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Backgrounder

BCLI Report no. 34—Report on Spoliation of Evidence

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"Spoliation" in the legal context refers to the destruction, modification, mutilation, alteration, or concealment of evidence. In order to address these problems, the courts have developed evidentiary and procedural rules to restore accuracy to the trial process, to sanction litigants who damage, mutilate, alter, or conceal evidence, and to provide limited compensation to litigants who are harmed by spoliation of evidence. Spoliation interferes with two major policy goals of the legal system: the establishment and maintenance of a fair trial process and the quest for the truth.

The report begins by reviewing the historical development of the law of spoliation. The origins of the evidentiary rule can be traced back to Roman law, though it first appeared in English law in the early seventeenth century. The evidentiary presumption that if the spoiled evidence had been available at trial, it would have been harmful to the spoliator's case continues to exist in Canadian law. Recent application of the longstanding evidentiary presumption is discussed in detail.

This report is concerned with spoliation of evidence in relation to civil trials and looks at existing sanctions for spoliation, and the policy goals underlying those sanctions. In particular, the report looks at the procedural sanctions available under the two primary sources of civil procedure: (1) British Columbia's Rules of Court, and (2) the inherent jurisdiction of the court.

Among the Rules of Court those rules that intersect with issues arising from spoliation of evidence are examined. The most important examples of such rules are those dealing with discovery of documents, orders to preserve property, and costs. The inherent jurisdiction of the court can be understood as a reserve or residual source of powers, which the court may draw upon whenever it is just or equitable to do so. Both sources of civil procedure mentioned provide a number of sanctions that can be used to restore fairness to civil proceedings affected by spoliation, to compensate litigants impeded by spoliation, and to punish those seeking to take advantage of spoliation.

The report concludes that the British Columbia courts have taken an unduly restrictive view of their role in developing the law to combat spoliation. Consideration is given to the ways in which the substantive law may be extended to provide remedies in certain cases

involving spoliation of evidence. The report proposes reforming the evidentiary and procedural rules and the substantive law on spoliation. The proposals for reform in this report seek to promote the development of a tort of spoliation of evidence, which would provide a substantive remedy in those cases that are currently beyond the reach of the existing rules. This reform could be accomplished by legislation, by amendments to the Rules of Court, or by judicial decisions. This report, while not ruling out legislative change, focuses mainly on the role of the courts.