



The Eve of Destruction

Why parting with files is about to get
easier

Rob McCleave – Legal Services Support

Bob Carter KC, Chair LOMSC

Fall 2022

Existing Approach

How long do you keep files? Written Policy?

Describe NSBS'/LIANS' approach to files

What would you prefer?





Reasons we are there

- NSBS can't tell people when to destroy
- Lack of data
- Fear & inertia
- Past practices
- No regulation possible
- No absolution point
- Small province
- LAA & LRA & PIPEDA were new



...Breaking News...



Distilling a New Formula

Proposed Standard:
change emphasises
privacy law obligation (ie
to destroy personal info)

Proposed Guidance:
minimum recommended
retention periods.



Draft Standard

Lawyers are responsible for the storage, maintenance and access to client property in the lawyer's possession.

Lawyers must adopt systems that ensure the maintenance, backup, storage and access to all client information and lawyer's business records in both printed and electronic form while ensuring and maintaining client confidentiality.

Lawyers' obligation to maintain confidentiality includes an **obligation for the timely disposal of client information** having regards to privacy law, limitation periods, the nature of the information, and obligations under the lawyer's liability insurance.



Draft Guidance

- Based on LSBC
- Recommends specific minimum retention periods
- You still use your skill & judgement to adopt or deviate
- Should be a written policy (template available)
- Should be reflected in retainer letters/agreements
- Consider getting permission if holding longer (PIPEDA)

How long?

This is what we're discussing - want feedback.

Is something like this possible?

- **Most Files: min. 6 yrs (like BC)**
- **Property: 15 yrs, with exceptions downward**

Looking at tax, will instructions and some other areas for duties to retain.



Draft Guidance

- **Part A General Retention Period** (everything not listed as an exception, below): **6 yrs.**
- *Reasoning: given the Limitation of Actions Act and other factors, very few claims or complaints are made beyond this time. Our Regulations require keeping client ID for 6 yrs.*
- **Part B Exceptions to the General Retention Period**
 - 1) **Real Estate**
 - a) **Foundation documents: indefinite**, required by regulations.
 - b) The rest of the real estate file: (both LRA and non-LRA files): **15 years**
- *Reasoning: real estate files have a greater possibility of a claim in later years, relative to most other files. Because claims, if they happen, are sometimes made directly against the lawyer in contract and tort, as opposed to through the RG, claims can arise after 10 years.*



GOALS

Protect public by protecting privacy

- **Reduce various cost pressures, which drive billing**
- **Increase compliance & adherence to best practices**

- Applies to e-data & paper
- Storage – lawyers
- Storage - Society
- Custodianships
- Complexity
- Clarity and simplicity

Is there an outer limit to retention?

Consider:

Privacy

Practicality

Price

Reason (why do it?)

**Risk – analyse retention vs
destruction**

Research (PIPEDA)

**Writing (get it in
retainer ag't)**





Limit? Specific recommendations

- Tell clients up front what you keep and for how long.
 - Certainly after 15 yrs, your justification for holding any personal information is undermined.
 - If you feel you have to exceed the minimums, have a good reason and get written permission (eg client signs retainer agreement).
- Manage expectations, eg you aren't an archives
 - Protect yourself from a PIPEDA breach
 - PIPEDA compliance

Analyse Risks & Burdens

Of Retention

- Cost of secure storage
- Off-putting to successor
- Privacy breach
- Stress
- Opportunity cost

- Tend to be constant and cumulative

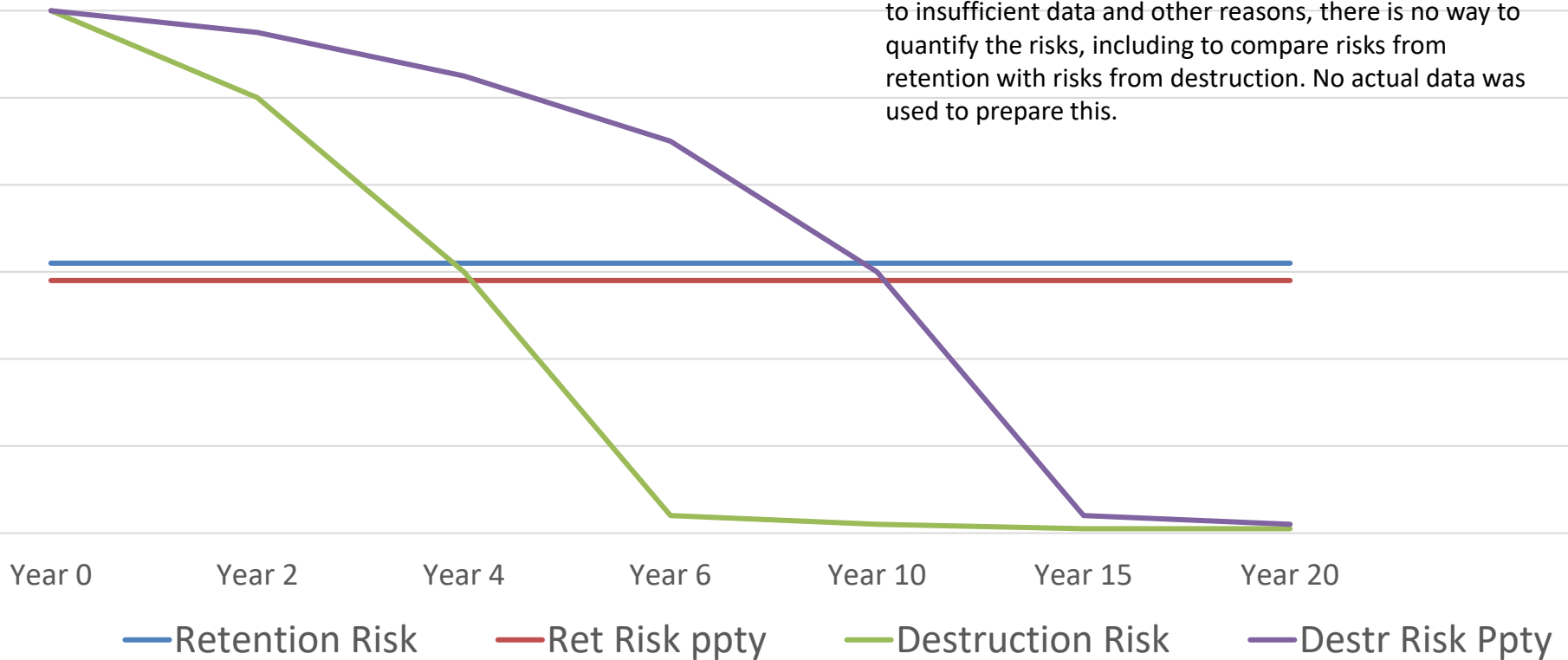
Of Destruction

- Cost of shredding
- (Declining) chance of claim
- (Maybe) some stress

- Tend to diminish

Approximate trajectory of risks and burdens

For illustration of shape of believed trend lines only. Due to insufficient data and other reasons, there is no way to quantify the risks, including to compare risks from retention with risks from destruction. No actual data was used to prepare this.





Worst Case Scenario

Retained file

- Deductible (if handle properly)
- Privacy breach

Destroyed File

- Deductible (if handle properly)



Insurance Implications

- LIANS, LOMSC, other committees, practitioners part of this project
- Lawyers making and following *bona fide* policies = good
- Claims data *informs* the numbers, but we don't have enough data in NS and numbers are not an absolute guarantee
- BC has been using similar approach with similar law



Easier for Lawyers Approaching Retirement

- Simple, tighter, more realistic times
- Less burden on their families
- Less risk of privacy breach



Migrations/Foundation Documents

- Use [Foundation Document Checklist](#) to determine what is/isn't a F.D.
- Keep in own subfile
- Best received & kept electronically
- Retain indefinitely (for benefit of RG)
- If change firms, clarify who keeps them (see Regs) and let NSBS know in writing
- If change status (to NP, retired...) a practising lawyer must sign for them



Foundation Document Checklist

NSBS Legal Services Support - Foundation Document File Checklist

General:

- **Anything** on which a lawyer relied in support of exercising professional judgment in rendering an **opinion of title or certificate of legal effect**. It includes, whether prepared by the lawyer or others: ([LPA Regulations](#) at 1.1.1 ma)
 - searches,
 - documents,
 - notes,
 - survey fabric,
 - other title information, or
- original or true copy of every e-submitted document s 6 (10) [LRA Administration Regs](#)

AFR: from [LRA Administration Regulations](#)

- written authorization to submit the PDCA and AFR, if the submitting lawyer does not have a solicitor/client relationship with the owner of the parcel being registered; s 10 (6) a
- an owner's declaration regarding occupation of the parcel and residency status in Form 5 and, if signed by the authorized lawyer or authorized surveyor, evidence of the information relied upon under subsection (7); s 10 (6) b
- notice of parcel registration, in Form 9, sent in accordance with this Section, together with proof of service in accordance with Section 30, and any written directions given by the Registrar General under this Section, if applicable; s 10 (6) c
- SRRI that was sent electronically to the submitting lawyer upon submission of the AFR in final form; s 10 (6) d ...

Foundation Doc Checklist (2/2)

AFR (con't)

- official report for the legal description from the parcel description database in Property Online at the time of submission of the AFR in final form; s 10 (6) e
- abstract of title upon which the submitting lawyer's certified opinion of title is based showing the chain of ownership of the parcel; and s 10 (6) f
- evidence of compliance with the *Municipal Government Act*. s 10 (6) g
- 2nd edition July 2022

Other Specific Requirements to Retain:

- RG's written directions - adding benefit or burden to registered parcel s 14 (8);
- Form 8 notice & required proof of service when
 - adding benefit or burden to unregistered parcel s 15 (4)
 - adding burden or restrictive covenant per s 16 (2)
 - adding overriding interest per s 18
- RG's exemption under 17 (1)
- Documents & info supporting request to correct certain errors s 21 & s 22

Future of Foundation Docs?

Purposes still valid:

- 1) audits
- 2) help RG resolve issues

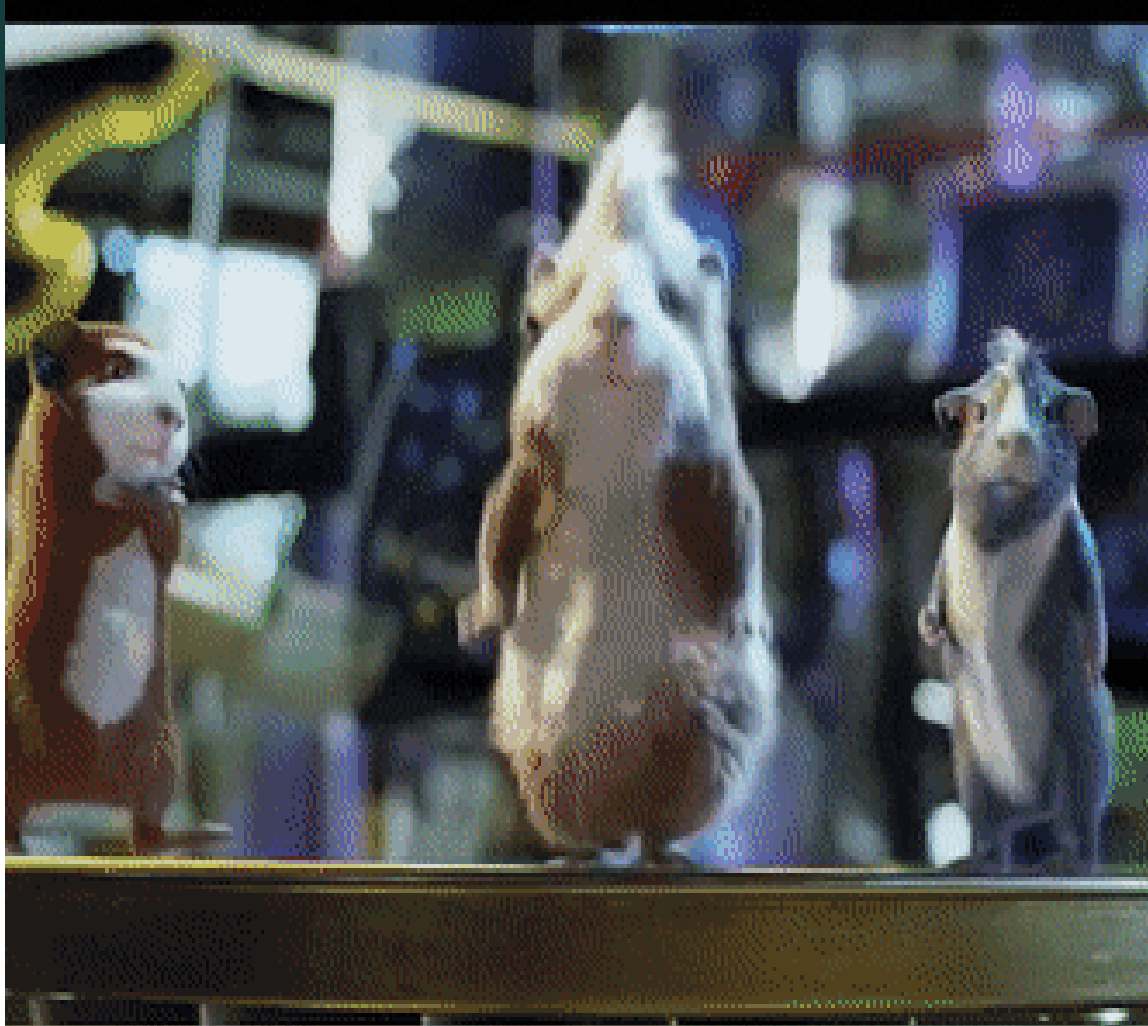
Electronic (paper FD's will be a thing of the past)

Transition?

Who should store?

Who should pay for that?

Lawyers' notes are valuable



Ready, Shreddy & Go