

## News

# Limitations Act's 2019 deadline puts pack rats on notice

## MICHAEL BENEDICT

A retiring partner at Goodmans LLP in Toronto recently rekindled some long-lost memories when he began reviewing his old files in storage, not all of them related to his practice. In one box, he found a pristine copy of the Nov. 23, 1963 *Globe and Mail* with its front-page coverage of the John F. Kennedy assassination.

"We've also found shoes, client gifts and even clothing," says knowledge management lawyer Eugene Cipparone, in charge of records and risk management for Goodmans.

Clearly, spending money on storing such non-legal items is not a prudent expenditure, and firms are beginning to clean out their legal attics as a cost-saving measure. Ontario's *Limitations Act* provides additional incentive with its assurance that as of Jan. 1, 2019, no legal action, with few exceptions, can be launched 15



years after an alleged act or omission takes place.

"Now, if you haven't found a cause of action within 15 years, you're out of luck," Cipparone says.

Traditionally, lawyers have been pack rats when it came to their files, typically out of fear of potential negligence suits.

"Generally, we kept things forever because we are risk-averse," says Cipparone, adding that some Goodmans files go back more than half a century.

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Eugene Cipparone  
Goodmans LLP

In a recent analysis, insurer LawPRO found that almost all claims against lawyers are launched within 10 years, from a low of 90.2 per cent for real estate matters to a high of 98.8 per cent for labour law cases. For claims filed after 15 years, real estate leads the way with 4.1 per cent followed by wills at 3.5 per cent.

LawPRO vice-president (claims prevention and stakeholder relations) Dan Pinnington says the

Pinnington advocates clear policies for all firms on retention and destruction.

"They should be simple and followed by everyone to maintain consistency," he says. "And they should set appropriate destruction times with a review mechanism."

While the profession is governed by different standards in each province, they are generally the same when it comes to retention and destruction of client files. The Law Society of Upper Canada, for example, requires that all client files be kept for six years while trust account records must be retained for a minimum of 10 years.

Furthermore, the law society recommends that clients be advised in advance of a scheduled file destruction date and that the date be subject to change should circumstances warrant. It also reminds lawyers that confidentiality must be maintained during **Distinction, Page 10**

new 15-year limitation should be "an absolute ban to older claims." He adds that even if faced with a claim dating back more than 15 years, a lawyer will be able to argue that it is barred by statute.

Pinnington says the insurer defends about 10 cases annually involving lost or misplaced files; there are even more where the files are incomplete.

"Sometimes, lawyers or firms are too quick to pull the trigger on destruction," he says.

## Distinction: Keep records but not as time capsules

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the destruction process — “a lawyer’s obligation to maintain confidentiality survives the retainer,” it says in its online guide to retention and destruction of client files — and that they should keep a record of destroyed files.

In Nova Scotia, where the limitation period can be as long as 40 years, lawyers have to take even more care in destroying files because the province’s limitation legislation, as interpreted by its courts, sets the clock ticking only when the facts that could lead to an action are discovered. However, if those facts ought to have been known earlier, the discoverability principle does not apply.

Kathryn Dumke of Dumke MacLeod in Bridgewater, N.S., is the co-author of a 2013 study on retention and destruction of client files that has been adopted by the province’s Barristers’ Society. “One of the biggest



problems we found is that files get closed and then become out of sight, out of mind,” Dumke says. “Many documents were not returned to clients and others were improperly filed and ended up as irretrievable. Others that could have been destroyed weren’t, making them unnecessarily subject to a potential discovery motion.” Dumke adds that it’s “stunning” that practitioners generally neg-

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**Kathryn Dumke**  
Dumke MacLeod

lect file retention and destruction. “It is such a fundamental aspect of one’s practice, it’s hard to believe that people didn’t think about it,” she says. “When you realize the storage costs and the potential liability if certain files are irretrievable, you have to ask, ‘Oh my God, what were they thinking.’”

Noting that lawyers have little interest in reviewing their files before leaving their practice,

Dumke says, “We found an inordinate number of basement floods and garden-shed fires among retiring lawyers.

“While that might be a creative way to deal with the files, it doesn’t take away the legal obligation. These missing records might come back and bite you.”

Dumke says her six-member firm was spending some \$30,000 annually in storage costs, including retrieval and return of documents.

“We had this increasing mountain of paper at some cost,” she says.

The solution was to move to more electronic record-keeping and scanning of existing documents, slashing their storage bill by 80 per cent.

Goodmans has also adopted scanning to reduce storage expenses, a change triggered by an office move to smaller facilities.

“Before the move, people were used to an infinite number of

filing cabinets and then moving the material off-site,” says Cipparone. “Now, we check any documents destined for storage to see if they can be scanned instead, or even if they are needed.”

The firm also began insisting on scanning documents as they were being created, so a paper file would not be necessary, “and we destroyed non-billable documents while banning the printing of e-mails as an unnecessary duplication of what exists electronically,” Cipparone says.

Cipparone says the costs of vetting the old files in storage can sometimes be greater than the storage costs. Nevertheless, he says that once the Jan. 1, 2019 “magical shredding date” arrives, the firm will start vetting its boxes from the 1960s, 1970s and 1980s.

And no doubt, uncover more hidden treasures.