

# 'Let's go surfing now' – spoliation revisited

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## Decision

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Two of the most popular surf tunes of the 1960s were *Wipeout* by The Surfaris and *Surfing Safari* by The Beach Boys. Back then, there was no such thing as the Internet. Surfing was a watersport and wipeouts were sports-related mishaps. Five decades later, surfing and wipeouts are activities in cyberspace.

## Decision

The recent high-profile decision of Justice Frank Newbould of the Ontario Superior Court of Justice (Commercial List) in *Catalyst Capital Group Inc v Brandon Moyses*(1) involved an allegation by plaintiff Catalyst that the corporate defendant West Face Capital Inc misused confidential information belonging to Catalyst that defendant Moyses allegedly acquired while employed by Catalyst as an analyst and thereafter allegedly passed on to West Face after joining. Catalyst further alleged that West Face had used the confidential information with its consortium partners (collectively, 'West Face Group') to successfully acquire an interest in Wind Mobile Inc based on a \$300 million enterprise value of Wind. West Face Group later sold its interests to Shaw Communications for \$1.6 billion. In the action against West Face and Moyses, Catalyst claimed an accounting of the profits made by West Face. The action was dismissed after a six-day trial and was recently appealed.

## Wipeout

Moyes deleted all of the information on his work BlackBerry before returning it and leaving Catalyst's employ. Following the commencement of Catalyst's action, Moyses attempted to delete the internet browsing history on his personal computer before a forensic image could be taken of its hard drive – a step contemplated by the terms of a consent court order.

## Spoliation analysis

The Ontario Superior Court of Justice considered whether spoliation had taken place and, if so, whether it should be recognised as an independent tort in Ontario. It ultimately left the latter issue for another day, having accepted Moyses's testimony regarding why he had deleted information from his computer and BlackBerry, and determined that the elements of spoliation had not been made out by Catalyst.

The court cited the Ontario Court of Appeal's leading spoliation decision in *Spasic Estate v Imperial Tobacco Ltd*(2) and stated: "the spoliation inference represents a factual inference or legal presumption that because a litigant destroyed a particular piece of evidence, that evidence would have been damaging to the litigant."

A finding of spoliation requires the following four elements to be established on a balance of probabilities:

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- The missing evidence is relevant;
- The missing evidence was destroyed intentionally;
- At the time of destruction, litigation was ongoing or contemplated; and
- It is reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation.

## **Internet browsing history**

Moyse testified that he was worried that Catalyst would have access to his personal internet browsing history, and in particular that he had accessed adult entertainment websites. He was concerned that this might become part of a public record in the litigation.

In deleting his browsing history from his computer, Moyse did not believe that there was anything improper in doing so, as the order setting out the process for taking a forensic image of the hard drive did not require him to maintain his computer 'as is' or to preserve clearly irrelevant files. The focus of the order was to maintain and preserve the documents relevant to Catalyst's action. If the order had required Moyse to maintain his computer 'as is', he would not have used it at all before the forensic image was due to be taken. Moyse considered that by deleting his history, he was merely deleting personal information irrelevant to the litigation.

The court accepted Moyse's testimony as to why he deleted his internet browsing history on his personal computer and stated:

*"I accept Mr. Moyse's evidence as to why he deleted his internet browsing history. There is no evidence to contradict his statements as to why he deleted his internet browsing history. He was a young man at the time who had a very close relationship with his girlfriend who is now his fiancée. He did not want his internet searching to become part of the public record. In deleting this history, he did not intend to breach the order of July 16, 2014 or to destroy any evidence relevant to this litigation. This lack of intention to destroy relevant evidence precludes any finding of spoliation resulting from the deletion of his internet browsing history."*

With respect to Moyse wiping out information on the BlackBerry, the court stated:

*"Regarding the wiping of his BlackBerry before returning it to Catalyst, Mr. Moyse's evidence is that his BlackBerry contained photographs and text messages of a personal and private nature, and he thought it was completely reasonable to take steps to ensure that they would not be accessible to the next user of the company issued BlackBerry."*

The court found that Moyse had no intention of destroying relevant evidence on the BlackBerry and that there was no proof that any relevant evidence had been destroyed.

The court found that Catalyst had failed to establish that Moyse had intentionally destroyed evidence in order to affect the outcome of the litigation – a critical element of spoliation. Consequently, there was no basis to find or infer a presumption that Moyse destroyed evidence that would be unfavourable to him. The court therefore determined that it need not consider whether an independent tort of spoliation exists in Ontario. That issue will be left for another day.

## **Comment**

Given that most documents are now stored in electronic form and the ease with which they can be deleted, either inadvertently or intentionally, it may be expected that assertions of spoliation will continue to be raised in commercial litigation, either as a claim or defence or as an alleged standalone tort. However, the courts have clarified that a claim of spoliation will withstand preliminary interlocutory challenges and will only be tested at trial on a full evidentially record.

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## Endnotes

(1) 2016 ONSC 5271.

(2) (2000), 49 OR (3d) 399 (CA).

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