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### 1. Do Lawyers Owe a Fiduciary Duty to their Employees?

The Supreme Court recently [granted leave](#) to appeal from the decision of the British Columbia Court of Appeal in [Perez v. Galambos](#), 2008 BCCA 91 (CanLII) on the question of whether a lawyer is in a fiduciary relationship with an employee when there is no mutual understanding that the lawyer will only act in the employee's best interests and where a power imbalance exists between the parties that is the result of the employment relationship, the lawyer's greater knowledge and the employee's admiration for the lawyer.

The basic facts of this case are that Estela Perez, a bookkeeper and sometime client of the defendant lawyer loaned without security some \$200,000 to his law practice. Mr. Galambos assigned himself into bankruptcy and his law corporation went into receivership. In the bankruptcy proceedings, secured creditors received the funds realized from the winding-up of the practice and Ms. Perez did not recover anything. Ms Perez then brought an action against Mr. Galambos in negligence, breach of contract and breach of fiduciary duty. At first instance, the court dismissed her action on the ground that she had not established the causes of action pleaded, but on appeal, the court found that the requirements for establishing a fiduciary duty had been met and entered judgment in favour of Ms Perez in the amount of \$200,000.

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### 2. Adding Parties After the Limitation Period: MBCA

The court in [Multi Pork Inc. v. A.G. Penner Farm Services Ltd. et al.](#), 2008 MBCA 119 (CanLII) dealt with limitation periods in situations that involve claims of both shoddy workmanship and actual property damage. The matter arose when the plaintiff sought to add new parties to the claim, allegedly after the expiration of the limitation period. The court held that the parties should be added and the limitation period issue resolved after a full trial on the merits.

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### 3. Reviewing the Law of Spoliation: ABCA

In [McDougall v. Black & Decker Canada Inc.](#), 2008 ABCA 353 (CanLII) the court considered an appeal "...about lost or destroyed evidence and whether an action can or should be struck, prior to trial, on the basis of spoliation." In the process of reaching its' decision, the court provided useful review of the law of spoliation in Canada and the following summary:

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.

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#### **4. National Model Practice Direction on Using Technology in Civil Litigation**

The [Canadian Judicial Council](#) recently [announced](#) the publication of the [National Model Practice Direction for the Use of Technology in Civil Litigation](#). The *Practice Direction* provides guidance to trial judges and lawyers with respect to the best practices for exchanging evidence in electronic form and is accompanied by a [Generic Protocol](#) that could be adapted as a checklist and form of agreement between parties to establish a simplified exchange of evidence.

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#### **5. e-Discovery Case Digests**

The [e-Discovery Canada case law digest](#) has been updated to October 16, 2008. It was last updated on June 26, 2008. The digests are maintained by members of the Sedona Canada Working Group and are just one of the resources available on the [Canadian e-Discovery Portal website](#).

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