

Preserving Evidence in Transportation Claims: Spoliation Risks in Canada and the United States

Transportation & Logistics

1 October 2026

It had been approximately 130 years since the Supreme Court of Canada (the “**SCC**”) last substantively addressed the legal doctrine of spoliation in its major ruling, *St. Louis v. The Queen*, 1896 CanLII 65 (SCC), 25 SCR 649.

Spoliation occurs when a party intentionally destroys, alters, or conceals evidence that may be relevant to litigation that is either: (1) ongoing; or (2) in the stages of reasonable contemplation.

On July 31, 2026, the SCC clarified the law of spoliation in respect of civil litigation when it rendered its decision in *SS&C Technologies Canada Corp. v. Bank of New York Mellon Corp.*, 2026 SCC 29 (CanLII).

In the decision, the SCC confirmed that where spoliation is found, the court will presume that the missing evidence would have been adverse to the party responsible for its loss, subject to that presumption being rebutted. If the party responsible for the spoliation cannot rebut the presumption, namely by demonstrating that the missing evidence would not have been harmful to its case or that the evidence was not intentionally destroyed, concealed, or misplaced, the court will draw an adverse inference against the spoliator. In doing so, the court addressed the evidentiary gap created by the loss or destruction of the evidence.

The decision is significant for transportation companies, insurance adjusters, and the insurance industry generally because it reinforces the obligation to preserve relevant evidence once litigation is reasonably contemplated or has been commenced.

Facts of the Case

SS&C Technologies Canada Corporation (the “**Data Provider**”) is a company that acquires and processes specialized financial data to generate pricing information for financial service companies to value securities. In 1999, it entered into two separate services agreements with: (1) the Bank of New York Mellon Corp. (the “**Bank**”), and (2) CIBC Mellon Global Securities Company (“**CIBC Mellon**”), a joint venture through which the Bank provided global custody business services to its Canadian clients.

Under both agreements, the data could not be shared or redistributed, and could not be sold to third parties, including affiliated companies.

In 2011, CIBC Mellon terminated the agreement with the Data Provider, claiming that it no longer needed the services. In 2016, however, the Data Provider discovered that CIBC Mellon had been receiving the data from the Bank at no cost. By doing so, CIBC Mellon and the Bank effectively avoided the licensing arrangement required under the agreements.

Accordingly, the Data Provider requested that the Bank preserve evidence regarding the ways in which the data was redistributed and to which affiliates, including the commission the Bank received from redistributing the data. Notwithstanding the Data Provider's requests to preserve the information, the Bank failed to comply, which led to the termination of the agreement.

Shortly thereafter, and as a result, the Data Provider commenced litigation against the Bank for breach of contract.

SCC's Decision

A unanimous decision rendered by the SCC enunciated a clear four-part test that a party alleging spoliation must establish on a balance of probabilities:

1. evidence was intentionally destroyed, altered, mutilated or concealed;
2. when the evidence was destroyed, litigation was ongoing or reasonably contemplated;
3. the evidence was relevant to said litigation; and
4. it is reasonable to infer that evidence was destroyed to affect the litigation.

Upon a court concluding that all four parts of the test had been met and that spoliation had been established, a rebuttable presumption arises providing a spoliator with an opportunity to challenge the above elements. A spoliator may rebut this presumption by proving that the *destroyed evidence* was not harmful to its case or position. However, if the spoliator fails to do so, then the court must draw an adverse inference against it.

The purpose of the adverse inference drawn against the spoliator is to compensate for the loss of evidence and place the innocent party in a fair position despite the destruction of important information by the party responsible (i.e., the spoliator).

The adverse inference drawn from a finding of spoliation will not necessarily be the highest possible inference. However, the trial judge assessing the facts will be in the best position to determine the extent of the prejudice to a party harmed by spoliating conduct and to determine a proportionate remedy.

When an adverse inference is drawn, it serves to undo the prejudice that the spoliation has caused and is intended to correct the imbalance and even the playing field of the litigation. Accordingly, the court may be required to draw a specific inference to fill in the evidentiary gap caused by the missing evidence. In addition, depending on the circumstances, the court may fashion other sanctions to address spoliation, including procedural remedies such as striking a claim or defence, making an adverse credibility finding against a witness's testimony, ordering significant costs awards and/or punitive damages, or making a finding of contempt.

Core Message

The SCC's decision underscores the critical importance of preserving evidence once litigation is reasonably anticipated or has commenced. The obligation on legal counsel and their clients to preserve relevant evidence becomes even more significant when one party directly requests that the other party preserve the evidence after an incident occurs.

Parties that fail to preserve and retain evidence may face significant consequences, as noted above.

To mitigate these risks, organizations should implement document and data preservation systems, as well as retention practices, including litigation hold procedures that suspend the routine destruction or deletion of potentially relevant evidence when a dispute is reasonably foreseeable or contemplated.

For example, in the transportation industry, companies should implement policies to ensure that evidence surrounding the incident is preserved. Regular staff training is equally important to ensure that employees can identify, preserve, and safeguard physical records, electronic data and other evidence relevant to an incident or claim.

Where cargo is lost, damaged, or stolen, carriers should preserve, as a matter of prudent litigation practice, shipment records including Bills of Lading, Rate Confirmations, dispatch communications, and other evidence relevant to the matter.

Similarly, following a serious motor vehicle accident involving a commercial vehicle, a party should preserve, as a matter of prudent litigation practice, Electronic Logging Data and Record of Duty Status data, dash-cam footage, inspection reports, maintenance records, and photographs relating to the accident.

Common Types of Spoliation Risks for Motor Carriers and Freight Operations

Motor carriers and freight operators should be mindful and aware of their duty to preserve both physical/documentary evidence and electronic evidence, including:

- **Physical and Documentary Evidence:** including records i.e. Bills of Lading (BOLs); commercial invoices; Proofs of Delivery (PODs); inspection reports and photographs; driver paperwork; vehicle inspection reports; claim documentation; and other records relating to a shipment, vehicle, driver, or incident; and



- **Electronic Evidence:** including operational logs; Record of Duty Status (RODS) and Electronic Logging Device (ELD) data; dispatcher and driver emails, text messages and other electronic communications; telephone and call records; GPS tracking data; vehicle Electronic Control Modules (ECM) data; dash-cam and surveillance footage; Event Data Recorder (EDR), or “black box” data; and electronic shipment management records.

By establishing effective preservation protocols and implementing litigation holds when a dispute arises or is reasonably contemplated, motor carriers and freight operators can reduce litigation risk, and avoid the adverse consequences associated with spoliation of evidence.

A U.S. Perspective: Preservation Obligations and Spoliation Risks for Insurers

For our American colleagues south of the border, a recent and noteworthy decision rendered on July 22, 2026, *H.D. Smith Wholesale Drug Co. v. Cincinnati Insurance Co.*, underscores that an insurer's obligation to preserve evidence in coverage litigation involving multiple underlying actions may extend beyond the specific lawsuit that initially gave rise to the coverage dispute.

If additional coverage litigation involving the same parties, policies, and substantially similar coverage questions are reasonably anticipated, the insurer's duty to preserve relevant documents may remain in effect even after the initial coverage proceeding has concluded.

Overview of the Case

This litigation arose as there was a coverage dispute regarding whether Cincinnati Insurance Co. (“**Cincinnati**”) was obligated to defend and indemnify H.D. Smith Wholesale Drug Co. (“**HD Smith**”) with respect to any opioid-related litigation. The initial proceedings were commenced by Cincinnati seeking a declaration that it had no duty to defend and indemnify HD Smith against the lawsuit that was commenced by the Attorney General of West Virginia. The higher courts, specifically the Court of Appeal for the Seventh Circuit rendered an Order declaring that Cincinnati had a duty to defend HD Smith. Shortly after, the district court ordered Cincinnati to pay the settlement costs for HD Smith in its action with West Virginia as it had a duty to indemnify.

In 2022, HD Smith initiated a further lawsuit against Cincinnati to seek relief for defence costs and settlement costs. During the course of the 2022 litigation, the parties argued whether Cincinnati had produced all relevant documents, including underwriting policies and custodial files. In this subsequent proceeding, HD Smith motioned the court to compel further documentation that was not initially produced, and the relief was granted by the courts. Notwithstanding this, Cincinnati took the position that the documents requested were no longer available within their system.

In response, HD Smith asserted that Cincinnati had failed to preserve relevant evidence and sought sanctions for spoliation. The court agreed and imposed sanctions against Cincinnati for its failure to preserve relevant evidence.

Sanctions: Federal Rule of Civil Procedure – 37(e)

Under the Rule 37(e) of the [Federal Rule of Civil Procedure](#), available court sanctions for spoliation related to electronically stored information that should have been preserved are divided into two distinct tiers.

1. Measures to Cure Prejudice – Rule 37(e)(1): If electronically stored information is lost due to unreasonable steps and causes prejudice to a party in the litigation, a court may make an order for curative measures, such as additional examinations for discovery, costs, or permitting evidence and/or arguments regarding the loss of the information;
2. More Severe Sanctions for Intent to Deprive – Rule 37(e)(2): If a party to the litigation acted intentionally to deprive another, a court may impose more severe sanctions, including drawing an adverse inference that the lost information was unfavourable, issuing jury instructions regarding the unfavourable nature of the evidence, dismissing the action or the party's pleading, or entering a default judgment.

Application For Insurers

The *H.D. Smith Wholesale Drug Co. v. Cincinnati Insurance Co.* decision has wider implications that can affect any type of litigation – not just lawsuits related to opioids. Accordingly, insurers who are involved in coverage disputes, including those arising from transportation-related claims, should implement robust document preservation and retention protocols as soon as litigation is commenced or reasonably anticipated.

Importantly, preservation obligations require more than simply retaining documents. Insurers should ensure that litigation holds are promptly implemented and that routine document destruction, deletion schedules, and data-retention practices are suspended for all potentially relevant information.

This decision is a caution to insurers that spoliation and inadequate document retention protocols can result in court sanctions, increased litigation costs, and strategic disadvantages. The best defence is a proactive preservation strategy supported by clear internal protocols and effective litigation hold procedures.



(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Author



Mason Kohn

Associate

416.865.6677

mkohn@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com