

DISPELLING MYTHS ABOUT RECORDS RETENTION IN CANADA

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INTRODUCTION

I have spent over 20 years of my practice advising organizations about their information governance. As a lawyer and records management consultant, I have learned that there are many myths about records retention law within the records and information management (RIM) profession in Canada. These myths hamper a proper understanding of records retention and increase the risk that records managers are applying the wrong law or no law at all in their work and thus exposing their organizations to risk of legal liability. These myths persist even with a wealth of information in the RIM profession to prove them as patently false. I will consider 6 of these myths in this article. I will demonstrate how they are myths and why they should not be followed by Canadian records managers and information governance professionals.

The 6 myths are:

- Myth 1: All Records Have A Legal Retention Period;
- Myth 2: Business Records In Canada Have A 7-Year Legal Retention Period;
- Myth 3: Legal Retention Periods In The United States Apply In Canada;
- Myth 4: All Employee Pay Records Must Be Retained Indefinitely;
- Myth 5: Since Emails are Transitory, Emails are Not Records and Not Part of A Records Retention Schedule; and
- Myth 6: There Are No Legal Consequences For Destroying Records, With Or Without A Records Retention Schedule.

MYTH 1: ALL RECORDS HAVE A LEGAL RETENTION PERIOD

Some Canadian records managers mistakenly believe that all records have a legal retention period. A legal retention period is the period of time specified by law for how long an organization must 'legally' keep records. These retention periods are usually expressed in the law as the organization keeping records for a minimum period of years. These legal retention periods are commonly found after proper legal research in applicable statutes and regulations.

However, the majority of the statute law and regulatory requirements do not set out a legal retention period. Canadian law is replete with legislative requirements for organizations to create and maintain classes of records but provides no stated legal retention requirement.

But without a specified legal retention period, what is an organization to do?

We know from practice that the vast majority of records created are not permanently preserved. So, how long does an organization need to keep records to be legally compliant when there is no guidance in the law? Proper legal research is required to determine which records have or do not have legal retention requirements.

This legal research needs to find out where the law is. While most legal retention periods are found in statutes and regulations, retention periods can also be found in other sources of law. Canadian courts are a source. From the Supreme Court of Canada, the top court in Canada, down through to the provincial Courts of Appeal and Superior Courts, and even the Provincial Courts, these courts are a source of guidance for organizations to learn how to interpret the law that affects their records.

Another source are boards and tribunals. These include the federal, provincial and territorial Information and Privacy Commissioners and a wide range of administrative tribunals across Canada: human rights, labour relations, regulators of professions, property assessment, environment, workers compensation, to mention a few.

Yet another source of law are contracts, collective agreements, bylaws and policies.

Legal research needs to be conducted to show if that law even applies to the organization. Is the law in force? Has the law been changed? Repealed? Organizations should conduct proper legal research annually since laws often change. An organization that relies on out-dated or repealed law is at risk of penalties for non-compliance.

Organizations need to conduct their own legal research or retain a qualified lawyer with experience in records management and records retention law. Providing a competent legal review for a records management and information governance system is a daunting task for the individual who is non-legally trained. Often even in-house legal counsel will defer this to other outside legal counsel who specialize in legal reviews of records retention schedules, because it is not their area of specialty and is very time consuming.

MYTH 2: BUSINESS RECORDS IN CANADA HAVE A 7-YEAR LEGAL RETENTION PERIOD

It is a common myth in Canada, that all business records have a 7-year retention period. This myth is operative even outside of the records management profession. For

example, in 1995 in the debate in the British Columbia Legislative Assembly to impose a 7-year legal retention on payroll records, a Member of the Legislative Assembly referred to retaining records for 7 years as “the infamous seven-year rule”.¹

Infamous or not, there is no blanket 7-year retention rule in Canada. The exact origin of the “7 year rule” for business records is not known. It appears the Canadian *Income Tax Act* is the source. Section of the 230(4)(b) of the *Income Tax Act*, requires specified tax records to be kept for a minimum of six years from the end of the last tax year to which these records relate.² For individuals, the tax year is the calendar year; for corporations the tax year is the fiscal period chosen by the corporation.

The *Income Tax Act* legal retention periods only apply to income tax records for Canada. There are an enormous number of records that do not come under the *Income Tax Act* legal retention periods. The *Income Tax Act* legal retention periods do not apply to business records like: payroll records, contracts, memoranda, minutes, articles of incorporation, business licenses, client records, sales and marketing records and workers compensation records.

MYTH 3: LEGAL RETENTION PERIODS IN THE UNITED STATES APPLY IN CANADA

Due to the common use of free Internet search engines in our workplaces today, there is a myth that legal retention periods in the United States apply in Canada.

An example disproves the myth. Let’s imagine a records manager working for a non-profit organization in Ontario. The Ontario non-profit is also a registered charity with the Canada Revenue Agency (CRA) and actively seeks donations from the public as an integral part of its budget.

The Ontario non-profit records manager is not legally trained. Her manager asks her to create a records retention schedule. An ARMA International member, she attends her local Chapter meeting and asks about creating a records retention schedule. She is referred to ARMA International’s recent 2015 standard: Retention Management for Records and Information (ARMA International TR 27-2015).³ She purchases it and finds it very helpful with loads of new information.

¹ Page 15611, Hansard (June 15, 1995)(Volume 21, Number 5)(<https://www.leg.bc.ca/documents-data/debate-transcripts/35th-parliament/4th-session/h0615pm2#15624>).

² See <http://laws.justice.gc.ca/PDF/I-3.3.pdf>.

³ See Bookstore at <http://arma.org/>.

TR 27-2015 defines “legal value” as the “usefulness of a record in complying with statutes and regulations, as evidence in legal proceedings, as legal proof of business transactions, or to protect an individual’s or organization’s rights and interests.”⁴ She finds further reference to how to determine legal value in TR-27-2015 by reviewing statutes and regulation, whether federal, state or local.

She, like many records managers is time and cash strapped, so she looks to the Google search engine for legal research to determine the legal value of her non-profit’s records to recommend the specific legal retention periods. She does a Google search using the search term “Records Retention And Disposition Guidelines”. That online search produces, on the first page of Google search results, a hit to the Smithsonian Institution Archives, “Records Retention And Disposition Guidelines” 2008.⁵

The Smithsonian seems a credible organization to her. The Smithsonian in Washington D.C. was established in 1846 on the National Mall, in Washington, D.C. It has become the world’s largest museum and research complex. It has grown to be world famous and a popular tourist destination.

On page 1 of these Guidelines, the Smithsonian says that these Guidelines may be “freely used and modified by any non-profit organization”. “Free is always good”, she says. The Guidelines appear to apply to a Canadian non-profit organization.

The Guidelines refer to a long list of American (USA) federal and state laws containing recordkeeping requirements. That would appear to meet the TR27-2015 requirements. The Guidelines are reasonably current she thinks, only about 8 years old.

In the section “How Long to Keep Records” is a long list of minimum records retention periods. These records start from accident reports and end at workers compensation. For instance, donations are retained for 7 years.⁶ So far, so good. Compliance for the legal value of her organization’s records seems to be met.

She decides to use these legal retention periods for her organization’s retention schedules. Mischief managed, end of story, “what’s next on my To-Do list?” she wonders.

But there are four legal liabilities lurking in the background. First, the Guidelines are over 8 years old. Laws change; all of the time! Some laws change weekly; with different

⁴ Page 4.

⁵ See http://siarchives.si.edu/cerp/RECORDS_RETENTION_SCHEDULE_rev3.pdf.

⁶ Page 5.

aspects being put into force and other aspects being repealed. Thus annual reviews of your records management programs are vital.

The Canadian Parliament and the provincial Legislative Assemblies usually meet at least once a year to debate, enact, amend and repeal laws. The volume of law can be very large. For example, in British Columbia in 2015 alone, the BC Legislature enacted 42 bills, from administrative law to workers compensation.⁷ Along the way, the BC government in 2015 also created, amended or repealed over 400 regulations; it put into legal force over 40 statutes, those statutes encompassing hundreds and hundreds of sections of statute law.⁸ While not all of that law affected records, that volume of law to review for what does apply to records is intimidating even to the seasoned legal researcher.

In an 8-year time span, likely laws affecting the Ontario non-profit have changed. As the law changes, that means the laws affecting the Ontario non-profit have changed too. This then requires a review of the records retention schedule. For an organization to rely on law that has been repealed and not in force means the organization is not following the law. TR27-2015 recommends periodic review of the retention schedule to ensure it is current and complies with laws in force. Many organizations complete an annual review of the law that applies to their records to ensure they are not liable for not complying with the law.

The second problem is the engagement of the principle of state sovereignty. State sovereignty says that countries have the exclusive right to make laws within their own boundaries. Recently, in 2014, the Supreme Court of Canada explained that:

Sovereignty guarantees a state's ability to exercise authority over persons and events within its territory without undue external interference. Equality, in international law, is the recognition that no one state is above another in the international order.⁹

An integral part of Canada's state sovereignty, is that Canada has federal, provincial, territorial and municipal governments. Each government has its own exclusive jurisdiction as defined in the *Constitution Act, 1867*.¹⁰ The federal or Canadian government has responsibility for laws of national and international concern, like a national currency, defence, foreign trade, criminal law and citizenship. The provinces are responsible for local concerns like education, health, property and civil rights and municipal government.

⁷ See <http://bit.ly/1KPh532>.

⁸ See <http://www.qp.gov.bc.ca/statreg/bulletin/bull2015/cumulati.htm>.

⁹ *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 SCR 176, 2014 SCC 62 (CanLII) at para. 35 per LeBel J. (<http://canlii.ca/t/gdwht>).

¹⁰ See <http://www.justice.gc.ca/eng/csj-sjc/just/05.html>.

Historically, jurisdictions across Canada have developed and revised their own records retention laws. These jurisdictions include the government of Canada, 10 provinces, 3 territories, First Nations and the thousands of local governments - big and small-across the country. These laws vary greatly. It is useful to understand to briefly review some of the laws that each of these jurisdictions can enact in order to understand how state sovereignty works. As well, we can see how these laws differ greatly, in both number and complexity.

Canada

Here is an example of time-specified retentions by the Canadian government for Health Canada. Health Canada has a mandate under the *Food and Drugs Act* to help Canadians maintain and improve their health. Requiring legal records retention periods ensures relevant records are retained and available for inspection and testing and that this government mandate is met. Specifically, the Blood Regulations under the *Food and Drugs Act* are intended to “promote the protection of the safety of Canadian blood donors and recipients in connection with the safety of blood for transfusion or for further manufacture into a drug for human use”.¹¹ Sections 119 to 122 of the Blood Regulations set out, for different types of blood products, a complex matrix of required retention periods that vary from between 1 year to 50 years.¹²

Provinces

Here is an example of a Canadian province, which has a records retention law for archival purposes. In Ontario, Part III of the *Archives and Recordkeeping Act, 2006* requires every public body to prepare a records schedule for each class of public records they create or receive, the records retention period and then the disposition of the records at the end of their retention period.¹³ Then, each records schedule must be approved by the Archivist of Ontario. Unlike Canada’s Blood Regulations, Ontario’s *Archives and Recordkeeping Act, 2006* does not set out specific retention periods for specific government records. Instead the *Archives and Recordkeeping Act, 2006* is focused, not on the records management requirements, but on the archival value of government records to ensure their long-term preservation.

¹¹ Ministry of Health, *Guidance Document: Blood Regulations* (Effective date October 23, 2014)(http://www.hc-sc.gc.ca/dhp-mps/alt_formats/pdf/brgtherap/applic-demande/guides/blood-reg-sang/blood-guid-sang-ligne-2014-10-23-eng.pdf).

¹² See Blood Regulations (SOR/2013-178)(<http://laws.justice.gc.ca/eng/regulations/SOR-2013-178/>).

¹³ See sections 11 to 16 (<http://canlii.ca/t/l33t>).

Territories

Here is an example of a Canadian territory specifying specific records that must be retained. Nunavut's *Wildlife Act* has not as complex a records retention requirement as the Canada's Blood Regulations, nor an archival approach like Ontario's *Archives and Recordkeeping Act, 2006*. Instead, the Nunavut government has taken a broad approach to records retention for wildlife matters in the territory. Section 187(4) provides that any record or document required to be kept under the *Wildlife Act* must be retained for a period of at least 2 years.¹⁴ These records are not just government records, but all records that come under the purview of the *Wildlife Act*.

First Nations

Here is an example of a First Nations Self-Government in the developmental stages of records management development. The Kwanlin Dün First Nation is located in Whitehorse, Yukon. The Kwanlin Dün First Nation has recently signed the Kwanlin Dün Final Agreement between it, the government of Canada and the Yukon Territory.¹⁵ The Final Agreement is comprehensive with provisions defining types of records as "Documentary Heritage Resources" and requiring specific classes of records like enrolment records to be maintained. The Final Agreement is silent on records retention but the Kwanlin Dün First Nation's Corporate Services Department is responsible for effective records management of Kwanlin Dün First Nation's records, including retention and disposition.¹⁶ As First Nations like Kwanlin Dün develop their legislative mandates, it is expected that they will enact records retention laws in the future.

Local Governments

Here is an example of a city creating a bylaw to address records management. The city of Surrey in British Columbia is the second largest municipality after Vancouver. Under the provincial *Community Charter*, the City Clerk is responsible for the preparation, maintenance, access and safe preservation of all City records.¹⁷ As well, the *Freedom of Information and Protection of Privacy Act* requires that the City must make every reasonable effort to assist applicants and to protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.¹⁸ To meet these legal requirements under two different

¹⁴ See <http://canlii.ca/t/51x1n>.

¹⁵ See http://www.kwanlindun.com/uploads/Final_Agreement.pdf.

¹⁶ See page 4 of the [Kwanlin Dün First Nation Annual Report 2014-2015](http://www.kwanlindun.com/uploads/KDFN_Annual_Report_2014_15_WEB.FNL_.pdf) (http://www.kwanlindun.com/uploads/KDFN_Annual_Report_2014_15_WEB.FNL_.pdf).

¹⁷ See section 148 (http://www.bclaws.ca/civix/document/id/complete/statreg/03026_00).

¹⁸ See sections 6(1) and 30 (http://www.bclaws.ca/civix/document/id/complete/statreg/96165_00).

provincial statutes, the City of Surrey has enacted a records management bylaw.¹⁹ This bylaw authorizes the Surrey City Clerk to manage the records management system for the City. A policies and procedures manual is required. This manual must include specified provisions, including those for records retention.

Let's review the implications regarding the Ontario non-profits records retention plan. The significance of this discussion is that Canadian law does not apply inside the United States and United States law does not apply inside Canada.

Applied to our example, the Smithsonian "Records Retention And Disposition Guidelines" applies only to US non-profits, not to Canadian non-profits. State sovereignty holds that Canadian or Ontario courts would not be bound in law to follow the American law upon which these the Smithsonian records retention periods are made. That means the Ontario non-profit is not able to prove it complied with applicable Canadian or Ontario law.

That leads us to our third and most concerning liability. Since the Ontario non-profit is using out-dated law, that is the wrong law from a foreign jurisdiction, its risk is great that it is liable to suffer penalties as a result. For example, the Smithsonian Guidelines provide a 7-year retention for donations after which it can be destroyed by the Ontario non-profit.

But the *Income Tax Act* of Canada requires that if the donor of property to the Ontario non-profit directs this donation is to be held by the Ontario non-profit for 10 years or more, then the legal retention period must be 2 years after the Ontario non-profit winds up its operations and/or its charitable status is revoked by the CRA.²⁰ Wind-up and revocation might not occur for decades, if at all. If the Ontario non-profit destroys records evidencing this 10+ year donation, let's say 7 years after it receives it following the American Guidelines, the Ontario non-profit is violating the *Income Tax Act* because the Ontario non-profit needs to retain these donation records for 2 years after the non-profit ceases operation and has its charitable status revoked. Since its charitable status has not been revoked, the Ontario non-profit wrongfully destroyed these donations records.

The penalties in the *Income Tax Act* of Canada that can be applied to the Ontario non-profit for this wrongful destruction are serious and multiple.

¹⁹ See Surrey Corporate Records By-law, 2010, No. 17002 (www.surrey.ca/bylawsandcouncilibrary/BYL-17002-1D94.pdf).

²⁰ See section 5800(1)(d) of the Income Tax Regulations and Canada Revenue Agency, Books and Records Retention/Destruction (IC78-10R5)(June 2010)(<http://www.cra-arc.gc.ca/E/pub/tp/ic78-10r5/README.html>).

First, at any time, the CRA can inspect and audit all of the Ontario non-profit's records, not just the donation records.²¹ An audit like this could alert the CRA to the Ontario non-profit's destruction of the 10+ year donation records. An audit could alert CRA to other irregularities, increasing the Ontario non-profit's legal liability.

Second, if the CRA finds out that the Ontario non-profit has improperly destroyed these records, the CRA can specify how and when the Ontario non-profit keeps its records. CRA can further require the Ontario non-profit to make an agreement with the CRA. CRA then can conduct follow-up visits to the offices of the Ontario non-profit to ensure the Ontario non-profit is complying with the agreement.²² Time and money spent by the Ontario non-profit with the CRA complying with the illegal records destruction event is time **not** spent doing the good works and charity for which the Ontario non-profit was created.

Third, if the CRA finds out that the Ontario non-profit has lawlessly destroyed these records, it can also fine the Ontario non-profit. The fine is a minimum of \$1,000 to a maximum of \$25,000.²³ CRA can go further and impose both the fine and a maximum 1-year in prison for the person at the Ontario non-profit who was guilty of destroying the records.²⁴

Fourth, if the CRA deems the ill-advised records destruction as tax evasion, the CRA can launch a tax evasion prosecution. The penalties for tax evasion are a maximum fine of 200% of the tax owed and/or 2 years in prison.²⁵ Tax evasion penalties are in addition to the penalties for records destruction.

Fifth, the CRA has the power to seek a compliance order from a Federal Court of Canada requiring the Ontario non-profit to abide by any agreements CRA requires. Failure of the Ontario non-profit to comply with a Federal Court order can result in contempt of court fines and even prison against the Ontario non-profit.

If faced with CRA's three-pronged enforcement actions of audit, investigation and prosecution, the Ontario non-profit will likely obtain legal advice to represent itself. That legal advice comes with a hefty price tag, not to mention the time the Ontario non-profit needs to spend to inform and instruct its legal counsel, marshal its evidence and prepare to defend itself against the CRA in Federal Court.

²¹ Section 231.1.

²² Section 230(3) and IC78-10R5)(June 2010) at page 4.

²³ Section 238.

²⁴ *Ibid.*

²⁵ Section 23.

These are just the legal liabilities. The Ontario non-profit will also have to face the wrath of the donor and the donor's family, the public and the media. This single unauthorized records destruction event could cost the Ontario non-profit future donations that would seriously hamper its operations.

MYTH 4: ALL EMPLOYEE PAY RECORDS MUST BE RETAINED INDEFINITELY

There is no legal requirement in Canada for organizations to retain all employee records indefinitely. This applies to other business records as well. Canadian courts have held that such a requirement is unreasonable.²⁶

Also, indefinite retention, without disposition, violates the life cycle of records. In the final cycle, records creators need to determine records disposition. They have to review the records and decide to: either retain the records permanently in an archive or destroy the records.

In a perfect world, at the moment of record creation, the record creator should consider the disposition of the record and appraise the record: either to be disposed after legal and operational requirements are completed (with a defined retention period) or preserved permanently as authentic evidence and heritage of the organization's activities.

There are principles that records managers in Canada can use to effectively apply records retention. For example, ARMA International has the Generally Accepted Recordkeeping Principles® (the Principles).²⁷ The Principles set out "the critical hallmarks of information governance and provide both a standard of conduct for governing information and metrics by which to judge that conduct."²⁸

There are eight Principles: Principle of Accountability, Principle of Integrity, Principle of Protection, Principle of Compliance, Principle of Availability, Principle of Retention, Principle of Disposition and the Principle of Transparency.

For the Principle of Retention:

[A]n organization shall maintain its records and information for an appropriate time, taking into account its legal, regulatory, fiscal, operational, and historical requirements.²⁹

²⁶ See *Moutsios c. Bank of Nova Scotia*, 2011 QCCS 496 (CanLII)(<http://canlii.ca/t/2fpvn>).

²⁷ See <http://arma.org/r2/generally-accepted-br-recordkeeping-principles>.

²⁸ Page 2 in ARMA International's Information Governance Maturity Model (<http://arma.org/docs/bookstore/theprinciplesmaturitymodel.pdf?sfvrsn=2>).

The Principle of Retention is silent on what are the specific legal, regulatory, fiscal, operational, and historical requirements. These requirements can cover a vast range: in what legal jurisdiction(s) is the organization is doing business and the complexity of the recordkeeping system employed by the organization. Complete legal research is required to ensure that the organization has the current relevant records retention law at hand.

ARMA International's Principle of Retention is closely allied to the Principle of Disposition.

The Principle of Disposition provides that:

[A]n organization shall provide secure and appropriate disposition for records and information that are no longer required to be maintained by applicable laws and the organization's policies.³⁰

For employee pay records, they typically are: employee personal information like name and address, hours worked, wage rate and calculation of wages and any overtime paid, deductions and allowances.

Statutes typically contain the legal retention periods for these records series. Statutes differ jurisdiction to jurisdiction across Canada. For example some jurisdictions require these records to include payroll information but information about leaves (like compassionate leave, reservist leave, maternity and parental leave) and vacations.

Let's examine how the 10 provinces from coast to coast in Canada treat records retention for employee pay records.

British Columbia

British Columbia requires employers to retain employee pay records for 2 years after employment terminates.³¹ British Columbia does not require employers to retain records of leaves.

Alberta

Alberta is different from British Columbia. Alberta requires employers to retain employment record for at least 3 years from the date each record is made.³² The employment record includes leaves and vacations.

²⁹ Principles.

³⁰ *Ibid.*

³¹ Section 28(2) of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (http://www.bclaws.ca/civix/document/id/complete/statreg/96113_01).

Saskatchewan

Saskatchewan requires employers to retain employee pay records for the most recent 5 years of the employee's employment and for 2 years after employment ends.³³ Vacation records are included in the pay records requirement, but not records of leaves.

Manitoba

Manitoba is the same as Alberta, 3 years.³⁴ Both Alberta and Manitoba require retention of payroll information and records of leaves and vacations.

Ontario

Ontario has the most complex legal retention requirements for employee pay records in Canada.³⁵ Ontario requires either the employer to retain the following records or to pay for someone else to retain these records.

Records of the employee's name and address and date employment must be retained for 3 years after employment terminates.

Records of the employee's date of birth, if the employee is a student and under 18 years of age, must be retained the earlier of 3 years after the employee's 18th birthday or 3 years after employment terminates.

Records of the number of hours the employee worked in each day and each week and overtime must be retained for 3 years after the day or week to which the information relates.

Records of employee wage statements, wages due on employment termination and vacation must be retained 3 years after the information was given to the employee.

Like Alberta and Manitoba, Ontario requires that records of leaves and vacation must be retained for 3 years.

Quebec

Quebec requires employers to retain payroll information for a given year for a 3-year period.³⁶ Records of vacation, but not leaves, are included in payroll records.

³² Section 15 of the *Employment Standards Code*, R.S.A. 2000, c. E-9 (<http://canlii.ca/t/52bwr>).

³³ Section 2-38 of the *Saskatchewan Employment Act*, SS 2013, c S-15.1(<http://canlii.ca/t/52kp9>).

³⁴ Section 135(3) of the *Employment Standards Code*, C.C.S.M. c. E110 (<http://canlii.ca/t/52ktp>).

³⁵ Sections 15, 15.1 and 16 of the *Employment Standards Act*, 2000, S.O. 2000, c. 41 (<http://canlii.ca/t/52k2z>).

New Brunswick

New Brunswick, like Ontario, permits employers or someone retained by the employer to keep payroll records. Payroll records must be retained for at least 3 years after work is performed.³⁷ Records of leaves and vacation are included in payroll records.

Nova Scotia

Nova Scotia requires employers to retain payroll information and records of leave and vacation for at least 3 years after the work was performed.³⁸

Prince Edward Island

Prince Edward Island requires employers to retain payroll records for 3 years after the work was performed.³⁹ Vacation records are included, but not leave records.

Newfoundland and Labrador

Newfoundland and Labrador requires employers to retain employee payroll and vacation information for 4 years from the date of the last entry in the record respecting the employee.⁴⁰

Triggering Event

The triggering event to start the retention period running depends on the province. There is no harmonized triggering event across Canada.

For British Columbia, the triggering event is the employment termination date; for Alberta and Manitoba it is when the record was made; for Ontario and Saskatchewan it is either termination date or when the record was made depending on the type of record; for New Brunswick, Nova Scotia and Prince Edward Island it is neither termination date, nor when the record was made but when the work was performed; for Newfoundland and Labrador it is from the date of the last entry in the record respecting the employee. For Quebec, it is the given year.

Records managers need to be mindful that the language of the statute determines the event that triggers the running of the retention period.

³⁶ Section 2 of the Regulation respecting a registration system or the keeping of a register, C.Q.L.R. c. N-1.1, r. 6 (<http://canlii.ca/t/hnx0>).

³⁷ Section 60 of the *Employment Standards Act*, S.N.B. 1982, c. E-7.2 (<http://canlii.ca/t/52cnh>).

³⁸ Section 15 of the *Labour Standards Code*, R.S.N.S. 1989, c. 246 (<http://canlii.ca/t/524c4>).

³⁹ Section 5.6 of the *Employment Standards Act*, R.S.P.E.I. 1988, c. E-6.2 (<http://canlii.ca/t/52k23>).

⁴⁰ Section 63 of the *Labour Standards Act*, R.S.N.L. 1990, c L-2 (<http://canlii.ca/t/526fq>).

All of the provinces do not mandate maximum retention periods. Neither do the provinces require destruction of employee pay records after the legal retention period has expired. The minimum legal retention periods range from 2 to 5 years depending on the province. The law is flexible in this regard. Records managers can take advantage of this flexibility if it benefits their organizations to retain these records longer if it legal risk to do so is reasonable and the organizations need these records for business purposes.

MYTH 5: SINCE EMAILS ARE TRANSITORY, EMAILS ARE NOT RECORDS AND NOT PART OF A RECORDS RETENTION SCHEDULE

This myth has several elements: emails are transitory, emails are not records and thus emails do not form part of a records retention schedule. All these elements are myths.

An instructive case to prove this myth false is a recent one arising out of a report from Elizabeth Denham, British Columbia's Information and Privacy Commissioner (the "Commissioner"). The Commissioner provides independent oversight and enforcement of B.C.'s access and privacy laws, including the *Freedom of Information and Protection of Privacy Act*.

In October 2015, the Commissioner released a report: [Access Denied: Record Retention And Disposal Practices Of The Government Of British Columbia](#).⁴¹

The facts of the case are unique.

In 2014, a former employee of the Ministry of Transportation and Infrastructure complained to the Commissioner that government emails were improperly destroyed responsive to an information access request about government meetings regarding the provincial Highway 16/the Highway of Tears. The Highway of Tears is a 700 kilometre portion of Highway 16, located between Prince George and Prince Rupert, in northern British Columbia. On the Highway of Tears a number of women have tragically disappeared.

The Commissioner's office investigated. After initial investigation, her office then expanded the investigation to also include the Ministry of Advanced Education and the Office of the Premier.

In her report, the Commissioner found that government employees had improperly destroyed emails, lied under oath and that the Premier's Office managed requests for records without documentation and these requests were not processed in a timely manner. As a result, the Commissioner found that the government had violated its legal

⁴¹ Investigation Report F15-03(October 22, 2015)(<https://www.oipc.bc.ca/investigation-reports/1874>).

duty to assist an information access request under the *Freedom of Information and Protection of Privacy Act*.

The Commissioner observed that:

I am deeply disappointed by the practices our investigation uncovered. I would have expected that staff in ministers' offices and in the Office of the Premier would have a better understanding of records management and their obligation to file, retain and provide relevant records when an access request is received.⁴²

The Commissioner's observation show how deep this myth is, the myth that email is not a record. British Columbia has had the *Freedom of Information and Protection of Privacy Act* in force since 1993. To have over 20 years elapse and still those in government have little understanding about records retention is both disappointing and surprising.

But this false belief does not reside only in British Columbia. In my experience, belief in this myth is common across Canada.

The Commissioner recommended the BC government take corrective action, including: mandatory training in records management, including training on what is a transitory record and what is not, to ensure that employees follow correct processes when responding to access to information requests.⁴³

After the Commissioner released her report, the BC government retained its own expert to provide recommendations on how to implement the Commissioner's report. This expert was David Loukidelis, QC, the former BC Information and Privacy Commissioner.

In December 2015, the government's expert released his report ("Loukidelis Report").⁴⁴

The Loukidelis Report frames the issue of emails and their relationship to RIM:

The records management and archival implications of modern electronic communications media are indeed daunting. It is difficult to understate the challenges such phenomena present for records and information management, and archives, in the electronic age.

The situation in British Columbia illustrates this. The provincial government's Office of the Chief Information Officer (OCIO) has advised that some 284,000,000

⁴² *Supra* at page 3.

⁴³ *Supra* at page 57.

⁴⁴ David Loukidelis, QC, Implementing Investigation Report F15-03 Recommendations To The Government Of British Columbia (December 2015)(www.cio.gov.bc.ca/local/cio/d_loukidelis_report.pdf).

emails are received by the provincial public service each year, with approximately 86,000,000 being sent each year. The storage space for received emails alone amounts to some 43 terabytes of data annually, with roughly 13 terabytes being required to store sent emails. This is apart from the doubtless staggering volume of other electronic information and records created each year. This matters, obviously, because, if records cannot be found because they have not been properly managed and retained in electronic form, important public interest objectives will be harmed. So will the public's rights of access to records. [footnotes omitted]⁴⁵

Many of the recommendations in the Loukidelis Report agree with those in the Commissioner's report. The BC government has stated it will implement all of the recommendations in the Loukidelis Report.⁴⁶

Reading both reports from these two privacy experts—one a sitting Privacy Commissioner, trained as an archivist and the other a former Privacy Commissioner, trained as a lawyer—affords insights to answers to the question “what is a transitory record?”

If we pause and look outside the British Columbia Commissioner's report and the Loukidelis Report, for a definition, we don't have to go far.

In the American Society of Archivists' A Glossary of Archival and Records Terminology, “transitory record” is “a record that has little or no documentary or evidential value and that need not be set aside for future use.”⁴⁷

In the Canadian General Standards Board, Electronic Records as Documentary Evidence standard, a “transitory record” is a “record that is required only for a limited time to ensure the completion of a routine action or the preparation of a subsequent record.”⁴⁸

In Newfoundland and Labrador's *Management of Information Act*, a “transitory record” “means a government record of temporary usefulness in any format or medium having no ongoing value beyond an immediate and minor transaction or the preparation of a subsequent record.”⁴⁹

⁴⁵ *Supra* at pages 6 and 7.

⁴⁶ Office of the Premier, “Premier's statement on freedom of information and records management improvements”(December 16, 2015)(<http://bit.ly/IRDU1gy>).

⁴⁷ See <http://www2.archivists.org/glossary>.

⁴⁸ CAN/CGSB-72.34, page 13 (<http://www.techstreet.com>).

⁴⁹ Section 2(h) in S.N.L. 2005, c. M-1.01(<http://canlii.ca/t/k03h>).

The common element in these definitions is that transitory records are only of temporary value. These definitions focus on the content of the transitory record; only the *Management of Information Act* mentions form.

Examples of common transitory records include: copies, drafts, notices, informational materials, advertisements like “junk mail” and unsolicited records.

In the RIM profession, transitory records are routinely destroyed to reduce record volume and the cost and time associated with managing records with temporary and limited value.

Back to the British Columbia Commissioner’s report and the Loukidelis Report, on the issue of email and transitory records, in her report, the Commissioner found that:

In conducting this investigation, it has become clear that many employees falsely assume that emails are impermanent and transitory, and therefore of little value. What this investigation makes clear is that it is a record’s content and context that determines whether a record is transitory, rather than its form.⁵⁰

But, as a general proposition, is all email transitory? In both the Commissioner’s report and the Loukidelis Report, the conclusion is that all email is not transitory because it depends on the content and context of the email whether the email is transitory or not.

The definition of “record” in the *Freedom of Information and Protection of Privacy Act* supports this emphasis on the content and context of email, not email’s format:

"record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records,⁵¹

As the Loukidelis Report observes, consistent with the Commissioner’s conclusions, that: [T]his non-exhaustive definition requires that information be “recorded or stored” by some “means”. It is beyond debate that electronic records, including emails existing only in electronic form, are records. Information in an email or an email string is electronically recorded or stored and is thus a record.⁵²

Beyond debate outside the privacy world, and beyond debate extended to the justice system in general. For example, all of the *Evidence Act* statutes in Canada, be they

⁵⁰ *Supra* at page 49.

⁵¹ Schedule (http://www.bclaws.ca/civix/document/id/complete/statreg/96165_00).

⁵² Loukidelis Report at page 10.

federal, provincial and territorial, employ similar non-exhaustive definitions of a “record”. In doing so, these statutes permit email to be a record on its own to be admitted in evidence in legal proceedings across the country. They also permit email to stand on its own, in place of paper records.

As a result, email in Canada can be a record, and like paper records, email has a proper home in a records retention schedule.

Myth 6: There Are No Legal Consequences For Destroying Records, With Or Without A Records Retention Schedule

A final myth is that there are no legal consequences for destroying records with or without a records retention schedule. The basis of this myth, in my experience, is the bogus belief that records are “just filing”. Records are not seen as an organization’s key information assets, *which they are*. Records are not considered evidence of an organization’s legal and business transactions, *which they are*.

In truth, there are serious legal consequences for destroying records, with or without a records retention schedule.

The term lawyers and judges use for illegal destruction of records is “spoliation”. The current statement of the spoliation in Canadian law is found in the 2008 Alberta Court of Appeal case, *McDougall v. Black & Decker Canada Inc.*⁵³

In that case, the litigation between the parties focused on a house fire in the home owned by the McDougall family. The fire department determined that the fire was caused by either carelessly disposed smoking materials or a malfunctioning cordless electric drill manufactured and distributed by Black & Decker. The McDougalls sued Black & Decker for the loss of their home. When litigation was started, the McDougall’s house was replaced by a new home. Parts of the McDougall’s drill in possession of the McDougall’s insurance company’s investigator went missing and were never found. Black & Decker applied to have the lawsuit dismissed because of spoliation. It claimed it was unable to defend itself in court to show how the fire really began. It could not investigate the fire scene because it was now a new home. It could not investigate the drill because it was missing. The Alberta Court of Appeal found there was insufficient evidence to prove spoliation but directed a new trial. At the new trial, it gave Black & Decker the right to examine the insurance company’s investigator who had examined the drill before the evidence went missing.

⁵³ 2008 ABCA 353 (CanLII)(<http://canlii.ca/t/21bl9>).

In coming to its decision, the Alberta Court of Appeal reviewed the law of spoliation in Canada. The Alberta Court of Appeal found that spoliation “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”.⁵⁴ It also found that, if spoliation occurs, the principal remedy is to presume as fact that spoliation is not to assist the spoliator and the courts, in their Rules of Court, have a variety of remedies to use to not assist the spoliator.⁵⁵

The Rules of Court across Canada give the courts broad discretion to apply a number of remedies to deny the spoliator the fruits of his or her evidence destruction.

Courts may refuse to admit documents into evidence. In addition, courts have the power to detain, take custody or preserve evidence. Courts may draw an adverse inference against a party guilty of spoliation to find as facts certain evidence against a party who spoliates. Courts may refuse to hear witnesses or permit a spoliator to examine or cross-examine witnesses. Courts may impose costs against a party who engages in spoliation. Courts may also levy contempt of proceedings orders against spoliators. In addition to these court sanctions, organizations may face further court proceedings for fraud or other criminal conduct arising out of the spoliation. Most rules of court permit a default judgment, without a trial, to be entered against a defendant who destroys evidence. Similarly, most rules of court permit the dismissal of a legal action when a plaintiff commits spoliation.

In addition to these serious legal consequences, an organization may also suffer losses from bad publicity, loss of business or loss of reputation if it is found guilty of spoliation. As well, there is the time and money an organization must expend in order to defend court actions for claims it spoliated. This is time and money not spent on furthering the organization’s mission or purposes.

Given the wide range of sanctions, as noted above, there are serious legal consequences for destroying records, with or without a records retention schedule. Compliance with records retention law is a “shall”, not an option.

⁵⁴ *Supra*, at para. 18.

⁵⁵ *Supra*, at para. 29.

CONCLUSION

After you read this article, I hope you are convinced that these myths, if they live in your organization, need to be dispelled. I hope my article gets you to ask yourself questions about the efficiency and effectiveness of your RIM program. Questions like:

- Who in my organization should I give this article to read?
- Is my organization's retention schedule legally compliant?
- How do I conduct legal research so I know what legislation has changed that affects my organization's records?
- Do I need to conduct a legal review of my retention schedule? How do I do that?
- When was the last annual review of my retention schedule completed?
- Does my retention schedule include email?
- Does my organization need a RIM bylaw? How do I make a bylaw?
- Does my organization need RIM policies and procedures? How do I write them?
- Does my organization need more RIM training? On records retention? On transitory records?
- Is my organization retaining too many records?
- Is my organization doing disposition? Doing disposition properly?
- Is my organization at real risk of audit, investigation or prosecution and fines or prison for noncompliance with the law?
- Where do I get a RIM lawyer?

Once you ask yourself these questions and think through your answers, I hope you start a conversation within your organization about RIM so you can help your organization get on track to using your records more as information assets with improved legal compliance, risk control and greater peace of mind.