

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Axion Ventures Inc. v. Bonner*,
2025 BCSC 167

Date: 20250129
Docket: S210438
Registry: Vancouver

Between:

Axion Ventures Inc. and Axion Interactive Inc.

Plaintiffs

And

**John Todd Bonner, Nithinan Boonyawattapisut, Monaker Group, Inc.,
William Kerby, Cern One Limited, Red Anchor Trading Corp.,
CC Asia Pacific Ventures Ltd., Jonathan Chen, HotPlay Enterprise Limited,
HotPlay (Thailand) Ltd., Christopher Bagguley, Mark Henry Saft,
Longroot, Inc., Jane Doe and ABC Corp.**

Defendants

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

Counsel for the Plaintiffs:

P.J. Sullivan
S. R. Shuchat
S. Macdonald

The Defendants, John Todd Bonner and
Nithinan Boonyawattapisut, appearing via
videoconference:

J.T. Bonner
N. Boonyawattapisut

No other appearances

Place and Dates of Hearing:

Vancouver, B.C.
January 15–17,
23, 24 and 27, 2025

Place and Date of Judgment:

Vancouver, B.C.
January 29, 2025

Table of Contents

INTRODUCTION 3
SPOILIATION 4
POSITIONS OF THE PARTIES..... 8
DETERMINATION 11

Introduction

[1] The applicants, who are the current defendants in this action, VA S210438, some of whom are plaintiffs in related actions, apply for an order dismissing this action on the grounds that the plaintiffs’ spoliation of a significant number of highly material emails and documents prevent them from defending themselves in this action. The applicants, whom I will refer to as the “defendants”, assert that this is one of those rare cases where the prejudice caused by the spoliation is so profound that I must dismiss the action as opposed to following the general rule, which is to have the issue determined at trial. The plaintiffs deny that any spoliation occurred and alternatively, if I am left in any doubt on the evidence, they say that the matter should be remitted to trial.

[2] The defendants’ application has been adjourned several times, all at their request; ultimately, the adjournment came with terms, including a term that the defendants could not adduce new evidence. Their application finally came on for hearing on the day the 80+-day trial of this complex commercial action was scheduled to begin before me as the trial judge (I have also been case managing these actions since 2022).

[3] The nature of the claims in this case, the related actions to be tried at the same time, and the history of proceedings, are discussed in numerous reasons for judgment issued over time; many may be found at 2021 BCSC 963, 2021 BCSC 1899, 2022 BCSC 945, 2023 BCSC 149, 2023 BCSC 181, 2023 BCSC 204, 2023 BCSC 213, 2023 BCSC 313, 2023 BCSC 337, 2023 BCSC 973, 2023 BCSC 974, 2023 BCSC 978, 2023 BCSC 1955, 2024 BCSC 45, 2024 BCSC 46, 2024 BCSC 198, and 2024 BCSC 475.

[4] All of the current defendants (some of whom are referred to by the parties in this action and related actions as the “Bonner defendants”) are now self-represented. As a result of findings of contempt against some of the Bonner defendants, set out in some of the reasons for judgment referred to in the preceding paragraph, the defences of some of them were struck. However, given the

significance of the spoliation allegations, those Bonner defendants were given leave to participate in the spoliation application. At the hearing of the application, Mr. Bonner and Ms. Nithinan Boonyawattapisut (whom I will refer to as “Jess”, as the parties do and as she has invited me to do, without intending any disrespect), made submissions on behalf of all of the defendants urging me to dismiss the claim based on spoliation.

Spoliation

[5] Spoliation is a doctrine that is engaged where relevant evidence is destroyed by an intentional act indicative of fraud. The doctrine is succinctly described by the Alberta Court of Appeal in *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353 at para. 18:

[18] *St. Louis [v. Canada (1896), 25 S.C.R. 649.]*, therefore, stands for the following proposition. Spoliation in law does not occur merely because evidence has been destroyed. Rather, it 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. Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him.

[6] In its useful and apt summary of the law of Canada concerning spoliation, the Alberta Court of Appeal in *McDougall* said that as a general rule, the issues of whether spoliation has occurred and what remedy should be given are matters best left for trial:

[29] In conclusion, therefore, I would summarize the Canadian law of spoliation in the following way:

1. Spoliation currently refers to the intentional destruction of relevant evidence when litigation is existing or pending.
2. The principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator. The presumption can be rebutted by evidence showing the spoliator did not intend, by destroying the evidence, to affect the litigation, or by other evidence to prove or repel the case.

3. Outside this general framework other remedies may be available -- even where evidence has been unintentionally destroyed. Remedial authority for these remedies is found in the court's rules of procedure and its inherent ability to prevent abuse of process, and remedies may include such relief as the exclusion of expert reports and the denial of costs.
4. The courts have not yet found that the intentional destruction of evidence gives rise to an intentional tort, nor that there is a duty to preserve evidence for purposes of the law of negligence, although these issues, in most jurisdictions, remain open.
5. Generally, the issues of whether spoliation has occurred, and what remedy should be given if it has, are matters best left for trial where the trial judge can consider all of the facts and fashion the most appropriate response.
6. Pre-trial relief may be available in the exceptional case where a party is particularly disadvantaged by the destruction of evidence. But generally this is accomplished through the applicable rules of court, or the court's general discretion with respect to costs and the control of abuse of process.

[7] To find spoliation, four elements must be established, which are outlined in *2025925 Ontario Inc. v. Maramusche Holdings Inc.*, 2023 ONSC 3041 at para. 250:

[250] A finding of spoliation requires that the following four elements be established on a balance of probability (see *Nova Growth Corp. v. Kepinski*, 2014 ONSC 2763 (“Nova Growth”) at para. 296):

- a. the missing evidence must be relevant;
- b. the missing evidence must have been destroyed intentionally;
- c. at the time of destruction, litigation must have been ongoing or contemplated; and
- d. it must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation.

[8] When the destruction is not intentional, it is not possible to draw the inference that the evidence was destroyed because it would have been damaging to the opposing litigant: *McDougall* at paras. 24, 25, and 29; *Chow-Hidasi v. Hidasi*, 2013 BCCA 73 at para. 29.

[9] Another useful description of the doctrine, from our Court of Appeal, is found in *Holland v. Marshall*, 2008 BCCA 468 at paras. 55 and 59:

[55] Justice Brooke stated his understanding of the law of spoliation based on four case authorities to which he was referred by counsel for the respondents. The following is a summary of what was stated:

1. A rebuttable evidentiary presumption arises where evidence of spoliation exists; the doctrine of spoliation is an evidentiary rule raising a presumption and not an independent tort giving rise to a cause of action (*St. Louis v. Canada* (1896), 25 S.C.R. 649).
2. In an appropriate case, destruction of documents carries a procedural but not substantive remedy, an action for damages cannot be sustained solely on the ground that documents have been destroyed (*Endean v. Canadian Red Cross Society* (1998), 48 B.C.L.R. (3d) 90 (C.A.)).
3. Spoliation requires four elements in evidence: a) the evidence has been destroyed; b) the evidence destroyed was relevant to an issue in the lawsuit; c) legal proceedings were pending; and d) the destruction of documents was an intentional act indicative of fraud, or an intention to suppress the truth (*Dyk v. Protec Automotive Repairs* (1997), 41 B.C.L.R. (3d) 197 (S.C.)).
4. There is no common law duty of care to preserve property which may possibly be required for evidentiary purposes; such an obligation can only be imposed by court order granted pursuant to the *Rules of Court* (*Dawes v. Jajcay*, 1999 BCCA 237, 66 B.C.L.R. (3d) 31, aff'g (1995), 15 B.C.L.R. (3d) 240, leave to appeal ref'd [1999] S.C.C.A.. No. 347).

...

[59] In a legal context, the term spoliation refers to the destruction, mutilation, alteration or concealment of evidence. The harm to the trial process that spoliation can cause is well-recognized. The more difficult problem is finding an appropriate remedy for spoliation. The sanctions or remedies available to litigants who suffer due to spoliation include procedural remedies, evidentiary presumptions, contempt proceedings and costs orders. Preventive measures may also be taken through preservation orders.

[10] Further, where the applicant asks the court to infer spoliation occurred, there must be evidence of a particular piece of relevant evidence that was destroyed, since the inference only applies to that particular evidence and not at large: 2025925 *Ontario* at para. 251, citing *Nova Growth Corp. v. Kepinski*, 2014 ONSC 2763 at paras. 297–298.

[11] Lastly, the question of spoliation will usually go to trial for determination. It is only in the clear-cut case where a claim is struck pre-trial. Again, I cite from the reasons in *McDougall*, at paras. 27 and 33:

[27] In summary, some Canadian courts have left open the possibility of extending the law relating to spoliation. There is, however, one aspect of the law that Canadian courts appear to agree upon. Because spoliation is primarily an issue of fact, and the remedies based on prejudice (also a matter of fact), these are matters usually best left to a trial judge. Thus, it would be rare for a claim to be struck pre-trial. The reasoning behind this position was described by Clarke J. in *North American Road Ltd. v. Hitachi Construction Machinery Co.*, 2005 ABQB 847, 385 A.R. 314. He was asked, on a pre-trial motion, to grant access to privileged documents as a remedy for spoliation. His Lordship denied the application, stating, at paras. 21-22:

I am satisfied that this is not the appropriate time for the question of spoliation to be addressed. ... The issue of spoliation is more appropriately raised at trial when all of the evidence will be available to be considered by the trial judge. In addition, the applicant does have other sources of evidence available to it that may be helpful for its defence, other than the respondents' privileged documents. ... Also, the applicant will have the opportunity through the discovery process and production of expert reports to become more fully informed of the facts on which the experts' opinions are based.

At this point, the nature and potential impact or effect of the respondents' expert evidence is unknown. At trial, the judge will be in a position to determine the existence and extent of any prejudice that may have been caused to the applicant by the respondents' failure to preserve the evidence. Accordingly, the trial judge will also then be in a far more able position to determine what, if any, remedy would be appropriate under the particular circumstances of this case.

...

[33] Indeed, this case demonstrates why the issue of spoliation should usually be left to trial. Here Black & Decker submits it has been severely prejudiced by the demolition of the fire-burnt house and the fact that parts of the drill appear to be missing. But determining whether the appellants and their expert did what they did intentionally, to affect the litigation, or to what extent the respondents might be prejudiced by these acts of destruction and possible loss requires a greater evidential foundation than can be found in an affidavit. Here the premises were demolished so that a new home could be built. Without more, this should not give rise to a presumption that the evidence would tell against the appellants. Moreover, here the fire department investigated the fire scene immediately after the fire and produced a report on the cause of the fire. A number of pictures were taken to preserve the scene. It would be inappropriate to determine, at this point in the proceedings, whether these measures might balance any prejudice alleged by Black & Decker arising from the fact that it did not get a chance to examine the fire scene.

[12] See also *The Insurance Corporation of British Columbia v. Teck Metals Ltd.*, 2020 BCSC 1617 at para. 84.

Positions of the Parties

[13] The defendants contend that this is one of those rare cases where it is so clear that spoliation occurred which has made it impossible for them to defend the allegations in this case.

[14] They urge me to find, from what they contend is unassailable evidence, that the plaintiffs intentionally cut off the Bonner defendants' (as well as those of others) access to their Axion email accounts, documents, and data (called the Google "G Suite") when the dispute between Axion (I refer to the two related plaintiffs collectively as "Axion") and Mr. Bonner was in its early stages (and after Mr. Bonner and Jess had commenced an oppression proceeding against Axion (VA S209078)). According to the defendants, Axion, through two of its senior executives, deliberately cut off their email and G Suite access to impede their ability to defend themselves against accusations that some or all of them had conspired together, in breach of their fiduciary duties, to either take over Axion or strip it of its valuable assets (e.g., what is known as the "In-Game Advertising", or "IGA") to their benefit. They say that the data in the G Suite included emails and documents that are material to their defence in this claim, as well as to their pursuit of a related claim for recovery of loans to Axion, referred to as the "Bonner family loans debt claim" advanced in VA S209245. They tell me that the missing materials include Board resolutions approving significant loans made by Mr. Bonner and members of his family to Axion when it was in financial distress, and approving Mr. Bonner's request to convert those loans into shares; emails showing that Board members were fully aware that Mr. Bonner was searching for a NASDAQ entity to partner with Axion, and of Mr. Bonner's intended transaction between Axion and an entity called Monaker; and evidence that the key asset in issue in this action (the IGA) was owned by Jess and Mr. Bonner as opposed to Axion.

[15] Although the defendants say that Axion preserved the data in the G Suite when they cut off the Bonner defendants' access, that data was ultimately lost when Google eventually deleted it consequent on Axion's failure to pay Google's monthly charges. The defendants equate Axion's failure to pay Google's charges to an

intentional act of spoliation because Axion knew that ultimately, Google would not retain the data and as a consequence, the defendants would be unable to obtain the documents they need to answer each of the allegations made against them by Axion in this action.

[16] To this latter point, the defendants rely on the decision of the Court of Quebec in *Hydro-Quebec v. Bell Canada*, 2019 QCCQ 263, where the underlying claim was struck because Hydro-Quebec failed (although not intentionally) to preserve a utility pole for inspection, depriving Bell Canada of the opportunity, to its significant prejudice, to examine Hydro-Quebec's evidence. However, as I read the reasons, the decision to strike the claim was grounded not in the doctrine of spoliation, but in Hydro-Quebec's non-compliance with good faith preservation of evidence per article 253 of the *Code of Civil Procedure of Quebec*, CQLR, c. C-25.01, which entitles a person who expects to become a party to a lawsuit to inspect a thing or property which may affect the outcome of the dispute.

[17] As far as I am aware, there is no common law case finding spoliation arising from a negligent failure to preserve evidence. Whether negligent spoliation exists in Canada was canvassed but not determined by the Court of Appeal in *Holland* at paras. 76–79. There is clear authority that there is no common law duty to preserve documents: *Holland* at para. 55. While preservation of documents is required under the *Supreme Court Civil Rules* [*Rules*], a negligent failure to do so is not tantamount to spoliation. It may be a breach of the *Rules*, and if it is, then the remedies provided for in the *Rules* would be raised for consideration. In contrast, to prove spoliation, there must be clear evidence of deliberate deletion, concealment, or lack of disclosure intended to impede the other party's rights in litigation: *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2020 BCSC 880 at para. 800.

[18] I take it from the reasons of Justice Fisher (as she then was) in *Patzer v. Hastings Entertainment Inc.*, 2010 BCSC 426 at paras. 102, 105, that while preservation of documents may be required where a party is threatened with or

reasonably apprehends litigation, to prove spoliation, the applicant must establish fraudulent intent, that the evidence was destroyed with an intention to suppress the truth. See also, *Doust v. Schatz*, 2002 SKCA 129 at paras. 27–29, where intentional loss or destruction of relevant documents in breach of Saskatchewan’s rules of civil procedure constituted spoliation.

[19] While the defendants make a good point that as a publicly traded company, Axion was required by securities regulators to preserve documents, it is not clear to me from the evidence in the record that Axion breached that obligation, because on their evidence, which at this juncture I am not determining is truthful or is false, its executives thought it was Mr. Bonner who cut off their access and they did their best to preserve what they considered to be a historical archive of relevant data they had on hand (which, Axion says, has been produced and consists of tens of thousands of emails).

[20] The defendants argue that while they have located some documents from external sources that would have been in the G Suite, it is clear, they submit, from those documents, that there are vast amounts of missing emails and documents such as board resolutions that would prove their defence and a complete answer to Axion’s claims in this action and the veracity of the Bonner family loans debt claim.

[21] Axion on the other hand argues that there is simply no evidence to establish, let alone suggest, spoliation. They contend that it was Mr. Bonner who cut off Axion’s access to the corporate email accounts to prevent Axion from seeing his *mala fide* conduct and to wipe the data from the G Suite. Axion points to emails in the evidentiary record where they say it is clear that this is what Mr. Bonner did, as an administrator of the account with Google, in respect of cutting off Axion’s access in order to delete data to prevent Axion from viewing it. The fact that Google eventually deleted the data was, Axion says, through no fault of its own. Axion asserts it has no knowledge of the reason(s) Google did that, and says it was counsel who previously acted for the Bonner defendants (and not Axion) who dealt with Google on this question. Axion reminds me that it worked with that counsel in

an attempt to obtain an order in this court requiring Google to deliver the data at a time when counsel for the Bonner defendants and Axion believed the data was with Google.

[22] Axion also maintains that the defendants have not established that they are prejudiced from the loss of data once held by Google, and point to the many documents in evidence that the defendants currently have in hand that address the very issues the defendants say they cannot respond to, either in defending this action or pursuing their claims for recovery of Bonner family loans. Axion also submits that the defendants have failed to identify the documents they say they are missing, and that a generic statement they are missing emails that they cannot identify fails to establish the specificity required to prove spoliation.

Determination

[23] Despite the valiant efforts of Mr. Bonner and Jess, who as self-represented litigants did an admirable job arguing the application, I cannot find on the evidence before me that it is clear that spoliation occurred, and even if it did, that it is clear that the defendants are now unable to defend against Axion’s claims in this case and prosecute the Bonner family loans debt claim.

[24] Their submissions ask me to draw inferences from email documents that I am not able to make in light of the following:

- (a) direct conflicts in the evidence, particularly competing accounts of who cut off email access and access to the G Suite and who failed to pay Google’s monthly charges;
- (b) if it was Axion who was obliged to continue those payments to Google, whether its decision to stop payment was made knowing and intending the data would ultimately be deleted by Google to the prejudice of the defendants;

- (c) certain inconsistencies in Mr. Bonner's own evidence with objective evidence (e.g., blocking access to the Axion on-line account hosted by Google) described by Axion in its submissions;
- (d) the lack of clarity arising from some of the impugned emails that Mr. Bonner and Jess ask me to draw inferences from;
- (e) the absence of any evidence from Google or any evidence in the record from any other source to explain why the data was deleted;
- (f) some of the defendants' submissions were premised on alleged facts not supported by evidence but instead on assertions of what made common sense in the circumstances; and
- (g) the real prospect that some of the key documents the defendants claim are now lost (such as Axion's board resolutions approving the Bonner family loans and Mr. Bonner's request to convert the loans to shares, emails concerning ownership of the IGA asset) may well be in the possession, custody, or control of Axion's former general counsel, something that neither party has ever attempted to confirm until Monday of this week (when Mr. Bonner and Jess sent a letter to that individual, whom, I am told, will answer questions put to him in writing).

[25] Thus, on the evidence before me, I cannot find that the defendants have established spoliation occurred. Nor am I able to find, as Axion asks me to do, that spoliation did not occur. I am also unable to find that if it did, which documents were intentionally destroyed to cause prejudice to the defendants. Much depends on the context in which documents in evidence are construed, which can only be done in this case when supplanted with *viva voce* testimony that is subject to the rigours of cross-examination. The most I can find is that some of the electronic data, comprised of emails and documents, once contained in the lost G Suite, pertaining to the relevant categories of documents identified by the defendants in submissions, may no longer be available.

[26] Moreover, even if spoliation did occur, I am unable to find that this is one of those clear cases where the defendants have been denied the means to defend against Axion’s claims in this case such that the claim should be struck (and similarly unable to find that their ability to prove their claims in the Bonner family loans debt action is impaired).

[27] For these reasons, I have determined that the issue of spoliation, and potential remedies if it is established, should be put over to and determined at trial.

[28] Accordingly, the application is put over to be determined at trial.

“Walker J.”