

## EMAIL STRINGS AND LAWSUITS: YOU SHOULD KNOW WHEN TO HOLD 'EM

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PHOTO: BURNET, DUCKWORTH & PALMER LLP



**SO, YOU JUST GOT WIND THAT YOU ARE ABOUT TO BE SUED**, or somebody is thinking about suing you, or threatening to sue you, or maybe you actually have been sued. Either you know about the claim, or the circumstances are such that you ought to know what's coming. In your organization, you have some records, documents, correspondence and the like. Most of these documents and records will be electronic, and will include correspondence that is likely to be primarily emails.

We'll call all of these documents and correspondence "records" for short. Some of the records will relate to our hypothetical pending case. Some of the records might help you defend the case against you, while others might not be so helpful to your position, and might even be embarrassing or downright damaging.

Hmmm, thinking about engaging in some selective shredding or deletion? You should think again.

Destruction of records in these circumstances is a bad idea. It is known as "spoliation," the destruction of evidence that may be required in the pending litigation.

The obligation on all parties to preserve and produce relevant evidence for use in a civil action that they know, or ought to know, is pending, is fundamental to our legal system. You are obligated to collect potentially relevant documentation and, if required, provide it to the opposing side during the litigation process.

Therefore, once you know, or ought to know, that litigation is coming, you are generally expected by the courts to "round 'em up" and "hold 'em."

If you have a document or records management system that is about to destroy records that may be needed in the pending case, you have to stop any such destruction and

implement what lawyers call a "legal hold" or a "litigation hold." Since similar obligations may arise in situations such as audits, requests for personal information under privacy legislation or governmental investigations, none of which are really litigation—I prefer the term "legal hold."

A legal hold will likely include identifying all the individuals who could possibly have created relevant records (we call those individuals "custodians"), and ensuring that any of their relevant documents, including emails, are preserved. You should confirm with the custodians their obligation to provide you with documents they have, and their obligation to refrain from deleting anything that is potentially relevant. In fact, you should do everything you reasonably can to collect and preserve all the records. If you don't, you may be explaining your actions—or inaction—to a judge.

Spoliation is a significant issue in the United States, often leading to very large and high-profile awards of damages or sanctions against the party destroying the evidence. In Canada, there have been fewer cases, and the consequences of a finding of spoliation have tended to be less spectacular. In the United States, spoliation may be a "tort" in and of itself, meaning you can be sued for damages for it, and juries can award punitive damages of millions of dollars against you.

In Canada, spoliation is subject to some debate, and you do not usually see the awards of damages that can be seen in the United States. However, some Canadian courts have left open the possibility of extending the law in this area to be a bit more like that of our American friends, so the future may not be quite like the present.

The law in Canada has generally been that spoliation occurs when a party to a lawsuit has intentionally destroyed relevant evidence in circumstances where it's reasonable to conclude that the destruction would have some effect in the litigation. Once this is demonstrated, a presumption arises that the destroyed evidence would have been unfavourable to the party destroying it.

Of course, with electronic records, including email, destruction by deletion is more difficult. When data on any typical computer's hard drive, or many other kinds of storage media, is deleted, all that really means is that the data is ignored by the operating system and is no longer readily visible to the user. However, the "deleted" data is still there on the hard drive or other medium until it is actually overwritten by other data. Even if overwriting occurs, it may not overwrite all of the data. Specialized software can readily enable a skilled user of the software to recover deleted evidence quite effectively.

Specialized software can also overwrite and permanently delete data. A case in Arizona involved the use of such software by the chief executive officer of the company being sued. The court found there was only one use for such software, as it even had the interesting brand name of Evidence Eliminator, and only one reason the executive would use it just before being required to provide the evidence. The consequence of such deliberate and permanent destruction was a fine of \$1 million against the CEO personally.

That's Arizona—but what is the current law right here on the Prairies?

The Alberta Court of Appeal recently considered the issue. The plaintiffs in the case had a house fire, which might have been caused by a defective drill (but might have been related to smoking). The few remains of the house were removed in the rebuild, and parts of the supposedly incendiary drill had gone missing. Undeterred, the plaintiffs pursued action against the drill manufacturer.

The drill manufacturer complained that the inability to inspect the charred remains of the house and the complete drill ruined its ability to defend the claim. The plaintiffs

were allowed to proceed, but with conditions, and the trial court was left to sort out and finalize the spoliation issues. The Court of Appeal summarized the law of spoliation in Canada as follows:

- Spoliation currently means the intentional destruction of evidence when litigation is existing or pending. (Note the word “currently”—willful blindness or carelessness may be enough in an appropriate case.)
- Usually, spoliation will result in an adverse inference, a conclusion that the destroyed evidence would not help the case of the destroyer. (This may mean that a court concludes that the record was worse for your case than it actually would have been had it been available.)
- A party may escape the adverse inference if it can show it did not intend, by destroying the evidence, to affect the litigation.
- The court has discretion and power to deal with spoliation appropriately, which could be by excluding an expert report, denying or awarding costs against the offender, or even striking out a defence or a claim. (Therefore, some creativity is quite possible.)
- Canadian courts have not yet found that spoliation is a tort on its own.

Spoliation will usually be dealt with by the trial judge when the case is heard, although it is possible a spoliation case could be struck out before it gets to trial if appropriate.

All of this means, at the least, that you should be better safe than sorry. Being careless may not be punished as yet, but the law is still evolving. When you anticipate or know of a pending claim, you would be best advised to “round ‘em up” and “hold ‘em.” Deleting or shredding are not appropriate options. **OSR**

*Note that this article, due to space limitations, does not discuss other relevant issues, such as criminal charges for obstruction of justice, which may be another way of punishing those who destroy evidence. Nor does this article discuss the wisdom of having an appropriate records management policy that could be quite useful in more efficiently conducting litigation and defending oneself against allegations of spoliation.*

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# upcoming events

## FEBRUARY 2012

SUN	MON	TUE	WED	THU	FRI	SAT
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29			

➤ **WEDNESDAY 1  
GOVERNMENT OF ALBERTA  
OILSANDS LAND SALE**  
<http://www.energy.alberta.ca/OilSands/831.asp>

➤ **TUESDAY 7  
CANADIAN HEAVY OIL  
ASSOCIATION TECHNICAL  
LUNCH  
FACILITIES AND UPGRADING**  
Calgary, Alberta  
[www.choa.ab.ca](http://www.choa.ab.ca)

➤ **WEDNESDAY 15  
GOVERNMENT OF ALBERTA  
OILSANDS LAND SALE**  
[www.energy.alberta.ca/OilSands/831.asp](http://www.energy.alberta.ca/OilSands/831.asp)

➤ **THURSDAY 23  
CANADIAN HEAVY OIL  
ASSOCIATION BEER & CHAT  
ENVIRONMENT**  
Calgary, Alberta  
[www.choa.ab.ca](http://www.choa.ab.ca)

➤ **THURSDAY 23  
FLUOR CENTENNIAL  
SPEAKER SERIES  
PIPELINES AND POLITICS**  
Calgary, Alberta  
[www.oilsandsreview.com](http://www.oilsandsreview.com)

➤ **TUESDAY 28 -  
WEDNESDAY 29  
EMPLOYING FOREIGN  
WORKERS**  
Calgary, Alberta  
[www.canadianinstitute.com](http://www.canadianinstitute.com)

➤ **TUESDAY 28 -  
WEDNESDAY 29  
SHUTDOWNS FORT  
MCMURRAY**  
Fort McMurray, Alberta  
[www.canadianinstitute.com](http://www.canadianinstitute.com)

➤ **TUESDAY 28 -  
WEDNESDAY 29  
OIL SANDS WATER  
MANAGEMENT INITIATIVE  
2012**  
Calgary, Alberta  
[www.oil-sands-water-management-2012.com](http://www.oil-sands-water-management-2012.com)