

Revisiting the Doctrine of Spoliation in the Age of Electronic Documents

By: Gideon Christian

The COVID-19 pandemic has driven us deeper into the virtual world. In our “new” work environments, conversations which were previously had one-on-one in office settings are now carried on by phone calls and emails. Meetings previously held in person are now substantially held virtually in Zoom, Microsoft Teams, WebEx, etc., and they are often recorded in electronic format. One of the impacts of this change is the fact that more than ever before, evidence of our work or business interactions, discussions and transactions will exist in this electronic format. We are generating more electronic documents than ever, and some of these documents may become the subject of discovery in future litigation arising from present transactions. The inability to produce these documents when they become relevant in future litigation may give rise to spoliation. Although the doctrine of spoliation was developed in the age of paper documents, the courts have increasingly applied it in the context of electronic documents. It is important to revisit this common law doctrine to identify the proper approach in its application to electronic documents, and its limits in addressing issues relating to preservation of electronic documents in litigation.

What is Spoliation?

Spoliation in the context of civil litigation occurs when a party intentionally destroys, mutilates, alters, or conceals evidence (usually a document) relevant to litigation. Parties to litigation or anticipated litigation have a general duty in the common law to take reasonable steps to preserve evidence relevant to the litigation. The act of spoliation is a breach of this duty to preserve such evidence. The common law doctrine of spoliation was developed to address the destruction of evidence in civil proceedings and its adverse impact on the administration of justice.

Spoliation of evidence may take various forms. Before the widespread use of electronic media in the storage of documentary information, spoliation of documentary evidence usually took the form of destruction of the document itself – such as the shredding, burning or discarding of paper documents. Historically, where the volume of paper was large, more effort would be required to successfully perpetrate the act of spoliation. However, with the advent of electronically stored information, spoliation became relatively easy. With the mere press of some keyboard buttons, a library-size folder of electronic documents can be successfully spoliated in a matter of seconds. With the increasing number of electronic documents potentially relevant as evidence in civil litigation, the ease with which spoliation can be perpetrated gives rise to some serious concern.

Spoliation in the Historical Context

The origin of the doctrine of spoliation can be traced back to ancient Rome, where an obligation was imposed on businessmen to preserve their business records or *Codex* for a specified period of time. Failure to do so would result in the application of the maxim *omnia praesumuntur contra spoliatores* (all things are presumed against the wrongdoer) in the event of litigation (*McDougall v Black & Decker Canada Inc.*, [2008 ABCA 353 \(CanLII\)](#) at para 15 (*McDougall*)). If the plaintiff was the spoliator, then the claim was dismissed and the plaintiff found guilty of fraud (Girouard J in *St. Louis v The Queen*, [1896 CanLII 65 \(SCC\)](#), [25 SCR 649](#) at 667-68 (*St. Louis*)).

The English courts adopted a fairly conservative approach to the application of the doctrine, interpreting it to mean that intentional destruction of evidence relevant to litigation raises a strong presumption that, if the evidence were available, it would be unfavourable or not helpful to the spoliator (*The Ophelia*, [1916] 2 A.C. 206, cited in *McDougall* at para 15). The Supreme Court of Canada in the 1896 decision in *St. Louis* closely followed the English Court's application of the doctrine. In *St. Louis*, a contractor engaged by the Crown to execute some construction projects intentionally (but innocently) destroyed documents relating to the projects as part of the company's routine operation. In a subsequent litigation arising from the project, the Court held that the destruction of the evidence, even though it was done intentionally and prior to litigation, was not a case of spoliation as it was done in the regular course of business when no litigation was reasonably anticipated. The Supreme Court of Canada took the position that intentional destruction of evidence should not give rise to an inference of fraud (without more), but rather to a rebuttable presumption that the evidence destroyed would have been unfavourable to the party who destroyed it (at 652-55).

Spoliation: Paper vs. Electronic Documents

Although physically distinct, the law considers paper and electronic documents to be similar in many ways. They have equal status in civil proceedings – they are both admissible in evidence to prove a fact in issue. The definition of document (or record) in our rules of court, civil procedure, and rules of evidence have evolved to include both paper and electronic documents (See Appendix, *Alberta Rules of Court*, [Alta Reg 124/2010 \(Alberta ROC\)](#); *Strength of Two Buffalo Dale v Canada*, [2020 ONSC 2926 \(CanLII\)](#) at para 8). Also, a party's discovery obligation in civil proceeding applies to all relevant and material information (see Rule [5.2\(1\)](#), *Alberta ROC*). It is irrelevant whether the information exist in paper or electronic format.

Notwithstanding these similarities, paper and electronic documents also differ in many ways. Electronic documents can be more easily replicated than paper documents. A greater volume of electronic documents can be stored in locations requiring far less space than paper documents. A library volume of electronic documents can be stored in a tiny memory stick, or even in the ubiquitous cloud. The ability to store greater volume of electronic documents in extremely smaller spaces (compared to paper documents) makes them more easily susceptible to spoliation than paper documents.

Electronic documents contain “metadata”, which also make them fundamentally different from paper documents. [Metadata](#) is “data about data.” It provides unique information about the document which is not necessarily evident on the face of the document. Metadata of a Word

document, for example, may reveal information about the filename, the dates the document was created and modified, names of the creator and editors of the document, the person who last accessed the document, and more. In the case of an email, the metadata would include the entire route of the e-mail as it travelled through the internet from the sender to the current recipient. This information is not normally available in paper documents. The concept of metadata is important in the spoliation discussion because spoliation could also take the form of alteration or destruction of the metadata. For example, converting electronic documents from their native format to hard (printed) copies would effectively destroy the metadata in the original documents (see *Harry Weiss, Inc. v Moskowitz*, [106 A.D.3d 668](#), [966 N.Y.S.2d 76](#)).

Judicial Approaches to Determination of Spoliation

Emerging jurisprudence relating to spoliation of electronic documents seems to take the position that the primary step in finding spoliation is to establish the existence of a duty to preserve the document alleged to have been spoliated. According to Michael R. Nelson and Mark H. Rosenberg, in “A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery” (2006) 12:4, *Rich. JL & Tech* 1 at 6, a finding of spoliation is “contingent upon the determination that a litigant had a duty to preserve the documents in question” at the time it was destroyed. Since documents in possession or control of a party can be viewed as property which a party has a general right to retain or destroy at will, the duty to preserve such information must either be imposed at law or voluntarily assumed by the party.

The duty to preserve electronic documents could arise from (i) statutory or regulatory requirements to preserve the information, usually for a particular period of time; (ii) a voluntary assumption of a duty to preserve information, for example a corporation’s internal document retention policy; or (iii) the long standing common law duty to preserve information when litigation has commenced or is reasonably anticipated.

Trigger and Scope of the Duty to Preserve at Common Law

It has been noted that the preservation obligation at common law arises from a “duty to preserve information because one knows or should know that it is relevant to future litigation.” (For a discussion in the context of the United States, see Benjamin Spencer, “The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court” (2011) 79 *Fordham L Rev* 2005 at 2007). In determining whether the duty exists, two main elements are essential. First, the duty has been triggered and, second, the scope of the duty can be ascertained (*Zubulake v UBS Warburg LLC*, [220 FRD 212](#), (SDNY 2003) (*Zubulake IV*)).

The trigger-point for the common law duty to preserve is the commencement of litigation or reasonable anticipation of litigation. Determining when a party reasonably anticipates litigation is subjective and dependent on the fact of each particular case. For example, an automobile accident resulting in serious bodily harm, could reasonably be anticipated to result in personal injury litigation, thus serving as a trigger-point for the duty to preserve relevant documents within a reasonable time e.g. limitation period. The duty could also be triggered when litigation is threatened by a potential litigant, or when litigation is commenced. In some cases, the court

may expressly make a preservation order for certain documents directed at one or more of the parties.

Once the duty is triggered, it is important to determine the scope of the duty. The duty to preserve does not require a party to preserve every conceivable document in its possession. A guide in the determination of appropriate scope of duty to preserve can often be found in the applicable Rules of Court or Rules of Civil Procedure relating to discovery (for Alberta, see Rule [5.2\(1\)](#), *Alberta ROC*). The scope of the duty to preserve is related to discovery obligations – that is, the obligation to disclose all documents or records relevant and material to the litigation through the discovery process. In essence, the scope of the duty to preserve is identical to the scope of a party’s discovery obligation. Where a clear duty to preserve has been triggered and the scope of the duty is reasonably ascertainable, failure to comply with the duty will amount to spoliation, giving rise to legal consequences on the part of the spoliating party.

In Canada, the current approach to determination of spoliation is consistent with the approach adopted by the Supreme Court of Canada back in 1896 in *St. Louis*. For example, the Alberta Court of Appeal in *McDougall* adopted the Supreme Court of Canada position in *St. Louis*, noting that destruction of evidence may amount to spoliation where the destruction occurred in circumstances giving rise to reasonable inference that the evidence was destroyed to affect the outcome of litigation. The inference will shift the burden to the alleged spoliator to show that the destruction was not aimed at defeating the end of justice or affecting the outcome of the litigation. In *McDougall*, the appellants lost their house to fire. The fire was allegedly caused by a faulty drill manufactured by the respondent. The respondent was informed of its possible liability for the fire, but took no immediate step to inspect the drill or the house. After the fire department and an expert hired by the appellants completed their investigations, the appellants demolished the house and began to build a new one. The drill which was alleged to have started the fire was destroyed by the expert during the investigation. The respondents sought to have the action struck on the basis of spoliation – the destruction of the drill during the investigation, and the demolition of the house. The Alberta Court of Appeal noted that the Canadian law of spoliation applies to intentional destruction of relevant evidence when litigation is existing or pending, and in this case, litigation was indeed existing and pending at the time the house and the drill were destroyed by the appellants.

Although the Alberta Court of Appeal referred the issue of spoliation back to the trial court, *McDougall* did highlight the fact that the duty to preserve evidence in anticipation of litigation should be reasonable and not rigid. It was not reasonable to expect that the appellants in *McDougall* would stay the reconstruction of their destroyed house in order to preserve the evidence pending litigation. (For more on reasonable expectations of preservation see also *Mastracci v 1882877 Ontario Inc.*, [2019 ONSC 3038](#) (CanLII) (paras 61 – 63)). Reasonableness should also apply in determination of spoliation in the context of electronic documents. For example, it may not be reasonable to impose a rigid duty to preserve electronic documents if doing so may result in a party shutting down its business’ system or routine operation. The case of *Commonwealth Marketing Group v Manitoba Securities Commission*, [2008 MBQB 319](#) (CanLII) is one of the few Canadian cases concerning the spoliation of electronic documents. The plaintiff commenced civil action against the Commission for the Commission’s conduct in investigating the plaintiff. Acting on the advice of its investigator, the Commission destroyed secret tape recordings of undercover conversations with the plaintiff’s employees. The

Court of Queen’s Bench of Manitoba in its ruling noted that although it was not expressly stated in the Rules of the Court, “[it is implicit in them and basic to our legal system that all litigants have an obligation to preserve all evidence and documents in their possession or control touching on matters that they know or ought reasonably know are in issue in their case](#)” (at para 1). The Court ruled that the destruction of the tape by the Commission was a breach of its duty to preserve the evidence.

In every case, a party seeking to prove spoliation must prove that (i) litigation existed or was reasonably anticipated when the evidence was destroyed, (ii) the evidence was relevant to the litigation, and (iii) the evidence was *intentionally* destroyed by the party. (See *Stamatopoulos v The Regional Municipality of Durham*, [2019 ONSC 603 \(CanLII\)](#) at para 606). The element of intention is important and requires a proof that the destruction was not by accident. This is because unintentional destruction of evidence is not spoliation in Canada. (See *McDougall* at para. 25).

Sanctions/Remedy for Spoliation

Although unintentional destruction of relevant and material documents is not spoliation in Canadian law, it may still attract sanction or remedy by the court. In exercise of its inherent jurisdiction, the court may impose a sanction or order a remedy to address any prejudice suffered by the innocent party as a result of the loss of the documents or records (see [Rule 5.3\(2\)\(d\)](#), *Alberta ROC*).

The only remedy for spoliation under the common law doctrine is the imposition of a rebuttable presumption (in favour of the adverse party) that the evidence destroyed would have been unfavourable to the spoliator (see *St. Louis* at 652)). Unlike in the United States (discussed below), there is no statutory codification of sanctions or remedies for spoliation of electronic records in Canada. Aside the presumption under the common law doctrine, the courts in exercise of their inherent authority have range of possible sanctions or remedies for spoliation. These include those sanctions or remedies used to address misconduct by litigants such as adverse inference, striking out a statement of claim or defence, exclusion of evidence, cost, or monetary award. (See *Western Tank & Lining Ltd. v Skrobutan et al*, [2006 MBQB 205 \(CanLII\)](#) at paras 21–23; *Dreco Energy v Wenzel*, [2006 ABQB 356 \(CanLII\)](#) at para 52). The most severe of these sanctions are usually applied in cases of spoliation involving bad faith or willful misconduct. For example, in *iTrade Finance Inc. v Webworx Inc.*, 2005 CarswellOnt 6366 (*iTrade*), the defendant used anti-forensic software to erase documents in its laptop while a court order to preserve evidence was pending. The Ontario Superior Court of Justice granted an order striking out the statement of defence.

In the United States, the [Federal Rules of Civil Procedure](#), Fed R Civ P (*FRCP*) contain provisions *specifically* dealing with sanctions for spoliation in civil proceedings. Rule 37(e) of the *FRCP* adopts two approaches in determining the appropriate sanctions for spoliation. The first approach is where there is loss of relevant electronic documents as a result of failure by a party to take reasonable steps to preserve the documents. In that case, the court may order remedial measures (e.g. exclusion of evidence) to address any prejudice on the part of the adverse party (see Rule 37(e)(1), *FRCP*). The second approach is where the spoliating party had

the intention to deprive the adverse party of the use of the information in litigation. When that happens, the court may impose more serious sanctions such as adverse inference, dismissal of the action or default judgment (see Rule 37(e)(2), *FRCP*).

It is important to note that the sanctions in Rule 37(e) *FRCP* are in addition to the inherent jurisdiction of the court to sanction misconduct by litigants. Spoliation perpetrated in bad faith may amount to misconduct. For example, in *Lester v Allied Concrete Co.*, 2011 WL 9688369 (Va Cir Ct.) (Trial Order), the plaintiff and his lawyer deliberately destroyed social media evidence with the intent to deprive the defendant access to the information. The Virginia court awarded a historic \$722,000 in sanction against the lawyer and his client for spoliation. Hence, when it comes to imposition of sanctions for spoliation, the courts in the United States do have wide range of available sanctions.

Conclusion

The vast increase in electronic documents arising from our changed work environment comes with increasing cost and difficulty in managing these documents. The custodians of these documents have a legal duty to take reasonable steps to preserve the documents where they may become relevant in current or future litigation. Once the duty is triggered and the scope is ascertainable, intentional destruction of the electronic documents will result in spoliation.

Although the doctrine of spoliation was originally developed to address the destruction or alteration of documentary evidence in paper form, recent case law dictate that the common law doctrine now applies with equal force to electronic documents. Nevertheless, the common law doctrine of spoliation does not fully address issues relating to destruction of relevant evidence in litigation. Aside from a rebuttable presumption against the spoliator, the doctrine does not provide adequate remedies/sanctions to the parties. Canadian courts may rely on their inherent authority to award serious sanctions in cases of bad faith spoliation where mere presumption against the spoliator may not be an adequate remedy (*iTrade* at para 23).

A better approach might require adopting the US model by amending our rules of civil procedure to specifically address issues relating to the preservation and use of electronic documents in litigation. The increasing generation of these documents and the ease with which they can be altered or destroyed in an attempt to frustrate litigation validates the need for this reform.

This post may be cited as: Gideon Christian, “Revisiting the Doctrine of Spoliation in the Age of Electronic Documents” (September 15, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/09/Blog_GC_Spoliation.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

