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Guidelines for Managing High Profile Litigation

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Introduction

This guide is intended to provide information on various aspects of managing high profile litigation. Please note that the topics may not be in sequential order, as topics may occur at various stages in litigation. You are encouraged to review the guidance carefully and refer to it as necessary to ensure you are aware of expectations from Litigation Analysts managing high profile litigation. Some lines of business may have particular requirements so please consult your Assistant Director. This is an evergreen document so should there be content that needs to be updated, please consult your Assistant Director (AD), who will consult with other ADs before updating the document.

Criteria for High Profile Cases / Seeking Confirmation a Case is High Profile

Cases can be considered high profile for a variety of reasons, such as:

- All cases where an Early Warning Notice (EWN) is prepared by DOJ;
- Politically/media sensitive/reputational risk;
- Elevated legal risk (assessed/potential);
- Potential significant impact on policy/operations/other;
- Potential appeal to Federal Court of Appeal (FCA) or Supreme Court of Canada (SCC);
- Escalation at DOJ/CBSA/other government department (OGD);
- Potential for significant financial implications;
- Recent decision with significant impact;
- Whole of government interests; or
- For situational awareness (not an IRCC lead).

Please note that the above list of criteria is not exhaustive. Some cases can be clearly identified as high profile upon reviewing the facts of the case at case assignment. However, sometimes cases become high profile later in the litigation process.

If you are unsure whether a case assigned to you meets the threshold of a high profile case, send a brief summary of the main/important case details to your Assistant Director for concurrence.

Litigation Analysts are encouraged to keep up-to-date on issues impacting the department, as this will help identify cases that may be of interest to our senior management. Helpful resources include IRCC Today and IRCC's daily media wrap.

Adding Cases to the Litigation Forecast / Updating the Forecast / Completing the Litigation Briefing's Checklist

The Litigation Forecast contains case details on high profile litigation cases managed by the Litigation Management Branch. It is an evergreen document, shared with senior management and the Minister's

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office weekly. It is imperative that cases added to the Litigation Forecast be updated regularly, to ensure the latest case details are available.

Once the Assistant Director has confirmed that a case is considered high profile, you should add it to the Litigation Forecast. The purpose of the Litigation Forecast is to provide high level summaries regarding high profile litigation cases to senior management. Attention should be paid when filling out each of the sections to ensure case accuracy (e.g. the status of the litigation, a link to the most recent factum, etc.).

Some additional considerations when entering/updating information in the Forecast include:

- Please include key words below the Case Name – it helps to situate for anyone reading and makes it easier to brief. Key words should reflect what the case is about;
- When adding a new case – identify as “**NEW**” at the top, **highlighted in yellow** – do not highlight the entire entry; once added, update the table of content (TOC) by clicking anywhere on the TOC and selecting on top “update table of content”, then “update all”.
- **Yellow highlights** should be used for new information only – do not highlight large sections. Also, remove previous highlighting the following week or when the information is superseded by newer information;
- Include the links to briefing materials, speaking points, memorandums and GCDOCs folders where specified.
- You are responsible for ensuring that your cases do not exceed more than one page – remove extraneous information as it becomes dated/irrelevant (e.g. every step may no longer be relevant);
- Please do not include unnecessary, internal procedural details (e.g., information about costs/disbursements unless related to settlement, internal consultations, etc.);
- When updating the document, please review the entire entry to ensure that it remains accurate (i.e., don’t simply add a bullet at the end. You may need to update tenses, move things from upcoming events to past events, delete some information to remain in the one page limit, etc.);
- Please keep date formats consistent: DD-Mmm-YYYY (i.e. 19-Jun-2024);
- Please ensure the headings (boxes at the top) are updated and the status of the litigation is accurate (e.g. Pending Applicant’s Arguments, Pending Leave Decision, etc.);
- Please note that cases should not be deleted from the Forecast without management’s approval. If you believe your case should be removed from the forecast, seek concurrence from your Assistant Director (including a rationale for removing the case). Once it’s decided to delete a case from the Forecast, enter a note above the case name indicating “will remove week of X”;
- Once you have updated the ADM Litigation Forecast, please remember to verify that the document in GCDOcs is no longer reserved under your name.

A call-out from the Junior Analyst supporting your team may be circulated every week, as a reminder to ensure the information in the Forecast is up-to-date. However, you are encouraged to add updates to your case when they become available, and let your Assistant Director know once you have made updates. Any changes should be made in track changes highlighted in yellow. While ad hoc updates are required when changes occur, you are also asked to review the case information when the call-outs are sent (i.e., every Monday) to ensure that any information that might have been previously new but is now considered a past event has been moved to the past litigation events section (with highlights removed, and any tenses are changed from present or future to past).

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Cases that are included in the Forecast should also have the internal [Litigation Briefing's Checklist](#) filled out as soon as possible. Please fill out as much information as possible when initially completing it, and add additional information later once it becomes available (e.g., cases assigned to Analysts solely based on them having an Early Warning Notice [EWN] may have limited information upfront, but as more details become available the checklist should be updated). This ensures that LMB Management has quick access to information that is typically requested during bilats with the Minister's Office (MINO).

In the Litigation Case Management System, there is the option of flagging whether or not your case is part of a high-profile/litigation look-ahead.

Screen Capture: Litigation Case Management System – Other Flags

Screen Capture: Litigation Case Management System – Cases views Litigation Look-Ahead

Seeking MINO Concurrence Before Issuing Instructions / Critical Path and Heads-up

Litigation has garnered a lot of interest from senior management, the Minister and the Minister's Office (MINO), which has resulted in greater demand for briefing products on high profile cases, and in some

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cases the need to seek input and concurrence prior to issuing instructions to the Department of Justice, taking a position before the Court, and/or filing legal arguments. This means that most decisions involving a case included in the Forecast require senior management review, and MINO's concurrence **before** instructions are issued to the litigator(s). This includes reviewing the evidence Canada plans to file (e.g., affidavits and associated exhibits), memoranda of argument, motions (e.g., to strike, EOT), etc. When in doubt as to whether MINO concurrence is required, consult your Assistant Director.

In cases where the Minister (or MINO) does not concur with the proposed approach, the Minister's direction should be documented using the [template seeking MINO concurrence](#).

In order to facilitate departmental reviews in high profile cases, you will need to create a critical path outlining timelines for review by each level of senior management, and when their concurrence is required by. A template for the critical path is included below (and is also available as an Annex in the Litigation Forecast), and will need to be included at the bottom of the case entry in the Forecast. The critical path will not count towards the one-page limit for entries in the Forecast. You will need to keep the following in mind when developing your critical path:

- coordinate well in advance with the litigator(s) regarding when they will be able to provide a draft of the submissions for review, and by when they will need comments back to ensure they file the documents by the Court deadline as these dates will inform the timelines in the critical path.
- In some instances, this may require negotiations with litigators for earlier drafts to allow for departmental reviews and approvals. Therefore, flagging that a case is high profile to litigators is key so they are aware of the dynamics and requirements for internal approvals.
- Ideally, there will be a 1 week period between when a draft is received by LMB to when MINO comments must be submitted to the litigator(s).
- The intention is to allow 1 business day per level between DGO and MINO for review.
- Typically, the due date for MINO to provide LMB with concurrence will be the day before the filing deadline.
- The critical path should also identify which stakeholders will be consulted.

Critical Path

DD-Mmm-YY	Submissions shared with LMB DGO (or other stakeholder DGOs) by [e.g., COB, noon, etc.]. Comments/approval sought from LMB DGO (or other stakeholder DGOs) by (time)
DD-Mmm-YY	Submissions shared with ADMO by [e.g., COB, noon, etc.]
DD-Mmm-YY	Submissions will be then shared with DMO and MINO concurrently by [e.g., COB, noon, etc.]
DD-Mmm-YY	MINO comments due at [e.g., COB, noon, etc.]
DD-Mmm-YY	Deadline for DOJ litigators to file the submissions to the Federal Court

Since you are aware of filing deadlines, you should be developing a critical path as soon as possible because, in addition to the critical path being included in the Forecast, you will need to give a heads up to MINO of the upcoming deadlines.

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You will need to draft an e-mail that includes the critical path for LMB Management to send up to MINO with as much advance notice as possible. Please include, in the draft email, the list of whom this heads up email should be distributed to (e.g. DGO Asylum Policy, ADMO MI, ADMO Asylum, DMO and MINO). The e-mail will need to include basic case details, what is being requested of MINO and why (i.e., we are seeking your concurrence on X document, which is intended to do Y. Your concurrence is required by X date so that we meet the Court-imposed deadline). You can also indicate if this document will also be concurrently reviewed by the CBSA, if applicable. The intention is to give MINO as much heads-up to set expectations so that when the draft submissions are actually circulated for comment, the timelines in the critical path at each level will be respected.

Please note that sometimes the timelines are not respected due to various reasons. It is recommended you ask your Assistant Director close to the MINO deadline, if it would be appropriate for Director's Office to send a friendly follow up to LMB DGO to ensure response is received from MINO as soon as possible.

Including Departmental Considerations in Briefing Products (including the Litigation Forecast and the Litigation Checklist)

You may be asked to create briefing products (e.g., speaking points, memo, etc.) or you may be asked to insert litigation considerations into briefing products created by other groups. When feeding into these various products consider who your audience is and what the intent of the document is when determining what level of detail is appropriate. Details that are entered in the Litigation Forecast, for example, will vary greatly from details inserted in media lines intended for public release.

In documents intended to brief senior management and/or implicated stakeholders, departmental/litigation considerations should indicate how the litigation could impact IRCC programs or policies

These departmental considerations should also be included in the Litigation Forecast. Litigation strategy, including whether or not settlement has been considered, should also be included in the Forecast. If settlement discussions took place, include the conclusion of the discussion (i.e., if settlement was reached, what are the terms?).

Raising High Profile Asylum-Related Cases to the Litigation Task Force (LTF)

The Litigation Task Force (LTF) is a forum for discussing refugee-related litigation that could have larger impacts on asylum policies/operations. The LTF meets biweekly, and seeks to develop and implement inter-departmental litigation strategies, resolve key policy questions, and provide operational guidance to IRCC and CBSA stakeholders. The LTF is comprised of interdepartmental stakeholders from IRCC and CBSA, such as: Operations, Litigation Management, Policy, Programs, Communications, and the Departmental Legal Services Unit (DLSU). If you have a high profile case that is related to asylum policy or litigation that

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challenges asylum policy or legislation, please contact [the LTF admin](#) so you can be added to the distribution list and have your case included as an agenda item. Call-outs for agenda items are sent the week before the scheduled LTF meeting, so please advise the LTF admin when there are updates to your case that should be included in the agenda and provide an overview of those updates.

Proactive Searches for Case Updates

Management is keen to be kept up-to-date on high profile cases, both through the Litigation Forecast and via e-mail updates. Proactive searches for case updates are highly recommended, since movement in high profile cases can sometimes be unpredictable (e.g., an advocacy group files a motion for intervenor status). You should check the [Federal Court docket](#), [Federal Court of Appeal docket](#), or the [Supreme Court of Canada \(SCC\) docket](#) regularly to see if there are any case updates. While the litigator(s) try to inform you of updates when they are able, it can be quicker to reach out to them when you notice movement in the Court docket. If you find it helpful, you can set yourself reminder e-mails or meeting invites to check the docket on a routine basis or use the Bring Forward (BF) function in LCMS.

Seeking Concurrence to File a Ministerial Application for Leave and Judicial Review

If you are requesting concurrence to file a Ministerial Application for Leave and Judicial Review (ALJR) of a decision made by the Immigration and Refugee Board (IRB), please follow the [MINO ALJR standard operating procedures](#), in addition to filling out the [concurrence template](#). If MINO concurs with filing the ALJR, please review the criteria for a high profile case to see if it meets the threshold. Just because MINO has concurred with the filing of a Ministerial ALJR, doesn't mean that the case is automatically considered high profile. However, if the case is considered high profile please review the entirety of this guidance document.

Seeking Approval for Disbursements by Justice

Some high profile litigation may involve costs that require LMB Management approval. For example, the litigator(s) may ask you to seek approval for them to: contract an expert to write a report on a topic that is central to your litigation; hire an expert to be an affiant for Canada, etc. These are considered to be disbursements under the IRCC/DOJ MOU, for which IRCC is responsible financially. While these do not require pre-approval at senior levels, senior management should be advised where such costs are significant (e.g. \$100,000 to hire expert witnesses, other contractors). A memo or email for information to the DM or ADM would normally be required, along with a description of the case, the need for experts, etc. Other costs that are necessary for the conduct of litigation may be more routine (i.e. Court reporter costs, translation of a document intended to be filed in Canada's evidence) but you should bring these to the attention of your Assistant Director/Director, especially if the costs are significant

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To obtain IRCC Management approval, you are asked to draft an e-mail for your Assistant Director outlining: the sum of the costs; a GCDocs link to the quote(s) that details each item; an explanation of why the costs should be approved (and why there is no less expensive option available); and the date by when approval is required. The draft e-mail will be distributed to the correct level in IRCC Management for approval.

(Note: the Department of Justice (DOJ) pays for the costs upfront, per the MOU, and costs are then added to the overall DOJ billing to IRCC.

Seeking Approval for Settlement with Financial Implications (Financial Delegation)

A Memo to the appropriate delegated authority (as per financial delegation chart above) is required when seeking a settlement mandate where monetary compensation is part of the proposed settlement. Pre-approval (s.32 approval) must be sought **before** authorizing litigators to engage in settlement negotiations. Reach out to your team or Assistant Director for examples of settlement Memos.

Engaging with Communications Branch

High profile litigation cases often generate media attention. In anticipation of this, all high profile litigation should be reported to the litigation contact within IRCC's Communications Branch: Suzanne.Lalande@cic.gc.ca. This is to ensure that media lines can be prepared in advance of any potential media inquiries and that Suzanne is aware of who her point of contact if/when these come in. In these instances, you may be asked to review draft responses and provide input with a view to ensure that any media response aligns with the department's position before the Court and that litigation-privilege is preserved. Suzanne should be updated for each major step in the litigation (e.g., when leave has been decided, if advocacy groups have requested intervenor or public interest standing, when submissions have been filed, when the hearing date(s) have been set, etc.).

Identifying and Supporting Canada's Affiant(s)

In the course of high profile litigation, the litigator(s) may indicate that it would be in Canada's best interests to identify an affiant to speak to certain topics that are at issue in the case. For example, this

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could be someone from IRCC Policy and/or Operations, and/or someone from another government department that is also implicated in the litigation (e.g. CBSA Operations, etc.). If the litigator recommends a Canadian affiant to speak on a certain topic, you will be asked to liaise with the associated group within IRCC to have them identify the correct contact. Any CBSA affiants would be identified and supported by CBSA's Litigation Management Unit (LMU). Experts (i.e. professors who can speak to international law and migration patterns) are generally identified and supported directly by the Department of Justice. Litigators should be responsible for providing a first draft of the affidavit to the affiant and the affiant will be responsible for filling out the main content that is based on their knowledge. DOJ is also responsible for commissioning affidavits.

Once an IRCC affiant has been identified, supporting them may include the following (*note: this list is not exhaustive*):

- Providing an overview of what the affiant can expect an affiant will need to be aware of the time commitment required and of the possibility of being cross-examined.
- Liaising between the affiant and the litigation team to provide affiant availability for cross-examination dates;
- Coordinating and attending cross-examination preparation session(s)
- Once the Direction to Attend (DTA) has been issued to the affiant by opposing counsel, assist the affiant by answering any questions about the documents opposing counsel is requesting (e.g., scope, level of effort required to produce and review them, likelihood of redactions being required, etc.);
- Assist with reviewing the collected documents (in response to the DTA and also what will be attached to the affidavit as exhibits) to identify any potential redactions that would be required under the Canada Evidence Act (*note: DLSU and the litigators will also review the documents for redaction, but some other areas may also need to be engaged by the document owners – such as International and Intergovernmental Relations [IRR] or security partners. If unsure of procedure if you identify potential redactions under the Canada Evidence Act, reach out to your DLSU on the file for guidance*); and
- Answering questions that may arise after cross-examination, such as whether there were any questions/document requests taken under advisement by the litigator(s), continuation of cross-examination (and what this means for the affiant’s involvement in broader litigation discussions), etc.

If documents collected for submissions as exhibits in an affidavit or in response to a Direction to Attend are higher than Protected B, they will need to be shared with the litigator(s) via secure means. If the document-holders do not have access to secure means, you will be required to share them via Government of Canada Secret Infrastructure (GCSI). If you do not have a GCSI account/access to a GCSI terminal, please

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reach out to a colleague in LMB or your Assistant Director for assistance in having the documents shared with the litigator(s).

Potential Co-Management of High Profile Litigation

Some high profile litigation requires time commitments above and beyond what one Litigation Analyst is able to provide. Some cases also involve a higher volume of additional taskings/briefings on an ongoing basis. In cases like these, your Assistant Director may assign another Litigation Analyst to the case to co-manage it with you. This will ensure that there is sufficient coverage should one Analyst be unavailable, and will help distribute the workload more evenly between two Analysts.

If you are co-managing high profile litigation, please keep in mind the following considerations:

- Both analysts need to be aware of all events occurring in the litigation (i.e., one person is not just passively being cc'd; both parties need to be actively aware of goings-on);
- Both analysts should always be cc'd on e-mails/taskings. Sometimes various stakeholders may inadvertently drop a contact off the distribution list, so please check that you are both always included on all correspondence;
- Between the two of you, you can decide how to divide up tasks (e.g., who will lead creating a document, who will e-mail out to stakeholders, who will review a tasking first before handing it off to the other analyst for review, etc.); and
- You will be working closely with your Assistant Director throughout the litigation to ensure that updates are expeditiously provided to IRCC Management. While your Assistant Director does not need to be cc'd on all litigation correspondence, there may be some correspondence they should be included on. Use your discretion on when to loop in your Assistant Director into correspondence, versus when to just send a separate briefing e-mail on updates.

Observing the Hearing of your High Profile Case

Once the hearing has been scheduled for a high profile case, Litigation Analysts are encouraged to observe the hearing. If Litigation Analysts do plan on observing the hearing, please indicate to the litigators how many LMB staff will be attending the hearing (including yourself). Concurrence should be sought with your Assistant Director to confirm your attendance (e.g., the hearing could be a multiple-day duration). In addition to yourself, your Assistant Director or Director might also be interested in attending if they are available, and/or a CO-OP student or Junior Analyst may also be interested in attending for educational purposes. Even though any member of the public in Canada is typically able to view a hearing, giving the litigator a final headcount of LMB employee attendance is done as a courtesy.

If the litigation is scheduled to only be in person and you are not physically located in the same city as the hearing, please ask the litigators to inquire with the Court if a hybrid hearing can be accommodated so you can attend virtually.

The litigators typically provide a short overview of how they think the hearing/day went, and this will also need to be shared with management.

After the hearing has concluded,

will need to be shared with your Assistant Director and Director (at a minimum), and included in the Litigation Forecast. Depending on

Departmental Contingency Planning

In some high profile cases, possible adverse outcomes might have a significant impact on the department (i.e. a program or legislative provision is struck with immediate effect). In those cases, Litigation Analysts will need to consider **litigation contingency planning**. This will include drafting of certified questions, seeking concurrence with seeking a stay of the Court's decision, appealing to the FCA or SCC, as the case may be. As with legal arguments, decisions on whether or not to pursue an appeal in high profile case and the rationale for doing so require concurrence from senior management and/ or MINO. In order to obtain these, Litigation Analysts should again prepare critical paths that allow for departmental consultations and approvals by the filing deadline.

In cases where we have either exhausted all of our litigation options (i.e. we do not have a CQ, a decision from the SCC), Litigation Analysts should coordinate departmental contingency planning, in collaboration with implicated stakeholders. Departmental contingency plans should consider how the department will respond to the Court's decision (i.e. what do we need to do if the Court strikes down the legislative provision?).

Departmental contingency planning will usually start once the hearing is completed

These potential outcomes will help guide stakeholder engagement in the development on a departmental contingency plan. LMB Litigation Analysts play an important role in coordinating these discussions, with policy, program and operational areas to develop a contingency plan which will include the impacts of each decision and how the department will react to such outcomes; this includes impacts and responses on policies, programs, Communications, Legal Services, etc. The Litigation Analyst will be responsible for identifying contacts for all areas affected, in leading discussions to develop the contingency plan, holding the pen on the plan, and preparing briefing products for senior management. Stakeholders will be responsible for feeding into the content of the plan, that is, identifying impacts on their respective areas and how they will respond to them. It is recommended to hold a kick-off meeting ahead of the hearing if it is determined that departmental contingency planning will be required. Departmental contingency

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planning is different than litigation contingency planning where we plan for next steps in the litigation, i.e. certified questions, whether to appeal.