

# **Electronic Discovery: Its Impact on Information Management**

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# Emerging E-Discovery Protocols in Canada

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## E-Discovery

- The preservation, collection, processing, review, and production of electronically stored information (ESI)
- The prevalence of ESI has irretrievably changed the litigation process in a number of significant ways
- New protocols have emerged to address e-discovery in Canada

## Preservation

- Parties must ensure that all potential sources of ESI are not modified or deleted
- Potential sources of ESI include work and home computers, laptops, blackberries, cell phones, back-up tapes, CDs, DVDs, etc.
- Even deleted versions of documents may be recoverable
- Do not delete electronic files simply because a paper copy has been preserved

## Litigation Hold

- Upon reasonable anticipation of litigation, parties must immediately institute a litigation hold on all ESI
- How?
  - Hold a preservation planning meeting, including representatives from legal, IT, records management and key employees
  - Identify all potential sources of ESI, the relevant time period, scope of production, potential custodians
  - If relevant ESI is not available in active form, back-up tapes and other archived data must be preserved

## Preservation Letters and Anton Piller Orders

- Upon the reasonable anticipation of litigation, counsel should consider sending opposing counsel a preservation letter
- It may also be prudent to consider a Preservation Order or an Anton Piller Order
- Ensure the letter or Order is as specific as possible, identifying types of ESI to be preserved, and the temporal scope to be applied

## Meet and Confer

- Counsel are encouraged to “meet and confer” early in the litigation
- Counsel for both parties should attempt to reach agreement on the following issues at the beginning of litigation:
  - Potential sources of ESI
  - The appropriate scope of e-discovery
  - The key players involved in the litigation
  - The steps already taken to preserve documents
  - The form in which ESI will be preserved and produced
  - Timelines for preservation and production

## Use of Experts

- Counsel should consider retaining experts to work within the client's IT department because the IT department:
  - May not be familiar with the litigation process
  - May not recognize the importance of certain documents
  - May underestimate the necessity of preservation
  - May not understand the chain of custody issues
  - May not be able to cope with the demands of preservation in addition to their daily duties



## Costs

- The rules regarding the costs of discovery are generally consistent with those of traditional paper document production
- The interim costs of preservation, retrieval, review and production of ESI are born by the producing party
- The opposing party will incur the cost of copying, for its own use, the resulting production
- In some circumstances, the parties may allocate the costs of ESI in a different manner by either agreement or Court Order


## Scope of Production/Conduct of Review

- Inherent nature and cost of e-discovery may require scope of production to be narrowed
- Over-production or irrelevant ESI may be as damaging to a party's interests as incomplete production
- Manually reviewing all ESI is cumbersome, time-consuming and expensive. Automated search tools should be utilized in appropriate cases

## Sanctions

- Spoliation is the destruction of evidence
- It need not be willful or malicious to attract sanctions
- Remedies awarded include:
  - A rebuttable presumption
  - Dismissal of a party's claim or defence
  - A contempt of court
  - Payment of costs

## Canadian E-Discovery Protocols

- The Sedona Canada Principles and Commentary (draft)  
<http://www.thesedonaconference.org/>
- Ontario Guidelines   
[www.oba.org/en/pdf\\_newsletter/E-discoveryguidelines.pdf](http://www.oba.org/en/pdf_newsletter/E-discoveryguidelines.pdf)
- B.C. Practice Direction  
<http://www.courts.gov.bc.ca/sc/ElectronicEvidenceProject/ElectronicEvidenceProject.asp>
- Several provinces are proposing amendments to their *Rules*

Document Retention



*David Wilson*

*October 16, 2007*

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- Overview of approach to document retention
- Lessons learned from the approach
- Current status
- Observations on Retention challenges

- Produce all forms of communications that John Smith and Sarah Jones had with ABC Inc. between 1999 and 2005.

- Decide what you want to accomplish before you start the process.
- IT typically approaches this subject with “backup” in mind, i.e. a system has failed, emergency situation, must restore and do it fast. Restore from full back up.
- Retention is more about being able to find particular things. Restoration does not typically do this, even if restoration is needed, the major part of the work is finding particular files.
- Decide: Do you keep everything and focus on search tools or keep the minimum needed and thus reduce the need for extensive search.
- Need a group that has a constant, ongoing interest in supporting and sustaining (legal tends to be topic driven e.g. litigation).



- Legal led internal project:
  - Approach was to retain only what is needed, everything else goes on a destruction time line in accordance with policy: (it is absolutely necessary that all material is consistently destroyed in accordance with policy - NO selective destruction).
  - Project estimated at 18 months took over 3 years.
  - When completed a very large backlog of back up tapes and thousands of boxes of paper files were destroyed.
  - For a brief period the storage mountain stopped growing and stood at steady state.

- Sent out memo to all senior executives from our CEO communicating the importance of the project and requiring the assistance of all departments (tone from top may be required but CEO's send many memos with great frequency—don't count on this helping).
- Created a departmental questionnaire to discover what documents existed (identified over 170 "types" of documents).
- Developed an internal coding and naming system for documents.
- Purged the backlog of physical and electronic materials.

- 40 % response rate from the total number of departments (after a 2 month period and lots of follow-up).
- No “major” department replied, only one office outside of Ottawa replied, many replies were incomplete.
- Of the replies there were very few matching document types.
- Where document match occurred, it later became clear that different uses created different issues.
- People consider (all) the work they do to be very important.
- People like ad hoc storage methodologies.

- No clear policy or practice has survived.
- Several mergers resulted in ownership becoming lost.
- Decision making became bogged down chasing new technology --- always a new version or demo to review.
- Decision to move from minimal retention to maximize retention (with reliance on search tools) caused confusion in the organization that was never really resolved.
- With back up still using tapes, broad search is not possible.
- Litigation holds in place too long leading to build ups.
- Other priorities and budget constrains matter and took priority.

- Start by defining your approach to documents—keep or discard?
- Develop a standard set of naming practices.
- Establish a permanent team to have ownership.
- Develop your approach with your business in mind—not simply fear of litigation.
- Technical knowledge, e.g. legal requirements are 10% of the task, with 90% knowing how to “work” the organization—consultants generally of little use



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# **“Everything” isn’t going to Court: The Impact of e-Discovery on IM in the Government Context**

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October 16, 2007

**Canada** 

## Stunningly simple problem

- PSEG Power New York, Inc., turned over more than 3,000 e-mails and 211,000 pages of documents to a legal adversary, but a magistrate judge has found that the company still failed to comply with a discovery request.
- The issue is not that information wasn't disclosed ... It was that e-mails and attachments weren't disclosed together.

– **Joel Stashenko**  
**New York Law Journal**  
**September 21, 2007**

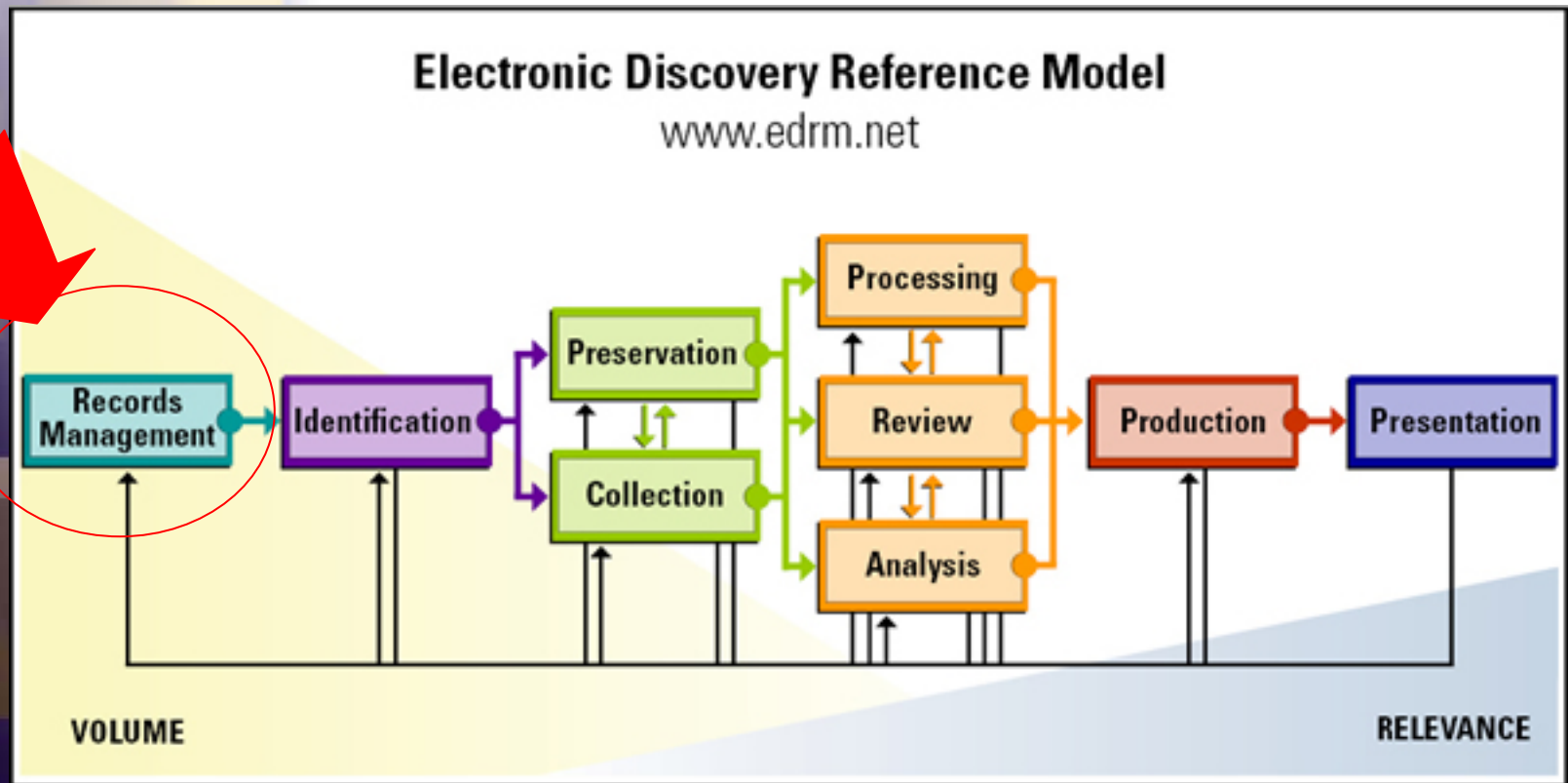
## e-Discovery: new focus on an old problem

- **The challenge is both paper and electronic**
  - Need to know what to do when the litigation hold is called, but
  - Also need to be able to do it
    - Quickly
    - Efficiently
    - Economically
    - At least somewhat gracefully
    - And with confidence that we have done it to everything to which it needs to be done
- **The problem is only partly that the medium has changed**
  - The problem is also that our IM processes and practices are not yet
    - Pervasive enough
    - Comprehensive enough
    - Risk-based enough



## Notice that RM is the first step

- in the Electronic Discovery Reference Model. When it is not done pervasively or is missing components, discovery is harder, longer, more expensive, more prone to errors of omission.



## Which means

- **we need to look upstream at the source of our information flow and understand**
  - What our information-producing and -sharing processes are
  - How those processes preserve / don't preserve information
  - The risks associated with the processes
  - How to convey the risks to clients in a way that they can understand and operationalize their response to DoJ
  - How to use technology to keep the bits and pieces and keep them together

## This is a significant change in IM drivers

- **Greater focus on how information is created, used and shared**
  - Know how information travels through the business process
  - Where does it end up? In all its multiple copies?
- **Greater recognition of accountability and transparency**
  - Duty to document
  - Duty to be able to find and rely on the documents
  - Duty to not be able to find
    - Retention and disposition
  - More focus on
    - Audit
    - Inquiries, hearings, Parliamentary committees
    - Litigation
    - ATIP
- **Integration with business processes because business units bear the risk!**

## That may mean working with new partners

- **IT Security**

- Is largely information security
- Some of your interests are also their interests
- Has a knowledge base in all the SOSs, TRAs, PIAs, etc., for various systems

- **Legal Services**

- Work with Departmental Legal Services Unit (DLSU) or litigation support group to
  - Define requirements
  - Understand the discovery process
  - Gain support for your IM program

## In a new way

- **Clients as sources of information risks rather than documents**
  - If you can't manage everything perfectly, focus on:
    - High risk/high value information
      - What can you not afford to lose?
      - How do you decide you can't afford to lose it?
      - How does information weave in and out of the business process?
      - Know this up front so you don't have to figure it out on the fly.
    - High risk technology-related behaviours
      - e.g. if the bulk of a group's correspondence is in email, how will you capture and preserve it? With its attachments? In all formats?
      - If a significant amount of a group's correspondence is via Blackberry, are you managing this information?
      - Do people use laptops? How is laptop use controlled?
    - High risk clients
      - Which clients are most at risk for litigation, ATIP, inquiries, etc.
      - Who has strong accountability or transparency requirements?

# e-Discovery shows us what we wish we had done

- **Policies and procedures**
  - That are known to your users
  - That are up-to-date; business needs evolve
  - That **include the litigation hold process** if that is significant risk for the organization
- **Inventory and description: paper-based or electronic**
  - Know what we have, where it is and what it is
    - Makes it easier to map out the universe of potentially relevant information and gauge its relevance early in the discovery process
- **Retention and disposition**
  - Schedules and disposition authorities current
    - Reflect current business requirements
    - Keep only what you need
  - Processes keep up with policies, procedures, schedules
    - Destruction step not overlooked, postponed, only partly done
    - No copies in people's personal archives or email files (much easier said than done!)
    - Backup technologies have a defined business purpose (e.g. recovery) and a corresponding life cycle (disposition)

## Or at least done better

- **Integrity**

- Much easier in paper – things less changeable and often come stapled together
- Electronically, things have a habit of morphing (content, metadata) and becoming detached from their components (metadata, attachments)

- **Roles and Responsibilities**

- Who does what?
- Who is accountable for what?
- Since most of us rely on our clients to do most of the IM work, they need to understand what they are to do

- **Monitoring**

- Know to what extent things are or are not done
- We need mechanisms to monitor client success / compliance

## We want everything ...

- **The first call may be for “everything”, but “everything” isn’t evidence and “everything” isn’t going to court.**
- **You need a way to identify your “everything” and track your progress as you sift through it, **SYSTEMATICALLY**, to identify the evidence (documents) that will actually make it to the production stage.**

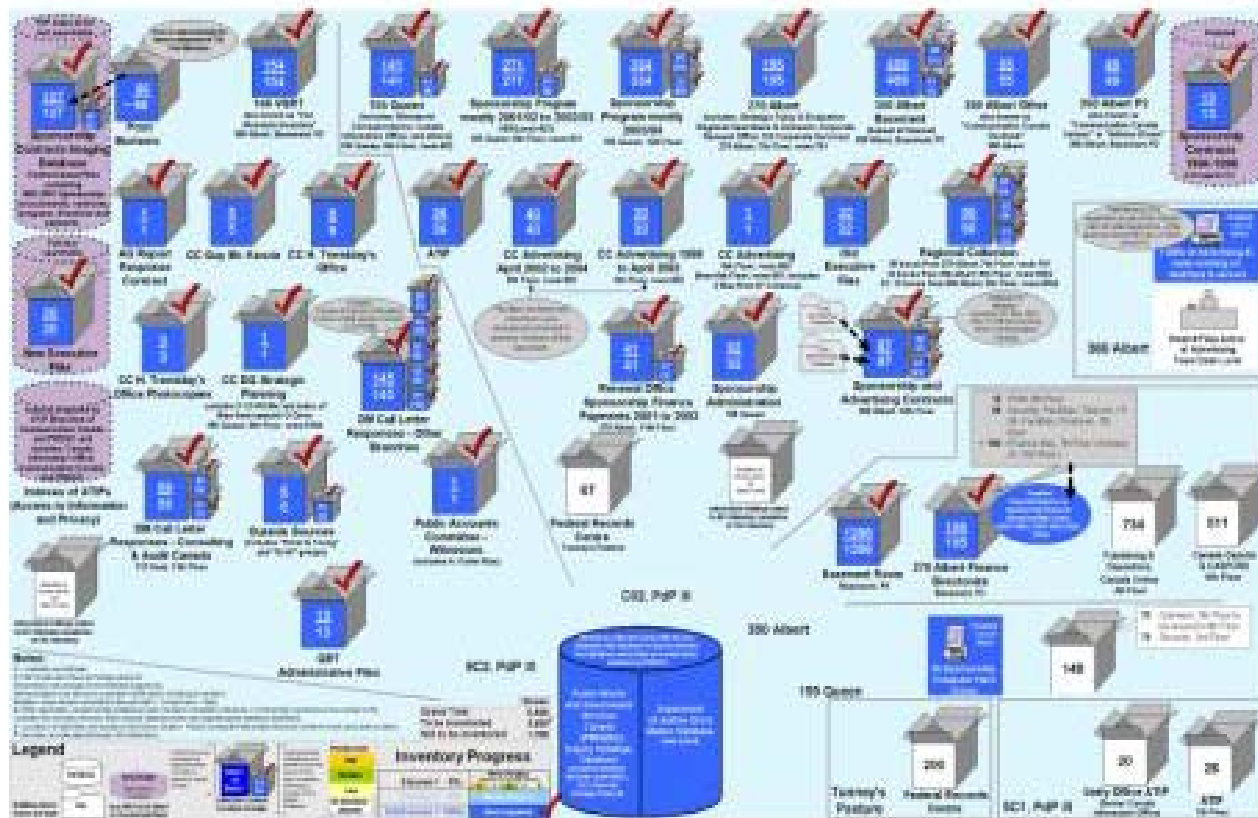


# Government Consulting Services Methodology: Universe

- **Visual approach to documenting collections**
  - What, where, how much
- **What is your universe of potentially relevant documents?**
  - Managed / unmanaged
  - Under our control / under control of others
    - Held in records of partner organizations
    - Held in provincial archives
    - Received by private sector, academic or other correspondents.

# Sample Universe: Gomery Inquiry

Essentially, an inventory,  
but dynamic and  
imparts data about the collection and its processing  
through stages of the discovery process



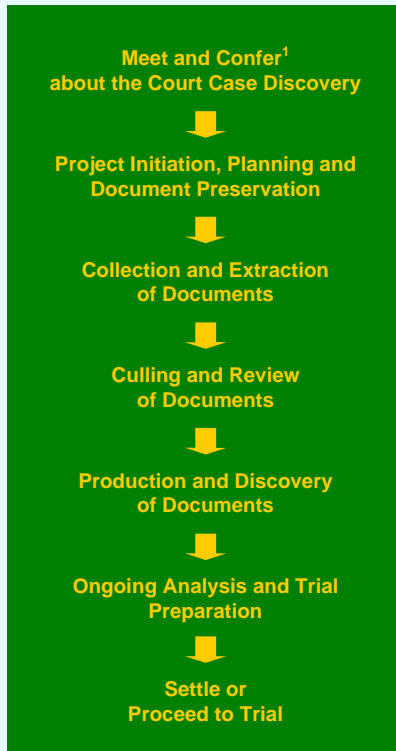
## Government Consulting Services methodology: Funnel

- **A systematic process for narrowing down the “everything” and being confident in your work.**

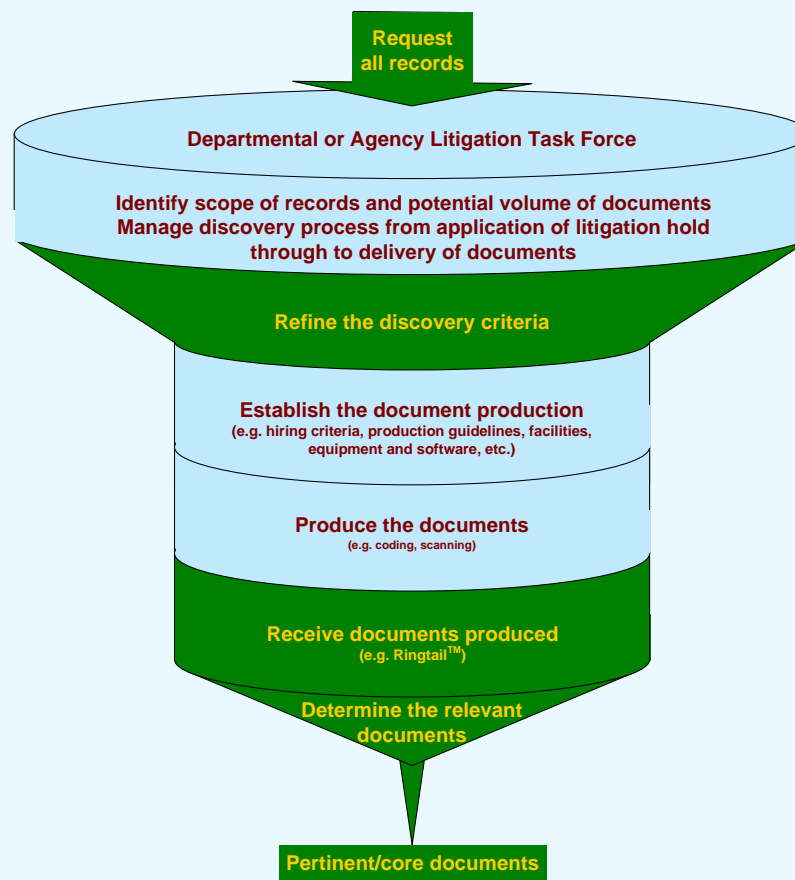
# Government Consulting Services methodology: Funnel

*The Crown's Legal Team needs the relevant documents to support their litigation case preparation*

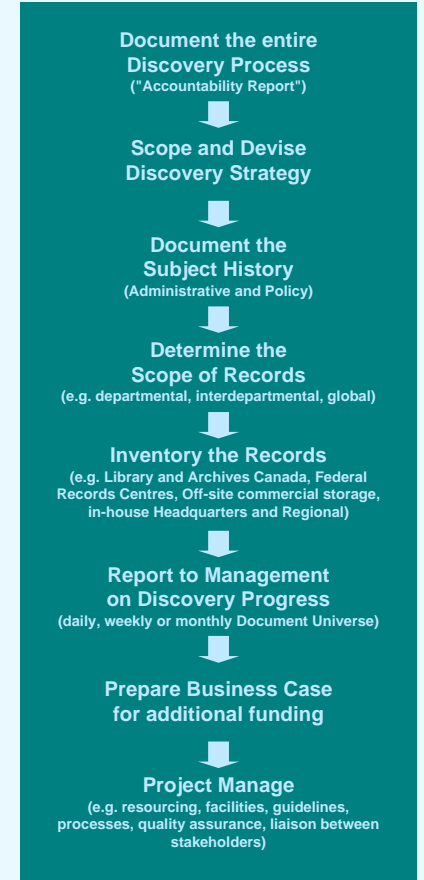
## Department of Justice Requirement



## Department or Agency Response



## Government Consulting Services Methodology



### Notes

1. Principle 3 of the *The Sedona Canada Principle* - <http://www.thosedonacanadaprinconference.org/> (under "Working Group Series").

### Legend

Departmental or Agency Litigation Task Force	Government Consulting Services Litigation Support Assistance
Department of Justice (DoJ)	

## For e-Discovery help in the Federal Government, call

- **Recordkeeping Liaison Centre  
Government Records Branch  
Library and Archives Canada  
Telephone: 819-934-7519  
E-mail: [centre.liaison.centre@lac-bac.gc.ca](mailto:centre.liaison.centre@lac-bac.gc.ca)**
- **François Matte  
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Telephone: (613) 947-2391  
E-mail: [francois.matte@pwgsc.gc.ca](mailto:francois.matte@pwgsc.gc.ca)**

# **Question and Answer Period**