A "CENTURY" OVERDUE: REVISITING THE DOCTRINE OF SPOLIATION IN THE AGE OF ELECTRONIC DOCUMENTS

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Spoliation in the context of civil litigation occurs when a party intentionally destroys, mutilates, alters, or conceals evidence, typically documents, that are relevant to litigation. Spoliation has become easier than ever with the advent and rise of electronically stored information. This article gives a brief overview of the history of spoliation and criteria required to trigger the need to preserve documents relevant to litigation. Following this overview, the article identifies the issues with the current remedies for spoliation in Canada and points to the advances the United States has made to address this pressing issue. The article concludes with recommendations for further research into spoliation in Canada.

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I. INTRODUCTION

Parties and prospective parties in civil litigation have a common law duty to take reasonable steps to preserve evidence relevant to a pending or reasonably anticipated litigation.[1] A breach of this common law duty may result in spoliation. Spoliation in the context of civil litigation occurs when a party intentionally destroys, mutilates, alters, or conceals evidence, usually documents, relevant to litigation.[2] The act of spoliation is a breach of the duty to preserve such evidence. In Canada, the common law doctrine of spoliation was developed by the Supreme Court of Canada in 1896 to address the destruction of relevant

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1 The duty to preserve evidence relevant to litigation also arises from the inherent power of the court to impose sanctions on a party who knowingly alters or destroys evidence relevant to an action. See A Benjamin Spencer, "The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court" (2011) 79:5 Fordham L Rev 2005 at 2006–2007.

2 Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St. Paul, Minn: Thomson Reuters, 2019) sub verbo "spoliation."

evidence in civil proceedings, and its adverse impact on the administration of justice.[3] For over a century, this common law doctrine with its flaws has continued to be applied by the courts. It is now even applied to types of documents not contemplated when the rule was crafted (for example, electronic documents).

Spoliation of documentary evidence may take various forms. Before the advent of the digital age and its consequential 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 — for example, by shredding, burning, or discarding. Where the volume of the paper is large, more effort would be required to successfully perpetrate the act of spoliation. However, with the advent and rise of electronically stored information, spoliation became relatively easier than ever. With the mere press of some keyboard buttons, a library-size folder of electronic documents can be successfully spoliated in a matter of seconds.

Spoliation in civil litigation is becoming (and should be) a matter of interest to civil litigators. One of the consequences of the COVID-19 pandemic was a sudden surge in migration to the virtual work environment. For many businesses, this transition will be permanent.[4] Hence, more than ever before, evidence of our work or business interactions, discussions, and transactions will exist in electronic form. We are generating (and will continue to generate) more electronic documents than ever, and some of these documents will become the subject of discovery in future litigation arising from present transactions. The ease with which electronic documents can be destroyed or mutilated resulting in lack of discoverability in future litigation is a proper subject matter for legal discussion in the context of civil litigation. Canadian courts will, more than ever before, be called upon to address this novel issue. Canadian jurisprudence in this area is not only sparse, but outdated and out of tune with the modern realities of the digital age.

The doctrine of spoliation in Canada, as it is today, was developed by the Supreme Court over a century ago, at a time when documentary evidence in litigation existed predominantly in paper form. Expectedly, the application of a doctrine designed in the paper age to a digital era will pose some challenges. Hence, this article revisits this common law doctrine to identify the proper approach to its application to electronic documents, the limit of the doctrine in addressing issues relating to the destruction of potentially relevant electronic documents in litigation — especially, in the area of sanctions/remedies for spoliation. The article will conclude with recommendations for possible statutory codifications (in line with the United States jurisdiction) which will address the identified limits of the common law doctrine in addressing the modern realities of spoliation in the digital age.

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3 *St. Louis v The Queen*, [1896] 25 SCR 649 [*St. Louis*]. The destruction of evidence relevant to an existing or contemplated judicial proceeding with the intent to pervert or defeat the course of justice may also give rise to criminal charges such as obstruction of justice under section 139 of the *Criminal Code*, RSC 1985, c C-46. However, this article deals with destruction of evidence in a civil, not criminal context.

4 Bryan Robinson, "Remote Work Is Here To Stay And Will Increase Into 2023, Experts Say" (1 February 2022), online: <www.forbes.com/sites/bryanrobinson/2022/02/01/remote-work-is-here-to-stay-and-will-increase-into-2023-experts-say/?sh=39ef779f20a6>.

II. SPOLIATION: A 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. Failure to preserve such records would result in the application of the maxim *omnia praesumuntur contra spoliatorem* (all things are presumed against the wrongdoer) in the event of litigation.[5] If the plaintiff was the spoliator, the claim was ordinarily dismissed, and the plaintiff was found guilty of fraud.[6]

The application of the doctrine soon spread to other jurisdictions outside the Roman courts. Perhaps the United States jurisdiction represents a rigid application of the doctrine in a fashion somewhat similar to the approach by the Roman courts. There are cases where the American courts applied the maxim by either striking the claim,[7] disallowing expert reports,[8] disallowing testimony of the spoliating party's witnesses,[9] or awarding historic monetary sanctions against the spoliating party.[10] 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.[11]

Canadian courts closely followed the English Court's application of the doctrine. The leading jurisprudence in Canada is the 1869 decision of the Supreme Court of Canada in *St. Louis*.[12] In *St. Louis*, a contractor was engaged by the Crown to execute some construction projects. Following the completion of the work, the contractor's employees, as part of the company's routine operation, destroyed documents relating to the time sheet and pay records of the projects. A dispute subsequently arose over the balance due on the construction projects. The contractor brought an action in the Exchequer Court for the balance it alleged. Invoking the doctrine, the Court dismissed the case. The Exchequer Court adopted the rigid Roman interpretation of the maxim holding that the deliberate destruction of the documents was designed to cover up a fraud. The Court surprisingly reached this conclusion even though the documents were destroyed as part of the company's routine business operation before the dispute arose. On appeal, this decision was unanimously overturned by the Supreme Court of Canada, which expressed the view that the Exchequer Court decision overstretched the consequences of the maxim.

The Supreme Court of Canada further held that the destruction of the evidence in *St. Louis*, even though it was done intentionally (as it was not accidental) and prior to litigation, was not a case of spoliation, as it was done in the regular course of business when no

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5 *McDougall v Black & Decker Canada Inc*, 2008 ABCA 353 at para 15 [*McDougall*].
6 *St. Louis*, *supra* note 3 at 667–68, per Girouard J .
7 *Metropolitan Dade County v Bermudez*, 648 So (2d) 197 (Fla 1st Dist Ct App 1994); *New Hampshire Ins Co v Royal Ins Co*, 559 So (2d) 102 (Fla 4th Dist Ct App 1990); *Iverson v Xpert Tune, Inc*, 553 So (2d) 82 (Ala Sup Ct 1989); *Manzano v Southern Md Hosp, Inc*, 347 Md 17 at 29–30 (Md Ct App 1997); *Gath v M/A-Com, Inc*, 440 Mass 482 (Mass Sup Jud Ct 2003).
8 *United States v Philip Morris USA, Inc*, 327 F Supp (2d) 1 (DC Cir 2003) [*Philip Morris*].
9 *Ibid*.
10 *Ibid*, where the Court awarded $2.75 million in damages against the spoliating party.
11 *Armory v Delamirie*, [1722] EWHC KB J94; *The Ophelia*, [1916] 2 AC 206 (PC), cited in *McDougall*, *supra* note 5 at para 15.
12 *Supra* note 3.

litigation was reasonably anticipated. Thus, the Supreme Court interpreted the doctrine of spoliation to mean that intentional destruction of evidence carries a rebuttable presumption that the evidence destroyed would have been unfavourable to the party who destroyed it.[13] In the absence of clear evidence of fraud, the Supreme Court would not go as far as the Roman Court in imputing any motive of fraud. As evidenced below, this has remained the position in Canada for over a century, and provincial and territorial courts in Canada have similarly adopted this position in their interpretation of the doctrine.[14]

III. PAPER VERSUS ELECTRONIC DOCUMENTS: DISTINCTION WITH AND WITHOUT A DIFFERENCE

Although physically distinct in form, the law considers paper and electronic documents to be similar in many ways. They have equal status in civil proceedings — where relevant and admissible, either paper or electronic document could be used to prove a fact in issue. In this context, the rules of civil procedure and evidence do not give preference or priority to any, nor do they attach greater weight to any merely because of their format. The definitions of document (or record) in our rules of court, civil procedure, and rules of evidence, have evolved to include both paper and electronic documents.[15] Additionally, a party's discovery obligation in a civil proceeding applies to all relevant and material information,[16] hence, it is irrelevant whether the information exists in paper or electronic format. In *Linnen v. A.H. Robins*,[17] the Massachusetts Superior Court made an important pronouncement to this effect:

> A discovery request aimed at the production of records retained in some electronic form is no different, in principle, from a request for documents contained in an office file cabinet…. [T]here is nothing about the technological aspects involved which renders documents stored in an electronic media "undiscoverable."[18]

Notwithstanding their similarities, paper and electronic documents differ in many ways. In terms of format, paper documents exist in tangible form, while electronic documents exist in an intangible form. Unlike paper documents, electronic documents are only readable with the aid of an electronic or mechanical device. While paper documents exist in just one format — paper, in the case of electronic documents, the digital format in which the document exists may differ (for example, PDF, JPEG, TIFF, Word document, and so on). This difference in format between paper and electronic documents is particularly important in terms of their destructibility or spoliation. When a paper document is shredded or set on fire, recoverability is practically impossible. This is not the case with electronic documents, which are more persistent even in the face of destructibility. Deleting an electronic document from an electronic drive or storage media does not (without more) permanently destroy or erase the document from the drive.[19] Such a document may still be accessible or recoverable where the

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13 *Ibid* at 652–65, per Taschereau J.
14 *McDougall*, *supra* note 5; *Stamatopoulos v The Regional Municipality of Durham*, 2019 ONSC 603;
15 *Alberta Rules of Court*, AR 124/2010, Appendix [*Alberta ROC*]; *Strength of Two Buffalo Dale v Canada*, 2020 ONSC 2926 at para 8.
16 *Alberta ROC*, *ibid*, r 5.2(1).
17 1999 Mass Super LEXIS 240 (Super Ct 1999) at 8.
18 *Ibid*.
19 Michele CS Lange & Kristin M Nimsger, *Electronic Evidence and Discovery: What Every Lawyer Should Know* (Chicago: ABA, 2004) at 6. Such recovery though may require the services of a skilled computer forensic expert.

storage space previously occupied by the "deleted" document has not been overwritten by the file allocation table (FAT).[20] The document, however, may be permanently destroyed from the storage device if the spoliator utilizes a software designed for that purpose. Notwithstanding the persistent nature of electronic documents, destruction of a larger volume of electronic documents can be achieved with much ease when compared to a similar volume of paper documents, which may require more resources and effort to accomplish the same task.

Another distinction between paper and electronic documents lies in the ease of reproduction and storage.[21] Electronic documents can be more easily replicated than paper documents, and larger volumes of electronic documents can be stored in more locations requiring far less space than paper documents. A library volume of electronic documents can be stored in a tiny flash drive, or even in the ubiquitous cloud.[22] The ability to store a greater volume of electronic documents in extremely smaller space (compared to paper documents) makes them more easily susceptible to spoliation than paper documents.

Electronic documents contain "metadata," which also makes them fundamentally different from paper documents. Metadata is "data about data."[23] It provides unique information about the document which is not necessarily evident on the face of it. Metadata would usually differ depending on the type of electronic document. Metadata of a Word document, for example, may contain 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 electronic mail (email), the metadata would include the entire route of the email 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 in an electronic document. For example, converting an electronic document from its native format to a hard (printed) copy would effectively destroy the metadata in the original document.[24]

Furthermore, the difference between paper and electronic documents is also important in the context of trying to determine whether the destruction of a document was intentional, or whether it was done in the normal course of business operations.[25] It might be easier to establish intentional destruction in the case of paper documents, as it will require some physical activity on the part of the spoliator to effect the destruction. This might be more complicated in the case of electronic documents, where the system could be set to overwrite the information in the storage medium or automatically delete information that has outlived

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20 *Ibid*.
21 *Ibid*.
22 *Ibid*.
23 *Ibid*.
24 *Harry Weiss, Inc v Moskowitz*, 106 AD (3d) 668 (NY Sup Ct App Div 1st Dept 2013) at 670. In *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, 2007 US Dist LEXIS 2650 at *5–*6 (EDNY Dist Ct 2007), at the discovery stage of the litigation, the plaintiffs printed out the document and then scanned the printed document thus destroying all metadata from the files. The Court stated that documents which exist in electronically searchable form "should not be produced in a form that removes or significantly degrades this [metadata] feature." *Ibid* at 14.
25 Robert A Weninger, "Electronic Discovery and Sanctions for Spoliation: Perspectives from the Classroom" (2012) 61:3 Cath U L Rev 775 at 786.

its retention period. Thus, the similarities and dissimilarities between paper and electronic documents are important considerations in seeking to apply a doctrine developed in the age of paper documents to an era of electronically stored information.

IV. THE RISE AND RISE OF ELECTRONICALLY STORED INFORMATION

It has been estimated that more than 90 percent of documents today exist in electronic form.[26] Electronic documents are currently being created and replicated in volumes that outpace and outnumber paper documents.[27] In many cases, paper documents are now conveniently being replaced by electronic documents.[28] The COVID-19 pandemic, which forced a global shutdown of in-person offices and relocation to virtual offices, has also resulted in the proliferation of electronic information. The migration to a virtual work environment continues to reduce the need for and production of paper documents, replacing them with a greater volume of electronic documents. Additionally, the decreasing cost of electronic document storage is further increasing the electronic document surge.[29]

A typical laptop today has a hard drive of about two hundred gigabytes — a capacity to hold about 13 million pages of word documents. Cloud storage is providing even bigger storage capacity at a fraction of the cost in previous years. The incentives any individual or business has in keeping or storing documents in paper form is now disappearing. Another factor responsible for the increasing surge of electronic documents is the ease with which they can be created and replicated. The same email could be conveniently sent to thousands of persons on a listserv at the fraction of time and cost it would take to create and send a paper version of the same correspondence to the same number of people. Recipients of the email could also forward the same as well as any accompanying attachment to others, thus creating an endless labyrinth of electronic documents. The volume of electronic documents is further compounded by the fact that most organizations do keep backups.[30]

The proliferation of electronic documents as well as the ease with which such documents can be destroyed or spoliated is of particular importance in civil litigation. Aside from the fact that such proliferation results in an increased cost of discovery, the ease with which the documents could be destroyed has an adverse impact on the administration of justice. While the doctrine of spoliation was developed to deal with the latter situation, this article takes the position that the proliferation of electronic documents requires that we fine-tune the existing

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26 "The Difference between Electronic and Paper Documents," online: *George Washington University* <www2.seas.gwu.edu/~shmuel/WORK/Differences/The%20Difference%20between%20Electronic%20and%20Paper %20Documents.html>.

27 Lange & Nimsger, *supra* note 19 at 6.

28 For example, while the volume of email sent daily continues to rise, the reverse seems to be the case with postal mail. A Canada Post Report noted that in 2014, the Crown corporation delivered 1.4 billion fewer pieces of mail than it did in 2006. The Report noted that in 2014, the volume of mail processed by Canada Post fell by about 5 percent compared to the previous year. This was also similar to the decline in preceding years. See Canada, Canada Post, *Annual Report 2014* (Ottawa: Canada Post, 2014) at 38, online (pdf): <www.canadapost-postescanada.ca/cpc/en/our-company/about-us/financial-reports/annual-reports/archive-annual-reports.page>.

29 Max Burkhalter, "The Cost Savings of Cloud Computing" (4 May 2021), online: <www.perle.com/articles/the-cost-savings-of-cloud-computing-40191237.shtml>.

30 Dan Pinnington, "Why Electronic Documents are Different," *LAWPRO Magazine* (September 2005), online (pdf): <www.practicepro.ca/2005/09/why-electronic-documents-are-different/>.

doctrine, as well as develop new rules to adequately address new issues and challenges that have risen since the development of the doctrine, to bring it in-line with the realities of the digital age. Predictably, the world will continue to witness the proliferation of electronically stored information in various formats. Thus, it is important to have rules that deal with the current as well as future realities arising from the increasing generation of potentially relevant electronic documents in civil litigation.

V. DETERMINATION OF SPOLIATION

Jurisprudence on spoliation seems to take the position that the primary step in finding spoliation is to establish the existence of a duty to preserve the document allegedly spoliated.[31] It has been noted that a finding of spoliation is "contingent upon the determination that a litigant had the duty to preserve the documents in question" at the time they were destroyed.[32] However, documents in the possession or control of a party may also qualify as property — in which case the party has a general right to retain or destroy it at will. Thus, it is important to show that, at the time the alleged spoliator destroyed the document(s), they did so in breach of an existing duty to preserve such property.

A party's obligation to preserve documents could be evidenced from: (1) an overriding statutory or regulatory requirement to preserve certain documents, usually for a fixed period;[33] (2) a voluntary assumption of the duty to preserve certain documents, for example, a corporation's internal document retention policy or by contract; or (3) the long-standing common law duty to preserve relevant documents when litigation has commenced or is reasonably anticipated.[34] The preservation obligation in the context of litigation has been described as a "duty to preserve information because one knows or should know that it is relevant to future litigation."[35] Thus, where a relevant document was destroyed in breach of the duty to preserve, it becomes less relevant that the party was exercising their general property right when they destroyed the document. Rather, the act becomes even more relevant to the allegation of spoliation.

Proof of spoliation starts with establishing the existence of a duty to preserve. Two important factors are essential in making that determination. First, it must be shown that the duty has been triggered, and second, the scope of the duty can be ascertained.[36]

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31 *St. Louis*, *supra* note 3; *Zubulake v UBS Warburg LLC*, 220 FRD 212 at 216 (SDNY Dist Ct 2003) [*Zubulake IV*].

32 Michael R Nelson & Mark H Rosenberg, "A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery" (2006) 12:4 Rich JL & Tech 1 at 6.

33 Some statutory or regulatory requirements obligate the retention of electronic documents for a particular period of time. In the absence of any pending or anticipated litigation, the party is at liberty to destroy the document following the expiration of that period of time. See e.g. *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 37.

34 The common law duty to preserve supersedes any shorter regulatory requirement or document retention policy in the sense that, where litigation is reasonably anticipated, even if the statutory or corporate retention period has expired, the party is not at liberty to destroy the documents. In fact, the party in such situation has a common law obligation to continue the preservation of the relevant documents in view of the litigation or anticipated litigation. In the US case of *Zubulake IV*, *supra* note 31 at 218, the Court noted that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."

35 For a discussion in the US context, see Spencer, *supra* note 1 at 2007.

36 *Zubulake IV*, *supra* note 31 at 216.

A. TRIGGER OF DUTY TO PRESERVE

As noted above, the duty to preserve documents could be imposed by statute — in most cases for regulatory purposes — or voluntarily assumed by a corporation as part of its corporate document retention policy or by contract. In the context of litigation, the common law duty is the superseding standard for establishing if and when the duty to preserve is triggered. This is because a regulatory or voluntarily imposed duty to preserve is triggered when the document is created and dies at the expiration of the regulatory or voluntarily imposed timeline. At common law, the duty is triggered when litigation is commenced, as well as when a party "reasonably anticipates litigation,"[37] or "should have known that the evidence may be relevant to future litigation."[38] Once triggered at common law, the duty continues to exist even after the expiration of any regulatory or voluntarily imposed duty to preserve.

The trigger of the duty at common law could be express or implied. The duty could be objectively triggered when litigation is commenced or realistically threatened by a potential litigant. This is more certainly the case where a party is served with a preservation notice.[39] The party served with such notice must preserve the documents relevant to the litigation or anticipated litigation within the period specified in the notice, or within a reasonable time frame. This may entail (in the case of a corporation) issuing a legal hold on data/record custodians.[40] In even more objective cases, the court may expressly make a preservation order directed at one or more of the parties.

The duty to preserve might be impliedly triggered when a party reasonably anticipates litigation. Determining when a party reasonably anticipates litigation is subjective and dependent upon the facts of each case. It may arise from the occurrence of an incident that may reasonably be anticipated to result in litigation. For example, an automobile accident resulting in serious bodily harm could reasonably be anticipated to result in personal injury litigation. Thus, even in the absence of, or prior to service of a preservation notice, the nature of the incident would reasonably trigger a duty on a prospective party in possession of vital evidence relating to the incident (such as video footage) to preserve the evidence for at least within the statutory limitation period.

B. SCOPE OF DUTY TO PRESERVE

It is important to determine or identify the documents that could reasonably be anticipated to be relevant to the commenced or anticipated litigation. This determination is important because, even where the duty to preserve is triggered, it would not be reasonable to expect

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37 *Univ of Montreal Pension Plan v Banc of Am Sec*, 685 F Supp (2d) 456 at 466 (SDNY Dist Ct 2010).

38 *Fujitsu Ltd v Fed Express Corp*, 247 F (3d) 423 at 436 (2d Cir 2001).

39 A preservation notice, sometimes referred to as a legal hold notice, is a notice requiring a legal person to preserve specific information, documents, or records in their possession or control and relevant to a claim against it. The purpose is to ensure that the information, documents, or records are available for discovery.

40 The legal hold informs the record custodians of existing or impending litigation and requests they take steps to preserve records or documents relevant to the litigation.

a party to preserve every conceivable document in its possession.[41] This would be burdensome, unreasonable, and costly. It has been noted that the "duty to preserve potentially discoverable information does not require a party to keep every scrap of paper" in its possession or control.[42] That notwithstanding, parties need to make a reasonable determination of the scope of the duty. For the party in possession of the documents, determining the scope of the duty is important because failure to do so may result in a breach of the duty and hence, a finding of spoliation. It is also important for the party sending a preservation notice to the opposing party (a trigger) to indicate the documents likely covered by the notice (scope); otherwise, while the duty to preserve may arise (technically), the receiving party may not preserve all the documents the opposing party may want them to preserve either because they do not know what will be sought later on, or they are unsure what documents might be relevant to the yet-to-be-commenced litigation.

As vital as the scope of the duty to preserve appears to be, there is no clear-cut rule for making that determination. Even the mere sending or receipt of a preservation notice specifying the scope of the duty to preserve does not necessarily imply that the receiving party is bound by the scope indicated in the notice, especially where the notice is (and sometimes could be) unreasonably broad and may appear to be a fishing expedition.

A guide to the determination of the appropriate scope of the duty to preserve can often be found in the applicable Rules of Court or Rules of Civil Procedure relating to discovery.[43] The scope of the duty to preserve is related to discovery obligations — that is, the obligation to disclose all documents or records relevant to the litigation through the discovery process. Hence, the scope of the duty to preserve could be interpreted in this context to extend to all potentially *relevant* documents (or records).[44] In essence, the scope of the duty to preserve is identical to the scope of a party's discovery obligations in civil litigation. Where a clear duty to preserve has been triggered and the scope of the duty is reasonably ascertainable, failure to comply with the duty may result in spoliation, giving rise to legal consequences on the part of the spoliating party.

VI. THE CANADIAN APPROACH TO DETERMINATION OF SPOLIATION

In Canada, the current approach to the determination of spoliation is still guided by the Supreme Court of Canada jurisprudence dating back to the 1896 decision in *St. Louis*.[45] It is concerning that the rule currently applicable to the determination of spoliation of electronic documents in Canada was crafted over a century ago — at a time when electronic documents

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41 In *Zubulake IV*, *supra* note 31 at 217, Judge Scheindlin queried: "Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no.'"

42 *In re Old Banc One S'holders Secs Litig*, 2005 WL 3372783 at 4 (NDIll Dist Ct 2005).

43 For Alberta, see e.g. *Alberta ROC*, *supra* note 15, r 5.2(1); Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194, r 30. See also *Federal Courts Rules*, SOR/98-106, r 222.

44 In the *Alberta ROC*, *ibid*, a record or information is deemed to be relevant (and material) if it "could reasonably be expected (a) to significantly help determine one or more of the issues raised in the pleadings, or (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings." See *Alberta ROC*, *ibid*, r 5.2(1). In the *Federal Courts Rules*, a document is relevant "if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case." See *Federal Courts Rules*, *ibid*, r 222(2).

45 *Supra* note 3.

or records had neither been invented nor conceived. Also, the concept of document has since evolved beyond what was reasonably contemplated by the Supreme Court at the time it developed the doctrine.

The documents destroyed in *St. Louis* were paper accounting records relevant to a dispute that subsequently arose between the parties. The documents, if available, would have been admissible at trial. But the documents were destroyed as part of the appellant's routine business operation, at a time when no litigation had commenced or was reasonably anticipated. The Supreme Court of Canada declined to make any finding of spoliation. While the Supreme Court did not go into a detailed analysis of the requirement of the duty to preserve the documents, the fact that the documents were destroyed by the appellant in the normal course of its business operation, and at a time when no litigation was anticipated, seems to negate any duty to preserve the documents at the time they were destroyed. In the absence of that duty, it was practically impossible to prove spoliation. In this regard, *St. Louis* seems to support the principle that the absence of a duty to preserve a document or record makes it more difficult to establish spoliation.[46] The fact that the documents were destroyed in the normal course of the business operation when no litigation was anticipated also goes further to negate the Exchequer Court's finding (which was overturned by the Supreme Court on appeal) that the alleged spoliator acted fraudulently in destroying the documents.[47]

Decisions by provincial courts in Canada have also added to the body of growing jurisprudence on spoliation in Canada. While aligning with the Supreme Court of Canada's position in *St. Louis*, the Alberta Court of Appeal in *McDougall* noted that the destruction of evidence may amount to spoliation where the destruction occurred in circumstances giving rise to a reasonable inference that the evidence was destroyed to affect the outcome of litigation.[48] The appellants, in that case, had 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 it took no immediate steps 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 reconstruction. 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 based on spoliation, including the destruction of the drill during the investigation and demolition of the house. The Court of Appeal noted that Canadian law on spoliation entails *intentional* destruction of relevant evidence when litigation was existing or pending.[49]

In the *McDougall* case, litigation was reasonably anticipated at the time the house and the drill were destroyed by the appellants. The case, however, did not provide much guidance

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46 *Ibid*.

47 It is important to note that the destruction of the documents in *St. Louis*, *ibid*, while intentional, was not made with the intent to deprive the opposing party in a litigation access to the documents. Thus, "intention" in the definition of spoliation should be interpreted to mean the intent to keep the document away from access by opposing party.

48 *McDougall*, *supra* note 5 at 18.

49 Though it noted that even in the case of unintentional destruction of evidence (which is not spoliation in Canadian law), the court could exercise its inherent jurisdiction to prevent abuse of process (or address prejudice to the opposing party) by granting the appropriate remedy. *Ibid* at 25.

on spoliation as it relates to the specific facts of the case. For example, while the fact that an insured home was destroyed by fire could give rise to reasonable anticipation of litigation, would it be reasonable to expect the homeowner or its insurer to continue to preserve the razed home as evidence in anticipation of litigation, and for how long? If they decide to tear down the building preparatory to reconstruction, as was the case here, would that amount to a breach of their common law duty to preserve evidence in anticipation of litigation? The Court of Appeal did not weigh in on these issues; rather, it hurriedly sent the case back to the Trial Court to decide on spoliation. However, what is evident from the facts in this case is that the duty to preserve evidence in anticipation of litigation should be reasonable and not rigid. This would also apply to the determination of spoliation in the context of electronic documents. It may not be reasonable to impose a rigid duty to preserve electronic documents on a party if doing so may bring the party's routine business operation to a standstill. What should be required of a party is an obligation to take reasonable steps to preserve documents relevant to litigation.[50]

The case of *Commonwealth Marketing Group Ltd v. The Manitoba Securities Commission* is one of the few Canadian cases on spoliation of electronic documents.[51] The plaintiff in *Commonwealth Marketing* commenced a civil action against the Commission for its 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 ruled that the destruction of the tape by the Commission was a breach of its duty to preserve the evidence. The Court linked the parties' preservation obligation to their obligations in the Rules of the Court. It noted that while the preservation obligation is 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."[52] Suffice it to say that the obligation set forth here is very similar, if not identical, to the common law duty noted earlier.

Justice Copeland in *Stamatopoulos v. The Regional Municipality of Durham*[53] summarized the requirement for proof of spoliation thus:

> [T]o prove spoliation, a party must prove: (i) that relevant evidence was destroyed; (ii) that legal proceedings existed or were pending; and (iii) that the destruction was an *intentional* act indicative of fraud or *intent to suppress the truth*.[54]

While a finding of a duty to preserve is vital to proof of spoliation, equally important is the element of intent. The current state of the law in Canada suggests that spoliation can only occur where there is *intentional* destruction of evidence. It is submitted that the *intention* here is not just about the act of willful or deliberate destruction or alteration of the document, but most importantly, it relates to a state of mind indicative of a *mala fides* desire to prevent the

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50 For more on reasonable expectations of preservation, see *Mastracci v 1882877 Ontario Inc*, 2019 ONSC 3038 at paras 61–63.
51 2008 MBQB 319 [*Commonwealth Marketing*].
52 *Ibid* at para 1.
53 2019 ONSC 603.
54 *Ibid* at para 606 [emphasis added].

use of the document in litigation, to suppress the truth, and hence, impact the outcome of the litigation. In the *St. Louis* case, the Supreme Court of Canada in reversing the trial judge's finding of spoliation noted that "the evidence did not warrant the finding that the documents had been destroyed with a *fraudulent intent*."[55] Similarly, in *McDougall,* the Alberta Court of Appeal unequivocally stated that "unintentional destruction of evidence is not spoliation."[56] It went further to state that *St. Louis* stands for the proposition that

> [s]poliation 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*.[57]

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*, it appears that the drill was destroyed by the investigator in the course of the investigation, which required disassembling the components. Also, the house in that case was destroyed by the owner for the purpose of reconstruction. Thus, it appears that the destruction of the evidence here, though intentional (in the sense that it was not negligent or accidental), was not to prevent the use of the evidence in litigation or defeat the end of justice. In *Tarling v. Tarling*, the defendant beneficiary abruptly wiped out the testator's computer hard drive shortly after the testator's death.[58] While the formatting of the hard drive here was "intentional," the Ontario Superior Court concluded from the facts of the case that it was not done to destroy relevant evidence. Thus, this article takes the position that the intention required for the purpose of establishing spoliation is a state of mind (during the course of destruction or alteration of the documents) aimed at impacting an existing or anticipated litigation.[59]

VII. SANCTIONS AND REMEDIES FOR SPOLIATION

One area where the century-old spoliation rule in Canada has proved inadequate and hence, warranting necessary change, relates to the inadequate remedy or sanction for spoliation provided under the rule. The proper administration of justice is premised on the fair adjudication of disputes between litigants. This is dependent (among other things) on the parties disclosing relevant evidence in their possession or control as well as obtaining the same in the possession or control of the opposing parties.[60] Destruction of documents relevant to litigation impacts the fair administration of justice. The main difference between intentional and unintentional destruction of documents relevant to litigation in Canadian law is that, while the former *may* amount to spoliation, the latter will not. That notwithstanding, the two share something in common, they may attract sanctions or remedies by the court, and where the intentional destruction was aimed at depriving the opposing party of the use of the

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55 *St. Louis*, *supra* note 3 at 649 [emphasis added].
56 *McDougall*, *supra* note 5 at para 25.
57 *Ibid* at para 18 [emphasis added].
58 2008 CanLII 38264 (Ont Sup Ct).
59 See also *Dawes v Jajcaj*, 1999 BCCA 237; leave to appeal denied, [1999] SCCA No 347 (SCC). In *Dyk v Protec Automotive Repairs* (1997), 151 DLR (4th) 374 (BCSC), the Court noted that even though the evidence in that case was intentionally destroyed by a testing expert, there was no spoliation as the destruction was not the result of bad faith or *intention* to suppress the truth.
60 Maria Perez Crist, "Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information" (2006) 58:1 SCL Rev 7 at 44.

relevant documents in litigation (hence spoliation), the act will generally attract greater sanction/remedy.

There are various sanctions and remedies available to the court in established cases of destruction of documents relevant to litigation. In Canadian law, these sanctions and remedies arise from common law (for example, the doctrine of spoliation) as well as from the inherent power of the court to prevent abuse of process and to ensure proper administration of justice. In the exercise of its inherent power, the court may impose a sanction or order a remedy to address the misconduct by a party or any prejudice suffered by the innocent party as a result of the misconduct.[61] These sanctions or remedies include adverse inference, striking out a statement of claim or defence, exclusion of evidence, cost, or monetary award.[62] The most severe of the sanctions are usually applied in cases of spoliation involving bad faith or egregious misconduct.[63] For example, in *iTrade Finance Inc. v Webworx Inc*., the defendant deliberately used anti-forensic software to erase documents in its laptop while a court order to preserve evidence was in effect.[64] The Ontario Superior Court of Justice granted an order striking the spoliator's statement of defence.

From a practical perspective, it is best to seek the extreme sanction of striking a claim or defence at the pretrial stage of the litigation. If successful, it terminates the litigation and saves the party the cost of trial. However, caselaw has shown the reluctance by Canadian courts to impose this sanction at this stage.[65] In *McDougall*[66] and *Commonwealth Marketing*,[67] the Courts were very reluctant to grant this remedy at the pretrial stage because the Courts reasoned that the spoliation issue is best left for trial. In *McDougall*, the chamber judge had struck the plaintiff's claim because of alleged spoliation by the plaintiff, but the Alberta Court of Appeal reversed the decision. The Court gave the following reason for reversing the chamber judge's decision:

> As a general rule, determining whether spoliation has occurred, and what relief should follow, if any, is a matter best left to the trial judge who can consider all of the surrounding facts. While the court always has the inherent jurisdiction to strike an action to prevent an abuse of process, it should not do so where a plaintiff has lost or destroyed evidence, unless it is beyond doubt that this was a deliberate act done with the clear intention of gaining an advantage in litigation, and the prejudice is so obviously profound that it prevents the innocent party from mounting a defence. These conditions are not close to being met in this case.[68]

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61 *Alberta ROC*, *supra* note 15, r 5.3.

62 *Western Tank & Lining Ltd v Skrobutan*, 2006 MBQB 205 at paras 21–23; *Dreco Energy Services Ltd v Wenzel*, 2006 ABQB 356 at para 52. See also the US case of *Lester v Allied Concrete Co*, 2011 WL 9688369 (Va Cir Ct) (Trial Order). In *Philip Morris*, *supra* note 8, the US Court used a combination of witness exclusion and monetary award.

63 Courts are usually vested with power under their rules or Rules of Civil Procedures to dismiss an action or strike a pleading where the party is in breach of rules relating to discovery for example, spoliation. For example, Rule 30.08(2)(b) of the Ontario *Rules of Civil Procedure* provides that where a party fails to produce documents for inspection or comply with the order of the court, the court may "dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant." See Ontario, *Rules of Civil Procedure*, *supra* note 43, r 30.08(2)(b).

64 [2005] 255 DLR (4th) 748 (Ont Sup Ct) [*iTrade*].

65 In *Cheung v Toyota Canada Inc*, 2003 CanLII 9439 (Ont Sup Ct); *Douglas v Inglis Ltd* (2000), 45 CPC (4th) 381 (Ont Sup Ct), the Court acknowledged that in particularly egregious circumstances a pretrial remedy might be available for spoliation up to and including dismissal of the claim.

66 *McDougall*, *supra* note 5.

67 *Commonwealth Marketing*, *supra* note 51.

68 *McDougall*, *supra* note 5 at para 4.

Thus, from the Court's reasoning above, dismissal is an appropriate pretrial sanction for spoliation where there is clear evidence to show that the act was deliberately perpetrated to adversely impact the outcome of the litigation, and the act was so profound that it affected the ability of the other party to pursue its claim or defend the claim against it. Where these conditions are not evident, then the court may resort to some other remedy short of dismissal or default judgment. Some US courts, like the Canadian courts, apply this sanction in the most severe cases of spoliation involving bad faith and willful misconduct. In some cases, the court has granted full or partial default judgment,[69] while in others, it struck the statements of claim or defence.[70] Some US courts, like their Canadian counterparts, are also of the view that granting this extreme remedy should be reserved for trial except in the most egregious of cases.[71]

Let us now turn to the most problematic aspect of the Canadian law on spoliation. Based on the current state of Canadian jurisprudence, the only sanction or 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.[72] The principle behind this adverse inference is based on common sense reasoning that a party is more likely to destroy evidence that is detrimental to its case than evidence that is favourable to it.[73] The common law doctrine of spoliation does not fully address issues relating to the destruction of relevant evidence in litigation. A rebuttable presumption against the spoliator may not always be an adequate remedy to the victim or adequate sanction to the spoliator.

There are situations where the common law rebuttable presumption may not be an adequate remedy to address the prejudice caused by the spoliator. For example, in cases of egregious, bad faith spoliation as evident in *iTrade*, the common law remedy would have been grossly unjust considering the circumstances of that case.[74] Although the courts may resort to their inherent authority in cases where the common law remedy is inadequate, the increasing generation of electronic documents, the dynamic nature of the documents, as well as the ease with which spoliation of electronic documents can be perpetrated, warrant the need for specific statutory provisions to address this novel area of spoliation. The Canadian legal system can (and should) no longer continue to rely on an over a century-old rule to seek to address a problem that was never contemplated at the time the rule was crafted. Going further, this article will consider the US approach to addressing this issue, as well as its implication for a possible reform of the Canadian civil litigation system.

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69 *Coleman (Parent) Holdings, Inc v Morgan Stanley & Co, Inc*, 2005 WL 674885 (Fla Cir Ct 2005). In *Daynight, LLC v Mobilight, Inc*, 248 P (3d) 1010 at 1012 (Utah Ct App 2011) [*Daynight*], the Court of Appeals of Utah confirmed a lower Court's entry of default judgment against a third-party defendant who destroyed evidence contained in a laptop by running over the laptop with a vehicle. The Court noted the conduct unquestionably demonstrated bad faith and a disregard for the judicial process.

70 *In re Kmart Corp*, 371 BR 823 (NDIll ED Bankr 2007) at 39.

71 *Ibid*.

72 *St. Louis*, *supra* note 3 at 652.

73 Lauren R Nichols, "Spare the Rod, Spoil the Litigator? The Varying Degrees of Culpability Required for an Adverse Inference Sanction Regarding Spoliation of Electronic Discovery" (2011) 99:4 Ky LJ 881 at 885.

74 *iTrade*, *supra* note 64. See also *Daynight*, *supra* note 69.

VIII. THE US APPROACH

As noted above, the common law adverse inference against a spoliator does not provide an adequate remedy in many cases of spoliation. Although the court may resort to its inherent power where the common law remedy is inadequate, the fact is that such discretionary power could result in uncertainty and similar cases of spoliation being treated differently by different courts. The proliferation of electronic documents, the cost of their preservation, and the ease of their destructibility give rise to the need for certainty in this area. This is especially the case for data custodians who may need to assess the legal risks associated with their data preservation efforts.

Efforts to address the uncertainty surrounding sanctions and remedies for the destruction of electronic documents resulted in changes to the US *Federal Rules of Civil Procedure* in 2015.[75] Unlike Canada, the US *FRCP* has rules *specifically* dealing with sanctions or remedies for the destruction of electronically stored information relevant in civil proceedings. The change in the US jurisdiction started with the 2006 *FRCP* 37(f), which restrained the court, absent exceptional circumstances, from imposing sanctions for loss of electronically stored information relevant to litigation where the loss occurred "as a result of the routine, good-faith operation of an electronic information system."[76] This was followed by another amendment to the *FRCP* 37(f) in 2015. The 2015 amendment provided some greater clarity on judicial sanctions for the destruction or loss of electronically stored information relevant to litigation in situations where a party fails to take reasonable steps to preserve the document, and the document cannot be recovered.[77] The 2015 *FRCP* 37(e) provides:

> (e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> > (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> >
> > (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
> >
> > > (A) presume that the lost information was unfavorable to the party;
> > >
> > > (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> > >
> > > (C) dismiss the action or enter a default judgment.

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75 2015 Fed R Civ P [*FRCP*].
76 2006 Fed R Civ P, r 37(f).
77 *FRCP*, *supra* note 75, r 37(e).

The 2015 *FRCP* 37(e) provides two different approaches to the determination of appropriate remedies for the loss of electronic documents relevant to litigation. Before the application of any of the approaches though, three things must be established: first, the lost electronic documents "should have been preserved in the anticipation or conduct of litigation."[78] This implies the presence of a duty to preserve the documents. Rule 37(e) does not create a new duty to preserve, rather it codifies the common law rule. Second, the documents must have been lost because "a party failed to take reasonable steps to preserve it."[79] It appears that the scope of Rule 37(e) is broad to cover cases of intentional and unintentional destruction or loss of relevant documents. Finally, it must be shown that the lost electronic documents "cannot be restored or replaced through additional discovery."[80] Loss of the documents will not invoke the application of Rule 37(e) if the documents are recoverable using the appropriate technological tool or skill.[81]

Where the three factors above have been established, the court is required to use one of the two approaches in Rule 37(e) (1) and (2) to determine the appropriate remedy for the loss of the relevant electronic documents. First, if the loss of the documents resulted in prejudice to the party, the remedy is limited to those "necessary to cure the prejudice" and nothing more.[82] While the rule here does not provide any specific remedy, it clearly sets out the objective to which the remedy must seek to achieve. Taking this objective and the circumstances of each case into consideration, the court is guided by its discretion to craft the appropriate remedy. Thus, Rule 37(e)(1) deals with cases of unintentional destruction or loss of relevant documents. This fact emerges from a reading of Rule 37(e)(2), which specifically requires proof of intent as a condition for the imposition of the sanctions outlined therein.

Rule 37(e)(1) provides less extreme remedies for good faith (unintentional) destruction of relevant documents such as destruction arising from the implementation of routine document retention/deletion policies.[83] The remedies here are less extreme and limited because the court cannot apply the sanctions outlined in Rule 37(e)(2) (adverse inference and default judgment) to cases falling under Rule 37(e)(1). As discussed below, the former deals with more serious cases than those contemplated in the latter.

The second approach to the determination of remedies for the destruction of relevant electronic documents in the US *FRCP* is found in Rule 37(e)(2). This rule specifically deals with *intentional* destruction of electronic documents relevant to litigation with the specific "intent to deprive another party of the information's use in the litigation."[84] This is the US equivalent of the Canadian concept of spoliation. Thus, the rule requires a finding of "the

78 *Ibid*.
79 *Ibid*.
80 *Ibid*.
81 This should take into consideration the concept of proportionality — the cost of recovering the document should be proportional to its relative importance in proof of or defence of the litigation. Hence, a document should not be deemed to be recoverable if the cost of recovery exceeds the claim in the litigation.
82 *FRCP*, *supra* note 75, r 37(e)(1).
83 Agnieszka McPeak, "Self-Destruct Apps: Spoliation by Design?" (2017) 51:3 Akron L Rev 749 at 757–58.
84 *FRCP*, *supra* note 75, r 37(e)(2).

intent to deprive another party of the information's use in the litigation."[85] On finding such intent, the court may draw an adverse inference or instruct the jury (in the case of a jury trial) that it may or must draw the adverse inference.[86] Another remedy available to the court in these circumstances would be to dismiss the action or enter a default judgment in favour of the victim of the spoliation.[87]

Rule 37(e)(2) introduced a uniform standard for the imposition of sanctions for spoliation in the US federal courts.[88] The imposition of an adverse inference only in cases of intentional destruction of relevant documents in Rule 37(e)(2), and not in Rule 37(e)(1), is somewhat in line with the Supreme Court of Canada jurisprudence in *St. Louis*, which limits that particular sanction to cases of destruction with intent (that is, spoliation).

It is instructive to note that, unlike Rule 37(e)(1), Rule 37(e)(2) does not require proof or finding of prejudice. The presence of prejudice is subsumed by the requirement of intent to deprive. A finding that the party destroyed a document with the intent to deprive the other party of its use in litigation is indicative that the document was not favourable to the party who destroyed it, and also supportive of a presumption that the loss of that document was prejudicial to the victim. The intent to deprive arises from the spoliator's view that the document is adverse to its case or beneficial to the opponent. Hence, the deprivation of the use of the document results in prejudice to the other party.

A finding of intentional spoliation does not necessarily imply that the court must apply any of the sanctions in Rule 37(e)(2). This is evident from the use of the permissive word "may" in Rule 37(e)(2). While flexibility is important in crafting sanctions that fit the act of the spoliator, the provision in Rule 37(e)(2) provides a standard guide for crafting such sanctions in the US federal courts. Suffice it to say that Rule 37(e) generally does provide a guide for the determination of appropriate sanctions in relation to destruction of electronic documents relevant to litigation.[89] This helps create some measure of certainty.

IX. CONCLUSION

Over a century after the doctrine of spoliation was developed by the Supreme Court of Canada, the doctrine is overdue for a reform that will bring it in line with the modern realities of the digital age. The meaning and concept of document have evolved beyond what was reasonably contemplated by the courts at the time the doctrine was developed. Additionally, the dynamic nature of an electronic document, its proliferation, and the ease of destruction necessitates a revisiting of the doctrine. Of greater concern is the sanction provided for spoliation under this common law doctrine. The lone sanction of adverse inference is not a one-size-fits-all. In cases where the spoliated document is tangentially relevant to the

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85 *Ibid*. This is in line with my previous discussion of the concept of "intention" in the Canadian spoliation jurisprudence.

86 *Ibid*, r 37(e)(2)(B).

87 *Ibid*, r 37(e)(2)(C).

88 Jeffrey A Parness, "Presuit Civil Protective Orders on Discovery" (2021) 38:2 Ga St U L Rev 455 at 464.

89 Alexander Nourse Gross, "A Safe Harbor from Spoliation Sanctions: Can an Amended Federal Rule of Civil Procedure 37(e) Protect Producing Parties?" (2015) 2015:2 Colum Bus L Rev 705 at 739.

litigation, the sanction might be overkill. In other cases of egregious, bad faith spoliation, this sanction might be inadequate to address the situation.

While countries like the US have taken steps to address these problems by making necessary changes to their *FRCP* to specifically deal with the destruction of electronically stored information, Canada has remained stuck in its century-old rule in *St. Louis.* It is high time for Canada to move beyond the common law doctrine in *St. Louis*. In the light of technological advancements, especially in electronic documents, our rules of court and rules of civil procedure at the federal, as well as provincial and territorial levels, need urgent reform to provide for flexible sanctions and remedies to address the destruction of electronic documents relevant to litigation. Such reform should provide flexible rules and principles to guide the courts in determining the appropriate remedies or sanctions to address cases of intentional and unintentional destruction of electronic documents relevant to litigation, taking into consideration the circumstances of each case. The approach in the US *FRCP* discussed in this article is a starting point for such reform.

In conclusion, it is important to highlight other issues related to spoliation which, while not addressed in this article, are of important consideration in any reform of Canadian law on spoliation. First, whether the increasing generation of electronic documents and the ease with which this type of document can be destroyed, thus adversely impacting a party's ability to litigate its case, should give rise to the recognition of spoliation as a distinct type of tort in Canada. The second issue relates to the increasing development and use of ephemeral (short-lived or self-destructing) messaging technology.[90] This is technology designed to send electronic messages which automatically self-destruct or self-delete after being read or viewed by the recipient or after a short amount of time.[91] In situations where such technology is used in the normal course of business (for example, in a corporate environment), would the continued use of the technology when litigation is pending or reasonably anticipated amount to spoliation if it results in destruction of electronic documents relevant to litigation?[92] These are some novel issues related to spoliation that are outside the scope of this article.

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90 Examples of ephemeral messaging apps include Snapchat, Telegram, Confide, Wickr, and so on.

91 Gideon Christian, "Burn After Reading: The Challenge of eDiscovery in Self-Destruct Messaging Environment" (8 January 2020), online (blog): <ediscoverylaw.ca/facebook/burn-after-reading-the-challenge-of-ediscovery-in-self-destruct-messaging-environment/>.

92 A prominent litigation relating to the use of self-destructing messaging technology was the case of *Waymo LLC v Uber Technologies, Inc*, No 3:17-cv-00939 (NDCal Dist Ct, 2017). However, the case was settled out of court effectively foreclosing any judicial ruling on the issue.