



Evaluation of Litigation Services

FINAL REPORT

December 2019

Evaluation Branch
Internal Audit and Evaluation Sector

ACRONYMS

AAP	Aboriginal Affairs Portfolio
ADAG	Assistant Deputy Attorney General
ADAGO	Office of the Assistant Deputy Attorney General
ADM	Assistant Deputy Minister
ARO	Atlantic Regional Office
BCRO	British Columbia Regional Office
BoD	Board of Directors
BRLP	Business and Regulatory Law Portfolio
CAP	Central Agencies Portfolio
CBLs	Competition Bureau Legal Services
CBSA	Canada Border Services Agency
CIRNAC	Crown-Indigenous Relations and Northern Affairs Canada
CLS	Civil Litigation Section
CRA	Canada Revenue Agency
CSC	Correctional Service Canada
DM	Deputy Minister
DPR	Dispute prevention and resolution
ESDC	Employment and Social Development Canada
EWN	Early Warning Notes
FCC	Federal Court of Canada
FY	Fiscal year
IFMS	Integrated Financial Management System
IRCC	Immigration, Refugees and Citizenship Canada
ISC	Indigenous Services Canada
LRM	Legal risk management
LSU	Legal Services Unit
LTRL	Long-term reference levels
MOU	Memorandum of Understanding
NCR	National Capital Region
NeDLSS	National eDiscovery and Litigation Support Services
NLC	National Litigation Committee



NLS	National Litigation Sector
NRO	Northern Regional Office
NSLAG	National Security Litigation and Advisory Group
O&M	Operations and Maintenance
ORO	Ontario Regional Office
PRO	Prairie Regional Office
PSDIP	Public Safety, Defence and Immigration Portfolio
PSES	Public Service Employee Survey
PSWG	Paralegal Strategy Working Group
QRO	Québec Regional Office
RCMP	Royal Canadian Mounted Police
RDG	Regional Director General
SCC	Supreme Court of Canada
SST	Social Security Tribunal
TB	Treasury Board
TBS	Treasury Board Secretariat
TC	Transport Canada
TCC	Tax Court of Canada
TLS	Tax Law Services
TLSP	Tax Law Services Portfolio
VAC	Veterans Affairs Canada



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EXECUTIVE SUMMARY

Introduction

The Evaluation of Litigation Services was conducted by the Department of Justice Evaluation Branch and covers fiscal years (FY) 2014-2015 to 2018-2019. The evaluation was completed in accordance with the Treasury Board's *Policy on Results* (2016). Its main objectives were to:

- examine the implementation and early progress toward the expected outcomes of the reorganization of litigation services in 2016, and the success of resolving litigation files in the context of a new organizational structure; and
- consider how the reorganization of the litigation business line has affected other areas of Justice Canada, including the Portfolios and Legal Services Units (LSUs).

Program Description

The Department of Justice Canada (Justice Canada) provides litigation services to federal departments and agencies. Litigation services include a variety of activities that are part of representing the federal government in the resolution of litigious or potentially litigious matters, which includes exploring resolution options, preparing cases for litigation, and representing the federal government before courts and administrative tribunals.

Justice Canada litigation services are primarily provided by staff who are part of the National Litigation Sector (NLS). The NLS became effective on April 1, 2016 and is responsible for the conduct for all litigation involving the Government of Canada or any of its departments or agencies. Justice Canada's regional offices (Atlantic, Québec, Ontario, Prairies, British Columbia, and Northern), as well as the Civil Litigation Section (CLS) and other groups in the National Capital Region (NCR), and National eDiscovery and Litigation Support Services (NeDLSS) provide litigation services and report directly to the Assistant Deputy Attorney General (ADAG NLS).

Some litigation services are also directly provided by several additional units outside the NLS, mostly by LSUs that are co-located in client departments/agencies. Namely, they consist of a specialized Tax Law Services (TLS) unit in the NCR, the National Security Litigation and Advisory Group (NSLAG) LSU, the Treasury Board Secretariat (TBS) LSU, the Competition Bureau Legal Services (CBLS), the Employment and Social Development Canada (ESDC)/Veterans Affairs Canada LSU, and the Transport Canada (TC) LSU.

Findings

Effectiveness

The creation of the NLS in 2016 was intended to plan, manage, deliver, and oversee litigation services for the government as a whole, and to enable a more consistent and efficient approach with clearer accountability and more flexibility in the use of litigation resources. The evaluation found that, in general, the NLS has been effective in achieving these objectives.

Justice Canada was successful in over 70% of its litigation files concluded during the period covered by the evaluation (defined by the Department as all settled files and adjudicated files with a successful outcome). Justice Canada provides litigation services that meet its established service standards and

are of high quality. This is reflected in the client satisfaction ratings related to the responsiveness, usefulness, and timeliness of litigation services and is confirmed by Justice counsel who liaise with clients and litigators. The evaluation also found that the Department is keeping pace with demand, which has required flexibility in responding to the diverse litigation needs of its client departments and agencies.

The NLS has had a positive impact on the management of litigation services. In particular, the NLS structure has facilitated consistency and coherence in the approach to litigation services through the development of frameworks and guidance documents. Reporting requirements on litigation files have been clarified under the NLS structure for regional offices. In addition, the NLS has facilitated collaboration among the areas of Justice Canada that provide direct litigation services (NLS and other litigation units). The Regional Directors General (RDGs) work directly with the ADAG NLS through the Board of Directors (BoD) to manage the litigation work of the Department, and regional litigation committees have been more active in sharing best practices.

While the new structure supports closer relationships among litigation units, including the regional offices, CLS and other litigation units, results suggest that there is less communication and engagement between regional offices and Portfolios/LSUs. The evaluation also found some ambiguity with respect to how and when to directly involve Portfolios and LSUs during the litigation process. Results indicate an ongoing need to facilitate communication and engagement between Portfolios/LSUs and the NLS, and within NLS units, in order to best support client centric strategic partnerships.

Efficiency

In terms of administrative efficiency, the evaluation found that the NLS structure has simplified budgeting and planning processes, by bringing the previous 35 separate budgets for litigation services into one consolidated budget. In addition, the NLS allows for a more flexible approach to staffing litigation files, both within regional offices (staff can more readily work across Portfolios), as well as through cross-regional collaboration to meet service delivery needs. The new structure also facilitates sector-wide initiatives, such as the development of a detailed resource allocation analysis project, the NLS Paralegal Strategy, and the development of standardized tools and processes for personnel selection and management, which contribute to more consistent approaches in NLS management nationally.

In terms of the efficiency in litigation file management, the level of effort (staff time) is appropriately allocated, as higher risk and complexity files (the more high-profile and sensitive cases) receive more attention in terms of staff time. However, the data also indicate that about half of files settle closer to trial. While counsel are using dispute resolution options, there is the potential to consider options to resolve cases in a more cost-effective manner (i.e., pursuing settlement at an earlier stage of the court process).

Recommendations

- 1) The NLS, in consultation with other Sectors or Portfolios, should clarify business processes including how and when various groups such as Portfolios (including LSUs), Sectors and client departments should be involved in the litigation process.
- 2) The NLS, in consultation with other Sectors and Portfolios, should establish opportunities for networking and information sharing among personnel from NLS, Portfolios (including LSUs) and Sectors, as well as within NLS (e.g., across regions).
- 3) The NLS should further explore opportunities to enhance the use of various alternative dispute resolution processes, as well as the possibility of pursuing settlement at earlier stages in the litigation process.

1 INTRODUCTION

1.1 Purpose of the Evaluation

This report presents the results of the Evaluation of Litigation Services. The evaluation was conducted in accordance with the Treasury Board's (TB) *Policy on Results* (2016), which requires departments to measure and evaluate performance and use the resulting information to manage and improve programs, policies and services. The evaluation was undertaken by the Evaluation Branch of the Department of Justice Canada between September 2018 and July 2019, as per the Department-approved 2019-2020 to 2023-2024 Departmental Evaluation Plan.

1.2 Evaluation Scope

The primary focus of the evaluation was the 2016 reorganization of litigation services, which included creation of the National Litigation Sector (NLS). The evaluation considered early progress toward meeting the objectives of this reorganization as well as the success of resolving litigation files in the context of a new organizational structure. The evaluation also considered how the reorganization of the litigation business line has affected other areas of Justice Canada that work with litigation services, including the Portfolios and Legal Services Units (LSUs).

Given the focus on litigation services, the evaluation included only those areas of the NLS that are directly involved in the management and provision of litigation services.¹ Areas of the NLS that were included in the evaluation are the Office of the Assistant Deputy Attorney General (ADAGO NLS), the Office of the Deputy Assistant Deputy Attorney General, the Civil Litigation Section (CLS), the six regional offices' litigation work (Atlantic or ARO, Québec or QRO, Ontario or ORO, Prairies or PRO, British Columbia or BCRO, and Northern or NRO), the National eDiscovery and Litigation Support Services (NeDLSS), and the Business Integration and Strategies Branch.

The evaluation scope also included, to a more limited extent, litigation services provided by other areas of Justice Canada that are not part of the NLS (which will be referred to in this report as "other litigation units"):

- the Tax Law Services (TLS) unit in the National Capital Region (NCR), which is part of the Tax Law Services Portfolio (TLSP);
- the National Security Litigation and Advisory Group (NSLAG) LSU, which is part of the Public Safety, Defence and Immigration Portfolio (PSDIP);
- Treasury Board Secretariat (TBS) LSU, which is part of the Central Agencies Portfolio (CAP); and
- the Competition Bureau Legal Services (CBLS), the Employment and Social Development Canada (ESDC)/Veterans Affairs Canada (VAC) LSU², and the Transport Canada (TC) LSU, which are part of the Business and Regulatory Law Portfolio (BRLP).³

¹ Areas of the NLS that were not included in the evaluation include the Litigation Practice Management Centre, the International Assistance Group, the National Security Group, and the Criminal Conviction Review Group. These areas are involved more in the provision of legal advice than in the direct provision of litigation services.

² The ESDC/VAC LSU is an LSU that provides legal services to two federal departments. However, all litigation work conducted by the ESDC/VAC LSU is undertaken for ESDC.

³ Because of the small amount of direct litigation services provided by the TC LSU, its litigators were included in the survey, but not included in the other data collection methods.

The evaluation considered the involvement of these other units with the NCR Litigation Committee and their processes for managing litigation.

The evaluation covered litigation services for the fiscal years (FY) 2014-2015 to 2018-2019. The Evaluation Branch directed the evaluation, with the support of an Evaluation Working Group composed of representatives from the NLS, the Public Law and Legislative Services Sector, and the Portfolios.

2 PROGRAM PROFILE

2.1 Program Description

2.1.1 Brief Overview

Litigation services are integral to Justice Canada's role in supporting the Minister and the Attorney General of Canada as the government's chief law officer and as the officer responsible for the conduct of all litigation on behalf of the Crown before any court, administrative tribunal, or inquiry body. Justice Canada's litigation services are primarily provided by litigators who work in regional offices or the CLS, which is located in the NCR. As mentioned in Section 1.2, other litigation units also exist that specialize in certain legal areas and/or appear before administrative tribunals (TLS unit, NSLAG LSU, ESDC/VAC LSU, CBLs, TC LSU, and TBS LSU).

Litigation services include a variety of tasks that are part of representing the federal government in the resolution of litigious or potentially litigious matters. More specifically, litigation services includes using the appropriate dispute prevention and resolution methods to promote early settlement; gathering and challenging evidence in accordance with applicable rules of evidence; developing legal positions and making submissions; and litigating cases before adjudicative bodies. This work is done in order to preserve and protect the interests of client departments and agencies and those of the federal government as a whole.

Litigation support is provided to litigators by LSUs that are co-located with client departments and agencies. Each LSU is assigned to one of five Portfolios that is responsible for structuring and managing the range of advisory, legislative, and litigation services provided by the Portfolio's LSUs to client departments or agencies. The five Portfolios are: TLSP, which provides legal services to the Canada Revenue Agency (CRA); PSDIP, which provides legal services to departments and agencies that deal with transnational criminal matters and immigration laws; Aboriginal Affairs Portfolio (AAP), which provides legal services to Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), Indigenous Services Canada (ISC), and other departments or agencies that have policies, programs, or services that target Indigenous clients; CAP, which provides legal services to the central agencies of government, such as the TB, the Department of Finance, and the Public Service Commission; and BRLP, which provides legal services to client departments and agencies that have a business or regulatory law component.

Litigators work directly with the LSUs, which serve as a liaison to the client and assist litigators with developing legal positions or strategies, obtaining instructions from the client, document production, and other litigation support tasks. Litigators also receive litigation support from the NeDLSS, which is a single point of access for discovery, e-discovery, and disclosure resources and services.

The relationship between Justice Canada and client departments and agencies is governed by standardized Memoranda of Understanding (MOUs), which guide both parties in their joint

management of the demand for legal services and include service standards for the legal services that Justice Canada provides.⁴

2.1.2 Governance Structure

In early 2016, Justice Canada announced a series of organizational changes designed to foster a cooperative approach at the departmental level. These changes included the creation of the NLS. The NLS became fully effective on April 1, 2016 and was intended to plan, manage, deliver, and oversee litigation services for the government as a whole, and to enable a more consistent and efficient approach with clearer accountability. Regional offices, which formerly reported directly to the Deputy Minister (DM) and Associate Deputy Minister of Justice, now report to the Assistant Deputy Attorney General (ADAG NLS).

The NLS is governed by a Board of Directors (BoD), which meets weekly and is chaired by the ADAG NLS and includes the Regional Directors General (RDGs) from all six regional offices, NCR Directors General and Directors, a Financial Management Advisor, and a Human Resources Client Services Director.

The NLS also relies on a committee structure to oversee significant litigation and ensure that consistent positions are adopted nationally. The National Litigation Committee (NLC) is a Standing Advisory Committee to the Deputy Minister and Deputy Attorney General of Canada and makes recommendations on legal positions in significant litigation, as well as on other litigation-related matters, such as practice directives and guidelines. In addition, each regional office has a litigation committee, as do (collectively) the litigation units located in the NCR. These regional litigation committees help to ensure that consistent positions are taken in litigation. For more on the litigation committees, see Appendix B.

While the NLS manages litigation services, the Portfolios and their LSUs continue to be accountable for the management of the law and for liaising with client departments and agencies.⁵ Litigation services provided by the other litigation units mentioned above report to their Portfolio and are provided with functional direction from the NLS.

The DM expected outcomes for the NLS are as follows:

1. improved coherence and consistency of litigation service delivery at the national level
2. more flexibility in the use of litigation resources
3. more efficient management of litigation operations and the ability to speak with one voice
4. clarified accountability structures
5. increased analytical and strategic capacity for litigation services
6. institutionalized capacity to drive continuous improvement and innovation⁶

⁴ Documents indicate that, as of FY 2018-2019, the NLS is responsible for MOUs with 23 clients. Service standards are an important part of the MOUs between Justice Canada and other departments and agencies in the provision of government legal services. Common service standards demonstrate the Department's commitment to providing high-quality (timely, responsive, useful, courteous) legal services in both official languages.

⁵ The TLSP also coordinates and ensures the delivery of legal services for all CRA matters, including the assignment of Tax Court of Canada files across Justice Canada based on resources and expertise required.

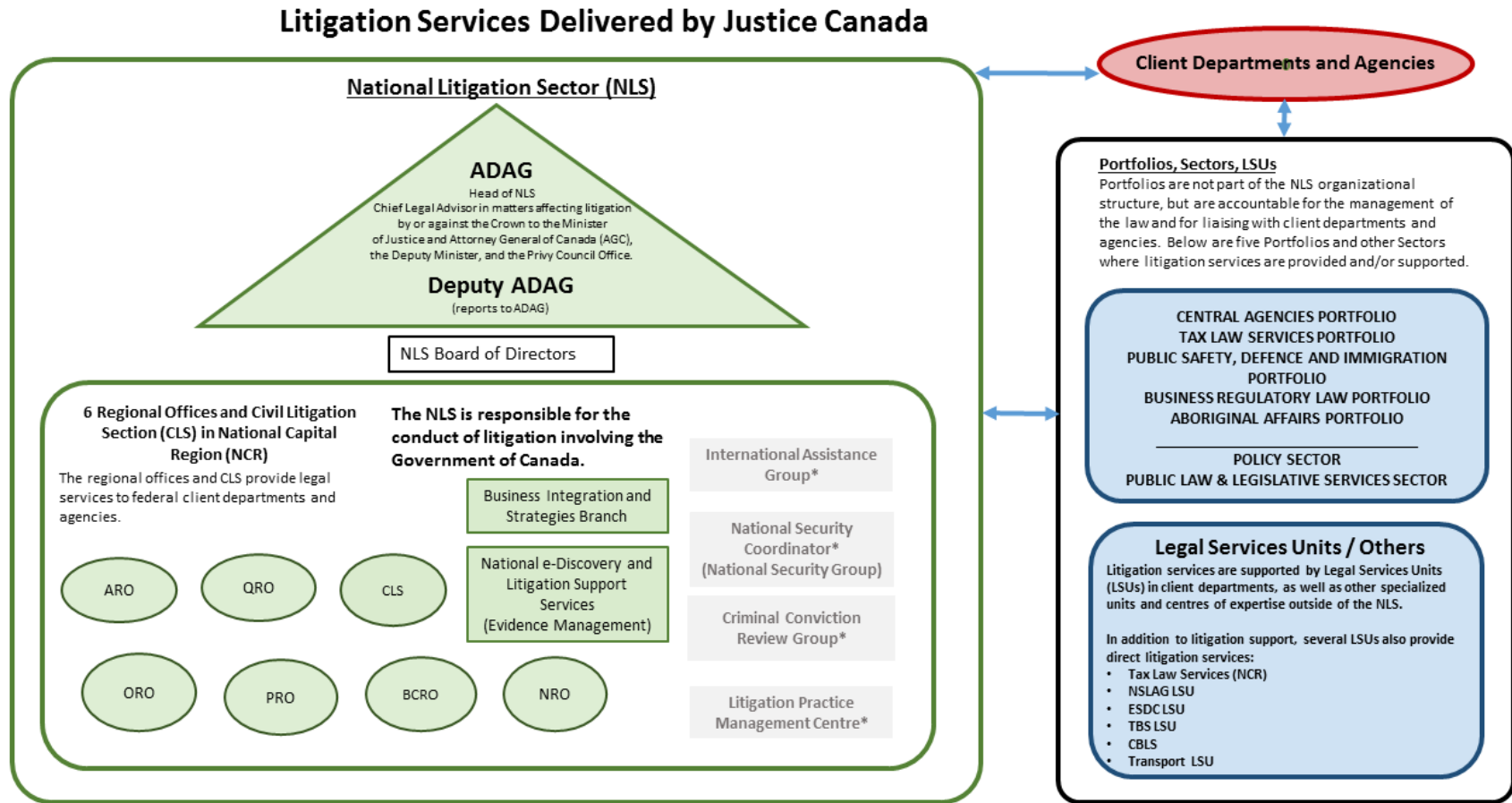
⁶ Justice Canada (2016, February 1). *Message from the Deputy Minister (DM) and Associate DM*; and Justice Canada (2016, February). *Litigation Background*.

The expected outcomes for NLS exist in the broader context of the overarching Vision for Justice Canada. Through Canada's Legal Team Vision, Justice Canada aims to extend a culture of collaboration across the Department and to clients. The goal is to position Justice as a trusted, collaborative strategic partner focused on supporting clients in their quest for solutions that benefit Canadians. Justice has an undisputed tradition of legal excellence, but becoming strategic partner requires moving beyond the traditional provision of legal advice that focuses mainly on the legal position and the assessment of the legal risks.⁷

The graphic on the following page provides an overview of the structure and relationships of the areas of Justice Canada involved in the provision of litigation services.

⁷ Justice Canada (2018). The Vision: Client-Centric Strategic Partnerships. Retrieved from <http://dmteam.justice.gc.ca/eng/priorities/vision/index.html>

Figure 1: Litigation Services Delivered by Justice Canada



*These sections are part of NLS, but not in scope for the current evaluation.

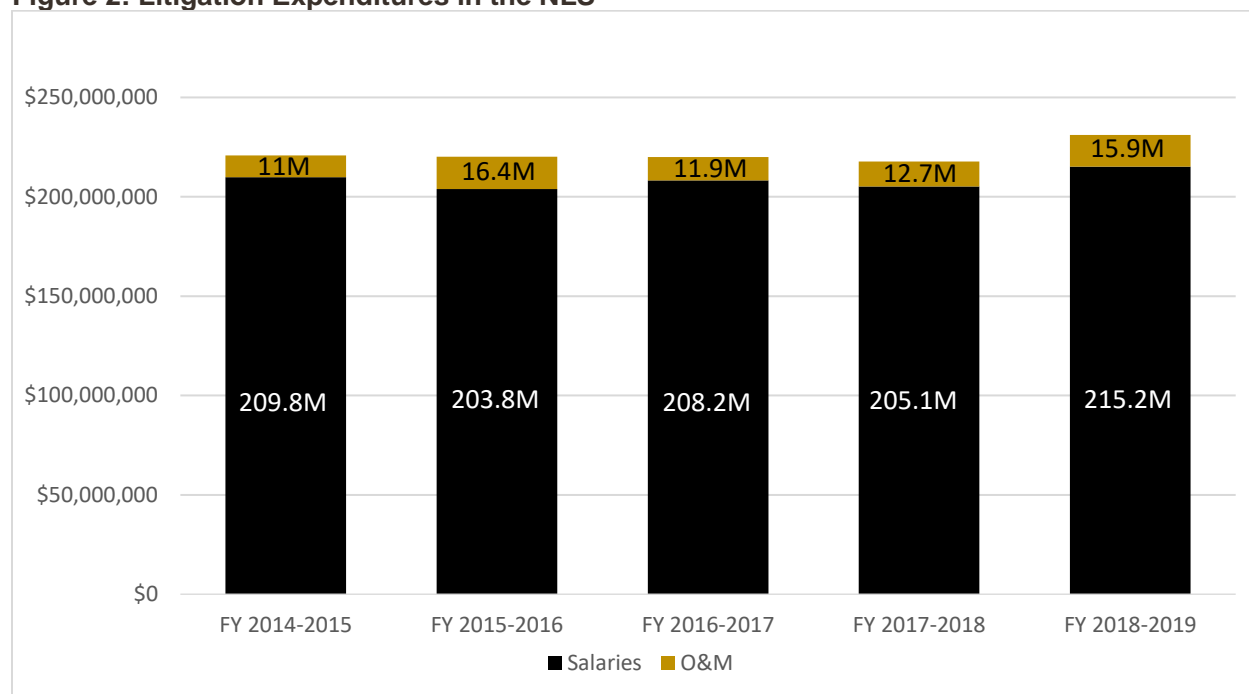
2.1.3 NLS Resources

NLS litigation expenditures

Litigation work in the Department is primarily conducted in the NLS, specifically within the NCR⁸ and the six regions (ARO, QRO, ORO, NRO, PRO, BCRO).⁹ Expenditures related to litigation services within the NLS averaged \$222 million over five years, with salary dollars accounting for approximately 94% of expenditures and O&M accounting for the remaining 6% (see Figure 2). Litigation expenditures were distributed across the NCR and the six regions, with some of the highest expenditures in larger regions where more litigation work is done (e.g., ORO, BCRO, QRO).

Overall, litigation expenditures within the NLS remained relatively stable between FY 2014-2015 and FY 2017-2018. Between FY 2017-2018 and FY 2018-2019, there was a 6% (\$13M) increase in expenditures (see Figure 2). The increase in expenditures can be attributed to an increase in salary, due to the implementation of collective bargaining agreements in FY 2018-2019, and an increase in full-time equivalents to manage demand on litigation files.

Figure 2: Litigation Expenditures in the NLS



Notes:

- I. The following expenditures were excluded from this analysis: (1) pay list items (e.g., maternity leave allowance, paternity leave allowance); (2) retroactive pay - previous years; (3) retroactive pay overtime - previous years; (4) transition payment - pay in arrears.
- II. 2015-2016 O&M expenditures include \$4.8M settlement payment, which was above average for settlement payments in this fiscal year.
- III. Threshold for cost recoverable disbursements was increased from \$200 to \$1,000 starting in FY 2016-2017 which increases the O&M expenditures incurred by the NLS.

⁸ The following NCR cost centres were excluded from the financial expenditures, as the work that they do falls outside the scope of the evaluation: Litigation Practice Management Centre, the International Assistance Group, the National Security Group, and the Criminal Conviction Review Group.

⁹ The majority of expenditures in the NCR and regions are related to litigation work. However, there is some advisory work also being done in the regions that could not be differentiated from the litigation work due to the way financial information was recorded. Therefore, some advisory-related expenditures may be included here.

Litigation expenditures in other Sectors in Justice Canada

In addition to litigation work in the NLS, additional litigation is conducted within the Department, primarily in six units outside the NLS (i.e., CBLs, TBS LSU, TLS, ESDC/VAC LSUs, NSLAG LSU, TC LSUs). Based on 2018-2019 data, the NLS accounted for the majority of litigation expenditures (88%), with litigation work conducted outside of the NLS accounting for the remaining 12% of all litigation expenditures across the Department.¹⁰

A glossary of key litigation terms is included in Appendix A and a more detailed program description can be found in Appendix B.

3 EVALUATION METHODOLOGY

To guide the evaluation, a methodology and evaluation matrix were developed that incorporated the flexibility of the *TB Policy on Results* (2016). The scope of the evaluation focussed on performance (effectiveness and efficiency) and key questions of interest to senior management, such as the impact of the changes made in 2016 to the litigation function. The evaluation included seven main performance questions, as summarized below.

Effectiveness

1. To what extent has the Department provided high-quality litigation services?
2. To what extent have the changes made to the litigation function since April 1, 2016 improved the effectiveness of litigation services?
3. How effectively does the NLS (including CLS, regional offices, and National eDiscovery and Litigation Services) engage or collaborate with Justice staff (Portfolios, LSUs, other areas) in delivering litigation services? What, if any, changes are needed?
4. Is the legal risk framework applied in an effective way to the litigation function?
5. To what extent do litigation legal professionals have the expertise, tools, structures, and resources to support the delivery of litigation services?

Efficiency

6. Are litigation services being managed and delivered efficiently?
7. Are litigation services achieving appropriate resolution of litigation cases in a timely, cost-effective manner?

Four lines of evidence were used to address the evaluation questions: a review of program and administrative documents; key informant interviews; a survey of litigation counsel; and a review of administrative data.

A brief description follows and additional details can be found in Appendix C.

¹⁰ Prior to FY 2018-2019, expenditures related to litigation were not calculated separately.

3.1 Document Review

The document review provided descriptive information on litigation-related activities, as well as information responding to most evaluation questions. The review was ongoing throughout the duration of the project and included the following types of documents:

- administrative and internal program documents
- publicly available departmental and other government documents
- results for relevant questions from the Department of Justice Canada Client Feedback Survey¹¹
- results for relevant questions from the 2017 Public Service Employee Survey (PSES)¹²

3.2 Key Informant Interviews

A total of 49 in-depth interviews were conducted with 122 individuals, representing the following groups:

- NLS staff (23 interviews with 52 individuals; these key informants mainly represented management or senior counsel who serve on regional litigation committees)
- Other areas of Justice that provide direct litigation services (5 interviews with 16 individuals)
- LSUs (9 interviews with 27 individuals)
- Justice Portfolios (6 interviews with 13 individuals)
- Other Sectors (6 interviews with 14 individuals)

3.3 Administrative Data Review

Administrative data was obtained from Justice Canada's Departmental Business Analytics System (i.e., Explore). Data was extracted from Explore's Data Warehouse via Tableau, which includes data from iCase, Integrated Financial and Material System (IFMS), and Human Resources Management System (HRMS). Data was extracted between March and June of 2019. The data were analyzed using R statistical software and Excel.

The data review focussed on litigation files led by the NLS or by one of the other litigation units between FYs 2014-2015 and 2017-2018. The data review for the NLS considered volume by type of client, outcome data, legal risk and complexity ratings, and level of effort (hours).

The administrative data for the other litigation units was more focussed and was limited to the number of litigation files opened, closed, and actively managed. The TC LSU, due to the small number of litigation files handled, and the NSLAG LSU, due to the sensitive nature of their litigation files, were not included in the administrative data review.

3.4 Survey of Litigation Staff

The evaluation included an anonymous and confidential bilingual web-based survey of litigation staff to obtain their opinions on the effectiveness and efficiency of litigation services and the impacts of the NLS. The survey population included all litigation staff (counsel, notaries, paralegals, and legal assistants) within the NLS, as well as staff from other litigation units outside the NLS that were included

¹¹ This survey is administered by the Corporate Planning, Reporting, and Risk Division as part of its overall performance management agenda.

¹² The Office of the Chief Human Resources Officer, Treasury Board of Canada, conducts the PSES to gather federal government employees' opinions about various dimensions of their work experience.

in the evaluation.¹³ In total, out of 1,615 staff who received the survey, 1,516 qualified to participate according to the selection criteria and 530 litigation staff completed the survey, for a response rate of 35%.¹⁴ Survey percentages are reported based on the overall number of respondents who were able to respond to the question (i.e., excluding “don’t know,” “not applicable” responses).

3.5 Limitations, Challenges, and Mitigation Strategies

The evaluation encountered a few methodological limitations or challenges. They are briefly mentioned below by line of evidence and are discussed in more detail in Appendix C.

Table 1: Summary of Limitations, Challenges, and Mitigation Strategies

Line of Evidence	Limitation or Challenge	Mitigation Strategy
Key informant interviews	Potential response biases from the sampling approach, the voluntary nature of participation, self-reporting, and the possible desire to affect outcomes	Used multiple lines of evidence and triangulation to confirm results
Survey of litigation staff	Potential response biases from the sampling approach, the voluntary nature of participation, self-reporting, and the possible desire to affect outcomes	Census approach (all litigation staff were invited) Used multiple lines of evidence and triangulation to confirm results
	Respondents included several categories of staff (counsel, paralegals, legal assistants)	Used complex skip logic Relied on working group members to assist in identifying appropriate questions for each group
Administrative data review	Ability to conduct a pre/post analysis with only two years before and after launch of NLS, due to the fact that many litigation files may take several years to conclude	Limited use of this type of analysis for quantitative data Also used qualitative methods for pre/post analysis
	Changes in data fields during time period (FY 2014-2015 to 2017-2018)	Relied on mapping of previous data to new fields Worked with NLS to ensure data were appropriately interpreted
	Financial data is maintained for units within Justice Canada rather than by business line until FY 2018-2019 (e.g., litigation)	Worked with Financial Management Services to obtain financial data for units that are now part of NLS over the full evaluation period, as well as construct financial data for litigation services (NLS and other units) over time

¹³ Staff who were already participating in the evaluation through interviews were not asked to complete a survey.

¹⁴ Screening questions were used to ensure that only individuals who worked predominantly on litigation files were included in the survey. Of the total 1,615 survey sample, 99 respondents were screened out. The response rate is calculated based on eligible respondents (530/1,516).

4 FINDINGS

4.1 Effectiveness

4.1.1 Managing Demand

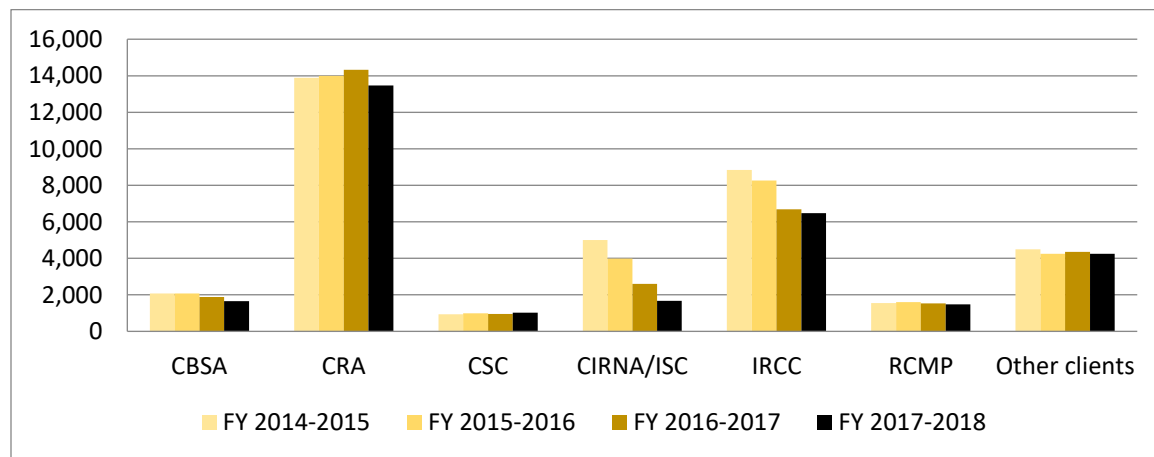
Justice Canada is effectively managing demand for litigation services, which requires flexibility in managing sudden increases in types of litigation.

The demand for litigation services provides an important context for the evaluation, and the ability to address the demand is a reflection of the effectiveness of the litigation services provided to federal departments and agencies.

NLS

The Department provides litigation services to all federal departments and agencies, although the majority of litigation files belong to three clients. These “top three” clients (in terms of the number of actively managed litigation files¹⁵ by the NLS) were consistent over the time period of the evaluation and show the concentration of litigation services. The CRA consistently had the most litigation files by a substantial margin, with 42% of the actively managed litigation files between FYs 2014-2015 and 2017-2018), followed by Immigration, Refugees, and Citizenship Canada (IRCC) (22%) and CIRNAC/ISC¹⁶ (10%). These high-volume clients are from three of the Portfolios —TLSP, PSDIP, and AAP. Figure 3 shows the number of actively managed litigation files by the “top six” clients by fiscal year.

Figure 3: Number of Actively Managed NLS Litigation Files by Top Six Clients



Source: Administrative data extracted from Explore (NLS units only)

The demand for litigation services is driven by a variety of factors, and changes in demand can occur suddenly, requiring Justice Canada to be flexible in its response. For example, changes in legislation

¹⁵ A file is considered actively managed in a FY if at least five minutes of time is recorded to the file during the FY.

¹⁶ CIRNAC and ISC officially became two separate departments on July 15, 2019 when the legislation dissolving Indigenous and Northern Affairs Canada and formally establishing CIRNAC and ISC took effect. For purposes of reporting on the administrative data, the new acronyms are used and the new departments are grouped together, as for most of the reporting period they were a single department.

can lead to an expansion of litigation in a particular legal area, or a class of litigants may decide to initiate a number of class action lawsuits within a relatively short period, which can affect the demand for legal resources and type of expertise required.

For the NLS, while the number of actively managed litigation files overall has declined by 18% from 36,781 files in FY 2014-2015 to 30,003 in FY 2017-2018, the decrease is concentrated to a reduction in active cases for two clients — CIRNAC/ISC and IRCC. CIRNAC/ISC experienced a 67% decline in the number of actively managed litigation files due, in large part, to the settlement of residential school litigation. IRCC experienced a 27% decline in actively managed litigation files between FY 2014-2015 and 2017-2018 due in part to changes to the *Immigration and Refugee Protection Act*, where cases that used to proceed directly to the Federal Court of Canada (FCC) now go before the Immigration and Refugee Board. Key informants reported that IRCC is now experiencing an increase in litigation due, in part, to high volumes of asylum claims, and Justice Canada has plans to add litigation staff to handle the increase in volume of FCC cases likely to result.

While the number of actively managed litigation files has decreased, the number of total hours spent by NLS on these files has remained relatively stable (1.26 million in FY 2014-2015 to 1.29 million in FY 2017-2018). The need for maintaining the overall level of effort is likely explained by the nature of actively managed litigation files between FY 2014-2015 and FY 2017-2018, which are increasingly of higher risk and complexity. For example, the percentage of actively managed litigation files that are both high complexity and high risk increased from 596 in FY 2014-2015 to 871 in FY 2017-2018 (a 46% increase). While they constitute a small percentage of the total files, these high-complexity/high-risk files are flagged as needing the greatest attention.

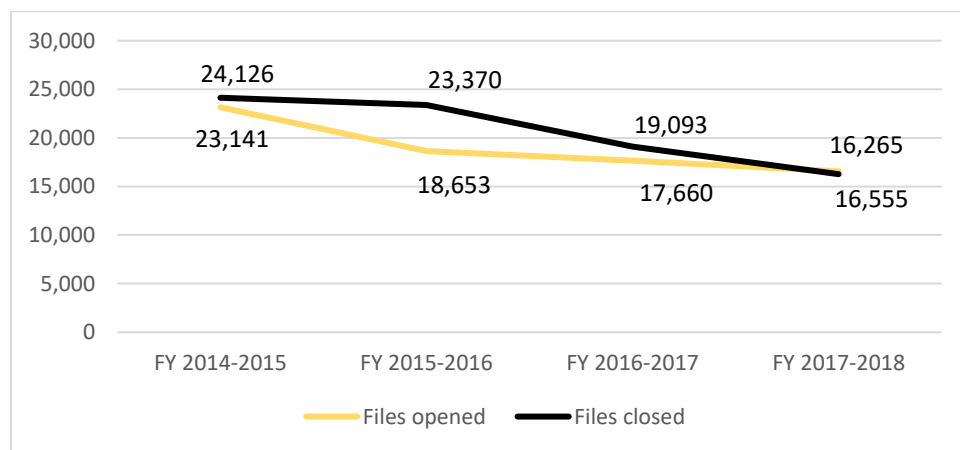
Keeping pace with demand

One way to assess the degree to which Justice Canada is keeping pace with litigation demand is to examine the number of files opened and closed each fiscal year.

NLS

The NLS appears to be keeping pace with demand. More files were closed than opened until FY 2017-2018, as shown in Figure 4.

Figure 4: Number of NLS Files Opened and Closed by FY



Source: Administrative data extracted from Explore (NLS units only)

In terms of the other litigation units, all of the units have experienced increased demand, and most have been able to keep pace with demand through the use of various strategies.

TLS

The TLS unit and tax law litigation overall (the TLS unit and the tax litigation services provided by regional offices) indicate particular challenges or strains to meet demand. The TLS unit in the NCR has experienced rapid growth in actively managed litigation files, with a 33% increase between FYs 2014-2015 and 2017-2018 (see Figure 5). Corresponding to this increase in volume, the TLS unit has gone from keeping pace with demand, as reflected by opening and closing approximately the same number of files in FY 2014-2015, to a situation in subsequent years where the number of files opened far exceeds the number of files closed. In addition, when considering the tax litigation work overall,¹⁷ documents and data indicate an increase in complexity, with a growing opening inventory of Class C files (where the amount at issue is \$150,000 or more) before the Tax Court of Canada (TCC) (a 38% increase from 1,160 in FY 2014-2015 to 1,604 in FY 2017-2018) and a 24% increase in actively managed complex TCC files from 1,563 to 1,944. To address the increasing demand across both the TLS unit and the tax litigation services provided within NLS in the regional offices, Justice Canada has implemented a strategy to address demand over the next five to ten years. This strategy includes a multi-year framework to review workload demand, workforce requirements and workforce expertise, and to develop an action plan to address the results.

ESDC

The ESDC/VAC LSU (see Figure 6) has also experienced rapid growth of actively managed litigation files. The LSU conducts the litigation for benefit-related matters under the Canada Pension Plan, *Employment Insurance Act*, and the *Old Age Security Act*. Most of these matters appear before the Social Security Tribunal (SST), which was established in 2013. As a result of the creation of the SST, the volume of litigation files handled by the ESDC/VAC LSU increased by more than 300% between FYs 2014-2015 and 2015-2016. The number of actively managed litigation files has continued to increase, although it has leveled off with an increase of 31% between FYs 2015-2016 and 2016-2017 and a 16% increase between FYs 2016-2017 and 2017-2018. Comparing the difference between the number of files opened and files closed demonstrates that the ESDC/VAC LSU is managing the increase in volume. While about 100% more files were opened than closed in FY 2016-2017, that decreased to 52% in FY 2017-2018. In order to assist in managing demand with respect to additional cases related to the new SST, a pilot project has been initiated in which the ESDC/VAC LSU and the NLS are sharing the work related to the SST tribunal, with certain cases being led through the LSU and others in the regions or CLS. This LSU continues to provide litigation support, as well as paralegal support to Justice regional offices to support SST litigation.

TBS

In FY 2017-2018, the TBS LSU (see Figure 7) opened 23% more files than it closed.¹⁸ While key informants did not indicate any issues with addressing the demand for litigation services, the demand rose with a 4% increase in the number of actively managed litigation files between FYs 2014-2015 and 2017-2018. The increase in demand for litigation services is expected to continue as the TBS LSU litigation work is before the Federal Public Sector Labour Relations and Employment Board, which

¹⁷ Tax litigation work overall includes litigation work undertaken by the TLS unit in NCR, as well as other tax-related litigation managed by NLS in the regions.

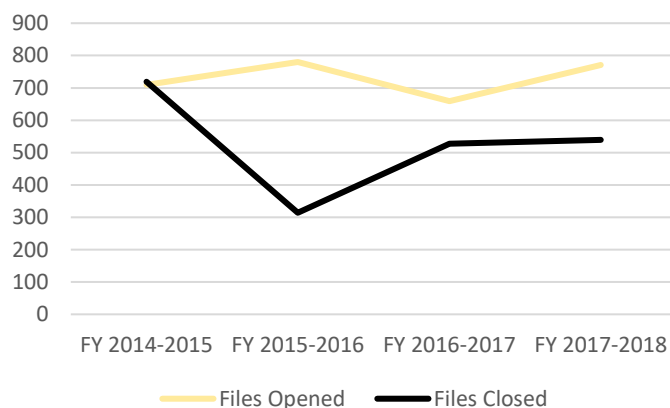
¹⁸ The TBS LSU reviewed its active files in FYs 2014-2015 and 2016-2017, which resulted in the closure of a large number of files. As a result of this review and changes in internal processes related to file opening, data regarding the number of files opening and closing may not accurately reflect demand for litigation services.

has recently undertaken efforts to reduce its backlog. TBS LSU will review and manage its staffing complement as necessary in order to address any potential increase in demand in upcoming years.

CBLS

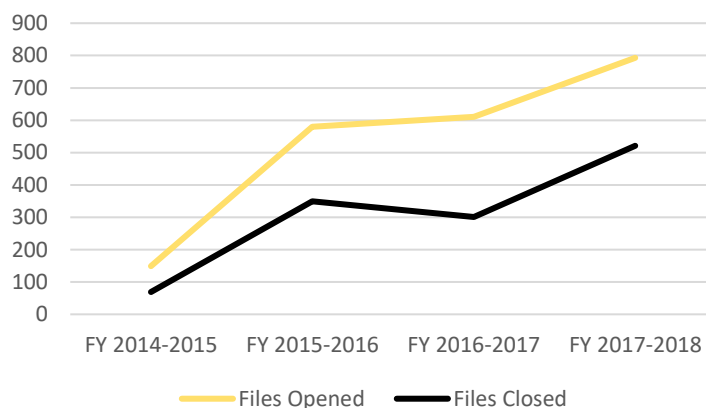
The CBLS (see Figure 8) have experienced a 28% increase in the number of actively managed litigation files between FYs 2014-2015 and 2017-2018 and have opened more litigation files than it have closed since FY 2015-2016. However, the CBLS' litigation inventory includes a number of files that will not require litigation and are therefore never assigned to litigation counsel.¹⁹ Many of the CBLS' actively managed litigation files have a consent agreement in place and therefore remain under surveillance for years, but do not require substantial counsel time. Consequently, the ability to address the demand for litigation services is not currently considered to be an issue.

Figure 5: Number of TLS Unit Files Opened and Closed by FY



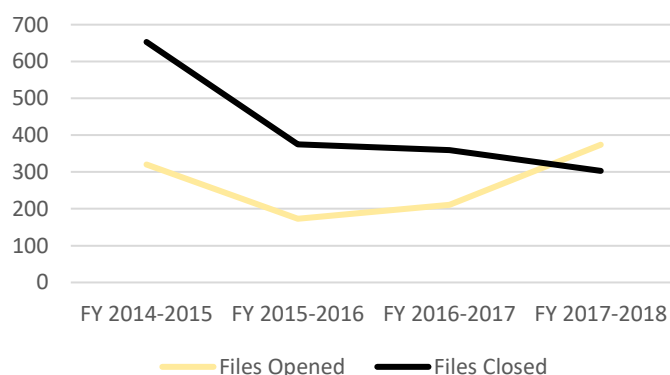
Source: Administrative data provided by the TLSP

Figure 6: Number of ESDC/VAC LSU Files Opened and Closed by FY



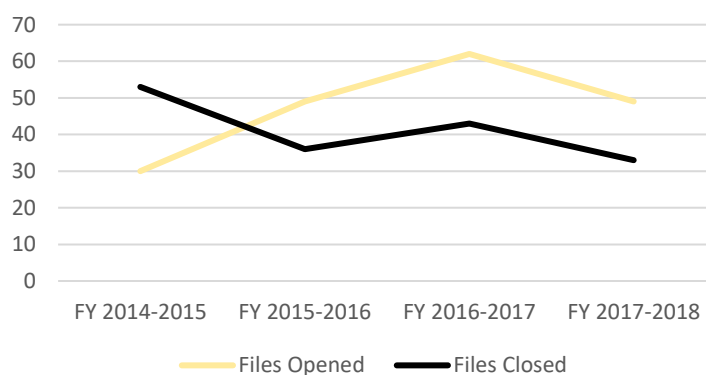
Source: Administrative data provided by the ESDC/VAC LSU

Figure 7: Number of TBS LSU Files Opened and Closed by FY



Source: Administrative data provided by the TBS LSU

Figure 8: Number of CBLS Files Opened and Closed by FY



Source: Administrative data provided by the CBLS

¹⁹ Since 2015, the CBLS handles all enforcement matters as anticipated litigation files unless told otherwise by the clients or by Competition Bureau management. Of those enforcement matters, a substantial number are merger reviews, which generally do not require litigation and are never assigned to litigation counsel.

Overall, the expectation is that demand will continue to increase for litigation services based on a number of factors, including:²⁰

- an increase in class action litigation, consistent with trends seen across our society. Class action proceedings are a relatively new phenomena, but have become a major factor in the federal government’s landscape of legal risks, with more than 150 proceedings representing a potential liability in the billions of dollars, and increasingly being used as a lever to influence federal policy;²¹
- the Supreme Court of Canada decision in *Daniels v. Canada* 2016 SCC 12, which held that non-status Indians and Métis people are “Indians” for the purpose of Section 91 of the *Constitution Act of 1867*;
- commitments to supporting the Missing and Murdered Indigenous Women Inquiry and reducing incarceration and mental health issues experienced by Indigenous Canadians;
- additional funding provided to the CRA to detect, audit, and prosecute tax evasion and collect outstanding tax debts;
- the CRA’s response to the Auditor General of Canada’s report on income tax objections, which involves substantial efforts to reduce its backlog of files;
- increased immigration levels and policies related to refugee reform, automated decision making, and lifting of visa requirements;
- the government’s focus on resource development projects and environmental regulatory reform;
- major procurement files (e.g., the national ship building procurement strategy) and regulatory changes (e.g., marijuana); and
- environmental and climate change issues.

4.1.2 Quality of Litigation Services

Justice Canada delivers high quality litigation services, meeting or exceeding established departmental targets.

Justice Canada Litigation: Client satisfaction

The Department has set performance indicators for litigation services that relate to the quality of litigation services.²² Performance indicators related to client satisfaction are measured by a standardized Client Feedback Survey that asks clients to rate the quality of legal services received and the extent to which Justice Canada is meeting its service standards for provision of responsive, accessible, timely, and useful services. For each element of client feedback for litigation services, Justice Canada has exceeded its performance target of 8.0 on a 10-point scale.²³ Based on the overall satisfaction score, results indicated that clients’ satisfaction has increased from Cycle II results.

²⁰ Justice Canada (2016). *National Litigation Sector: FY 2017-2018 Business Plan, Section 1*; Justice Canada (2017). *Department of Justice Canada 2017-2018 Departmental Plan*. Retrieved from https://www.justice.gc.ca/eng/rp-pr/cp-pm/rpp/2017_2018/rep-rap/dp-pm.pdf.

²¹ Justice Canada (2017). *Structure for the Integrated National Management of Class Actions*.

²² Performance indicators for litigation services are found in Justice Canada’s Departmental Results Report, 2017-2018, p. 26. Retrieved from https://www.justice.gc.ca/eng/rp-pr/cp-pm/dpr-rr/2017_2018/dpr-rmr/drr-rrm.pdf.

²³ Justice Canada has surpassed this target based on Cycle II results and results available to date for Cycle III (see Table 2).

Table 2: Client Feedback Survey Results

Service	Cycle II (2012)	Cycle III – partial (2017-18)
Overall	8.3	8.5
Responsiveness/accessibility	Combined service score not available for these measures of service quality.	8.9
Usefulness		8.6
Timeliness		8.5
Sources: Justice Canada (2012, May). Department of Justice Canada Client Feedback Survey Cycle II (2009-2012). Retrieved from https://www.justice.gc.ca/eng/rp-pr/cp-pm/dpr-rr/2012/docs/cfs2012.pdf . Justice Canada. (2018). Departmental Results Report, 2017-2018, p. 26 (Cycle III). Retrieved from https://www.justice.gc.ca/eng/rp-pr/cp-pm/dpr-rr/2017_2018/dpr-rmr/drr-rrm.pdf .		

Justice Canada: Litigation success ratio

An additional indicator of success is the “success ratio” for litigation files, which has a performance target of 70% successful outcomes. The methodology applied, starting in FY 2015-2016, considers two types of results to be successful: “complete wins” in adjudicated files brought by or against the Crown, as well as all settled files.²⁴ Partially successful adjudicated files are not considered as having a successful outcome for the purpose of the “success ratio” calculation. Litigation services have consistently exceeded this performance target of 70% successful outcomes (81% in FY 2015-2016, 80% in FY 2016-2017, and 79% in FY 2017-2018).²⁵

NLS success ratios by risk and complexity

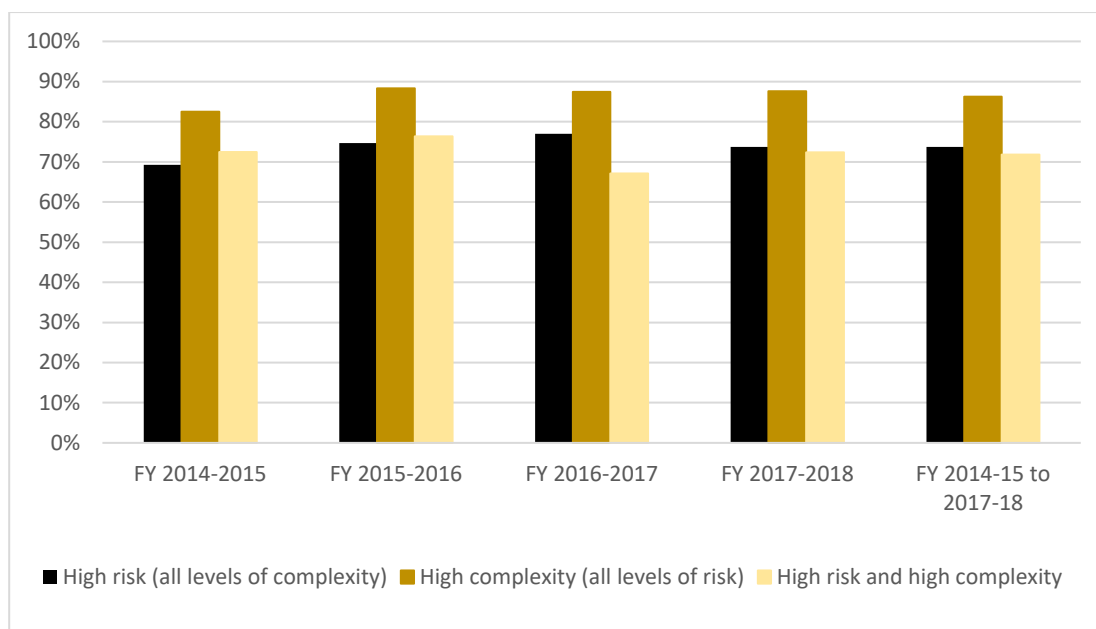
The evaluation applied the success ratio methodology to certain types of files to determine how successful the NLS was in resolving them. An analysis of the success ratios for NLS files by legal risk and complexity demonstrates a high level of success in litigation outcomes for high-risk and/or high-complexity files, which would include the most high-profile, sensitive litigation files.²⁶ The files with both high risk and high complexity between FY 2014-2015 and FY 2017-2018 have a successful outcome 72% of the time. Over this time period, high-risk files (regardless of complexity level) have a 74% success rate, while high complexity files (regardless of risk level) have an 86% success rate (see Figure 9). Files of medium or low risk and/or complexity also exceeded 70% for all five years.

²⁴ In FY 2014-2015, settled files were also given a Crown result of successful, partially successful, or unsuccessful. In that FY, only adjudicated and settled files with a result of “successful” were considered successful.

²⁵ Justice Canada (2018). 2017-2018 Departmental Results Report, p. 26. Retrieved from https://www.justice.gc.ca/eng/rp-pr/cp-pm/dpr-rr/2017_2018/dpr-rmr/drr-rrm.pdf.

²⁶ For definitions of legal risk and complexity, please see the Glossary in Appendix A.

Figure 9: Success Ratio Applied to High-risk and High-complexity NLS Litigation Files (Adjudicated and Settled) by Fiscal Year and Overall



Source: Administrative data extracted from Explore (NLS units only)

NLS success ratios – Adjudicated files only

In addition, the evaluation considered the success of the NLS in court by examining the results of adjudicated files only. The NLS has also achieved an almost 70% success rate (complete wins) between FYs 2014-2015 and 2017-2018.

Table 3: Crown Result for Adjudicated Litigation Files by FY

Result	FY 2014-2015	FY 2015-2016	FY 2016-2017	FY 2017-2018	FY 2014-2015 to FY 2017-2018
Successful	68%	68%	72%	69%	69%
Partially successful	6%	6%	6%	4%	6%
Unsuccessful	26%	25%	22%	27%	25%

Note: Totals may not sum to 100% due to rounding.
 Source: Administrative data extracted from Explore (NLS units only)

Potential areas for improvement

Confirming the administrative data and Survey results, almost all key informants who worked with litigators (LSUs, Portfolios, and other Sectors) generally consider the service to be of high quality and either meeting or exceeding most or all of the established service standards. As evidence of the high quality of litigation services, they pointed to the high degree of experience and expertise of litigation counsel when it comes to the conduct of litigation, the ability to master the relevant substantive law, success on the litigation files handled, and the collaborative approach to working with the LSUs. Any quality issues were identified as “outliers” by these key informants. Examples of quality issues fell into

two main categories: instances where counsel have not been well aligned to the files in terms of litigation experience; and situations where the client perspective is not adequately taken into account, which often includes lack of consultation with the LSU. The relationship between litigators, LSU counsel, and the Portfolios is discussed in more detail in Section 4.1.6.

While services were generally considered timely by clients based on Client Feedback Survey results and by 76% (n=221/292) of counsel who responded to the litigation staff survey, many key informants, primarily those within the NLS, reported increasing challenges in providing timely service. Timeliness of service was largely affected by factors such as the growing volume of litigation (tax litigation was an example), client responsiveness related to providing instructions, the internal NLS approval processes, and the length of time required to assign counsel to class action litigation. Some regional offices mentioned that, as a mitigation strategy, they put in place various processes to engage clients and the LSUs early in the development of legal strategies on high profile files, to ensure information flows to the client, and to anticipate the need for instructions.

4.1.3 Consistency, Coherence, and Speaking with One Voice

The NLS structure facilitates consistency and coherence of litigation services across Justice Canada.

Coherence and consistency in the approach to litigation services nationally supports the ability of Justice Canada to speak with one voice. Almost all key informants believe that Justice Canada is effective at speaking with one voice. While some noted that conversations can be difficult, they commended counsel for having open and frank discussions that remain productive and eventually serve to reach a consensus on a legal position. Survey results confirm this, as three-quarters of counsel and paralegal respondents (75%; n=282/377) believe that Justice Canada effectively or very effectively speaks with one voice.

The evaluation findings indicate that the NLS has implemented processes and directives that either have or will lead to greater consistency and integration of litigation services. The NLS is credited by key informants with facilitating the ability of Justice Canada to speak with one voice on litigation by building closer linkages across regional offices through formal and informal structures and serving as a single point of contact for clients. Counsel and paralegal survey respondents believe that the creation of the NLS had a positive (41%; n=101/249) or neutral (47%; n=117/249) impact on the capacity of Justice Canada to speak with one voice in litigation matters.²⁷

A specific example of an initiative that is considered to support greater coherence and consistency in litigation services is the new approach to class actions, which reflects a transition from coordination of class actions to national management of class actions. The National Class Action Proceedings Management Framework was launched in March 2019, so it is too early to determine its effectiveness in managing class actions, but having the NLS centralized management structure was considered to have facilitated its development.

The NLS has also supported the development of national litigation policies and directives that promote consistency in approach to litigation. One example is the *Directive on Civil Litigation Involving Indigenous Peoples*, which promotes a litigation approach that is consistent with the goal of reconciliation and provides guidance to counsel on applying the *Principles Respecting the*

²⁷ Remaining counsel and survey respondents indicated that the impact of the NLS was negative (12%; n=31/249).

Government of Canada's Relationship with Indigenous Peoples. While the directive was developed by Justice Canada, the NLS played a leading role in its development and can now ensure consistent application of the directive through national training, interpretation of its terms, and coordination of litigation so that consistent positions are taken across the country.

Contribution of litigation committees

The litigation committees are a key mechanism in ensuring that Justice Canada speaks with one voice. The evaluation found that the committees continue to serve a key role in ensuring consistency and quality assurance.

National Litigation Committee

The NLC continues to be an effective forum to support the national management of litigation and facilitate speaking with one voice. Over four-fifths (82%; n=111/136) of counsel survey respondents believe that the NLC is effective. In general, key informants believe that the appropriate individuals attend the meetings, as they are the most senior and experienced counsel in Justice Canada. However, Portfolio/LSU key informants thought that the NLC could consider inviting LSU lawyers whose files are being discussed, at least as observers, and also that the NLC should include greater consideration of the policy implications of legal positions.

Regional litigation committees

The evaluation found that, prior to the creation of the NLS, the regional litigation committees tended to operate in isolation. As a result, they served as an important quality assurance mechanism for reviewing pleadings in their region, but they did not share best practices across regional offices.

Since the creation of the NLS, regional litigation committees have begun coordinating with each other. Starting in FY 2017-2018, they began to create more standardization where they considered it appropriate. NLS key informants considered the efforts to standardize governance principles and facilitate linkages across regions a positive development, although maintaining regional differences in approach was also important. In addition, the regional litigation committee chairs have recently (2019) begun meeting outside of the NLC in order to share best practices and discuss issues of mutual concern.

NCR Litigation Committee

After the creation of the NLS, the NCR Litigation Committee has been expanded to include not only the CLS, but the other litigation units outside of the NLS (the six "other litigation units" defined in Section 1.2 and the Trade Law Bureau). The evaluation found that the NCR Litigation Committee has fostered a national approach to litigation cases handled within the NCR by bringing together the CLS and the other litigation units into one regional litigation committee. The NCR Litigation Committee is considered effective in improving the quality of litigation services through its review of documents prepared by counsel to be filed at courts of appeal and the creation of a network where litigation counsel within the NCR can learn from each other's experiences. Survey respondents in NCR litigation units almost unanimously (97%; n=38/39) considered the Committee to be effective or very effective in interacting and collaborating with their offices on litigation files.

4.1.4 Clarity of Accountability Structures

The creation of the NLS has provided some clarity of accountability structures, particularly in terms of regional reporting on litigation files. However, there was insufficient clarity with respect to business processes, including roles and responsibilities on litigation between Portfolios (including LSUs) and the NLS.

Reporting structure

The reorganization of litigation services and the creation of the NLS were intended to result in the national management of litigation services, thereby clarifying accountability structures for litigation services within Justice Canada. Under the former structure, the management of litigation services was divided between the Litigation Branch (which included the CLS and a specialized class actions unit), the regional offices, and LSUs that directly provided litigation services. While the head of the Litigation Branch (ADAG Litigation) had functional and coordination responsibility for all litigation conducted by or on behalf of Justice Canada, the regional offices did not report directly to the ADAG of the Litigation Branch.

With the creation of the NLS, line reporting of RDGs, which used to be to the DM and Associate DM of Justice, was shifted to the ADAG NLS. The RDGs became part of the newly created NLS BoD, along with the NCR Director Generals (which includes CLS). Regional litigators still report to their regional managers as they did before. Other units within Justice Canada that directly handle litigation, but are outside of the NLS, continue to report as they did before. For these other litigation units, the main change resulting from the creation of the NLS is the institution of the NCR Litigation Committee of which they are now members.

Overall, the evaluation found that the NLS has made accountability structures clearer than it had been under the Portfolio structure. Prior to the NLS, regional offices had to adjust reporting requirements based on the different Portfolios and LSUs involved. As one key informant put it, the NLS has “taken the guesswork out of that.” As a result, key informants from regional offices believe that reporting is better coordinated and there is heightened awareness that the ADAGO NLS must be kept apprised of major litigation. In addition, more reporting is going through the RDGs, so they are more aware than before of the positions taken in court on the litigation in their offices, according to a few key informants.

However, the evaluation findings indicate that the clarity related to the roles and responsibilities of Portfolio-level management (offices of the Assistant Deputy Ministers [ADMs]) on litigation files could still be improved. Just over half (55%; n=130/238) of counsel surveyed consider the roles and responsibilities of Portfolio-level management (offices of the ADMs) related to decision making on litigation files unclear.

Counsel also wanted more clarity on how and when the NLS, Portfolios, and LSUs should be involved at various stages of litigation. In particular, counsel wanted more information on when or whether they should still include the Portfolio when reporting on files and one suggestion was the creation of protocols for both NLS and LSU counsel regarding when and how the Portfolios should be engaged on litigation files. The protocols could serve to clarify the role of the Portfolio ADMs on litigation, and whether and when litigators should include Portfolios when reporting on particular litigation matters to the ADAG NLS, or when regional offices should respond directly to Portfolio requests for information. Protocols could also address situations related to whether LSU counsel should directly involve the ADAG NLS when the client and Justice Canada disagreed about the legal position to take in court. It was also suggested that either the NLS should be invited to a Portfolio-wide meeting or the NLS should

offer a training day for LSUs to explain their role, including how the regional offices work with the ADAG NLS.

Roles and responsibilities for decision making within the NLS

The NLS has recently undertaken several initiatives to clarify when to involve the ADAGO NLS on specific litigation files. First, in recognition of the need for clarity on ADAGO NLS involvement, the NLS BoD agreed upon the need for each region to develop guidelines on communications with the ADAGO NLS on litigation files, and in late 2018, regional offices began developing guidelines. Second, the adoption of the *Directive on Civil Litigation Involving Indigenous Peoples* and plans for the creation of a regional champion and a challenge function within each regional office should provide greater clarity of the nature of ADAGO NLS involvement in Indigenous litigation files. The Directive promotes a litigation approach that is consistent with the goal of reconciliation and provides guidance to counsel on applying the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*. While the Directive was developed by Justice Canada, the NLS played a leading role in its development and can now expect consistent application.

Despite these initiatives, the evaluation findings indicated some ongoing need for clarity regarding the roles and responsibilities of the ADAGO NLS related to decisions on litigation files. Just over 40% of counsel who responded to the Survey reported that the decision-making roles and responsibilities of the ADAGO NLS (41%; n=101/245) are unclear or very unclear. The findings indicate that counsel desire more clarity related to the level and nature of ADAGO involvement in files and when the ADAGO NLS should become more involved in a litigation file. Previously, this level of ADAGO involvement was usually only in cases that involved pan-governmental issues that impacted several departments. However, in other types of files, the ADAGO NLS is now assuming a decision-making role.

4.1.5 Communication and Engagement

There is an ongoing need to facilitate communication and engagement between Portfolios (including LSUs) and the NLS, and within NLS units in order to best support client-centric and strategic partnerships.

The evaluation considered the collaboration and working relationships between the NLS litigation units with Portfolios (including LSUs) and within NLS. The findings in this section also touch on a priority area of the Vision Project, which is supporting client-centric strategic partnerships.²⁸ The Portfolios and LSUs serve as the liaison between the client and the NLS on litigation files, so an effective working relationship between Portfolios, including LSUs and the NLS, is critical to supporting client-centric strategic partnerships.

NLS Litigation Units with Portfolios/LSUs

In general, key informants and survey respondents considered the interaction and collaboration between NLS litigation units and Portfolios/LSUs to be effective. The majority of survey respondents (78%; n=274/350) considered the relationship with LSUs to be effective or very effective. Similarly, many key informants (NLS and Portfolio/LSUs) considered the relationship between NLS litigation units and Portfolios/LSUs to be strong and collaborative.

While the overall evaluation findings reflect that NLS litigation units and Portfolios/LSUs are working together effectively, some Portfolio/LSU counsel expressed concern that there are inconsistencies in

²⁸ Justice Canada (2018). The Vision Project – Overview.

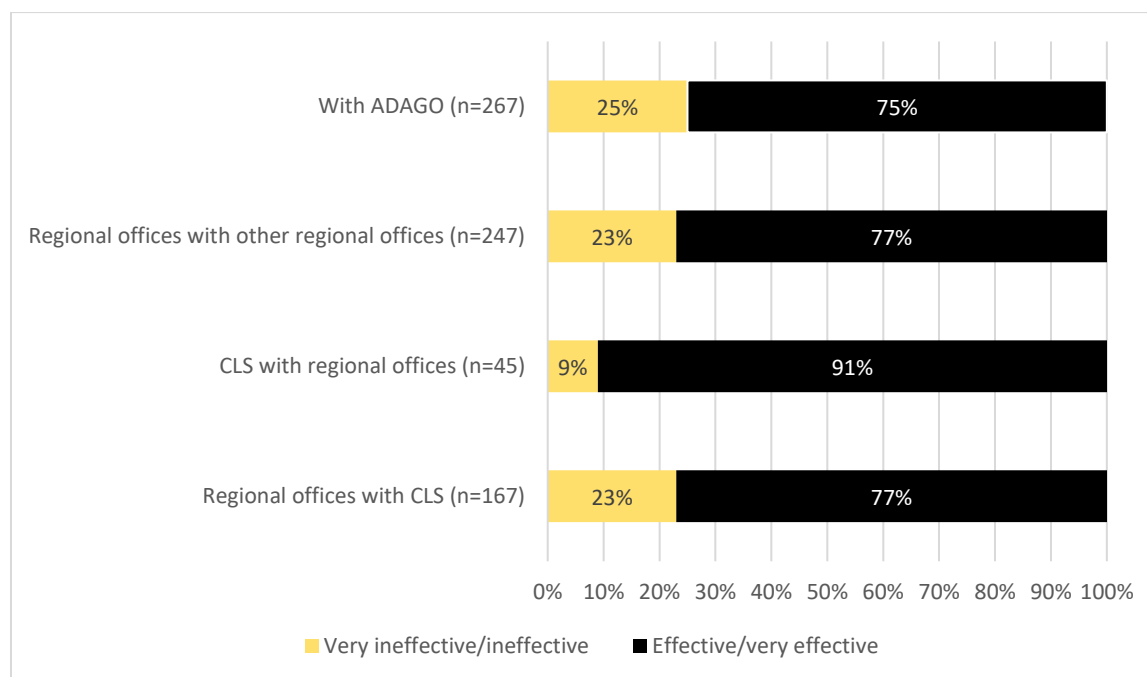
the approaches to collaboration on litigation files by region, litigator and LSU, which impact the effectiveness of the collaboration. In addition, an unintended consequence of the creation of the NLS raised by some key informants (NLS and LSUs/Portfolios) was that there is less communication and engagement between NLS litigation units and Portfolios/LSUs now. Prior to the creation of the NLS, the regional office counsel had more of a connection to the Portfolios and, therefore, a better network from which to draw when issues or questions arose related to client department policies or legislation. LSU key informants raised concerns that litigators will have less understanding of the client departments' realities and policy objectives and this could have negative impacts on litigation, as well as client relationships. It was reported that the ADAG NLS is aware of these unintended impacts and conversations are underway on how to ensure that the benefits of the Portfolio structure are not lessened due to the new structure of litigation services.

Within NLS

The effectiveness of the interaction and collaboration among NLS units was viewed positively by key informants. Survey respondents were also positive about the collaboration within NLS (see Figure 10). Some key informants noted that the connection between regional offices is stronger than before, although a few wanted more interaction with other regional offices. National practice groups and an annual NLS conference were two suggestions for sharing information across regions and building networks.

Figure 10: Effectiveness of NLS Interaction and Collaboration on Litigation Files

Based on your experience, how would you rate the level of effectiveness of the interaction and collaboration on litigation files between your office and the following areas?



Source: Survey of litigation staff

Communication about NLS to Justice Staff

The evaluation found that litigation staff within Justice Canada were not well informed of the rationale for and achievements of the NLS. Survey respondents were asked to assess the clarity of communications related to:

- the rationale for the reorganization of litigation services;
- the anticipated goals for the NLS;
- planned changes to litigation services; and
- achievements of the reorganization of litigation services, including achievements by the NLS.

Between 71% (n=307) and 79% (n=332) of respondents reported that Justice Canada communications have been unclear or very unclear. For each topic, between 21% and 29% (n=87 to n=123) reported that communications have been clear or very clear. These results are more pronounced among counsel. For each area listed above, over three-quarters of counsel respondents replied “not clear” or “very unclear”, in comparison to roughly two-thirds of paralegal respondents and around half of legal assistant respondents. Key informants, who were typically in management or on litigation committees, also believe that communication on the initiatives and achievements of NLS can be improved.

4.1.6 Legal Risk Management

Justice Canada continues to review its legal risk management (LRM) approach to ensure legal risk assessments are comprehensive, helpful, and meaningful to clients.

Counsel across Justice Canada are required to assess legal risk and complexity on their files. These assessments are an important method for the Department to communicate with clients about the work it is undertaking for them in a consistent and coherent way so that clients have a clear understanding of the legal risk and complexity of their litigation files. That importance is reflected in “meaningful risk assessments” being one of the four priority areas of the Vision Project, which is a key component of the Departmental Strategic Plan’s direction to foster a whole-of-government approach.²⁹ Meaningful legal risk assessments should be comprehensive and helpful to clients and effectively communicated to them.³⁰

Evaluation results indicate general satisfaction with the effectiveness of litigation services in assisting with the management of legal risk. More specifically, Client Feedback Survey results (Cycle III, results to date) indicate that clients are satisfied with how Justice Canada advised them on issues and developments that may impact them; worked with them to identify legal risks; and incorporated their instructions in the review and development of legal options to mitigate identified legal risks. On all of these dimensions, litigation services exceeded the target of 8.0 out of 10.0.³¹

Generally speaking, key informants (NLS and LSUs/Portfolio) also considered litigation services to be effective in assisting with the management of legal risk. Justice employees also provided some suggestions for improvement.

The legal risk grid does not adequately communicate risk. The risk assessment in iCase was generally considered to be the least helpful aspect of the LRM framework by counsel who were

²⁹ Justice Canada (2018). The Vision Project – Overview.

³⁰ Ibid.

³¹ Justice Canada (2018). Departmental Results Report, 2017-2018, p. 26 (Cycle III). Retrieved from https://www.justice.gc.ca/eng/rp-pr/cp-pm/dpr-rr/2017_2018/dpr-rmr/drr-rrm.pdf

interviewed, and this was confirmed by survey results where over two-fifths of counsel (44%, n=129/293) reported that they were unsatisfied or very unsatisfied with it. Survey results related to the framework's effect on consistency in litigators' assessments of legal risk levels also stand out. Less than half (48%, n=124/256) of counsel assessed the framework as "good" or "excellent" in this area. Key informants and survey respondents highlighted some limitations of the current LRM framework, including that the framework is not sufficiently nuanced (i.e., there is a need for flexibility in use of the current LRM grid to allow for consideration of a broader range of factors affecting risk, and to ensure that risk assessments meet the needs of different clients/Portfolios).³² Most key informants (NLS and LSUs/Portfolio) raised the issue of the high proportion of medium-risk files, which clients often do not find to be particularly helpful. Ongoing efforts by Justice Canada to improve the LRM framework and, in particular, to unpack medium risk in a way that maintains some standard of consistency in approach while providing the client with more helpful direction, were viewed favourably by most key informants.

Working closely with LSUs on legal risk assessments is important. Key informants identified a need, in some cases, for litigators and LSUs to work together more closely on legal risk assessments, as the LSU counsel are more aware of the broader context of the legal and policy issues implicated in the case and the other non-legal risks important to the client, such as financial risks, media attention, potential reputational harm, and/or the impact on policies and programs.

Clients desire earlier risk assessments. In addition, some LSU key informants emphasized the importance of earlier risk assessments from litigators in order to support clients' decisions regarding whether to settle a case, what level of resources to assign to a file, and to enable an earlier determination and management of contingent liability. According to these LSU key informants, an assessment based on the information available at the time is considered better than no legal risk assessment. A method suggested for handling this issue for complex litigation was to have working or practice groups for certain subject matters (of current cases and/or potential future cases) to identify legal risks and discuss how to strategically manage them. In addition, LSUs are better aware of client preferences in terms of length and type of advice desired for legal risk narrative. Some LSU counsel noted that the narratives do not always provide the advice that clients want to receive, such as whether to pursue settlement, aggressively pursue taking the case to trial, or the arguments that can be advanced by the Crown if the case is pursued.

Training on legal risk could build common understanding. Key informants (NLS and LSUs) and survey respondents³³ also called for more training opportunities to ensure both clients and counsel have a solid understanding of how legal risk assessments are used, as well as other elements related to the legal risk model. A few NLS key informants noted that counsel would also benefit from training to refresh them on LRM, the importance of legal risk assessments and how they are used, and how to better and more clearly communicate what medium risk means.

³² Survey respondents were asked if they had any suggestions for how to improve the measurement of legal risk and complexity. The suggestion provided by the most respondents (n=29) was to make the risk and complexity processes/tools/guidelines more flexible/less restrictive to allow for more nuanced assessments.

³³ Survey respondents were asked if they had any suggestions for how to improve the measurement of legal risk and complexity. The second most frequently made suggestion was better training to enhance the awareness and use of risk and complexity assessment tools (n=22).

4.2 Efficiency

4.2.1 Management of Litigation Services

The evaluation found that the NLS has undertaken substantial work on creating efficient management practices, and the two years since its inception indicate progress toward this commitment.

Increased analytical and strategic capacity

Consolidated budgets

Multiple lines of evidence (document review, key informant interviews) support that the consolidation of budgets (from 35 separate budgets into one NLS budget) has been a positive change resulting from the reorganization of litigation services, which has simplified budgeting and planning processes. The consolidated budget has enabled the NLS to more accurately, and earlier in the FY, identify whether it will have a deficit or a surplus which can be reallocated for other purposes. Documents showed that the NLS has identified surpluses early, as in both 2017-2018 and 2018-2019, the NLS was able to reallocate projected surplus to address technology needs (e.g., increase server capacity, purchase new computers and Next Generation software). However, key informants cautioned that the loss of some connection between LSUs and regional offices has had an effect on the accuracy of forecasts of estimated litigation expenditures provided to clients and the timeliness of receiving this information to support the client's budgetary cycle.

The right work at the right level

Through the Resource Allocation Analysis Project, the NLS has made (and continues to make) efforts to increase the efficiency of its management of litigation resources. The goal of the project is to ensure the right work at the right level, which means that litigation units are appropriately staffed with the right complement of employees to manage their volume and complexity of litigation work. Part of this project included establishing long-term reference levels (LTRL) (i.e., setting the ideal number of staff by classification) and benchmark ratios (i.e., ratios of different staff to each other, such as paralegals to counsel and managers to counsel and paralegals) for each region and NLS NCR unit. Having these benchmarks also supports and simplifies budget allocation, forecasting, and monitoring. In addition, risk and complexity benchmarks have also been established for LPs (01-05), which show that, as the LP level increases, so does the risk and complexity levels of files on which employees are expected to spend the majority of their time. Based on internal documents, the NLS has conducted comparisons of iCase data (hours, as well as file inventory) for 2017-2018 with data for 2016-2017, which substantiated the reference levels established through the resource allocation project.

The NLS has engaged in a number of initiatives designed to promote consistency and efficiency in staffing related processes and activities. Some examples included the implementation of standardized statement of merit criteria for various levels of EC and LP classifications, as well as working towards the development of standardized job descriptions for several groups (e.g., ECs as well as various coordination and supervisory positions). Development of these standardized tools facilitated several national collective staffing process for various groups within the NLS. Standardized performance objectives across NLS staffing groups (LC, LP, EC, CR and EX) were also developed and applied.

The evaluation evidence shows that the NLS has made substantial progress in staffing up to reference levels. At the end of 2017-2018, the NLS was 49 FTEs below the LTRL of 1,769 (the LTRL for the sector as a whole), with staffing shortages within the paralegal (EC) group and at the counsel LP-02

level, in particular. However, as of December 2018, the NLS overall was only 11 FTEs below the LTRL of 1,769. The NLS' success in increasing staff, particularly at the LP-02 level, was attributed largely to its national strategy on recruitment. However, FTE shortages still remain, primarily for paralegals.

While a goal of the NLS is to enable more flexible approaches to staffing, some key informants were concerned that business decisions were being driven by a rigid formula. While information is shared regarding the resource allocation project on SharePoint, key informants still called for greater transparency of the methodology and approach. Additionally, communication regarding the approach may assist in clarifying the goals for some personnel.

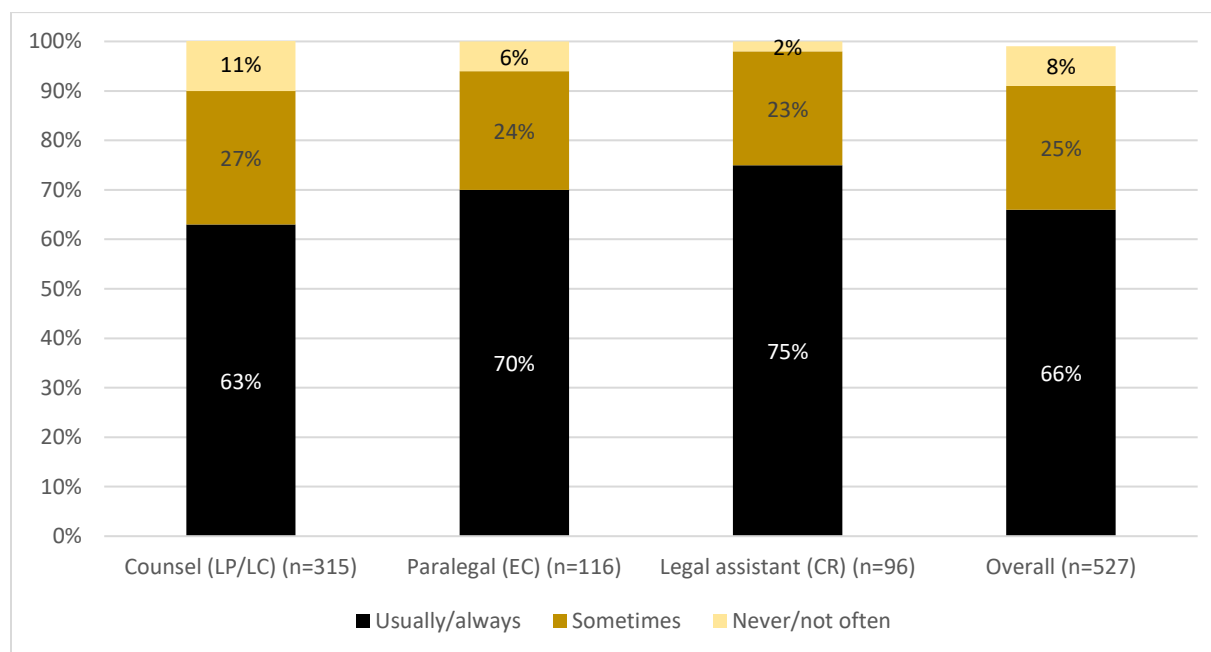
4.2.2 Delivery of Litigation Services

Litigation staff generally have the tools and structures required to support the delivery of litigation services and, for the most part, are satisfied with the tools and supports available.

The evaluation considered the extent to which litigation legal professionals have the expertise, tools, structures, and resources to support the effective delivery of litigation services. The findings indicate that litigation staff generally have the tools and structures they need. As shown in Figure 11, the majority of survey respondents (66%; n=350/527) reported that, in their litigation work over the past year, they usually or always had the tools and supports necessary to enable them to provide the best possible service. However, survey results indicate differences based on employee position/classification, with legal assistants and paralegals more likely to report having access to the tools and supports they need than counsel.

Figure 11: Access to Tools and Supports

Thinking of your litigation work over the last year, how often have you had the tools and supports necessary to enable you to provide the best possible service?



Source: Survey of litigation staff

The evaluation found that litigation staff are generally satisfied with specific tools (LRM assessment grid/matrix, practice directives, Justipedia, JUSnet, Ringtail, and iCase/LEX) that are available to support employees in the provision of litigation services. While over half of survey respondents reported that they are satisfied or very satisfied with these tools, about one-third of respondents were dissatisfied.

- The LRM assessment grid/matrix (44%; n=129/293 survey respondents are unsatisfied; see Section 4.1.5 for a more detailed discussion)
- iCase/LEX³⁴ (40%; n=205/517 survey respondents reported that they were unsatisfied with iCase and key informants expressed the hope that LEX will be an improvement on iCase)
- Justipedia (36%; n=159/438 survey respondents were unsatisfied, as were many key informants, who said that its search functions are difficult to use and the database is not well maintained or curated, so materials that are no longer accurate or reflective of the current state of the law remain in the database)
- Ringtail (30%; n=120/399 survey respondents were unsatisfied)
- Practice directives (29%; n=81/284 survey respondents were unsatisfied)

Of all tools listed, it appears that litigation staff are most satisfied with JUSnet, with key informants and over three-quarters of survey respondents (78%; n=363/468) reporting that they were satisfied. Key informants are looking forward to wider implementation/use of SharePoint/digital workspace, which is expected to facilitate up-to-date sharing of precedents and best practices, as well as efforts to work collaboratively.

These tools are intended to support efficiency, as well as consistency in litigation service delivery, so when they are considered unhelpful, inefficient and inconsistent practices can arise. For example, regional offices have developed separate systems for storing their precedents because Justipedia is considered cumbersome and unhelpful. This is contrary to the goal of sharing work product and knowledge across the Department to promote efficiency and the use of best practices.

Justice Canada and the NLS more specifically have focussed considerable effort on tools and resources to support document production and e-discovery to respond to the increasing volume of documentation in litigation files. The evaluation found that, overall, the NLS and Justice Canada are effectively meeting this challenge. The Department's investments in establishing NeDLSS and in acquiring and deploying e-discovery software have helped to contain e-discovery costs. NeDLSS has allowed the Department to process and analyze data collections at a lower cost than if the Department continued to outsource e-discovery services.³⁵

However, the evaluation identified several issues related to document production and e-discovery that impact efficiency. In particular, key informants suggested that NeDLSS staff need to be more (physically) embedded in the litigation team in order to properly assess relevance of documents and to allow the litigation team to do quality control. There are also capacity issues within both Justice Canada and client departments that impact efficiency in handling cases with substantial documentary evidence. Some key informants noted that the NeDLSS Evidence Management Team is not always available when requested, and also that client departments, particularly those with less frequent involvement in litigation, experience capacity issues in supporting litigation and may not fully understand their role.

³⁴ As LEX is just coming into operation, these findings likely pertain mostly to iCase.

³⁵ Justice Canada (2018, Dec). Audit of e-discovery and litigation readiness. Retrieved from <https://www.justice.gc.ca/eng/rp-pr/cp-pm/aud-ver/2018/edis/p1.html>

Results of a recent audit indicated that the NeDLSS is managing demand for its services in an effective manner and is prioritizing the use of its limited resources. The audit also noted, however, that the Department has not yet fulfilled its commitment to develop the National Litigation Readiness Standard. This was identified as an area for improvement, since the “vast majority” of departments consulted for the audit indicated that they were not adequately prepared for litigation.³⁶

Finally, issues related to technological supports were widely identified by key informants. In particular, they identified the need for more reliable internet connectivity, up-to-date software and hardware, and improvements to document and email management systems. However, while improvements were still desired, it was noted that the creation of the NLS has had, and is having, a positive impact in this area, as surplus funds have been used and earmarked for investments in technology and eLitigation tools.

As evidence that the NLS has supported continuous improvement and innovation (one of its outcomes), the NLS has made additions/investments in litigation tools and structures to support counsel, particularly with regard to technology and eLitigation tools. Many of these improvements are recent (i.e., occurring during the evaluation, or in the planning stages at the time of the evaluation). These include the following:

- investments in Next Generation litigation software (through the Next Generation Litigation Software Project);
- the acquisition of tablets for CLS and Regional Office counsel for use in court, as well as for office use;
- Ringtail e-discovery software updates; and
- a pilot test of Artificial Intelligence for use in tax litigation files.

4.2.3 Flexibility in the Use of Litigation Resources

The NLS structure facilitates flexibility in the use of litigation resources.

The reorganization of litigation services and the creation of NLS were also expected to increase the flexibility in how litigation resources are used and allocated across Justice Canada.

Allocate staff to meet service delivery needs within regional offices

The NLS was conceived as a way to support efficient delivery of litigation services by enabling staff to work across Portfolios within regional offices. NLS key informants indicated that this was occurring as regional offices are now more independent from the Portfolios in terms of staff assignment to files. Under the previous structure, regional offices replicated the Portfolio structure as counsel were assigned to specific Portfolios. Since the NLS, some offices are now moving away from this structure and even those that maintain that structure still reported greater flexibility in resource use.³⁷

Engage in cross-regional collaboration on litigation files

The NLS is considered to promote the collaboration of regional offices on files, including having a regional office lead a file that resides in another regional office (e.g., ARO leading ORO/BCRO tax files, PRO taking BCRO files) and having multi-regional litigation teams. While a few key informants

³⁶ Ibid.

³⁷ Determining the extent to which counsel are working across Portfolios within regional offices could not be assessed using administrative data.

believe that this was occurring prior to the NLS, most reported that this is a major positive impact of the NLS on the management of litigation services.

Overall, the number of actively managed litigation files that involve cross-regional collaboration has declined from 1,452 in FY 2014-2015 to 1,350 in FY 2017-2018.³⁸ The evaluation does not have information to explain the reasons for the decline in cross-regional collaboration, but the motivation to collaborate across regions depends on other factors, such as having available resources within the region or in other regions (counsel, paralegals, legal assistants) with the appropriate expertise.

The decline in the number of actively managed litigation files varies by region. Most regional offices (ARO, BCRO, NRO, and PRO) and CLS have experienced increases in the involvement of other regional offices on their files, but cross-regional collaboration has declined significantly for the two largest regional offices (ORO and QRO), where fewer files have other offices involved.

Promote and facilitate national collaboration of litigation teams on files with similar issues

Based on available documentation, regional offices have created litigation teams across the country focussing on a variety of issues, including LGBTQ2 matters, diversity litigation, RCMP/Canadian Armed Forces gender harassment, and administrative segregation, with the purpose of increasing national collaboration on files raising these issues.

Enhance the integration of paralegals on litigation files

The NLS is working on a Paralegal Strategy that will also align with the Departmental National Paralegal Strategy. Through implementation of the NLS Paralegal Strategy (approved by the NLS BoD in December 2017), the NLS is working to enhance the involvement of paralegals in litigation files.

In terms of whether the creation of the NLS has had an impact on the involvement of paralegals on files, key informants were about equally divided. Some believe that the promotion of greater involvement of paralegals on litigation files occurred before the NLS and, therefore, did not see much change. Others believe that there are changes. They pointed to a variety of factors, such as the creation of the NLS Paralegal Strategy Working Group (PSWG)³⁹, greater use of paralegals across sections or divisions within regional offices (this depended on the region), changes to the management of paralegals in some regional offices, and the resource allocation project, which resulted in some regions hiring more paralegals. Survey respondents, however, mostly indicated either no change in terms of allocation of tasks or integration of teams (about one-third of respondents), or they could not provide an opinion (about half responded “not applicable to my work” or “don’t know”).

The NLS is working on implementing a number of the strategy’s approved measures, such as:

- Regions and units have either developed or are in the process of developing Paralegal Education Funding policies/guidelines.
- Regions and units have achieved or are actively working to achieve the recommended ratio of one paralegal supervisor to 12 paralegals.
- The NLS is working to develop a Paralegal Continuous Learning Plan/Program to offer in-house training for current paralegals.

³⁸ This is based on the number of actively managed files by fiscal year that have timekeepers from regions outside of the region that opened the file. This analysis does not consider situations where one regional office completely handles a file for another regional office, as there would not be timekeepers from more than one regional office on those files.

³⁹ There is both an NLS Paralegal Strategy Working Group (PSWG), including representatives from across the NLS, and a Departmental Steering Committee on Paralegal Excellence. The NLS PSWG works to enhance the use of paralegals in litigation files. It also works with the Departmental Steering Committee on Paralegal Excellence on the national paralegal strategy.

- The NLS is discussing expansion of training/awareness sessions for counsel on how to better include paralegals and legal assistants in work on files.

While there is general agreement that Justice Canada's and the NLS' emphasis on enhancing the involvement of paralegals is important for improving efficiency, the evaluation findings indicate that there are variations across Justice in how paralegals are involved in litigation files. Overall survey results indicate that counsel and paralegals are relatively satisfied with the way that Justice Canada manages integrated teams of counsel and paralegals (71%; n=263/369). The analysis reveals a slight difference regionally, with the PRO and QRO reporting lower results.⁴⁰

Evaluation findings indicate that paralegals could be better utilized on litigation files. A relatively high proportion (39%; n=144/367) of survey respondents reported that Justice Canada has been ineffective in managing the allocation of tasks to paralegals. In addition, approximately one-third (31%; n=34/111) of paralegal respondents indicated that they are only sometimes assigned to appropriate tasks on litigation files given their skills and experience (and a further 4% indicated that this rarely or never happens). When asked how often they thought that paralegals work to the full scope of their practice, about half (54%; n=57/106) of paralegals reported that this occurs regularly or frequently.

4.2.4 Resolving cases in an appropriate, timely, and cost-effective manner

Justice Canada continues to support clients in resolution of files through various approaches, although there may be opportunities to enhance the use of alternative dispute resolution.

Use of dispute resolution mechanisms

Over the four-year period (FY 2014-2015 to 2017-2018), 58,045 cases were resolved (i.e., had an outcome of adjudicated or settled). Most files (67%) were resolved by adjudication (i.e., obtaining a court or tribunal decision on the case), while one-third (33%) were settled (i.e., the parties negotiate an agreement to resolve the matter). The majority of counsel who responded to the survey reported that, in their experience, Justice Canada usually or always makes recommendations when it should, to attempt to negotiate a settlement (80%; n=238/299) or take a case to trial (77%; n=221/286).

Evaluation results indicate that there may be room for improvement in the use of certain dispute resolution methods, such as mediation, arbitration, and neutral evaluation, which can be used to avoid lengthy court trials or assist with negotiation efforts. While most key informants believe that the NLS and Justice Canada more generally are exploring dispute resolution processes when appropriate on litigation files, they typically referred to negotiated settlements between the parties and not mediation or arbitration. Administrative data confirm that a small percentage of files use these other forms of dispute resolution. While the use of voluntary mediation in closed litigation files increased from 2% in FY 2014-2015 to 5% in FY 2017-2018, mandatory mediation and arbitration remained steady at 1% and 3%, respectively.

Evaluation stakeholders (key informants, survey respondents) believe that Justice Canada could engage in these forms of dispute resolution more often. While most respondents (58%; n=142/247) believe that Justice Canada usually makes recommendations to use other dispute resolution methods (e.g., mediation, arbitration) when it should, one-sixth (16%; n=39) of counsel surveyed reported that Justice Canada never or does not often use these methods and that substantial improvements in this area are needed. In addition, over one-quarter (27%; n=66) indicated that at least some improvement

⁴⁰ Close to half (47%; n=22/47) of QRO respondents and 42% (n=30/71) of PRO respondents replied "ineffective" or "not very effective" compared to 33% of respondents overall.

is needed.⁴¹ Key informants highlighted arbitration as an option that should be used more often, or at least explored.

The issue of promoting and supporting the use of dispute resolution methods when appropriate is one recognized by Justice Canada. The Legal Practices Policy Division is undertaking a departmental review of dispute prevention and resolution (DPR) needs and resources. The review will be used to develop a DPR strategy to promote the use of DPR and ensure employees are able to efficiently and effectively consider and apply DPR principles to their work.

Reasons files do not settle

For files that were adjudicated in FY 2016-2017 and 2017-2018 (n=15,772), over nine-tenths did not have a settlement attempted.⁴² For those cases where settlement was not attempted, the most common reason which was recorded for two-thirds of files in both fiscal years (65% in FY 2016-2017 and 69% in FY 2017-2018) was the nature of the issue. The client was not open to settlement was the reason in 8% (FY 2016-2017) to 12% (FY 2017-2018) of cases. “Other” was recorded in approximately one-third (FY 2016-2017) to one-quarter (FY 2017-2018) of files, most often without another reason given.

For adjudicated files where settlement was attempted without success (approximately 3% of files in each FY), the most common reason was the other party refusing the offer (57% in FY 2016-2017 and 50% in FY 2017-2018). A few files had the settlement attempt fail due to instructions sought, but not obtained from the client (7% in FY 2016-2017, which rose to 20% in FY 2017-2018). About one-third of adjudicated files where settlement attempts did not succeed did not have a reason indicated.

Based on these results, not attempting a settlement appears to be an indication that the decision to go to trial is taken with due consideration. Key informants confirmed that, in many cases where settlement is not attempted, the nature of the issue is the reason. While tort or monetary cases are more likely to be settled, settlement is less of an option for cases involving Charter issues or larger policy considerations. However, as shown in the discussion of early resolution below, there are reasons why settlement was not attempted that are not captured in the current administrative data fields.

Stage of resolution

The stage of the case when the files were settled is one indicator of early resolution. Files are about evenly divided between settling at an early stage (pre-discovery) and at a later stage (post-discovery).⁴³ Discovery, which includes the identification, production, and review of information relevant to a case, is a time and resource-intensive part of litigation, which is why the rate of resolution pre/post-discovery was analyzed. In FY 2016-2017 and 2017-2018, 45% and 47% of files respectively settled at the commencement, planning, or pleadings/factum stage (pre-discovery) compared to 46% and 44% at the pre-trial/trial preparation or hearing/trial stage (post-discovery). The point in the process where cases were least likely to settle was during discovery (9% in FY 2016-2017 and 10% in FY 2017-2018). The settlement process can be challenging in private and public sectors in many countries. For example, results from the United States suggest that settlement often does not occur until late in discovery or even until the eve of trial.⁴⁴

⁴¹ The degree to which respondents reported that Justice Canada recommends alternative dispute resolution methods when it should varied somewhat across regions.

⁴² In FY 2016-2017 and 2017-2018, 96% (n=8,207/8,506) and 97% (n=7,043/7,266), respectively, of NLS files that were adjudicated did not have settlement attempted. This data field was created in FY 2016-2017, so results are limited to two FYs.

⁴³ This field capturing the stage of the case when settlement occurred was introduced in February 2016, so only two years of data are available.

⁴⁴ Bernard Chao, Christopher Robertson & David Yokum (2018). The New Settlement Tools 102:3 Judicature 63.

In addition to the administrative data, survey and interview results indicate some potential room for improvement in relation to the service standard “identification of means to prevent and resolve legal disputes at the earliest opportunity”. While over two-thirds (68%; n=195/289) of counsel surveyed agreed that their office had met this standard, one-quarter (25%; n=73) reported that their office had only partially met the standard (experiencing some challenges), and an additional 7% (n=21) reported that their office did not meet, or mostly did not meet, the standard (experiencing many challenges). Key informants also identified impediments to early resolution, in particular:

- the effort required of counsel to keep up with the pace of litigation limits their ability to invest time to support early resolution efforts;
- the tendency of some counsel to review all or most of the evidence before advising clients to pursue settlement options, which delays the exploration of alternative dispute resolution options until closer to trial; and
- delays and barriers to obtaining client approvals for settlement.

Key informants noted efficiency issues that result from these impediments to early resolution. For example, there is no flexibility in the client’s approval process for settlements, which can be lengthy, regardless of the monetary amount involved. This consumes litigation resources while waiting for client approval. When large amounts are involved, the need to engage central agencies to get approvals for settlement is necessary, which also lengthens the process. A few key informants also pointed out that disincentives to settlement are also created by optics where a hard-fought large award in court is questioned less than a large settlement sum.

Working with clients to encourage earlier resolution is one approach. One client, the RCMP, has a pilot project regarding early resolution of claims. In collaboration with regional offices, they are attempting to identify cases appropriate for early mediation. Other LSUs interviewed also desire Justice Canada, in collaboration with clients, to more actively pursue options for earlier resolution outside of court. These LSU key informants had the impression that the LSU often suggests settlement, rather than the litigators, although the litigators are open to exploring settlement once it is suggested.

Cost-effectiveness

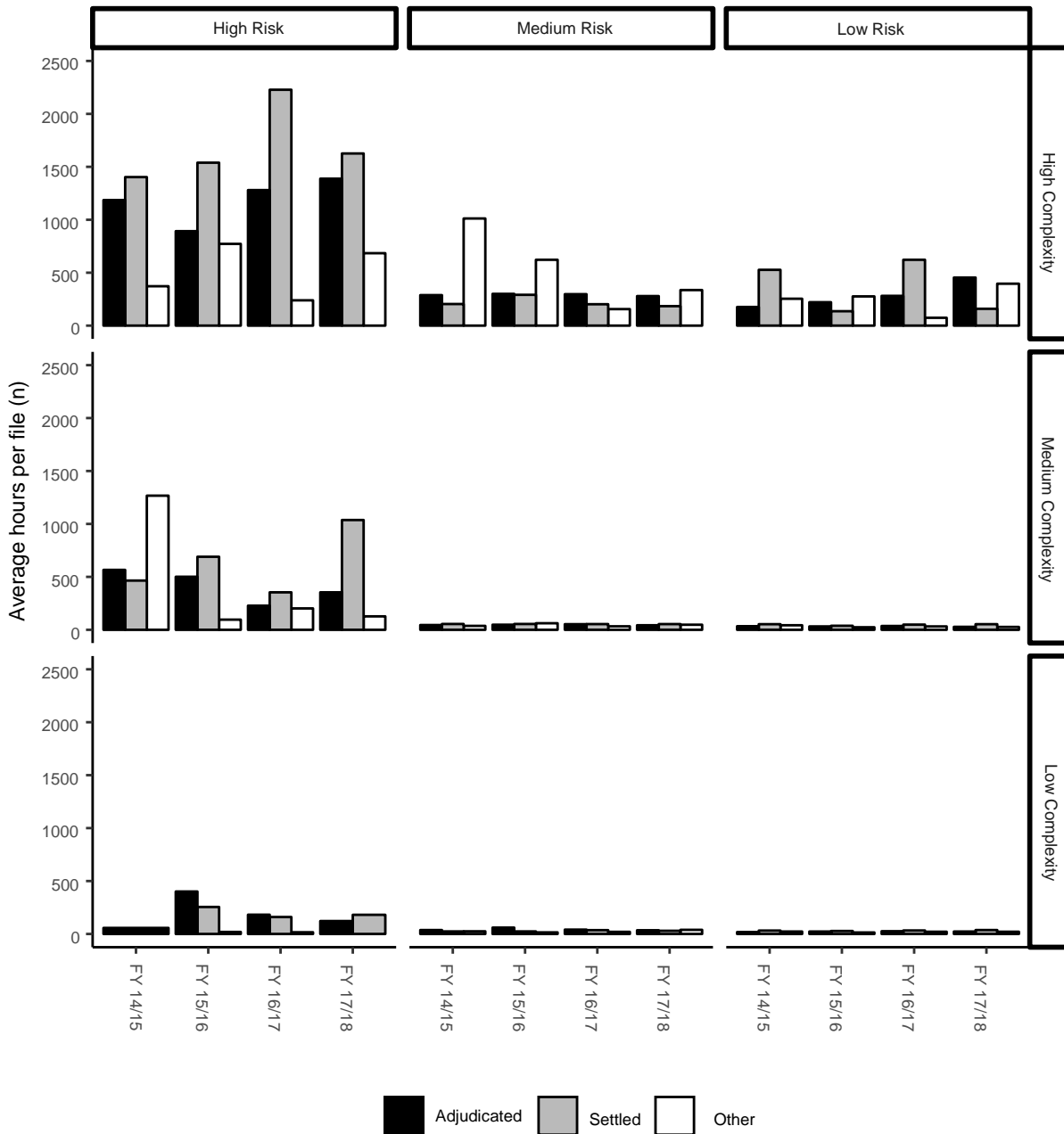
The administrative data demonstrates that Justice Canada is spending more hours on files with higher risk and complexity, which supports the conclusion that the Department is resolving matters in a cost-effective manner by focussing resources on its high-profile and sensitive files. As Figure 12 (next page) demonstrates, the average hours per file decreases as the level of risk and complexity decreases (compare the upper-left to lower-right quadrants of the graphic).

The evaluation also considered the cost-effectiveness of litigation services by analyzing the time spent in terms of staff hours on resolved litigation files (adjudicated or settled) in order to test whether settling more files would produce more cost-effective litigation services. In fact, the analysis shows that settling more files will not necessarily produce more cost-effective results. When analyzing the data by risk and complexity level, settled files can take more time than adjudicated files. For high-complexity/high-risk files, the average time spent per resolved file was greater for settled files than for adjudicated files for each of the four FYs. As an example, in 2017-2018, the average number of hours on a high-complexity/high-risk file that settled was 1,626 hours compared to 1,388 hours on an adjudicated file.

The average amount of time spent on settled files could be reduced by exploring the potential of settling files at earlier stages in the court process. As discussed in the section above, about half of

files are settled after discovery, which means that substantial resources have been devoted to the file as discovery has occurred and the case is closer to trial. However, as key informants also commented, dispute resolution is not the only way to resolve cases in a timely, cost-effective manner. Using court processes to file motions to reduce the number of issues in contention (and so forth) are also effective methods for litigators to resolve cases faster, using less resources.

Figure 12: Average NLS Hours per Resolved Litigation File by Complexity, Risk, Final Outcome Type, and FY



Source: Administrative data.

5 CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

The results of the evaluation indicate that the litigation services provided by Justice Canada are of high quality, achieve successful outcomes on litigation files, and are well managed.

All lines of evidence demonstrate that Justice Canada provides high-quality litigation services to clients. Client Feedback Survey results reflect overall satisfaction of client departments and agencies with the litigation services received, in particular they are satisfied with litigation services' responsiveness, usefulness, and timeliness. Other Justice Canada counsel (in LSUs and Portfolios) who are responsible for serving as a liaison with clients and litigators confirm that litigation services provided to clients are generally of high quality.

Furthermore, Justice Canada has consistently exceeded its performance target of 70% of litigation files with successful outcomes during the period covered by the evaluation.

The reorganization of the litigation services and the creation of the NLS has had a generally positive impact on the management of litigation services. Accountability structures for litigation services are clearer, particularly in terms of regional reporting on litigation files. The NLS structure has facilitated greater consistency and coherence in litigation services through initiatives that provide general frameworks and guidance, such as those related to class action proceedings and the *Directive on Civil Litigation Involving Indigenous Peoples*. Other structures, such as the NLC, continue to make a strong contribution to Justice Canada speaking with one voice on litigation matters.

Collaboration among the areas of Justice Canada that provide direct litigation services is effective. The RDGs work directly with the ADAG NLS through the BoD to manage the litigation work of the Department. Regional litigation committees have been more active in sharing best practices, and the NCR Litigation Committee has served as an effective forum for interaction and collaboration with the CLS and other litigation units in the NCR that are not part of the NLS.

With all staff now falling under the NLS organizational structure rather than under five different Portfolios, regional offices and the CLS have more flexibility in assigning staff to meet service delivery needs both within and across regional offices and the CLS. The new structure facilitates sector-wide initiatives, such as the resource allocation project, the NLS Paralegal Strategy, and the Next Generation Software Project. These initiatives are pursuing more consistent approaches across NLS litigation services.

The NLS structure has reduced administrative burden by bringing the previous 35 separate budgets for litigation services into one consolidated budget, which has simplified budget development as well as assisted with planning.

The NLS is resolving cases in a cost-effective manner as higher risk and complexity files receive more attention in terms of staff time. However, the data indicate that for these files, settled files require a greater level of effort to resolve than adjudicated files. About half of settled files are settled after discovery (i.e., closer to trial). It may be worthwhile for Justice to explore opportunities to settle files at an earlier stage of litigation or through other alternative dispute mechanisms.

5.2 Recommendations

Although the NLS has made many positive improvements to litigation services, some areas for future attention were noted.

Business Processes

While the new structure supports closer relationships among litigation units—the regional offices, CLS, and other litigation units—there is less communication and engagement between, in particular, regional offices and Portfolios (including LSUs). In addition, the approach to working together on litigation files is not consistent across the NLS and Portfolios (including LSUs). Therefore, the evaluation found the need for better clarity of the business processes related to the roles and responsibilities of the NLS and Portfolios/LSUs during the litigation process. Facilitating an effective relationship between the NLS and Portfolios/LSUs is important not only to provide litigation counsel with the client perspective, but also for regional litigation counsel to have a network of Portfolio/LSU counsel to whom they could seek advice about a legal area or a policy decision of the client.

Recommendation 1: The NLS, in consultation with other Sectors or Portfolios, should clarify business processes including how and when various groups such as Portfolios (including LSUs), Sectors and client departments should be involved in the litigation process.

Communication and Engagement

The need for improvement in the communications from senior NLS management to NLS staff was evident from some evaluation findings. For example, clarity of when to involve the ADAGO on litigation files was an issue raised by both LSU and NLS counsel. Another example was simply having a better understanding of the objectives and achievements of the NLS. Justice personnel also suggested that an unintended consequence of the creation of the NLS was that there is less communication and engagement between NLS litigation units and Portfolios (including LSUs). Ongoing communication and engagement between these groups was highlighted as important to understanding client departments' realities and policy objectives in the context of litigation files.

Recommendation 2: The NLS, in consultation with other Sectors and Portfolios, should establish opportunities for networking and information sharing among personnel from NLS, Portfolios (including LSUs) and Sectors, as well as within the NLS (e.g., across regions).

Alternative Dispute Resolution

While alternative dispute resolution options are being utilized, there is the potential to consider options to resolve cases in a more cost-effective manner (i.e., pursuing settlement at an earlier stage of the court process).

Recommendation 3: The NLS should further explore opportunities to enhance the use of various alternative dispute resolution processes, as well as the possibility of pursuing settlement at earlier stages in the litigation process.

APPENDIX A: GLOSSARY

Glossary of Terms

Adjudication	The parties present their cases to a neutral third party who makes a binding decision on the outcome of the dispute. Court adjudication is the most structured and formal dispute resolution mechanism.
Arbitration	A private consensual quasi-judicial process for the resolution of disputes. Similar to litigation in that it is an adversarial process that requires a neutral third party to render a decision. Although arbitration is a formal process covered by federal and provincial laws, the parties can design many of its structural elements, including the rules of procedure, time limits, and the number of arbitrators.
Class Action Case	A legal action undertaken by one or more plaintiffs on behalf of themselves and all other persons having an identical interest in the alleged wrong.
Discovery and e-discovery	Discovery is a pre-trial procedure in which the parties to a claim identify information that is relevant to a case and produce or present that information to the opposing side. E-discovery is the process by which <i>electronic</i> information is produced and presented. Discovery serves several purposes: to enable the opposing party to know the case against it; to help identify and resolve disputed facts; and to narrow the legal issues to be heard at trial.
Dispute Resolution (DR)	Dispute Resolution refers to any process used to resolve a conflict and includes informal, consensual processes such as negotiated settlements, as well as formal, rights-based ones such as litigation. This term encompasses dispute prevention and alternative dispute resolution (which includes approaches such as mediation and arbitration).
Legal Complexity	A standardized method used by Justice Canada to assess legal complexity as High, Medium, or Low based on the presence of a number of specific factors such as unclear factual situations, two or more substantive legal issues, or short deadlines.
Legal Risk	A legal risk is a risk arising out of an issue or event giving rise to a need for a legal response. It consists of threats and opportunities associated with an organization's management of its legislative, advisory, and litigation activities, including the development and renewal of, and compliance with, laws, regulations, international treaties/agreements, and policies.
Legal Risk Management (LRM)	Legal Risk Management is the process of making and carrying out decisions that reduce the frequency and severity of legal problems that may affect the government's ability to meet its objectives successfully. LRM is an essential aspect of the work of the Department of Justice, and is practiced in partnership with departments and agencies as a component of Integrated Risk Management.
Mediation	Mediation is "the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no decision-making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute" (Canadian Bar Association definition quoted in Justice Canada [1995], <i>Dispute Resolution Reference Guide</i>).
Settlement	The resolution between disputing parties of a legal civil claim, reached either before or after court action begins. In general, counsel mandated by Justice Canada must ensure that settlements serve the public

Glossary of Terms

	interest and do not involve legitimate constitutional, Charter or other public law issues or policies that need to be addressed by courts. In particular, counsel must balance the Crown's interest in reducing litigation costs by settling early and its interest in protecting the public purse against inappropriate settlements.
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**Reference of the terms are drawn in part from several documents, including:*

- *Department of Justice Canada (April 2013). Legal Risk Management Renewal Report and Recommendations Phase I.*
- *Department of Justice Canada (April 2013). Legal Risk Management Glossary.*
- *Department of Justice Canada (2019). National Protocol for the Single Approach to File Management.*
- *Department of Justice Canada (July 2006). Dispute Resolution Reference Guide.*
- *Department of Justice Canada (2017). Civil Litigation Deskbook.*
- *Rules of Civil Procedure, Federal Court Rules, Part 5.1 R. 334.*



APPENDIX B: PROFILE OF LITIGATION SERVICES

This section provides additional details about Justice Canada's litigation services.

Overview of litigation services

The National Litigation Sector

The National Litigation Sector (NLS) is accountable for litigation involving the Government of Canada across the country. Litigation resources are managed under a single unified budget and consolidated under the ADAG NLS.

ADAG NLS

The ADAG NLS has responsibility for overseeing the NLS, and for providing substantive, strategic, and policy advice to the Minister, Deputy Minister, and Privy Council Office on issues arising from the conduct of litigation. The ADAG NLS also coordinates litigation involving the Federal Crown in all provinces and territories. In providing national leadership and management of the Department's litigation services, the ADAG NLS is accountable for:

- managing the conduct of litigation, which includes file assignment, approval of litigation positions (jointly with the Portfolios), and reporting;
- ensuring the coherence, consistency, and efficiency of litigation services, which includes strategies such as development of national approaches for specific areas of litigation as well as all national litigation policies and directives, and standardization of resource use; and
- developing an analytical and strategic capacity for litigation services, which includes identifying trends and providing advice on mitigating and managing risks, including the use of settlements.

The Office of the ADAG comprises the ADAG, Deputy ADAG, Special Advisors, executive assistants, a Director General of Business Operations, and a business management team.

Six RDGs and the Director General of the CLS report to the ADAG NLS. In addition, the Director General of the International Assistance Group, which is out of scope for this evaluation, also reports to the ADAG NLS.

Reporting to the Deputy ADAG NLS are the Directors of the NeDLSS; other areas that are out of the scope for this evaluation (but that report to the Deputy ADAG NLS) include the Litigation Practice Management Centre, the Criminal Conviction Review Group, and the National Security Group.

The remainder of this section focusses on areas of the NLS that are within the scope of this evaluation.

Board of Directors (BoD)

The NLS is governed by a BoD, which oversees NLS decisions pertaining to substantive management responsibilities, national projects, talent management, and change initiatives. Members of the NLS BoD include: the ADAG NLS (chair), the Deputy ADAG NLS (co-chair), RDGs from all six regional offices, NCR Directors General and Directors, a Financial Management Advisor, and a Human Resources Client Services Director.

Litigation services (Regional offices, CLS)

The responsibility for providing litigation services to the federal government is shared by CLS and regional litigation counsel. Regional offices are primarily responsible for handling litigation within their own regions,⁴⁵ while CLS handles litigation within its geographic region (the Ottawa Region, which contains eastern and northeastern Ontario). NLS litigation counsel work with counsel in departmental LSUs on litigation matters.

Litigation support (NeDLSS)

NeDLSS is a division of the NLS, originally established in 2014. NeDLSS plays a role in carrying out the Department's e-discovery and litigation readiness responsibilities.

NeDLSS provides a variety of support services to legal teams across all regions in relation to litigation and the use of technology. Services include providing assistance with discovery planning, document intake, e-discovery, and legal review. In addition:

- The Evidence Management Team is a standing team of experienced paralegals and counsel who can assist with evidence management and assessment projects. This is a cost-recovered service that aims to assist with the efficient and cost-effective management of evidence for files with a high volume of documents to review.
- Members of regional Litigation Support Centres also offer services to assist with document production and exchange, and with remote access to documents.

Litigation committees

The NLS also has or reports to various committees, which support a national approach to litigation, and these are described below.

National Litigation Committee

The NLC is a Standing Advisory Committee to the DM and Deputy Attorney General of Canada which offers a forum for senior level engagement on all significant litigation (at any court level). Its mandate is to “ensure that the Government of Canada’s interests are properly represented in legal proceedings; consistent positions are adopted nationally; the Attorney General acts as a model litigant; necessary consultations across government are undertaken; legal risk is managed appropriately; and sound advice is provided to the Minister and DM in significant litigation”. The NLC makes recommendations to the Minister and DM regarding legal positions in significant litigation, as well as litigation-related legal opinions, advice, practice directives and guidelines, and other matters.

Regional litigation committees

The purpose of regional litigation committees is to monitor significant litigation happening in the region. While counsel and their direct managers are responsible for day-to-day carriage of litigation and advisory files, regional litigation committees bring a cross-Portfolio perspective, and help to ensure that consistent positions are taken in litigation; that issues of law or policy have been identified and consultations take place as appropriate; and that the Attorney General acts as a model litigant. Regional litigation committees provide guidance and advice to counsel to assist them in providing

⁴⁵ Counsel from regional offices also agree to take on work outside their regions, in order to bring particular expertise and experience to bear, or to augment available resources.

high-quality legal services. In addition, these committees provide a link between the regions and the NLC.⁴⁶

Regional litigation committees include the following:

- National Capital Region Litigation Committee
- Northern Region Law and Litigation Committee
- Atlantic Regional Office Law and Litigation Committee
- British Columbia Regional Office Law and Litigation Committee
- Ontario Regional Office Litigation Committee
- Prairie Regional Office Law and Litigation Committee
- Québec Regional Office Legal Affairs Committee

Additional committees which support a national approach to litigation

Other committees that support a national approach to litigation include the following:

- The Deputy Minister Committee on Litigation Management is co-chaired by the ADAG NLS and the Privy Council Office. This committee reviews information on litigation that is going to Cabinet committees, including legal positions being taken and funding requests for large settlements.
- Class actions committees developed as key features of the National Class Proceedings Framework (which was officially launched by the NLS in March 2019). These include the Class Proceedings Steering Committee (which provides oversight and high-level guidance to the ADAG NLS on class action proceedings) and the Class Actions Oversight Committee (which contributes to consistency in the provision of legal advice, and the development of policy direction as it relates to the implementation of the National Class Proceedings Management Framework).
- ADM steering committees are also struck as needed for large litigation, such as class actions.

Other areas of Justice Canada involved in litigation services

Portfolios and LSUs

The role of Portfolios in relation to litigation services has changed under the NLS structure. Portfolios no longer manage litigation, but they continue to be accountable for management of the law, and for liaising and managing relationships with client departments. In addition to its management structure at headquarters, each Portfolio has LSUs that are co-located with client departments and agencies.

Specifically, Portfolios (with their LSUs) are responsible for:

- seeking instructions from client departments;
- developing strategic litigation positions to advance the law, which consider both client and broader government interests;

⁴⁶ Regional Litigation Committees may recommend that the Attorney General intervene in proceedings at any court level. These recommendations must be reviewed by the NLC.

- ensuring the integration and coherence of legal advisory, policy and litigation strategy advice in the Portfolio's areas of legal expertise, which includes identifying litigation trends impacting client departments;
- analyzing litigation trends and developing strategies to respond to these trends (in consultation with NLS); and
- forecasting the needs and costs of advisory and litigation services for client departments, which includes ensuring that services provided remain within negotiated funding agreements and resource levels.

While both the ADAG NLS and the Portfolio ADMs are accountable for the development of Justice Canada litigation positions, the nature of their respective involvement in the development of these positions depends on the type of litigation. For high-volume, low-complexity litigation, the NLS is responsible for day-to-day conduct and management. Portfolio involvement in the development of litigation positions for low-complexity litigation is mostly at the strategic level (for example, advising on the development of national approaches for litigation in a specific area of the law). Portfolios are more involved in the development of litigation positions for sensitive, high-profile litigation, as their input is sought at every step of the process as positions develop.

LSUs that provide direct litigation services

In addition to the NLS, litigation services are also directly provided by areas outside of the NLS, namely:

- the Tax Law Services unit in the NCR, which is part of the Tax Law Services Portfolio;
- the National Security Litigation and Advisory Group LSU, which is part of the Public Safety, Defence and Immigration Portfolio;
- Treasury Board Secretariat LSU, which is part of the Central Agencies Portfolio; and
- the Competition Bureau Legal Services, the Employment and Social Development Canada/Veterans Affairs Canada LSU⁴⁷, and the Transport Canada LSU, which are part of the Business and Regulatory Law Portfolio LSU litigators report to LSU Heads, but LSUs receive functional directions from the NLS.

Litigation services provided by these entities report to their Portfolio.

Specialized units and centres of expertise

There are a number of areas within Justice Canada that have counsel who are experts in certain areas of the law. Upon request from litigation counsel, counsel in the Public Law and Legislative Services Sector and centres of expertise provide legal advice on areas of the law in which they are specialists.

⁴⁷ The ESDC/VAC LSU provides legal services to two federal departments. However, all litigation work conducted by the ESDC/VAC LSU is undertaken for ESDC.

APPENDIX C: METHODOLOGY

The methodology for the evaluation consisted of multiple lines of evidence, including a document review, key informant interviews, an administrative data review, and a survey of litigation staff. Each of these methods is described below.

Document review

The document review provided descriptive information on litigation-related activities as well as information responding to most evaluation questions. This review was ongoing throughout the life of the project, and included the following types of documents:

- **Program documents.** A wide variety of administrative and internal documents related to the function of the NLS and the Department's provision of litigation services were available for the evaluation.
- **Publicly available departmental and other government documents.** The document review included review of Departmental Performance/Results Reports, Reports on Plans and Priorities, Litigation Year in Review reports, and other publicly available documents containing relevant information on federal priorities related to litigation.
- **Results for relevant questions from the Department of Justice Canada Client Feedback Survey.** This survey is administered by the Corporate Planning, Reporting, and Risk Division as part of its overall performance management agenda. The purpose of the survey is to obtain feedback on the degree to which Justice Canada legal services respond to the needs of federal departments and agencies. The questions are designed to measure the extent to which Justice Canada is achieving its service standards outlined in the MOUs with client departments/agencies. The evaluation included available results for Cycle III (2016-2019) of the Survey.
- **Results for relevant questions from the 2017 Public Service Employee Survey (PSES).** The Office of the Chief Human Resources Officer, Treasury Board of Canada conducts the PSES to gather federal government employees' opinions about various dimensions of their work experience. Results from the 2017 PSES (specific to the NLS overall and for NLS Regional Offices) were available for the evaluation.

Key informant interviews

Key informant interviews were conducted to obtain the opinions, perceptions, and experiences of key stakeholders with knowledge of the Department's litigation services and the NLS. Interviews involved various groups within Justice Canada, including NLS staff, as well as representatives from other areas of Justice Canada which are involved in the Department's litigation activities either directly (through direct provision of litigation services) or indirectly (through provision of support or advice to departmental litigators).

Interviews were conducted using structured interview guides tailored to the specific groups, with questions designed to address the evaluation issues. To maximize the number of groups and individuals involved, interviews were primarily held in small group (as opposed to individual) interviews.

Senior managers were selected from the areas of Justice involved in the delivery of litigation services or litigation support and asked to participate in these small group interviews with other senior managers in their sectors. A total of 49 interviews were conducted with 122 individuals. Interviews were conducted either by telephone or in person in the key informants' official language of choice, and were generally between 75 and 90 minutes in length.

Table 4 below provides a more detailed breakdown of the key informants and groups that participated in interviews.

Table 4: Key Informants

Organization	Area	Number of interviews	Number of interviewees
Justice — NLS	NLS headquarters (ADAGO, Deputy ADAG, Business Integration and Strategies Branch, Financial Management Administration, NeDLSS)	6	11
	Regional offices (senior management and litigators) (two small group interviews in each region)	12	27
	CLS	2	6
	Paralegals across Justice (CLS, regional offices)	3	8
	Total — Justice, NLS	23	52
Justice — other areas that directly provide litigation services	Areas of Justice outside of NLS that also provide litigation services (small group interviews with members of the NCR Litigation Committee and/or other representatives): TLS NCR; TBS LSU; ESDC/VAC LSU; ⁴⁸ CBLS; and the NSLAG LSU.	5	16
Justice — areas involved in litigation support or provision of advice to litigators	Other Sectors (Public Law and Legislative Services Sector, Policy Sector, Management Sector)	6	14
	Representatives of Portfolios (Assistant Deputy Ministers and/or other appropriate senior level) (small group)	6	13
	LSUs (selection of those who work for clients with high demand for litigation services and/or high-profile/high-risk litigation)	9	27
	Total — Justice, other areas	26	70
	TOTAL	49	122

The following descriptive scale was used to report on some aspects of key informant interviews, with “a few” being approximately 10% to 15% or less of respondents, “some” being more than 15% to approximately 40%, “many” being more than 40% to approximately 60%, “most” being more than 60% to approximately 80%, and “almost all” being over 80%.



Administrative data review

Administrative data was obtained from Justice Canada’s Departmental Business Analytics System (i.e., Explore). Data was extracted from Explore’s Data Warehouse via Tableau, which includes data from iCase, IFMS, and HRMS. The data were extracted between March and June of 2019.

⁴⁸ Only the ESDC client has litigators in the LSU.

The data review focussed on litigation files led by the NLS or by one of the other litigation units between FYs 2014-2015 and 2017-2018. The administrative data for the other litigation units focussed on the number of actively managed litigation files opened and closed. TC, due to the small number of litigation files handled, and NSLAG, due to the sensitive nature of their litigation files, were not included in the administrative data review. The data review for the NLS was more extensive and also considered volume by type of client, outcome data, legal risk and complexity ratings, and level of effort (hours). The data review for the other litigation units was more limited, and included the number of litigation files opened, closed, and actively managed.

To the extent possible, the administrative data review considered trends over time, pre/post-NLS comparisons, and regional trends as applicable and relevant. However, as data was provided primarily in aggregate form (e.g., summarized at the level of NLS units), statistical analysis was not typically feasible due to the reduced degrees of freedom and statistical power associated with summary data. Trends were therefore examined graphically.

Survey of litigation staff

To gather the input of litigation staff, the evaluation included an anonymous and confidential bilingual web-based survey. The survey population included all litigation staff (including counsel, paralegals, and legal assistants) within the NLS, as well as staff outside the NLS that provide litigation services.⁴⁹

Prior to administering the survey, a bilingual survey questionnaire was developed and pretested by PRA and the Evaluation Branch to ensure that all skip logic was working correctly and that there were no technical issues. Skips were used to ensure that survey respondents were only asked questions that were relevant to them.

The survey was online for just over three weeks, from March 1 to March 20, 2019. During this period, three reminders were sent to potential participants to increase the response rate. Survey invitations were sent to 1,615 potential respondents. Ninety-nine respondents were screened out of the survey (for not working in a targeted area of Justice Canada, or because they were not primarily involved in litigation work). In total, 530 respondents completed the survey for a response rate of 35%.⁵⁰ Once the survey was finished, open-ended questions were coded and the survey data was analyzed using SPSS, a statistical software package.

Table 5 provides a profile of survey respondents. The vast majority (93%) of respondents were from the NLS as opposed to LSUs or other areas involved directly in litigation (7%).

Table 5: Respondent Characteristics

Characteristics	Responses (n=530)	
What is the classification level of the position that you currently occupy?		
	Number	Percentage
Legal Assistant (CR)	96	18%
Paralegal (EC)	117	22%
Counsel (LP and LC)		

⁴⁹ Staff outside the NLS invited to participate in the survey included staff working in: the Tax Litigation unit in the NCR (TLSP); the NSLAG LSU (the PSDIP); the CBLs; the ESDC/VAC LSU (the BRLP); and the TBS LSU (the CAP).

⁵⁰ Screening questions were used to ensure that only individuals who worked predominantly on litigation files were included in the survey. Of the total 1,615 survey sample, 99 respondents were screened out. The response rate is calculated based on eligible respondents (530/1,516).

Characteristics	Responses (n=530)	
What is the classification level of the position that you currently occupy?		
LP-01	61	12%
LP-02	180	34%
LP-03	36	7%
LP-04 and LP-05	20	4%
LC-01 to 04	20	4%
Total counsel	317	60%
Where do you work?		
NLS – Offices of the ADAG or Deputy ADAG	12	2%
NLS – Regional office		
Ontario Regional Office	95	18%
Prairie Region	93	18%
British Columbia Regional Office	91	17%
Québec Regional Office	75	14%
Atlantic Regional Office	19	4%
Northern Region	5	1%
NLS – CLS	67	13%
NLS – NeDLSS	38	7%
Other litigation unit (LSU or other unit)	35	7%
How long have you been working on litigation files for Justice Canada?		
Less than 1 year	52	10%
Between 1 and 2 years	58	11%
Between 3 and 4 years	57	11%
Between 5 and 6 years	18	3%
More than 6 years	345	65%
Language used for the survey		
English	443	84%
French	87	16%
Note: Some totals do not sum to 100% due to rounding.		

Limitations, challenges, and mitigation strategies

Interviews and the survey. One important limitation was the possibility of introducing bias as a result of the approach to sampling for the survey and key informant interviews, as well as the voluntary nature of participation in these data collection methods. For the survey of litigation staff (counsel and paralegals), this risk was mitigated somewhat by taking a census approach (i.e., inviting all litigation staff to participate). While this approach does not eliminate all forms of bias (most notably, self-selection bias among those who choose to complete the survey), it does remove the possibility of introducing bias at the sample development stage. The interviews with key informants and the survey of litigation staff also have the possibility of introducing self-reported response bias and strategic response bias. Self-reported response bias occurs when individuals are reporting on their own activities and so may want to portray themselves in the best light. Strategic response bias occurs when the participants answer questions with the desire to affect outcomes.

The risk of bias was mitigated by the use of multiple lines of evidence, including objective sources of data, such as documents and administrative data (to the extent that these are available), to arrive at the overall evaluation conclusions.

The survey had the added challenge of including several categories of staff (counsel, paralegals, legal assistants) and areas of Justice Canada (regional offices, CLS, NeDLSS, ADAGO, other litigation units outside of NLS). The development of the survey questionnaire attempted to ensure that respondents received questions that would be relevant to them. The feedback of the evaluation working group and the use of complicated skip logic were the methods used to direct respondents to appropriate questions.

Administrative data review. An objective of the evaluation was to consider the early impact of the NLS on the effectiveness and efficiency of litigation services. The evaluation period covered two years before the creation of the NLS (FYs 2014-2015 and 2015-2016) and two years after its launch (FYs 2016-2017 and 2017-2018). The short time period since the creation of the NLS meant that there was limited ability to conduct a pre/post analysis using administrative data. As a result, this type of pre/post comparison relied largely on qualitative data gathered through interviews. In addition, a number of data files had changed during the time period, which sometimes meant that they were not available pre-NLS or even for both years post-NLS. The evaluation relied on the NLS to assist with identifying when this had occurred and when mapping of previous data to new fields was possible and yielded reliable results.

The financial data for Justice Canada used to be maintained based on organizational units within the Department, but starting in FY 2018-2019, financial data by business line is being kept. Because this evaluation is of the litigation services business line, the evaluation team worked with Financial Management Services to construct financial data for litigation services. Doing so was also complicated by the fact that the NLS did not exist for the first two years of the evaluation, not all NLS units were included in the evaluation, and NLS units are involved in both litigation and advisory work.

The cost of legal services relative to the file outcomes was an indicator for efficiency of litigation services. Because of the difficulty in obtaining accurate cost over time, the evaluation relied on the level of effort (hours recorded to the file) as a stand-in for cost.