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Supreme Court of Canada Confirms Inferred Intent and Mandatory Consequences for Spoliation of Digital Evidence

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At the Forefront of Discovery

A party cannot allow relevant electronic evidence to disappear and then benefit from the uncertainty its absence creates. That is the central message of the Supreme Court of Canada ("SCC")'s decision in *SS&C Technologies Canada Corp. ("*SS&C*") v. Bank of New York Mellon Corp. ("*BNY*")*, 2026 SCC 29. Although the appeal arose from a commercial dispute over the unauthorized sharing of licensed financial data, its significance extends far beyond the underlying claim. For the first time in over 100 years, the SCC addresses spoliation. This decision clarifies that when the duty to preserve electronic evidence arises, an intention to affect the litigation may be inferred from a party's failure to preserve, and holds that once spoliation is established, an adverse inference is mandatory and must meaningfully fill the evidentiary gap left behind. The result is arguably the most consequential Canadian decision on digital evidence to date.

In SS&C, the missing evidence at issue was electronic usage data generated by BNY's operational systems. SS&C licensed proprietary financial market data to BNY under a contractual arrangement that restricted how and with whom that data could be shared. The central issue was the extent to which BNY had distributed and used that data across its affiliated entities. The answer lay in two electronic databases which recorded the use of the licensed data but retained that information for only limited periods before it was automatically deleted or moved to backup storage. When litigation became reasonably foreseeable, those systems contained precisely the evidence needed to determine who had accessed the data, how often it had been used, and the scope of any unauthorized sharing. By the time the matter reached trial, much of that information had been lost.

Spoliation is Abuse of Process

The Supreme Court begins its analysis with the purpose of the doctrine itself. Spoliation, the Court explains, is fundamentally an abuse of process. It exists to protect both the integrity of the judicial process and the court's ability to determine the truth. The doctrine reflects two core judicial principles, fairness between the parties and the preservation of the court's truth-seeking function. Where relevant evidence is intentionally destroyed or allowed to disappear after litigation is reasonably contemplated, the resulting prejudice extends beyond the opposing party, it undermines the administration of justice itself.

The Court confirmed that spoliation is established where, on a balance of probabilities:

1. the evidence was intentionally destroyed, altered, mutilated or concealed;
2. litigation was ongoing or reasonably contemplated at the time of the destruction;
3. the evidence was relevant to the litigation; and
4. it is reasonable to infer that the evidence was destroyed in order to affect the litigation.

The Court's articulation of the test itself is significant. While the elements remain grounded in traditional common law principles, the Court's application of those principles reflects the realities of modern electronic evidence. As discussed below, the judgment makes clear that the first element can be met by not preserving records that would otherwise be deleted under business retention policies, and that the fourth element does not require direct evidence of a subjective intention to suppress the truth. Rather, that intent may be inferred from the surrounding circumstances, including a party's knowledge of contemplated litigation and its failure to preserve relevant electronically stored information.

The judgment confirms that once litigation is underway or reasonably contemplated, a party cannot simply allow relevant electronic evidence to disappear or be routinely deleted under retention policies. Although the facts of the case involved an express preservation demand, the Court's reasoning is broader. The common law duty to preserve arises when litigation is reasonably contemplated, and a preservation letter simply creates an unmistakable bright line. BNY nevertheless declined to preserve the relevant usage data because it relied on its own assessment that SS&C's claim lacked merit. The Court rejected that approach. A party cannot avoid its preservation obligations based on its own view of the strength of the anticipated claim. Where a party knows litigation is coming, has the ability to preserve relevant evidence, and nevertheless allows it to be lost without reasonable justification, serious consequences may follow whether or not the party expressly refused to preserve the information.

Defensibility Becomes a Legal Standard

Although the Court never uses the term, in many respects, this a decision about defensibility. Throughout the judgment, the Supreme Court scrutinizes the reasonableness of BNY's preservation decisions, its investigation, its search methodology, and its explanations for why critical electronic evidence was no longer available. The Court was not simply concerned with whether evidence had been produced; it examined whether the processes used to preserve, search for, and account for that evidence were capable of withstanding judicial scrutiny.

For eDiscovery lawyers, this analysis is immediately recognizable. Defensibility has long been the guiding principle of electronic discovery, requiring that preservation, collection, search, review and production decisions be reasonable, proportionate, transparent and capable of explanation. While those concepts have traditionally been associated with best practices and the Sedona Canada Principles, this case effectively imports them into mainstream Canadian evidence law. The judgment demonstrates that courts are prepared to look beyond the outcome of a discovery exercise and examine the integrity of the process itself.

Adverse Inference for Spoliation is Mandatory

The real hammer of the decision is the Court's holding that, once the elements of spoliation have been established, the adverse inference is mandatory. Trial judges retain discretion regarding the precise scope of that inference, but not whether an inference should be drawn. This is a significant development. Historically, litigants often treated adverse inferences as discretionary consequences that might or might not be imposed. SS&C changes that analysis.

Intent is Inferred from Conduct

Equally significant is the Court's treatment of intent. The decision moves away from requiring direct proof that a party deliberately destroyed evidence to suppress the truth. Instead, intent may be inferred from the surrounding circumstances. Where a party knows litigation is reasonably contemplated, understands that relevant evidence exists, has the practical ability to preserve it, and nevertheless chooses not to do so, the necessary inference may arise from that conduct itself.

In the modern technological environment, this is likely to be a difficult inference to rebut. Preservation technologies are readily available. Cloud platforms routinely and easily allow litigation holds, retention overrides and inexpensive preservation of vast quantities of information. The cost and technical complexity that once accompanied preservation exercises have been dramatically reduced. As cloud computing becomes the norm, it is increasingly difficult to identify circumstances in which a party could establish a reasonable excuse for failing to preserve evidence that remained within its control.

Court Must Fill Evidentiary Gap

The Court also clarified an equally important remedial principle. The adverse inference must fill the evidentiary gap created by the missing evidence. It is not sufficient merely to acknowledge that evidence has been lost. The inference must address the specific prejudice created by the spoliation. Trial judges should therefore identify what probative evidence the missing evidence would likely have provided and fashion an inference capable of replacing, as fairly as possible to the non-spoliating party, the evidentiary value that has been lost.

Future litigation will undoubtedly focus on practical questions flowing from this analysis. Courts will likely ask what information the missing evidence could have contained; when litigation became reasonably contemplated; when any preservation demand was received; what preservation steps were technically available; and whether there was any genuine justification for failing to preserve the information.

The decision may also reshape preservation remedies. Consider *Verge Insurance Brokers Limited et al. v Daniel Sherk et al.,* 2017 ONSC 1597, in which the Ontario Superior Court ordered expensive restoration of backup tapes to recover potentially relevant evidence because Verge did not properly preserve its email. If preservation should have occurred before the evidence became inaccessible, courts may be less willing to require extraordinary and costly recovery efforts and more willing to impose robust evidentiary consequences on the party that allowed the evidence to become inaccessible in the first place.

Preserve First, Argue Later

The practical lesson for clients is straightforward: preserve first, argue later. Once litigation is reasonably contemplated, organizations should identify relevant data sources, suspend routine deletion where appropriate, implement litigation holds promptly and document the preservation steps taken. The cost of preservation is now modest compared to the potentially severe evidentiary consequences of failing to preserve relevant evidence.

SS&C is a foundational digital evidence decision. It recognizes that electronically stored information requires different legal analysis than paper records and places preservation at the center of the truth-seeking process. For Canadian litigators, this marks a significant evolution in the law. For those who work in digital evidence every day, it is a welcome recognition that defensible preservation is no longer merely best practice, it is the legal standard.