurred and the remedy for it are generally matters for trial; and
6. Pre-trial relief may be available in rare cases.

Landmann says American courts have dealt with spoliation remedies more aggressively than the Court of Appeal did.

"US courts have granted a variety of more serious remedies such as striking claims and have done so both before and during trial," he says. "In some cases, they've gone so far as to rule that spoliation is an actionable tort in itself."

But Ramon McKall, a lawyer with the Alberta Motor Association Insurance Company who represented the plaintiffs in *Black & Decker*, points out that the Court of Appeal did in

Tip Sheet

Susan Wortzman of Wortzman Nickle Professional Corporation, a Toronto-based e-discovery and litigation management boutique, provides the firm's step-by-step approach to preserving evidence and avoiding spoliation allegations:

1. Learn your case. Begin with the pleading or complaint that governs the issues in dispute.
2. Get your own house in order before approaching your opponent.
3. Speak to the client's key players to determine all sources (paper or electronic) of evidence and all possible custodians of it.
4. Talk to the techies! Learn to speak the techie language or hire someone who does. They are the ones who really understand how electronic records are stored or destroyed.
5. Distribute a "legal hold" directive for all potentially relevant records immediately.
6. Make sure key employees read and understand the legal hold memo.
7. Follow up on the legal hold to ensure compliance.
8. Move quickly to preserve volatile electronic records.
9. Start with a broad approach to preservation. Protect yourself and the client from criticism.
10. Now go after the other side. Hope they screwed it up and then amend your pleading to allege spoliation.

fact fashion a pre-trial remedy by allowing a limited examination of the plaintiff's expert.

"There was definitely an effort to alleviate the situation for the defendants to the extent appropriate before trial," he says.

But Donald Wilson of Davis LLP, who represented Black & Decker, says the decision dilutes the doctrine of spoliation.

"By adding the requirement of deliberate behaviour as a condition for imposing an adverse presumption, the Court of Appeal has greatly circumscribed the doctrine's ability to take hold," he says. "Lawyers whose clients are subject to cross-examination on the destruction of evidence will make sure their clients understand that spoliation only applies if the conduct was intentional."

Kaufman is of similar mind. He points to the December 2008 decision of Manitoba Court of Queen's Bench Justice Perry Schulman in *Commonwealth Marketing Group Ltd. v. The Manitoba Securities Commission.*

"*Commonwealth* was a case in which the general counsel of a public body intentionally destroyed evidence, and all he got pre-trial was a slight rap on the knuckles," Kaufman says.

The case originated in 2003, when the Manitoba Securities Commission (MSC) initiated an undercover investigation of the investment solicitations of Commonwealth. In the course of their activities, MSC investigators taped a meeting with Commonwealth representatives and had a transcript made of the tape. Eventually, the MSC published an investor alert warning the public about the risks of investing with Commonwealth.

Commonwealth responded by suing the MSC and its general counsel, Douglas Brown, for defamation and abuse of public authority. After the pleadings were in, an investigator told Brown that he thought the tape and transcript should be destroyed. Brown complied, believing that certain provisions of the *Criminal Code*'s wiretapping provisions required him to do so. He indicated what he had done in the MSC's affidavit of documents. Although it turned out that another copy of the transcript had survived, it was not clear whether it was an accurate depiction of what had been said on the tape.

On a motion by Commonwealth to strike the statement of defence, Justice Schulman ruled that the *Criminal Code* provisions had no application to the MSC's activities.

"Plainly, Brown breached his and the MSC's obligation to preserve evidence by destroying the tape and transcript," he concluded.

Although Brown had clearly not acted in bad faith, his actions were nonetheless intentional. Still, Justice Schulman agreed with the *Black & Decker* court that the pre-trial stage was not the appropriate time to make a final ruling on the consequences of spoliation. "A qualitative assessment of the blameworthiness of Brown's act and the question of prejudice are ideally suited for determination at trial and not by a pre-trial judge," Justice Schulman wrote.

But, much like the *Black & Decker* court, Justice Schulman fashioned a pre-trial remedy to ensure the parties would be on a level playing field at trial.

"It follows that I find that no case has been made out to strike out the statement of defence at this time and that a qualitative assessment of Brown's act and its impact on the plaintiffs' ability to have a fair trial should be left for the trial judge on the condition that the defendants make no use of the transcript during the discovery process, whether orally or by interrogatories," Justice Schulman concluded.

"In my view, the unique situation that Brown has created satisfied the 'exceptional case' requirement of *Black & Decker* [for a pre-trial remedy] and my adaptation of it."

Still, Daniel Michaluk of Hicks Morley Hamilton Stewart Storie LLP says Canadian jurisprudence on preservation and spoliation remains wanting.

"The difficulty with [*Black & Decker*] is that it tells us what the law related to preservation is not — in the sense that it holds that no duty of care to preserve evidence currently exists in our law," he says. "On the other hand, it at least provides some clarity in making the distinction between deliberate conduct and conduct that is not intentional."

The only Canadian jurisdiction that imposes an express positive duty to take preservation measures, Michaluk notes, is Nova Scotia.

"The absence of a standard otherwise is a problem because it's the extent of the duty to preserve that gets lawyers nervous, not the bad faith stuff," he says.

By contrast, in the US, the duty to preserve has been firmly in place since the 2004 decision of the US District Court for the Southern District of New York in *Zubulake v. UBS Warburg LLC.* The court articulated a two-headed duty that "once a 'litigation hold' is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed 'on hold' to the extent required."

Kaufman believes, however, that it won't be long before the Canadian law on spoliation and preservation crystallizes.

"The Alberta Court of Appeal's approach has the advantage of being a very flexible one," he says. "Although we'll have to wait to see how trial judges apply it before we get a handle on the law, that shouldn't take too long because there's a lot of this stuff going on nowadays, especially in litigation with the financial industry over the credit crunch."

Landmann agrees that *Black & Decker* will be the catalyst for the crystallization of preservation and spoliation law.

"I think that the decision will kick-start more definitive jurisprudence on the subject," he says.

The first kick at the can may come when the Ontario Court of Appeal considers the pending appeal in *Tarling v. Tarling*. There, the defendant had the testator's computer wiped after the plaintiff threatened litigation and after he received correspondence from plaintiff's counsel. There was also at least one e-mail destroyed (although later produced by a third party) that supported the plaintiff's claim of undue influence.

At trial, Superior Court Justice Thea Herman concluded that the defendant did not intentionally destroy relevant evidence and dismissed the plaintiff's spoliation claim. But it's unclear whether Justice Herman would have required both bad faith and prejudice to establish the claim. The decision also fails to consider the extent of the duty to preserve or whether such a duty even existed in this case.

"One of the difficulties in determining whether [the defendant] intentionally destroyed relevant evidence is that he is being asked to prove a negative," Justice Herman wrote. "How can he prove that he did not destroy relevant evidence? As his father's executor, [the defendant] was entitled to deal with his father's papers. There was no preservation order in this proceeding."

Michael Deverett of Deverett Law Offices, who represented the plaintiff at trial, says Justice Herman set the bar too high.

"The judge raised the bar by effectively requiring the plaintiff to prove the relevance and significance of the evidence that the defendant destroyed," he says. "Wouldn't you think the guy doing the destroying of evidence should be the one taking notes?"

However that may be, the Ontario Court of Appeal will have an opportunity to lend its voice to the jurisprudence. It is notable that the court, in its 2000 decision in *Spasic Estate v. Imperial Tobacco Ltd.*, refused to summarily dismiss a spoliation claim before trial on the ground that it did not disclose a reasonable cause of action.

Meanwhile, although the parameters of the duty to preserve have not been expressly articulated, there is no doubt about the general principle, as expressed by Jusice Schulman in *Commonwealth*.

"Although *The Queen's Bench Act* and *Rules* do not expressly say so, it is implicit in them and basic to our legal system that all litigants have an obligation to preserve all evidence and documents in their possession or control touching on matters that they know or ought reasonably [to] know are in issue in their case," Justice Schulman wrote.

But general principles may be insufficient guidance for in-house counsel and external advisors struggling with what they should actually do when litigation is even remotely on the horizon. What is certain is that they will have to deal with some very specific, thorny issues.

"For example, when does the red flag go up?" asks Susan Wortzman of Wortzman Nickle Professional Corporation, a Toronto-based e-discovery and litigation management boutique. "Is it when the phone call is received from opposing counsel that an employee whose employment has been terminated intends to commence an action, or does the duty to preserve commence as soon as the disgruntled employee's job is terminated?"

While no Canadian court has articulated a precise test, Wortzman suggests that a standard focused on a "reasonable anticipation of litigation" is a workable starting point. Indeed, that is the test articulated in The Sedona Canada Principles, which have filled a void in Canadian law by becoming a point of reference for courts dealing with e-discovery issues. Most recently, the Alberta Court of Appeal's June 2008 decision in *Innovative Health Group Inc. v. Calgary Health Region* made reference to the principles. In November 2008, the Supreme Court dismissed an application for leave to appeal from the judgment.

The principles, which were drafted by leaders in the legal and e-discovery fields to provide workable solutions to the challenges created for litigants with reference to the preservation, collection, processing, review and production of electronically stored information, also deal with the complex question of what a party must preserve. Here, principle five states that the parties "should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden."

The commentary to the principle outlines the steps that should be taken to ensure that a litigation hold is properly in place and that relevant documents have been preserved. According to the commentary, the obligation is not to search all potentially relevant sources of information. Instead, "the more costly and burdensome the effort to access electronically stored information from a particular source, the more certain the parties need to be that the source will yield relevant information."

The key to all of this is to ensure that an organization's legal and IT departments are working in tandem.

"Often the problem is that legal doesn't know what IT is doing," Wortzman says. "In our practice, we try to marry the two by sitting down with IT and figuring out what they're doing. Sometimes it's difficult, because as a rule, lawyers don't really speak techie language."

On the other hand, learning a new language as a first step in formulating a reasonable preservation policy can produce a very tangible benefit by turning the revived debate about the parameters of spoliation into nothing more daunting than an academic endeavour for an organization willing to keep up with the times.

Julius Melnitzer is a freelance legal affairs writer.