



# ALBERTA CONSTRUCTION COMMUNIQUÉ

*April 2006*

*A publication of Miller Thomson LLP's  
Construction Law Practice Group*

## ELECTRONIC SPOILIATION - A LEGAL MINEFIELD

### Our Changing World

On any given day, billions of e-mails are sent and received throughout North America. In today's world, we communicate electronically.

Of course, it was not always that way. Gone are the days of the typewriter and handwritten drafts. We now have data files (e.g. word processor documents, spreadsheets and databases), e-mail attachments, voice mails, website and internet access and usage records, together with back-ups and archives of all this information. These electronic records are now produced from a variety of sources, including personal computers, enterprise computers, hand-held PDAs, cell phones, Blackberries, dictation machines, to name but a few.

When a party is involved in litigation, it is obliged to produce all relevant and material records. In the past, this meant making copies of all the papers and notes and physical items in a party's possession for production to the other side. Today, with the advent and widespread usage of the personal computer, document discovery now also involves the production of "electronic documents" stored in electronic or computerized form.

This "e-discovery" can create a plethora of new issues for the parties that previously did not have to be addressed. For example, in contrast to more traditional forms of documents, electronic documents are often:

- More spontaneous and casually created;
- Easier to alter, more difficult to destroy and more complicated to access; and
- Extremely voluminous.

Importantly, nearly one-third of all electronically stored data is never printed. This means that electronic records often contain information that simply cannot be found elsewhere. This makes the preservation of such evidence all the more important.

### What is Spoliation?

Spoliation means, in its most general sense, the destruction or loss of evidence. It is a well-established legal principle that the destruction of evidence carries with it a presumption that the evidence that was destroyed would have been unfavourable to the party who destroyed it (although the presumption may be rebutted by independent evidence). Where the destruction of the evidence made

Note:

This *Communiqué* is provided as an information service and is a summary of current legal issues of concern to the Construction Industry. *Communiqués* are not meant as legal opinions and readers are cautioned not to act on information provided in this *Communiqué* without seeking specific legal advice with respect to their unique circumstances. Your comments and suggestions are most welcome. Please direct them to: [ConstructionLaw\\_AB@millerthomson.com](mailto:ConstructionLaw_AB@millerthomson.com)

it impossible for the plaintiff to prove its case, some courts in Canada have even reversed the onus of proof to place it on the defendant. In addition, courts have been willing to impose significant costs on parties, and even their counsel, for destroying evidence. A party could face an order for contempt of court or, in the most egregious circumstances, the ultimate sanction of having judgment entered or their action dismissed, as the case may be, for the destruction of evidence.

The consequences of loss or destruction of evidence can therefore be serious. With the explosion in recent years of electronic documents such as e-mail, the obligation to preserve this voluminous and often fertile ground of evidence is becoming an ever-increasing focus of litigation. While Canadian jurisprudence regarding the obligations imposed on parties with respect to the preservation and production of electronic documents is still in its infancy, recent high-profile cases in the United States have attracted considerable attention. Canadian courts will almost certainly look to these American decisions for guidance in developing our own case law relating to e-discovery issues.

### ***Zubalake***

Of all the American decisions in this area, the New York case of *Zubulake v. UBS Warburg* is perhaps the most high-profile. During 2003 and 2004, the United States District Court issued five opinions that are generally viewed as the first definitive and comprehensive decisions on a broad range of electronic discovery issues.

*Zubulake* was an action for gender discrimination brought against UBS Warburg by one of its equity traders, Laura Zubulake. Ms. Zubulake had requested that UBS produce all documents with respect to any communication by or between UBS employees concerning her. When she reviewed the production, Ms. Zubulake noted that a number of e-mails were missing and requested that UBS produce the e-mail by archival media. During this restoration effort, the parties discovered that a number of back-up tapes were missing and that e-mails had been deleted. Ms. Zubulake moved for various sanctions against UBS for its failure to preserve the missing tapes and e-mails.

The Court in *Zubulake* made the following important findings:

1. WBS had a duty to preserve the missing evidence, which arose some months prior to the actual commencement of the action, since UBS should have known that the e-mails might be relevant to future, reasonably-anticipated litigation.
2. WBS failed to comply with its own retention policy, which would have preserved all of the back-up tapes at issue.

As a result, the court granted sanctions against UBS for failing to produce back-up tapes in a timely manner, including the drawing of an adverse inference and the payment of costs by WBS.

The Court also held that UBS' defence counsel was partly to blame for the document destruction because it had failed in its duty to locate relevant information, to preserve that information, and to produce that information in a timely manner. The Court declared that litigation lawyers are obligated to ensure that relevant documents are preserved by placing a "litigation hold" on the documents, communicating to clients the need to preserve them, and arranging for safeguarding of relevant archival media.

In the final result, a federal jury awarded Ms. Zubalake \$29 million in damages for her claim, \$20 million dollars of which constituted an award of punitive damages.

### **What can your business do to avoid a Zubulake debacle?**

In order to better manage the risk of electronic discovery and possible spoliation, it is recommended that all organizations review their practices with respect to the following:

### **1. Educate Employees on Email Use**

Email is an invaluable tool in modern business. However, because e-mail is a rapid and informal way to communicate, ill advised and imprudent correspondence is often sent. Some employees may believe that a deleted email is permanently erased. This is simply not the case and accordingly employees must be advised to avoid informal communications using their email.

### **2. Create or Review Policies Regarding Retention Of Electronic Data**

Written policies must be in place and must be followed by all persons within the organization. The periodic destruction of these documents in accordance with such a policy will not serve as much ammunition for an opposing party intent on bringing a claim for spoliation. However, policies which are intended to destroy information on a frequent basis so that it will not be producible in litigation will not be viewed with a sympathetic eye by the Courts.

### **3. Systematically Organize Electronic Information Preservation**

It is recommended that there be a physical segregation of backup copies of an email system, properly labelled and safely stored, as this will make it easier to respond to discovery requests.

### **4. Develop an Electronic Discovery Process**

Organizations should develop an established procedure for handling e-discovery requests. Many corporate IT departments are designed for the support of ongoing operations and may not be prepared to handle electronic discovery requests. Organizations should form a committee to responds to e-discovery requests, which could be comprised of a number of individuals within the IT, administrative and legal services departments.

### **5. Be Prepared to Issue a Litigation Hold**

As soon as litigation is anticipated, the regularly scheduled destruction practises must cease. These directives should be periodically reviewed so that all new employees become aware, and existing employees are reminded, of the policy.

Taking these steps should assist in avoiding the very unpleasant consequences associated with the spoliation of evidence. Although there is currently an absence of binding Canadian case law on the subject, it appears from the more developed American jurisprudence that litigants in Canada will soon be forced to likewise sit up and take notice to ensure electronic documents are properly preserved.

#### **ABOUT THE AUTHOR :**

This communiqué was written by Darin Hannaford who is a partner in our Edmonton office. Darin practices commercial litigation with a particular emphasis on contractual and leasing disputes, construction and transportation law.

*Darin Hannaford  
Edmonton  
780.429.9714  
dhannaford@millerthomson.com*

#### **REGIONAL CONTACTS**

Our Construction Law Practice Group is dedicated to providing comprehensive and integrated legal services to construction industry clients. For more information about our group, visit our website at [www.millerthomson.com](http://www.millerthomson.com) or contact one of our regional contacts listed below.

**Edmonton**

Debra Curcio Lister 780.429.9763  
 dcurciolister@millerthomson.com  
 Kent H. Davidson 780.429.9790  
 kdavidson@millerthomson.com  
 Geoffrey N.W. Edgar 780.429.9760  
 gedgar@millerthomson.com  
 Scott J. Hammel 780.429.9726  
 shammel@millerthomson.com  
 Darin J. Hannaford 780.429.9714  
 dhannaford@millerthomson.com  
 Sandra L. Hawes 780.429.9787  
 shawes@millerthomson.com  
 William J. Kenny, Q.C. 780.429.9784  
 wkenny@millerthomson.com  
 Bryan J. Kickham 780.429.9713  
 bkickham@millerthomson.com  
 Monique M. Petrin Nicholson 780.429.9704  
 mpetrinnicholson@millerthomson.com  
 Daniel C.P. Stachnik, Q.C. 780.429.9761  
 dstachnik@millerthomson.com  
 David N. Thomlinson 780.429.9778  
 dthomlinson@millerthomson.com

**Toronto**

Dražen F. Bulat 416.595.8613  
 dbulat@millerthomson.com  
 Lloyd D. Cadsby, Q.C. 416.595.8639  
 lcadsby@millerthomson.com  
 Peter K. Foulds 416.596.2112  
 pfoulds@millerthomson.com  
 William M. Pigott 416.595.8179  
 wpigott@millerthomson.com  
 Anthony D. Scane 416.595.2661  
 ascane@millerthomson.com  
 Michael T. Tamblyn 416.595.2660  
 mtamblyn@millerthomson.com  
 Thomas R. Whitby 416.595.8561  
 twhitby@millerthomson.com

**Markham**

Michael L. Shell 905.415.6709  
 mshell@millerthomson.com

**Kitchener-Waterloo**

F. Stephen Finch, Q.C. 519.579.3660X 310  
 sfinch@millerthomson.com  
 Timothy J. McGurrin 519.579.6440X321  
 tmcgurrin@millerthomson.com

**Whitehorse**

Murray J. Leitch 867.456.3301  
 mleitch@millerthomson.com  
 André W.L. Roothman 867.456.3302  
 aroothman@millerthomson.com

**Calgary**

Michael D. Aasen 403.298.2438  
 maasen@millerthomson.com  
 Michael J. Bailey 403.298.2411  
 mbailey@millerthomson.com  
 Philip A. Carson, Ph.D. 403.298.2403  
 pcarson@millerthomson.com  
 Morella M. De Castro 403.298.2458  
 mdecastro@millerthomson.com  
 Fred R. Fenwick, Q.C. 403.298.2421  
 ffenwick@millerthomson.com  
 Kathleen J. Kendrick 403.298.2455  
 kkendrick@millerthomson.com  
 E. Jane Sidnell 403.298.2435  
 jsidnell@millerthomson.com  
 Nicole T. Taylor-Smith 403.298.2453  
 ntaylorsmith@millerthomson.com

**Vancouver**

Wendy A. Baker 604.643.1285  
 wbaker@millerthomson.com  
 Charles W. Bois 604.643.1224  
 cbois@millerthomson.com  
 Peter M. Jarvis 604.643.1273  
 ljarvis@millerthomson.com  
 Terrance A. Kowalchuk 604.643.1222  
 tkowalchuk@millerthomson.com  
 Peter Macdonald 604.643.1231  
 pmcdonald@millerthomson.com  
 Owen D. Pawson 604.643.1254  
 opawson@millerthomson.com  
 Michael J. Percival 604.643.1230  
 mpercival@millerthomson.com  
 David L. Rice 604.643.1209  
 drice@millerthomson.com  
 Brian T. Ross 604.643.1216  
 btross@millerthomson.com  
 Stephen R. Ross 604.643.1205  
 srross@millerthomson.com  
 Donald J. Sorochan, Q.C. 604.643.1214  
 dsorochan@millerthomson.com  
 Dwight M.D. Stewart 604.643.1248  
 dstewart@millerthomson.com  
 Mari A. Worfolk 604.643.1240  
 mworfolk@millerthomson.com

**Montreal**

Gilles Brunelle 514.871.5444  
 gbrunelle@millerthomsonpouliot.com  
 Eric Couture 514.871.5489  
 ecouture@millerthomsonpouliot.com  
 Normand D'Amour 514.871.5487  
 ndamour@millerthomsonpouliot.com  
 Daniel Gagné 514.871.5422  
 dgagne@millerthomsonpouliot.com  
 Luc Gratton 514.871.5482  
 lgratton@millerthomsonpouliot.com  
 Pierre Paquet 514.871.5427  
 ppaquet@millerthomsonpouliot.com  
 Louis Michel Tremblay 514.871.5421  
 lmtremblay@millerthomsonpouliot.com  
 Louise Tremblay 514.871.5476  
 ltremblay@millerthomsonpouliot.com  
 Mathieu Turcotte 514.871.5492  
 mturcotte@millerthomsonpouliot.com

Note:

On January 1, 2004 privacy legislation came into force across Canada governing the collection, use and disclosure of personal information by organizations. Miller Thomson respects the privacy of persons who receive our newsletters and other information that we provide as a service to them. We wish to take this opportunity to confirm that we hold personal information about you in the form of the contact information we possess. We wish to confirm that you consent to our maintaining this information and continuing to use it for the purposes of providing our newsletters and similar mailings to you. All recipients of our newsletters also receive notices of firm seminars and other events that may be of interest to you or your organization as well as information respecting marketing of our firm and relevant legal developments from time to time. In addition, we may send you holiday cards and other greetings on occasion. We only use your information for these purposes and do not disclose it to any third parties outside of our firm's employees and independent contractors.

If you consent to our possessing and using your personal information for the above purposes, you need not take any further steps. If, on the other hand, you do not wish us to have your personal information for these purposes, please notify us by return e-mail and we will remove your personal information from our newsletter database and cease forwarding the above-noted communications to you. Your comments and suggestions are most welcome. Please direct them to: [ConstructionLaw\\_AB@millerthomson.com](mailto:ConstructionLaw_AB@millerthomson.com)

## Newsletter & Communiqué Subscription Request

Miller Thomson LLP produces several electronic newsletters & communiqués throughout the year to keep our clients informed of industry news. This is a free information service to our clients and is a summary of current legal issues of concern to the industry. Please indicate which newsletters & communiqués you would like to receive:

### Alberta Communiqués

- Construction Communiqué - Alberta
- Health Communiqué - Alberta
- Labour and Employment Communiqué - Alberta
- Securities and Corporate Finance Communiqué - Alberta

### National Newsletters

- Aboriginal Law
- Charities and Not-For-Profit
- Communications Law Communiqué
- Competition Law Report
- Construction Law
- Customs and Trade
- EnviroNotes!
- eSecurities Notes
- Financial Services & Insolvency
- Insurance
- Labour and Employment Communiqué
- Oil and Gas
- Privacy Communiqué
- Tax Notes
- Technology & Intellectual Property

### Other Publications

- Doing Business in Canada  
*A guide to Canada's legal, government and economic structure for executives, entrepreneurs, investors and counsel who are, or may be, doing business in Canada.*
- Focus on Alberta: Insurance & Risk Management Communiqué  
*A publication for risk managers, underwriters and claim advisors*

Name: \_\_\_\_\_ Title: \_\_\_\_\_

Company Name: \_\_\_\_\_

Address: \_\_\_\_\_ City: \_\_\_\_\_ Postal Code: \_\_\_\_\_

E-mail address: \_\_\_\_\_

Please feel free to distribute the following to other individuals within your organization who may benefit from our service.

**Please fax this page to Miller Thomson LLP at 780.424.5866 or 403.262.0007**

I confirm that I am providing you with personal information about myself. I consent to you maintaining this information and continuing to use it for the purposes of providing your newsletters and similar mailings to myself. I confirm that I am aware that all recipients of your newsletters also receive notices of seminars and other events as well as information respecting marketing of Miller Thomson and relevant legal developments from time to time. I understand that I maintain the right to be removed from your mailing list upon reasonable notice to you. For any questions pertaining to the collection and use of your information, please contact Linda Finn (Calgary) at 403.206.6356.