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WOMEN'S LEGAL
EDUCATION & ACTION FUND

FONDS D'ACTION ET D'ÉDUCATION
JURIDIQUE POUR LES FEMMES

THIS CASE IS ABOUT FEMINISM

ASSESSING THE EFFECTIVENESS OF FEMINIST STRATEGIC LITIGATION

Written by: Kaitlin Owens

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Women's Legal Education and Action Fund (LEAF)
180 Dundas Street West, Suite 1420
Toronto, Ontario, Canada M5G 1C7
www.leaf.ca

LEAF is a national, charitable, non-profit organization, founded in 1985. LEAF works to advance the substantive equality rights of women and girls in Canada through litigation, law reform and public education using the *Canadian Charter of Rights and Freedoms*.

This publication was created as part of LEAF's Feminist Strategic Litigation (FSL) Project. The FSL Project examines the use and impact of feminist strategic litigation to help LEAF, feminists, and gender equality advocates more effectively combat systemic discrimination and oppression.

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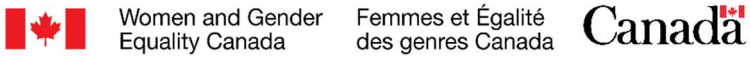

Preface

The Women's Legal Education and Action Fund (LEAF) works to advance the rights of women and girls across Canada. The organization uses litigation, law reform, and public education to bring about legal change and awareness, and to push for substantive equality for women and girls.

In the spring of 2019, LEAF launched its Feminist Strategic Litigation (FSL) Project – a project to assess the impact of its past litigation work, and develop a five-year plan for litigation moving forward. To plan its future litigation work, LEAF needs to know:

1. What are the key issues facing women and girls across Canada?
2. How do we assess the impact of feminist strategic litigation?

The first question was examined in the companion report “National Needs Assessment Survey for Women and Girls in Canada”.

To help answer the second question, FSL Project Director Kaitlin Owens led a year-long research and consultation process, culminating in the completion of this report.

Contents

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[1] The Advisory Committee was initially composed of: Jackie Stevens, Avalon Sexual Assault Centre; Karine-Myrgianie Jean-François, DisAbled Women's Network Canada (DAWN Canada); Linda Silver Dranoff, lawyer, feminist, author and writer; Nathalie Léger, La Centrale des syndicats du Québec (CSQ) and LEAF's Law Program Committee; Rachelle Venne, Institute for the Advancement of Aboriginal Women (IAAW); Raji Mangat, West Coast LEAF; Samantha Michaels, Pauktuutit Inuit Women of Canada; Savannah Gentile, Canadian Association of Elizabeth Fry Societies (CAEFS); and Tamar Witelson, Metropolitan Action Committee on Violence Against Women and Children (METRAC). At the time of publication, Karen Segal, Ontario Nurses Association (ONA); Roxana Parsa (METRAC); and Tamar Witelson (Barbra Schlifer Memorial Clinic) had also joined the Advisory Committee.

[2] The Steering Committee was initially composed of: Megan Stephens, LEAF's Executive Director & General Counsel; Susan Boyd, then Co-Chair of LEAF's Law Program Committee; Karen Segal, then Staff Lawyer at LEAF; and Elizabeth Shilton, former Chair of LEAF and LEAF's Law Program Committee. Susan Boyd and Karen Segal were subsequently stepped down from the Committee. Adriel Weaver, current Chair of LEAF's Law Program Committee; and Rosel Kim and Cee Strauss, current Staff Lawyers at LEAF, then joined the Committee.

Introduction

At its core, this report examines two primary questions:

1. What is feminist strategic litigation?
2. How do we assess the "effectiveness" or "impact" of feminist strategic litigation?

A. Positionality

Before outlining the methodology used in this report, it is important to note my positionality as it relates to collecting, analyzing, and presenting information. I am a white, cisgender, heterosexual, Anglophone woman. Although I have made efforts to center and highlight the voices of people with different backgrounds to mine, my experiences and biases will have shaped the information put forward in this report and how it has been put forward. I note that the absence of Francophone literature in this report does not reflect a lack of valuable contributions to this topic – rather, it reflects my language limitations.

I am an employee of LEAF, and have participated in LEAF's litigation and law reform work. This relationship to LEAF shaped who I reached out to for consultations, and likely influenced who agreed to consult and what they communicated to me. I am also a lawyer who completed graduate studies in international law, including work on strategic litigation and human rights. I believe in the rights framework and have applied it in different work experiences. I believe that the law is one tool for advancing human rights, but not the only tool and not always the most effective tool. These experiences and beliefs will have influenced my work on this report.

B. Methodology

To answer the questions outlined above, I relied on several qualitative research methods.

First, Emily Dutton completed a literature review examining feminist strategic litigation, methods to assess the impact of feminist strategic litigation, and methods to assess

the impact of strategic human rights litigation.[3] I reviewed that literature, as well as additional literature on feminism and the law.

Second, I conducted 65 semi-structured interviews with individuals across the country, a list of whom can be found in Appendix B. I reached out to participants who fell within one or more of the following categories:

- Staff of community and advocacy organizations, primarily those which had previously partnered with LEAF on litigation and/or law reform efforts
- Staff of feminist organizations in Canada, South Africa, the United Kingdom, and the United States
- Academics with a focus on equality rights, feminist legal theory, and/or issue areas connected to LEAF's mandate[4]
- Legal practitioners working in strategic litigation organizations
- Current and former members of LEAF's Law Program Committee (formerly the National Legal Committee), which guides and supports LEAF's litigation work
- Current and former members of LEAF's Board of Directors
- Current members of LEAF's branches (volunteer chapters located across the country)
- Current and former LEAF staff members[5]

The FSL Project's Steering Committee and Advisory Committee also provided suggestions for consultees.

[3] Strategic human rights litigation shares some features with feminist strategic litigation, and has also engaged more deeply with questions of measuring effectiveness, particularly in recent years.
[4] For example: reproductive justice, sexual assault law, disability rights, Indigenous law, Aboriginal law, pay equity, criminal law, economic and social rights, and gender-based violence.
[5] LEAF is fortunate to have benefited from, and continue to benefit from, the contributions of countless individuals committed to working towards substantive equality. This is without a doubt a key strength for the organization. It also means that I was not able to consult with every person who falls within one or more of the categories on this list. This report should not be seen as the end of the discussion, however, but rather as a starting point for future conversations both within the context of the Feminist Strategic Litigation Project and beyond it.

I asked interviewees about their thoughts on assessing the effectiveness of feminist strategic litigation, and on the effectiveness of LEAF's litigation work in particular. Where I drew a specific point from a consultation, I have attributed that information to the consultee. The consultation process and all individuals consulted provided me with significant assistance in thinking through my approach to this report, and the content within it.

Finally, the FSL Project's Steering Committee and Advisory Committee provided comments on initial drafts of the report.

C. Report outline

Part One of the report examines the meaning and characteristics of feminist strategic litigation (FSL). I begin by providing a definition of "feminism" as used in this report. I then turn to an analysis of the arguments for and against feminists engaging with "the law", and what those arguments mean for moving forward. Finally, I provide an overview of strategic litigation more broadly, and then use that to highlight the meaning and characteristics of FSL.

Part Two of the report looks to how we assess the effectiveness of FSL. I begin with a consideration of the challenges inherent in this task, and then outline some broad principles to keep in mind when considering the impact of FSL. I then outline different approaches to assessing effectiveness that have been put forward in the literature and by advocacy organizations. Finally, I propose a broad model for assessing the effectiveness of FSL, which can then be modified as needed to reflect your or your organization's priorities for a case or series of cases.

Part One: What is feminist strategic litigation?

A. Defining feminism

Any discussion of feminist strategic litigation would be incomplete without a consideration of a critical question: what is feminism?

Feminism is not easily defined. As Angela Davis notes, "feminism is not only about women, nor only about gender. It is a broader methodology that can enable us to better conceptualize and fight for progressive change".[6] Feminism is not "only produced by women" nor is it "something that all women produce".[7] Moreover, while feminism is informed by issues that women have been concerned with over the years (for example: reproductive justice, sexual assault, sex work, gender-based violence, pay equity, sexual harassment, and divorce/separation), it is not confined to these issues.[8]

Feminism can take many forms. The term "feminism" can be used in describing: Black feminism, Indigenous feminism, liberal feminism, wave-based feminism (first, second, third, and now fourth wave), Critical Race feminism, transfeminism, socialist feminism, Marxist feminism, radical feminism, anti-racist feminism, decolonial feminism, ecofeminism, anarchist feminism, and more. By defining feminism here, I am in no way attempting to establish a conclusive definition – rather, I am seeking to provide an explanation that will help provide context as I look to the meaning of feminist strategic litigation, and how to assess its impact.

My understanding of feminism owes much to bell hooks' succinct and powerful definition of the term. As she explains: "Feminism is a movement to end sexism, sexist exploitation, and oppression."[9] Feminism is closely linked to the concept of patriarchy, or the

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[6] Angela Davis, "A vocabulary for feminist praxis: on war and radical critique" in *Feminism and War: Confronting US imperialism* (London: Zed Books, 2008) 19 at 25.
[7] Ann Scales, *Legal Feminism: Activism, Lawyering, and Legal Theory* (New York, NY: New York University Press, 2006) at 7.
[8] *Ibid*.
[9] bell hooks, *Feminism is for Everybody: Passionate Politics* (London: Pluto Press, 2000) at viii.

structural and institutionalized sexism which privileges men at the expense of women.[10] As Lorna Finlayson notes, feminism recognizes the existence of patriarchy, and opposes it – although feminists may disagree about the nature of patriarchy, its consequences, and the chosen manner of opposition.[11]

As I talk about feminism through this report then, I am referring to a movement which looks to end sexism and which opposes patriarchy. Feminism must also be grounded in the framework of intersectionality, introduced by Kimberlé Crenshaw and discussed in greater detail over the following pages. This ensures that feminism takes into account how other oppressive systems and structures interact to oppress women and those facing gender-based discrimination.

B. The importance of intersectionality

Feminism – particularly liberal feminism – has, fairly, faced criticism over the years for having too limited a scope in the issues and voices it has centered. As Carol A. Aylward points out, racialized women, lesbian women, women with disabilities, and women living in poverty have highlighted feminism's "non-responsiveness to the issues surrounding the multiple oppressions experienced by women who were not White, middle class, heterosexual and able bodied."[12] This non-responsiveness has extended to the issues facing trans and non-binary persons as well. While some feminists see a clear connection and overlap between trans rights and feminism, others condemn transphobia but also resist opening up traditionally "women's only" spaces to trans women. Others go so far as to exclude trans and non-binary people from feminist struggle and advocacy altogether.[13]

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[10] See *ibid* at ix; Lorna Finlayson, *An Introduction to Feminism* (Cambridge: Cambridge University Press, 2016) at 6–8. Both hooks and Finlayson note that this does not mean that patriarchy exclusively harms women – men also suffer under patriarchy, however, not to the same degree as women.
[11] Finlayson, *supra* note 10 at 6–9.
[12] Carol A Aylward, "Intersectionality: Crossing the Theoretical and Praxis Divide" (2010) 1:1 Journal of Critical Race Inquiry 1 at 2–3.
[13] See the discussions in Cristan Williams, "Radical Inclusion: Recounting the Trans Inclusive History of Radical Feminism" (2016) 3:1–2 TSQ 254; Emi Koyama, "Whose feminism is it anyway? The unspoken racism of the trans inclusion debate" in S Stryker & S Whittle, eds, *The transgender studies reader* (New York: Routledge, 2006);

Intersectionality has been put forward as an analytical lens that can be used to broaden feminism's understanding of how systems of oppression interact to shape people's lived experiences. The framework of intersectionality was introduced by Kimberlé Crenshaw in the late 1980's. Crenshaw used analysis rooted in Black Feminism and Critical Race Theory to highlight the ways in which race and gender interact to shape the experiences of Black women.[14]

It is important to remember that intersectionality is not about simply "adding on" harms. That approach assumes that "gender discrimination is oppressive in the same way for all women, only more so for 'racialized women', 'disabled women', 'poor women' and 'lesbian women', thereby leaving the unstated 'norm' of whiteness, heterosexuality, and able-bodiness."[15] That unstated "norm" also likely means the woman is cisgender, and middle class.

As Rakhi Ruparelia observes, however, quoting Angela Harris, "[r]acialized women are not simply 'white women only more so.'"[16] Their experiences of oppression are unique, and result from the interactions and linkages between sexism and racism.[17] This highlights the importance of incorporating an understanding of different forms of oppression into feminist theory and feminist work. Feminists must constantly consider the interactions between sexism, classism, racism, colonialism, ableism, heterosexism, and transphobia.[18] Women in positions of privilege, and in particular those who fit within the "unstated norm", must think through their own role in perpetuating patriarchy and oppression.[19] Engaging in this analysis

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Lorna Finlayson, Katharine Jenkins & Rosie Worsdale, "'I'm not transphobic, but…': A feminist case against the feminist case against trans inclusivity", (17 October 2018), online: *Verso* <https://www.versobooks.com/blogs/4090-i-m-not-transphobic-but-a-feminist-case-against-the-feminist-case-against-trans-inclusivity>.

[14] See Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex" (1989) U Chi Legal F 139.

[15] Aylward, *supra* note 12 at 14.

[16] Rakhi Ruparelia, "Legal Feminism and the Post-Racism Fantasy" (2014) 26:1 Canadian Journal of Women and the Law 81 at 85; Angela P Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42:3 Stanford Law Review 581–616 at 595.

[17] Ruparelia, *supra* note 16 at 85.

[18] See *ibid*.

[19] *Ibid* at 86.

will help feminists better understand the causes of oppression, and how to fight against them.

Moving beyond an "adding on harms" understanding of intersectionality also requires reflection about what it means to engage in feminist advocacy. Sonia Lawrence observes that women facing a combination of intersecting oppressions may have needs, wants, priorities, and strategies that differ from those of professional legal feminists choosing which issues to emphasize and which arguments to pursue.[20] Taking an intersectional approach to feminism is therefore not only about thinking through and expressing how oppressive systems interact to harm particular individuals – it is also about understanding that women are likely to have different needs, desires, and goals, and working to reflect these different positions in the decisions advocates make.

C. Feminism and the law

Before diving in to an examination of what exactly is meant by "feminist strategic litigation", it is helpful to take a step back and think about the relationship between feminism and the law more broadly. When I talk about "the law" here, I mean the use of legal mechanisms and frameworks. In the Canadian context, these include the court system, the legislative process, the tribunal system, public inquiries or inquests, truth and reconciliation commissions, and international treaty bodies and courts. While those using the law can base their arguments in different legal traditions – including Indigenous law, common law, civil law, and international law – the legal mechanisms themselves largely embody and reflect colonial, primarily Western or Anglo-European, understandings of law.

While many feminists have embraced law and the framework of women's rights as methods of pushing for social change, concerns have been raised as to whether they have conceded too much in doing so.[21] There have been, and continue to be, debates over whether

[20] Sonia Lawrence, "Feminism, Consequences, Accountability" (2004) 42:4 Osgoode Hall Law Journal 583 at 593.
[21] See e.g. Karin Van Marle, "'We Exist, but Who Are We?' Feminism and the Power of Sociological Law" (2012) 20 Fem Leg Stud 149–159 at 158; discussing Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989).

or not feminists should look to the law at all in pushing for substantive equality. These points of view are important to bear in mind when thinking about feminist litigation as a strategy, and for whom the law works (and for whom it does not).

i. Concerns about using the law

There are several different concerns raised about using the law as a tool for feminist change.

One concern centers on the inherent oppressiveness of law. Despite claims to the contrary, the law is not a neutral referee – instead, it is "a powerful web of symbols, rules, and practices that combine to oppress women and other groups."[22] Feminist legal theory has highlighted the role of law in reproducing patriarchy. Women identifying at different intersections have "expanded feminist legal theory to recognize that the law is not only a carrier of patriarchal relations, but also of racial hierarchy, heterosexism, ableism, and Anglo-dominance, among other things."[23]

The oppressiveness of law is particularly visible in the ongoing harms caused by colonialism. Colonial law has oppressed and continues to oppress Indigenous women and girls in Canada. As Sharon McIvor observes, Canadian federal laws embody and have replicated colonialism and patriarchy.[24] Mary Ellen Turpel argues that the *Charter*, and the entire framework of rights attached to it, represent a cultural and historic framework imposed on Indigenous peoples with different cultures and histories.[25] Using the law therefore requires accepting the language, terms, and concepts set out by the dominant

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[22] Sherene Razack, "Using Law for Social Change: Historical Perspectives" (1992) 17 Queen's Law Journal 31 at 49.
[23] Radha Jhappan, "Introduction: Feminist Adventures in Law" in *Women's Legal Strategies in Canada* (University of Toronto Press, 2002) at 13.
[24] See Sharon Donna McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" (2004) 16 Canadian Journal of Women and the Law 106.
[25] See Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989) 6 Can Hum Rts YB 3.

culture, no matter how they fail to reflect or appreciate cultural difference.[26] Engaging with the law thus has the potential to reproduce and reinforce existing oppressive structures.

Engaging with the law also has the potential to replicate problems in feminism. As Lise Gotell observes: "efforts to give voice to a 'women's perspective' in legal discourse, as in other discourses, tend to rely on the construction of an essential women's experience."[27] This "gender essentialism", as Harris explains, relies on the belief that an "'essential' woman's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."[28] The danger of essentialism is particularly present in law, as courts have preferred and better understood claims based in a universal women's experience rather than those based in intersecting grounds of oppression.[29]

There are also concerns that law weakens social movements. Using the law supports the status quo and existing social hierarchies, rather than pushing for radical social change.[30] It has the potential to deradicalize and take resources away from grassroots organizing and social movements.[31] In addition, participating in legal processes may make advocates more likely to accept a negative court outcome, provided they feel their arguments were heard, even if they were not accepted.[32] Legal involvement may therefore take energy away from social movements without resulting in meaningful change.

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[26] *Ibid* at 20–21.
[27] Lise Gotell, "Towards a Democratic Practice of Feminist Litigation? LEAF's Changing Approach to Charter Equality" in Radha Jhappan, ed, *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) 135 at 139.
[28] Harris, *supra* note 16 at 585.
[29] Gotell, *supra* note 27 at 140. Gotell points to LEAF's early litigation work as an example of this essentialism in law: 141-146.
[30] Joanne St Lewis, "Beyond the Confinement of Gender: Locating the Space of Legal Existence for Racialized Women" in Radha Jhappan, ed, *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) 295 at 305.
[31] *PLP Research Paper: Literature Review on the Use and Impact of Litigation*, by Dr Lisa Vanhala & Jacqui Kinghan (UK: Lankelly Chase and Public Law Project, 2018) at 19; James A Goldston & Erika Dailey, *Strategic Litigation Impacts: Insights from Global Experience* (New York, NY: Open Society Foundations, 2018) at 38.
[32] One of the justifications for allowing interventions into court cases argues that people will be more likely to accept a negative court outcome where they believe they were able to participate in a meaningful way. See the discussion of legitimacy theory in Kathryn Chan & Howard Kislowicz, "Divine Intervention: A Study of the

Any change resulting from law may be limited as well. As Audre Lorde argues, "the master's tools will never dismantle the master's house" and will only permit "the most narrow parameters of change".[33] And while the law may provide symbolic legal wins, these do not necessarily translate into improvements in people's day-to-day lives. This is the argument made by Gerald Rosenberg, who examined U.S. cases including *Brown v. Board of Education* and *Roe v. Wade* and concluded that litigation campaigns had produced little to no significant social change.[34] He also argued that the use of the legal system had produced negative results, including backlash.[35]

Rosenberg's concerns have been echoed in contexts outside of the United States. Writing in the early days of the *Charter*, Judy Fudge challenged uncritical embraces of constitutional law, noting that many cases involving *Charter* "wins" on their faces had "had little effect in persuading lower courts to adopt a radical new stance to equality rights in order to alleviate women's subordinate position in society."[36] In the Israeli context, Noya Rimalt has argued that legal reforms since the 1980s have not resulted in changes to the lives of women in Israel, and have counterproductively created a sense that the legal system is committed to gender equality when in fact it is not.[37]

Some feminist critiques of law have centered less on the use of law itself, and more on the manner in which the law has been used. To use the law, a person must have access to it – and marginalized individuals and groups face significant access to justice barriers. Radha Jhappan explains that activists and scholars have suggested that the use of law by feminists has often "largely pursued the interests of white, middle-class, heterosexual, able-bodied,

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Operation and Impact of NGO Interveners in Canadian Religious Freedom Litigation" in Cheryl Milne & Kent Roach, eds, *Public Interest Litigation in Canada* (Toronto: LexisNexis Canada Inc, 2019) 217 at 229–230.

[33] Audre Lorde, *Sister Outsider*, revised ed (New York: Crossing Press, 2007) at 111–112.

[34] Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

[35] *Ibid*.

[36] Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25:3 Osgoode Hall Law Journal 485 at 487.

[37] Noya Rimalt, "From Law to Politics: The Path to Gender Equality" (2013) 18:3 Israel Studies (Special Section - Roundtable on the Status of Israeli Women Today) 5–18 at 6.

English-speaking women at the expense of marginalized women".[38] As a result, the use of the law has prioritized the needs and wants of a small subset of women. Any benefits achieved through the law have then flowed to them. Under this critique, however, law still has potential – but there is a need to change the way it is used.

ii. Arguments for using the law

Despite the concerns raised about turning to the law as a tool for social change, there are many arguments made in favour of its use. These arguments tend to be pragmatic in nature – those making the claims recognize law's inherent limits, but also observe that we exist within the system and cannot opt out of it entirely.

One such argument is that the law exists, whether feminists choose to engage with it or not. The law "has real practical impacts in the daily lives of real people."[39] Engaging with the law provides an opportunity to potentially shape those impacts. It also provides a means through which to shape the legal system itself. Jhappan suggests that feminists cannot transform the legal system through boycotting it, and that the system's imperfections present avenues through which it can be changed.[40] Feminist use of law, it is argued, can transform the law so that it takes into account gendered realities.[41] In doing this, feminists can chip away at the oppressiveness of law and legal systems.

In addition, just because feminists choose not to use the law does not mean that other groups will do the same. Some of these groups may look to use the law to advance equality, while others may look to challenge progressive laws, including under the *Charter*. Choosing not to engage means that important principles will be created without feminists at the

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[38] Jhappan, *supra* note 23 at 13.
[39] *Ibid* at 21.
[40] *Ibid* at 23.
[41] Tracy A Thomas & Tracey Jean Boisseau, "Introduction: Law, History, and Feminism" in Tracy A Thomas & Tracey Jean Boisseau, eds, *Feminist Legal History: Essays on Women and Law* (New York: New York University Press, 2011) 1 at 1.

table.[42] As a result, feminists are likely to be drawn into constitutional litigation, whether they want to be there or not.

Law, and litigation in particular, may end up being the only space within which feminists can fight for social change or defend advancements that have been made. In some instances, political strategies may not have led to the desired outcomes, requiring a switch in tactics.[43] In other cases, it may be easier for groups to get their arguments heard by courts as opposed to by legislators. This may be because the groups in question lack the resources or social capital to directly influence policymakers on issues that affect them.[44] Or it may be the case that political discourse is so focused on one or a few issues that there is no appetite for engaging in policy dialogue in other areas.[45]

There are those who argue that the law can energize social movements, rather than take away from them. Litigation may empower and strengthen social movements, and encourage individuals and groups to become involved in public interest campaigns.[46]

Finally, and importantly, law may result in positive – albeit often imperfect and incomplete – change in the lives of women. While the law is oppressive and slow to change, advocates have pushed for and achieved meaningful changes using law.[47]

iii. Moving forward

As the concerns listed above make clear, law does not offer an all-encompassing solution to the oppression of women and other marginalized groups. In some cases, using the law may in fact worsen the situation faced by these groups. At the same time, however, the

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[42] Interview of Fay Faraday by Kaitlin Owens and Nicole Biros-Bolton (20 February 2020).
[43] Jhappan, *supra* note 23 at 9.
[44] Andrea Durbach et al, "Public Interest Litigation: Making the Case in Australia" (2013) 38:4 Alternative Law Journal 219 at 219–220.
[45] For instance, an individual at one organization we spoke with explained that they considered litigation as a strategy because of particular events dominating the political space and leaving little room for legislative review.
[46] Durbach et al, "Public Interest Litigation", *supra* note 44 at 220.
[47] For example, following the filing of a 2016 constitutional challenge by Abortion Access Now PEI (AAN PEI) with legal support from LEAF, the PEI government ended its policy barring surgical abortions on the Island and announced it would open a women's health clinic in the province.

law remains a tool through which states create policies with real consequences for people. And it presents opportunities to use existing systems to press for social change. Although advocates may not be able to change the legal system, to quit the field entirely may be more dangerous than continuing to engage.[48]

Moving forward then, it is critical to remember the dual roles of law – as "both a site of oppression and an important means of social transformation."[49] Put another way by Susan Boyd, the law is "situated within the complex set of relations that we call state and society, and is implicated both directly and ideologically in women's oppression and in women's struggles against oppression".[50]

It is also critical to keep in mind that law, and in particular litigation, is only one tool in the struggle against gender injustice. As Sherene Razack notes, there is a "danger of litigation as feminist political activity when there is no sound structure to facilitate a coordinated feminist response to women's oppression in law".[51] The tools that will be effective vary from case to case, and require feminists to consider context in planning their advocacy strategy. As Linda Silver Dranoff explains: "There's no one way to make change – there's what the circumstances require."[52] In addition, litigation is not an option for all of the issues facing feminists, and paints an incomplete picture of those issues.[53] Litigation is therefore, as

[48] Interview of Emma Cunliffe by Kaitlin Owens and Nicole Biros-Boltion (14 November 2019).
[49] Andrea Cornwall, "Preface" in Mulki Al-Sharmani, ed, *Feminist Activism, Women's Rights, and Legal Reform* (London: Zed Books, 2013) ix at ix.
[50] Susan Boyd, "(Re)Placing the State: Family, Law and Oppression" (1994) 39:1 Canadian Journal of Law & Society 39–73 at 46.
[51] Sherene Razack, *Canadian feminism and the law: the Women's Legal Education and Action Fund and the pursuit of equality* (Toronto, Canada: Second Story Press, 1991) at 131.
[52] Interview of Linda Silver Dranoff (8 June 2020). Silver Dranoff provides the example of the multi-pronged campaign for family law reform in the 1980s. The campaign began with litigation, which resulted in a partially successful result at the Supreme Court of Canada. Silver Dranoff observes that this highlighted the need for continued lobbying and activism with the goal of justice for women in family law. The combination of litigation and lobbying led to the enactment of Ontario's *Family Law Act, 1986*, which finally gave women an equal share of family property earned during a marriage.
[53] Christopher P Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (UBC Press, 2005) at 12.

Jhappan observes, "but a small (though significant) element, invariably preceded, accompanied and succeeded by intense movement activism on many different fronts".[54]

As a result, litigation must be situated in a broader landscape, accompanying and accompanied by education, awareness-raising, alliance-building, discourse-shifting, and policy reform. Frontline service providers, community members, academics, grassroots organizers, unions, advocacy organizations, students, and more all have crucial roles to play in pushing for gender equality.

D. Feminist strategic litigation

To understand how to assess the effectiveness of feminist strategic litigation (FSL), it is helpful to set out what FSL is. As the name suggests, FSL is a subset of strategic litigation. As a result, to know what FSL is, we need to first take a look at strategic litigation.

i. What is strategic litigation?

There is no set definition of strategic litigation. The terms used to describe activities that seem to fall under the umbrella of strategic litigation are inconsistent and varied. Authors and organizations use terms such as "public interest litigation", "impact litigation", "cause lawyering", and "strategic human rights litigation" (SHRL), often but not always interchangeably.[55]

I will not seek to provide the definitive meaning of strategic litigation in this report, but rather provide a description of features commonly associated with it. These features can then be used to distinguish feminist strategic litigation from other types of strategic litigation.

a. Strategic litigation requires involvement in a legal action or case

As may be obvious, strategic litigation requires involvement in a legal action or case. What that involvement looks like, however, can vary.

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[54] Jhappan, *supra* note 23 at 5.
[55] See Goldston & Dailey, *supra* note 31 at 25.

Strategic litigation can take the form of direct involvement as a party to a case. This could see an individual bringing a lawsuit, or a group of individuals taking part in a class action. It could also involve an organization bringing a lawsuit through public interest standing.[56]

Strategic litigation may also take place through interventions. An intervention is "a legal procedure which allows individuals or organizations to participate in judicial proceedings to which they are not otherwise parties."[57] The intervener – meaning the individual, organization or coalition intervening in the case – must get the permission of the court to intervene.[58] While they may make legal arguments on issues raised in the case, interveners are usually not allowed to introduce new evidence.[59] Given the costs associated with bringing their own cases, many equity-seeking groups have focused on interventions.[60]

Strategic litigation of any form may be proactive or reactive. Proactive litigation involves identifying key issues, and developing or monitoring potential cases to address those key issues. Reactive litigation, in contrast, involves responding to issues or cases as they emerge.

Scholars also distinguish between offensive litigation and defensive litigation. F.L. Morton and Avril Allen explain that "offensive litigation" is used to achieve favourable policy change, whereas "defensive litigation" is used to preserve the policy status quo.[61]

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[56] Angus Grant defines public interest standing as "the act of appearing before a court to assert the rights of another party not before the court": "Stand by Me: Public Interest Standing and Immigration and Refugee Advocacy in Canada" in Cheryl Milne & Kent Roach, eds, *Public Interest Litigation in Canada* (Toronto: LexisNexis Canada Inc, 2019) 147 at 147. This allows a third party to bring a case before the courts where the individual or individuals directly impacted are unable to bring the case themselves.

[57] Chan & Kislowicz, *supra* note 32 at 222.

[58] *Ibid*.

[59] *Ibid* at 222–223.

[60] See Bruce Porter, "Twenty Years of Equality Rights: Reclaiming Expectations" (2005) 23 Windsor Yearbook of Access to Justice 145.

[61] F L Morton & Avril Allen, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada" (2001) 34:1 Canadian Journal of Political Science 55 at 67–69.

It should also be noted that choosing *not* to engage in strategic litigation, of whatever form, may be a strategic decision in itself. The decision not to pursue strategic litigation could be made because the time is not right for a particular case, or because it is better to wait for a different factual situation to emerge before going to court. But it could also be to pursue another strategy to advance a goal. This could involve supporting others already engaged in litigation, so that the legal analysis you want to get across is still being put before the judge even if you, as the advocacy group, are not formally named as an intervener or party in the litigation.[62] It could also involve stepping outside of the courtroom altogether, and focusing on media campaigns, public awareness, law reform projects, or other forms of advocacy.

b. Strategic litigation's goals extend beyond those of the immediate parties

What distinguishes strategic litigation from other forms of litigation are its goals or interests. Unlike typical litigation, strategic litigation specifically looks to achieve effects that extend beyond the particular individual or group which has brought the case.[63] Strategic litigation aims for "some public significance that extends beyond the interests of the immediate parties."[64]

The goals of strategic litigation reach beyond the courtroom. Cases are "consciously aimed at achieving rights-related changes in law, policy, practice, and/or public awareness above and beyond relief for the named plaintiff(s)."[65] These changes may be radical or structural in nature, but strategic litigation can also "be carried out without challenging existing power structures or narratives".[66]

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[62] Interview of Lobat Sadrehashemi (17 October 2019).
[63] Michael Ramsden & Kris Gledhill, "Defining Strategic Litigation" (Forthcoming) Civil Justice Quarterly, online: <https://ssrn.com/abstract=3467034> at 8–10.
[64] Fay Faraday, Tracy Heffernan & Helen Luu, "Winning the Right to Housing: Critical Reflections on a Holistic Approach to Public Interest Litigation" in Cheryl Milne & Kent Roach, eds, *Public Interest Litigation in Canada* (Toronto: LexisNexis Canada Inc, 2019) 31 at 34; see also Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Bloomsbury Publishing, 2018) at 3.
[65] Goldston & Dailey, *supra* note 31 at 25.
[66] Faraday, Heffernan & Luu, *supra* note 64 at 34.

It is important, however, to keep in mind the caution against drawing sharp lines between strategic or public interest litigation, and other forms of litigation.[67] As Helen Duffy notes, the goals of victims or clients may be the same as broader goals.[68] Silver Dranoff observes that individual cases may not be conceived of as strategic litigation, yet lawyers in those cases may be able to both put their client's interests first *and* use the case as an opportunity to change the law in a way that has broader implications.[69] Client-focused litigation (such as legal aid) may also serve strategic goals itself, such as increasing access to justice and strengthening the legal system.[70]

c. Strategic litigation is forward-thinking

Regardless of the form of court involvement or the particular goals involved, strategic litigation requires planning and forward thinking. As may seem obvious, what is strategic in one situation or context may not be strategic in another.[71] Participants must think through strategies and opportunities for advocacy at all stages of the litigation, from case development to post-judgment response.[72] This requires the use of "a series of legal, political, and social techniques" in developing legal tactics and incorporating non-litigation strategies.[73] Participants in strategic litigation must engage in long-term thinking, determining their goals for the short, medium, and long terms and the strategies required to achieve those goals.[74] This is the case even where litigation is reactive in nature – even if

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[67] Duffy, *supra* note 64 at 48–49.
[68] *Ibid*.
[69] Interview of Linda Silver Dranoff (4 June 2020). Silver Dranoff gives the example of a family law case where it was in the interests of her client to have cost of living increases added to spousal support payments, and to have bonuses earned by the client's spouse counted as part of his income for determining the amount of support owed. The trial judge's decision to consider the bonuses and include cost of living increases, which was upheld by the Ontario Court of Appeal, set a precedent with broader effects for women seeking support.
[70] Duffy, *supra* note 64 at 48–49.
[71] Priti Patel & Tamar Ezer, *Advancing Public Health Through Strategic Litigation* (New York: Open Society Foundations, 2016) at 8.
[72] Goldston & Dailey, *supra* note 31 at 19, 25.
[73] Macarena Sáez, *Impact Litigation: An Introductory Guide* (Washington, D.C.: Center for Human Rights & Humanitarian Law, 2016) at 1.
[74] *Ibid*.

advocates had not planned to be involved in a particular case, they still need to think ahead and strategize once becoming involved.

d. Strategic litigation is part of a broader context

Strategic litigation cannot be divorced from the context surrounding it. It takes place in the context of broader social and political struggle, and it both draws from and helps build social movements.[75] As Macarena Saéz observes, strategic litigation "is one element of a broader project and not an end in itself."[76] This can make it challenging to determine when strategic litigation has ended, as further steps are often required to achieve the goals of the strategic litigation process.[77]

e. Strategic litigation is not only about lawyers

Despite taking place in a courtroom, strategic litigation is not and should not be all about lawyers. Where a test case involves a victim, complainant, or survivor, their voice should play an important role in the proceedings. As Duffy explains, the "starting point for strategic litigation should be the perspective of the victim, in whose name cases are brought and to whom the process should, in principle, belong."[78] James A. Goldston reiterates this, noting that "research and experience consistently shows the value of listening to and learning from clients and their communities".[79] In many cases, it will be critical to also highlight the voices or experiences of those not directly involved in the case, but who will be impacted by the outcome. This is particularly true in the context of interventions – where the intervener will be trying to bring a broader perspective before the court, and illustrate the impact of a case on individuals and groups outside of the parties to the litigation.

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[75] Goldston & Dailey, *supra* note 31 at 36.
[76] Sáez, *supra* note 73 at 1.
[77] Lisa Vanhala & Jacqui Kinghan, *Using the law to address unfair systems: A case study of the Personal Independence Payments legal challenge* (London, U.K.: The Baring Foundation and Lankelly Chase, 2019) at 24.
[78] Duffy, *supra* note 64 at 38.
[79] James A Goldston, "Why Strategic Litigation Matters" in *Global Human Rights Litigation Report* (New York: Open Society Foundations, 2018) 1 at 3.

In addition, and as previously noted, strategic litigation is only one tool for social change. It fits within a broader landscape of strategies including advocacy, education, lobbying, media campaigns, international pressure, popular support, and legislative reform.[80] Many authors suggest that strategic litigation is most likely to be successful where it is used in combination with these other strategies.[81]

Litigators, or litigation-focused organizations, are not and should not be the only ones involved in these non-litigation tactics.[82] Community members, community advocates, communications and media experts, educators and many others bring important lived experience and expertise to the table in working to enhance the value of strategic litigation and direct the broader project for social change.

ii. What is feminist strategic litigation?

As is the case with feminism, there is no universally-accepted definition of feminist strategic litigation (FSL). As FSL is a type of strategic litigation, we know that, at a minimum, it features involvement in a legal case with the goal of achieving effects beyond the interests of the parties to the case. It is also forward-thinking and part of a broader context, and involves a variety of actors, not just lawyers.[83]

So what distinguishes FSL from strategic litigation more broadly? Naomi R. Cahn offers a basic definition of feminist litigation as feminist lawyering on feminist issues.[84] She

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[80] Durbach et al, "Public Interest Litigation", *supra* note 44 at 220; Goldston & Dailey, *supra* note 31 at 33.
[81] Scott L Cummings & Deborah Rhode, "Public Interest Litigation: Insights from Theory and Practice" (2009) 36 Fordham Urb LJ 603; Goldston & Dailey, *supra* note 31; Catherine Corey Barber, "Tackling the evaluation challenge in human rights: assessing the impact of strategic litigation organisations" (2012) 16:3 Int'l J of HRs 411; Josh Paterson, "The Work Outside the Courtroom: Public and Government Engagement in the Carter v. Canada Case" in Cheryl Milne & Kent Roach, eds, *Public Interest Litigation in Canada* (Toronto: LexisNexis Canada Inc, 2019) 107; Durbach et al, "Public Interest Litigation", *supra* note 44; Steven Budlender, Gilbert Marcus & Nick Ferreira, *Public interest litigation and social change in South Africa:* (New York, NY: The Atlantic Philanthropies, 2014).
[82] Budlender, Marcus & Ferreira, *supra* note 81 at 96.
[83] As is the case for strategic litigation, the literature on FSL emphasizes that feminist strategic litigation must be combined with other feminist action (such as legislative lobbying or education about equal rights) to maximize its effectiveness. See e.g. Manfredi, *supra* note 53 at 12. See also Lynn Smith, *Report: Equality Litigation for Women in Canada* (Toronto, Canada: Nancy's Very Own Foundation, 1998) at 36.
[84] Naomi R Cahn, "Defining Feminist Litigation" (1991) 14 Harvard Women's Law Journal 1 at 1.

offers this understanding with the caveat that there can be a multiplicity of "feminist positions" on any feminist issue, and that it is important to avoid developing too narrow or restrictive an understanding of FSL.[85]

I would adopt Cahn's definition, with her caveat in mind, but add one piece so as to define FSL as "feminist lawyering on feminist issues with feminist goals". What this means is likely to look different in different contexts, and shift over time. But having an evolving and flexible definition gives more guidance than having no definition at all. It also allows us to identify common features of FSL, recognizing that our understanding needs to be able to change and grow over time.

a. Feminist lawyering

Feminist strategic litigation involves bringing feminist analysis into the courtroom. The introduction of this analysis provides courts with "a gendered and feminist framework" in which to make their decisions.[86] It helps courts to understand the broader context of the cases facing them, and the implications of their decisions for women and other marginalized groups.

One key way to bring feminist analysis before the courts is to center lived experiences in the litigation, and use a gendered lens to show the court that laws thought to be "neutral" or "objective" contain gendered assumptions and have gendered consequences.[87] This means exposing how laws and policies negatively impact women and marginalized groups, and providing suggested changes that take into account their lived experiences.[88] It also looks

[85] *Ibid* at 1–2.
[86] Amanda Spies, "Considering The Impact of Amicus Curiae Participation on Feminist Litigation Strategy" (2015) 31:1 South African Journal on Human Rights 136 at 142.
[87] See the discussion of the "women question" in *ibid* at 140–141; Katharine T Bartlett, "Feminist Legal Methods" (1990) 103:4 Harvard Law Review 829 at 842–843.
[88] Bartlett, *supra* note 87 at 837.

beyond the specific facts of any given case to highlight the broader social implications of a decision.[89]

When discussing the centering of lived experiences, it is of course critical to remember that there is no one "woman's experience". As Sheila McIntyre cautions, theorizing about women as a flat category in feminist litigation risks reinforcing essentialist and inaccurate understandings, which can have a negative impact on those at the margins.[90] The same can be said for the experiences of members of marginalized groups more broadly. As noted earlier, feminism and feminist litigation have faced fair criticism for only centering the experiences of women considered to fall within the "norm" – that is, white, heterosexual, cisgender, able-bodied, and middle class.

When different lived experiences are thoughtfully and effectively centered, however, they present a powerful challenge to depoliticized or entrenched understandings about issues commonly impacting women and other marginalized groups. Razack suggests that by using women's lived experiences in the courtroom to challenge judges' deeply held personal biases, FSL "issue[s] a fundamental challenge that reaches into the very core of liberal legalism".[91] For example, McIntyre explains that some of LEAF's litigation work has pushed back against "the liberal construction of rape as an atypical practice of deviant individual men", and instead articulated "a systemic analysis of how liberal laws and structured relations of inequality, particularly those defined by gender, race and disability, interact to normalize male sexual violence."[92]

Another important way to introduce feminist analysis into the courtroom is to provide legal arguments grounded in feminist theory. Ann Scales, for example, suggests that there is no meaningful split between theory and application and that "concrete and stable legal

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[89] Sheila McIntyre, "Feminist Movement in Law: Beyond Privileged and Privileging Theory" in Radha Jhappan, ed, *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) at 61.
[90] *Ibid*.
[91] Razack, *supra* note 51 at 70.
[92] McIntyre, *supra* note 89 at 61–62.

successes are grounded, consciously or not, on theoretical foundations."[93] This may mean using "radical, not liberal, feminist scholarship and advocacy" to inform FSL, and declining to pander to "the misogyny of judge-made precedent or the ideologies it reflects and legitimates."[94]

FSL also presents arguments grounded in an analysis of power issues. As Cahn explains, FSL "has evolved through the efforts of people who found themselves excluded from the mainstream of the legal profession and thus were pushed to think about alternatives."[95] Their arguments recognize that the law is grounded in gendered assumptions, based on male norms with rights outlined in male terms.[96] In this way, a consideration of power imbalance is embedded in the very fabric that makes up feminist litigation.

The substance of the analysis presented is a key feature of feminist lawyering. But so too are the processes involved. Feminist lawyering may involve bringing in a variety of voices to help shape a case, ensuring that those forming the arguments reflect a broad array of experiences and expertise. Where an organization engages in direct client representation, feminist lawyering involves listening to the client's story, and looking to elevate it before the court.[97] It may also involve using the lawyer's own experiences to help guide the litigation.[98]

b. On feminist issues

Feminist strategic litigation involves legal cases dealing with feminist issues. Of course, establishing whether or not a particular issue "counts as feminist" is a thorny exercise.

As noted earlier, there are some issues that have historically been of particular concern to feminists – including reproductive justice, sexual assault, sex work, gender-based

[93] Scales, *supra* note 7 at 6.
[94] McIntyre, *supra* note 89 at 61.
[95] Cahn, *supra* note 84 at 4.
[96] Thomas & Boisseau, *supra* note 41 at 25.
[97] Cahn, *supra* note 84 at 4.
[98] *Ibid*.

or intimate partner violence, pay and employment equity, sexual harassment, and divorce/separation.[99] What is important, however, is not whether a particular issue falls on this (non-exhaustive) list. Rather, it is whether the issue in question reflects the existence of institutionalized sexism or patriarchy, and the litigation challenges that sexism or patriarchy. Ensuring that intersectionality informs FSL means that feminist issues will also be informed by the interactions between other oppressive structures, including classism, racism, colonialism, ableism, heterosexism, and transphobia.[100]

c. With feminist goals

Finally, feminist strategic litigation pursues feminist goals. Specific goals may differ based on the nature of a particular case, but their broader aim should include working to end systemic sexism, patriarchy, and other oppressive structures. Cahn understands the goals of FSL as working to "improve women's social and economic status; to reach those women most in need; and to enhance women's self-respect, power, and ability to alter existing institutional arrangements".[101] FSL may also pursue what Katharine T. Bartlett calls "consciousness raising", looking to provide a platform for the voices of women.[102] And, as Ruparelia points out, feminist goals should also include "anti-racism, anti-colonialism, and challenges to other systems of domination."[103]

There is a tension, however, which is critical to keep in mind. Maneesha Deckha expresses this tension by asking whether feminists committed to intersectionality must only support cases which harm no women, or whether they can "tolerate benefiting some women at the expense of other women (or even non-elite men)".[104] This tension can be seen in the fight against gender-based violence, for example, where pushing for longer sentences and

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[99] Scales, *supra* note 7 at 7.
[100] See Ruparelia, *supra* note 16 at 85.
[101] Cahn, *supra* note 84 at 3; quoting Deborah Rhode, "Feminist Critical Theories" (1990) 42 Standford Law Review 617 at 637.
[102] Bartlett, *supra* note 87 at 863–864.
[103] Ruparelia, *supra* note 16 at 113.
[104] Maneesha Deckha, "Book Review: Women's Legal Strategies in Canada, by Radha Jhappan (ed)" 41:4 Osgoode Hall LJ 720 at 727.

stronger police responses within a racist justice system "will have predictably uneven results" for women and those in marginalized groups.[105]

If avoiding harm altogether is unrealistic, Deckha goes on to ask, then how do we assess whether a case or a goal is feminist?[106] There is no clear or easy answer to this question. One response is to adopt a harm reduction approach, with the goal of causing the least harm possible while pursuing goals aimed at challenging patriarchy and other oppressive structures. Another is to choose to prioritize cases with goals that benefit the most marginalized, or those who have historically been left out of FSL. Whatever the response, it is crucial that those engaged in FSL consistently ask themselves what their goals are, who their actions benefit, and who their actions may not benefit, or even harm.

[105] See the discussion in Lawrence, *supra* note 20 at 596.
[106] Deckha, *supra* note 104 at 727.

Part Two: How do we measure the effectiveness of feminist strategic litigation?

Developing methods to measure the effectiveness of feminist strategic litigation (FSL) is attractive for many reasons. First, developing an understanding of what we mean by effectiveness can help us to more precisely identify what we are trying to achieve through litigation. Once we have identified these goals, we can then think through which litigation efforts have "worked", and which have not. This can help us to recognize additional work which needs to be done. It can also help us to learn lessons to guide that future work.

In addition, figuring out how to measure effectiveness can potentially help us to think through whether or not litigation is appropriate in particular circumstances. By looking at the impact of past cases, we can explore whether there are some issue areas more suited to litigation than others. We can also consider whether there are factors which, when present, might make litigation more likely to be successful. This can then help us to make strategic decisions regarding whether or not to pursue litigation as opportunities arise.

Throughout this section of the report, I will use the terms impact, effectiveness, and success interchangeably. As was the case in earlier sections, I will draw on the information shared by FSL Project consultees as well as information from feminist literature, and feminist legal literature in particular. But I will also heavily draw on literature on strategic human rights litigation, a field which has engaged more deeply with questions of measuring effectiveness, particularly in recent years.

A. Challenges in measuring the effectiveness of FSL

Measuring the effectiveness of FSL is not a straightforward task. Deciding what we mean by effectiveness is challenging, and involves making value judgments about who and what we prioritize. Even once we have decided what effectiveness means, measuring it presents challenges. These include a lack of measuring tools, difficulties in measuring particular areas of impact, challenges in distinguishing between correlation and causation, and the trickiness of choosing timelines for assessment.

i. Effectiveness: what does it mean?

An initial challenge in measuring the effectiveness of FSL lies in determining what exactly we mean by "effectiveness". Sheila L. Martin emphasizes that "while it is relatively simple to state whether the court granted or withheld the requested remedy, it becomes more difficult to say that a particular case was a 'success' because it may be difficult to construct a principled definition of success".[107] Moreover, success may mean different things to different people in different moments. As a result, it may be necessary to regularly revisit our understanding of what effectiveness means and what we need to try to measure.

As we determine our understanding of impact, it is critical to remember that what we consider to be a success illustrates our priorities. As Lawrence observes: "When we attempt to take stock of what feminism, particularly legal feminism, has accomplished in Canada, the discourses produced are more than backwards-looking assessments. They represent important statements of contemporary feminism's view of its role and responsibilities."[108] Thus any consideration of effectiveness reflects our understanding of who and what we value, and cannot be undertaken lightly.

ii. Effectiveness: how do we measure it?

Even after we have determined what success looks like, there are several challenges to measuring the impact of FSL.

Writing in 2012, Catherine Corey Barber suggested one of the main challenges in assessing strategic litigation's impact was the lack of adequate methodological tools developed to define what constitutes success.[109] Organizations involved in strategic litigation often lack the time and resources to develop and implement assessment frameworks. Where evaluation metrics exist, they are often obligations tied to funding or grants. These reporting requirements may satisfy a funder, but do not necessarily help the organization to fully

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[107] Sheila L Martin, "Abortion Litigation" in Radha Jhappan, ed, *Women's Legal Strategies in Canada* (University of Toronto Press, 2002) at 340.
[108] Lawrence, *supra* note 20 at 601.
[109] Barber, *supra* note 81 at 411–412.

understand the impact of its work. As we will see below, there have been attempts by some academics and organizations to develop frameworks for measuring success. It is still, however, an ongoing process.

An additional challenge stems from the nature of FSL and its goals. As Duffy notes in the context of strategic human rights litigation, much of litigation's impact is immeasurable.[110] She points to forms of "indirect impact", such as the contribution of litigation to gradual processes of social, political, legal, or cultural change, as well as change to discourse and political space.[111]

The difficulties of measuring impact can be seen when considering how to assess the impact of litigation on public awareness or public discourse. Measuring activity – say social media engagement, news coverage, or the number of people who sign a letter – is easier to do, but it does not necessarily capture the actual impact.[112] Even conducting qualitative research – say through polls or interviews – may not produce an accurate picture, as people may say one thing publicly, but behind closed doors say something different.[113] Indirect impacts such as these are very difficult to quantify, but may be the most important in some cases.[114]

Relatedly, it can be difficult to tease out the link between litigation and a particular outcome. Goldston and Erika Dailey note that it is "often impossible to establish with confidence causative or even correlative relationships between a judicial decision and subsequent changes."[115] In addition, as litigation is generally only one of a variety of tools used by equality-seeking organizations, it can be difficult to determine the unique impact of each strategy on a particular outcome.[116] As a result, Goldston and Dailey explain: "the

[110] Duffy, *supra* note 64 at 46.
[111] *Ibid* at 40.
[112] Interview of an individual at a civil society organization by Kaitlin Owens and Emily Dutton (7 June 2019).
[113] Interview of Megan Stephens by Kaitlin Owens and Nicole Biros-Bolton (28 November 2019).
[114] Duffy, *supra* note 64 at 40.
[115] Goldston & Dailey, *supra* note 31 at 24.
[116] *Ibid* at 28.

impacts of strategic litigation tend to be unpredictable, unclear, paradoxical, occasionally perverse, and difficult to measure."[117]

A further challenge emerges when thinking through the timelines for measuring effectiveness. As Scott L. Cummings observes, there is often no obvious timeframe for measuring social change.[118] The choice of when to stop measuring, however, can affect how we perceive the effectiveness of litigation.[119] Enough time needs to pass so that the impact of litigation can appear or become clearer.[120] Assessing the impact of litigation too soon after it concludes may mean missing out on consequences which take longer to emerge. However, as time passes, the links between the litigation and particular outcomes can become fuzzier and harder to establish.[121] Thus allowing more time after the litigation may give a better understanding of changes in the overall landscape, but also make it harder to say that it was the litigation that led to those changes.

B. Principles to keep in mind when assessing effectiveness

It is clear that measuring the effectiveness of FSL will not be a scientific process. We are unlikely to ever be able to perfectly identify the impact of a particular case. However, important insights can come from *attempting* to understand the role of litigation in creating change.[122] We can still learn from and reflect on different perspectives and available indicators of progress.[123] The lessons that we learn can then help shape our strategies and efforts moving forward. In determining how to measure effectiveness, there are a number of general principles useful to keep in mind.

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[117] *Ibid*.
[118] Scott L Cummings, "Empirical Studies of Law and Social Change: What is the Field? What are the Questions?" (2013) 1 Wis L Rev 171 at 193.
[119] *Ibid*.
[120] *Supporting systems changers through the use of collaborative legal approaches*, by Jacqui Kinghan & Lisa Vanhala (London, U.K.: Public Law Project, 2020) at 7.
[121] *Ibid*.
[122] Goldston & Dailey, *supra* note 31 at 28.
[123] Duffy, *supra* note 64 at 46–47.

i. Moving beyond a narrow conception of effectiveness

There appears to be broad agreement in the literature and among consultees that there is a need to move beyond a narrow conception of impact to a broad one. A narrow approach to impact focuses on questions tied to the courtroom. It examines the legal result, asking whether the result reflects the arguments made, and if the remedy ordered by the court is consistent with the litigation's goals.[124]

The need to move beyond a narrow consideration of impact does not mean that these questions do not matter. They allow us to assess how receptive judges are to arguments made by feminists and other equality-seeking groups.[125] This in turn allows us to think through the impact of FSL on case law, future litigants, judicial attitudes, and the legal system more broadly.

Focusing only on what happens within the walls of the courtroom, however, will cause us to miss other important areas of impact. While a case may be "lost" in the courtroom, it is not automatically a loss as it relates to the larger project and goals of FSL. Losses may provide building blocks for future litigation wins, and the basis for successful law reform initiatives. They may also provide a starting point for political strategy aimed at changing legislation or practice.[126] Mary Eberts characterizes this type of case as "the good loss" – where you did not get the legal outcome you wanted, but the courts said a number of things that would be helpful in future cases or in efforts to advocate for changes in legislation.[127] These cases may help to facilitate consciousness-raising, increase social awareness, gain media attention, build support from other organizations, and provide momentum to social movements.[128]

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[124] Interview of Rosel Kim by Kaitlin Owens and Nicole Biros-Bolton (6 December 2019).
[125] Morton & Allen, "Feminists and the Courts", *supra* note 61 at 64.
[126] Susan D Phillips, "Legal as Political Strategies in the Canadian Women's Movement: Who's Speaking? Who's Listening?" in Radha Jhappan, ed, *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) 379 at 380.
[127] Interview of Mary Eberts by Kaitlin Owens and Nicole Biros-Bolton (21 February 2020).
[128] Hannah Camplin & Emma Scott, "'We are a Group of Feminist Litigators Doing What We Can': An Interview with Emma Scott, Director of Rights of Women" (2015) 23 Fem Leg Stud 319 at 325.

Similarly, a "winning" judgment may have limited, or even negative, impact outside the walls of the courtroom. Victories may remain confined to narrow legal grounds, which do not result in the desired changes to the real lives of those affected. As Duffy explains, "a winning judgement that remains unimplemented may change little", and "a winning judgement that creates legal or political backlash may make things worse on the ground".[129]

Focusing solely on the legal outcomes of FSL is therefore likely to miss the broader picture of a case's impact. Instead, there is a "need to cast the net wide to look for evidence of impact", looking at outcomes including the judgment, general legal principles, policy change, and changes in the lives of broader groups impacted by the decision.[130]

ii. Considering process and outcome

Another theme that emerged in the literature and consultations was the importance of considering both process and outcome when thinking about the impact of FSL. Evidence of impact can be found from the initial stages of the litigation.[131] The process of developing a case and making arguments is important feminist work,[132] and requires engaging the voices that need to be involved in that process.[133] For Jane Bailey and The eQuality Project, an important aspect of impact is the degree to which they are serving and prioritizing the needs of women in the most vulnerable positions, and doing that in a way that is both supportive but also recognizes their agency, knowledge, and expertise.[134]

iii. Thinking about different types of impact

Authors and consultees also highlighted the importance of thinking about different types of impact. Litigation can have positive and negative impacts, or even no impact.[135] Positive impacts may take the form of progressive changes, but can also be seen in

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[129] Duffy, *supra* note 64 at 37.
[130] Kinghan & Vanhala, *supra* note 120 at 7.
[131] *Ibid*.
[132] Interview of Joanna Erdman (11 September 2019).
[133] Interview of Raji Mangat (17 July 2019).
[134] Interview of Jane Bailey (26 June 2019).
[135] Kinghan & Vanhala, *supra* note 120 at 7; Goldston & Dailey, *supra* note 31 at 26.

preventing regression and maintaining positive aspects of the status quo.[136] Common examples of negative impacts include backlash and counter-mobilization, creating "bad law", and alienating members of the communities impacted.[137] While instances of no impact may be rarer, they may still arise. For example, a case which does not receive media attention may have no impact on the public perception of an issue.

iv. Examining context

Understanding the context of litigation is an important part of assessing impact. Barber argues that organizations need to establish indicators for success on a case-by-case basis, to ensure that the measurements for success reflect the particular goals of a case.[138] She notes that these goals can be revised as the litigation unfolds, but warns against setting vague or easily attainable goals so that the organization appears more successful.[139]

For Martin, context includes: "the particular issue involved; its subject matter, its moment in time, its social context, the people involved and implicated; and the type of legal action".[140] An assessment of context also requires analysis of the facts of the particular case and must involve asking questions such as: "is the law a prohibition or a form of regulation, is a party seeking an injunction, is there a constitutional claim, what remedy is being sought, what evidence is available and admissible, who started the proceedings, and who controls the litigation."[141]

Examining the context highlighted by Martin allows us to have a better understanding of the likelihood of different forms of success – and where to focus on when looking for impact. For example, it may be clear going into a case that the legal arguments are unlikely to be accepted by the court. The case may instead have been brought to change public perception and discourse. With this context, we may be less concerned with the "failure" of

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[136] Kinghan & Vanhala, *supra* note 120 at 7.
[137] Cummings, *supra* note 118 at 190; Duffy, *supra* note 64 at 79.
[138] Barber, *supra* note 81 at 30.
[139] *Ibid*.
[140] Sheila L. Martin, *supra* note 107 at 340.
[141] *Ibid*.

the legal arguments in court than with the effectiveness of the case in changing public attitudes or obtaining media attention.

Context also means asking the question: effective compared to what? This means considering alternative approaches that could have been pursued, and what the outcome of those approaches were likely to have been.[142] We therefore examine effectiveness absolutely (asking whether the litigation was effective), but also comparatively (asking whether the litigation was more or less effective than other available strategies would have been).

C. Different models for assessing effectiveness

With those broad principles in mind, I will now take a look at different models that have been used to assess the impact of FSL or strategic human rights litigation. These models have been drawn from academic studies, reports by strategic litigation organizations, and consultations with strategic litigation organizations. I will start with models with a narrower focus on impact, and move towards those which take a more expansive approach to assessing effectiveness.

i. Intramural studies

Many authors examining the effectiveness of strategic litigation take the "intramural study" approach identified by Morton and Allen, focusing primarily on what happens within the litigation and the courthouse. Given the overlap in their approaches, I will highlight two models here.[143]

In a 2019 study, Kathryn Chan and Howard Kislowicz look at the impact of non-government interveners on the quality of judicial decision-making in Canadian litigation concerning religious freedoms.[144] They use two primary approaches to assess that impact:

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[142] Kinghan & Vanhala, *supra* note 120 at 6; Phillips, *supra* note 126 at 380.
[143] For examples of the intramural study approach applied to individual cases, see Anna S Pellatt, "Equality Rights Litigation and Social Transformation: A Consideration of the Women's Legal Education and Action Fund's Intervention in Vriend v. R." (2000) 12 Canadian Journal of Women and the Law 117; and Elizabeth A Sheehy & Julia Tolmie, "Feminist Interventions: Learning from Canada" (2019) 3 New Zealand Women's Law Journal 201.
[144] Chan & Kislowicz, *supra* note 32.

1. Duplication analysis: this uses computer software to identify instances where judgments contained identical language to arguments made in intervener factums.
2. Thematic analysis: this features a qualitative analysis of intervener factums and judgments to identify common themes.[145]

Morton and Allen look slightly more broadly at three dimensions of success:

1. The dispute dimension: this considers whether or not the litigant representing "the feminist interest or position" won the case, although Morton and Allen note that this may not be a priority for interveners depending on the case.
2. The law dimension: this focuses on whether the decision creates useful precedent or case law for use moving forward.
3. The policy dimension: this considers whether the case ends with a court order or government concession leading to a change in or elimination of problematic policy, but stops short of looking at compliance after the case and any "real world change". Morton and Allen also note that a policy "win" may also result when interveners become involved to defend an existing policy, and the decision upholds the policy.[146]

ii. Legal Voice's community lawyering approach

Legal Voice, a Seattle-based organization pursuing justice for women and members of the LGBTQ community in the Northwest United States, centers their understanding of impact in the community. They are looking to do impact advocacy through partnerships with vulnerable communities. This involves engaging in a "community lawyering model", centering the voices of affected communities and looking to them for what their needs are. Impact evaluation is then done through community-based organizations, who are best suited to determine whether a legal case has led to changes in the situation on the ground.[147]

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[145] *Ibid* at 233–234.
[146] Morton & Allen, "Feminists and the Courts", *supra* note 61 at 65–68.
[147] Interview of Lisa M. Stone by Kaitlin Owens, Emily Dutton, and April Leather (9 May 2019).

iii. Phillips' question-based approach

Susan Phillips argues that litigation is a form of political strategy, and proposes a three question framework for analyzing its success as political strategy:

1. Did litigation help frame or reframe the issue in ways that can be used politically by the movement?
2. Did the case facilitate political mobilization within the movement and among allies?
3. Did the judicial decision lead to changes in the law, policy, or process?[148]

iv. Five questions for success

One of the individuals that we spoke with explained that their organization asks five questions in relation to their litigation:

1. Did they win the case?
2. If they did not win the case, did they lose in a way that is very narrow and sets them up to fight another day?
3. Did they meet the needs of their clients?
4. Did they leverage the case in a way to change public conversation?
5. Did they bring in unlikely allies?[149]

v. Canadian HIV/AIDS Legal Network

The Canadian HIV/AIDS Legal Network proposes that the following questions be answered in conducting a final assessment of the impact of strategic litigation:

1. What was the outcome of the case?
2. What kind of precedent did it set, if any? (Good, bad, neutral?)
3. Were our arguments adopted by the court?
4. What kind of media coverage did the case generate?

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[148] Phillips, *supra* note 126 at 399.
[149] Interview of an individual in a civil society organization by Kaitlin Owens, Gabrielle Aquino, and Emily Dutton (3 July 2019).

5. In what specific ways did the case help empower affected communities through awareness-raising, capacity-building and making their voices heard?
6. Did this case help mobilize support from key influentials and attract new supporters?
7. Have there been any other outcomes (anticipated or unanticipated)?
8. Overall, how helpful was the case in advancing the organization's policy agenda?[150]

vi. Manfredi

Christopher Manfredi takes a three-part approach to assessing effectiveness, considering the following questions:

1. Did legal mobilization change (or preserve) legal rules in the manner desired?
2. Did legal mobilization strengthen the social movement?
3. Did legal mobilization lead to social change?[151]

vii. Open Society Justice Initiative's three category approach

Goldston and Dailey do not understand impact as a one-time event, like "impact" of a car hitting a tree, and instead frame impact as open-ended, iterative, and subjective with positive, negative, and neutral meanings.[152] They have developed a model focused on three categories of impact:

1. Material impacts: these are direct changes resulting from litigation, and include monetary restitution, compensation for harm, transfer of land, an order that perpetrators be prosecuted, or disclosure of information.
2. Instrumental impacts: these are results that are indirect but quantifiable, and include changes in policy, law, jurisprudence, and institutions such as the judiciary.

[150] *Advocacy and Social Justice: Measuring IMPACT* (Toronto: Canadian HIV/AIDS Legal Network).
[151] See Chapter 6 of Manfredi, *supra* note 53.
[152] Goldston & Dailey, *supra* note 31 at 26.

3. Non-material impacts: these are indirect impacts that are impossible to quantify, and include changes in empowerment and agency, behavior and attitudes, community cohesion, and public discourse.[153]

viii. Duffy's camera metaphor

Duffy puts forward a camera metaphor that offers three analytical lenses through which strategic human rights litigation (SHRL) can be assessed, suggesting that "to better understand the significance of human rights litigation, we need to jettison the old camera *obscura* and adopt more modern sophisticated lenses."[154] She suggests the use of three particular lenses:

1. High definition lens: this highlights the numerous, multi-dimensional levels of impact of strategic litigation. Duffy provides nine broad levels of impact:
    a. Impact on victims, including judicial recognition, empowerment, and reparation
    b. Legal impact, including on legislation and case law
    c. Impact on policy and practice
    d. Impact on institutions, including judicial strengthening
    e. Impact on information, truth, and the historical record
    f. Social or cultural impact, including on discourse, attitudes, and recognition of culture
    g. Mobilization and empowerment
    h. Impact on democracy and the rule of law
    i. Negative impact
2. Long lens or time-lapse function: this highlights the need to look at how impact changes over time, examining all stages of a case including at its start point, during the litigation, when the judgment is released, and after the judgment.

[153] *Ibid* at 43–73.
[154] Duffy, *supra* note 64 at 37–38.

3. Wide-angled lens: this emphasizes the importance of understanding litigation in the context of other tools for change, such as advocacy, education, and law reform, which will shape the effectiveness of the litigation.[155]

D. Suggested model

My proposed model for assessing the effectiveness of FSL, found in Appendix A, takes the various levels of impact suggested through all of the models above, and modifies them to fit the FSL context. I recognize that implementing the model would require a considerable amount of time and resources – both of which are often at a premium for feminist litigators and organizations. As a result, I would suggest modifying the model to reflect your or your organization's priorities for a particular case or series of cases, while keeping in mind that unplanned impacts may also arise. The model could also be used as a tool to support strategic planning efforts by identifying potential and desired areas of impact.

I will explain the broad categories presented in the model here, with additional explanation or examples of what impact could look like in each category.

i. Impact on individual(s) involved in the given case

One of the key areas to look for impact in FSL is on the particular individual, or individuals, involved in any given case. This may stem directly from the judgment, if it provides recognition or vindication of their rights, or if it leads to financial or symbolic reparation.[156] Even where a case is unsuccessful in court, complainants may still feel the process was successful because of the opportunity to communicate their position and mobilize others.[157] They may feel empowered by the experience of participating in the litigation, because they have been able to expose an issue and tell their story.[158]

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[155] *Ibid* at 38, 50–80.
[156] *Ibid* at 50–59.
[157] Richard Sigurdson, "The Left-Legal Critique of the Charter: A Critical Assessment" (1993) 13 Windsor YB Access Just 117 at 128.
[158] Interview of Jackie Esmonde, Leandra Louis, Marie Chen, and Nabila Qureshi by Kaitlin Owens and Gabrielle Aquino (7 August 2019).

At the same time, litigation can impose significant costs on the individuals involved, including financial costs, emotional costs, and costs to an individual's reputation.[159] Litigation can take years, and face numerous delays and setbacks. A successful judgment at trial can be appealed, further dragging out the process. Complainants may need to testify and face cross-examination, and may receive negative media attention. Complainants may also face violence and harassment as a result of their involvement in FSL.[160]

ii. Impact on broader communities or groups

Given FSL's focus on impact outside of those involved in a particular case, it also makes sense to look at the broader communities or groups impacted by the litigation – recognizing that this will involve a degree of caution as these groups will not be homogenous in their experiences or opinions.

Groups may face similar challenges to the individual claimant in a case, and so may experience overlapping benefits or losses from litigation. For example, a larger group of women may benefit from one woman's challenge of barriers to reproductive health services, although individual women are likely to benefit to different degrees based on the other oppressions they face. Communities may feel recognized or heard, despite not directly participating in the litigation, because they have seen a story similar to theirs be told or accepted by the courts. They may benefit from reparation, or from the mobilization of others in support. Conversely, these communities may also face backlash arising from the litigation.

As FSL pursues the goals or interests of some women, it may at the same time harm other women or individuals facing gender-based discrimination. Litigation may omit or erase the experiences of different groups, in particular those who face multiple intersecting oppressions. Gotell observes this in the context of LEAF's early interventions, which were criticized for failing to acknowledge the experiences of marginalized women.[161] As Lawrence

[159] Kinghan & Vanhala, *supra* note 120 at 7.
[160] Patel & Ezer, *supra* note 71 at 22.
[161] Lise Gotell, "Review: Feminist Activism in the Supreme Court" (2005) 30 Queen's LJ 883 at 887–888.

observes, harms "can arise from the pursuit of goals that explicitly harm 'other' women, strategic decisions not to challenge systems and institutions that oppress these groups of women, and strategic choices to treat systems and institutions as normal, natural, and neutral as between women in… advocacy."[162] It is therefore critical to consider the impact of a case on these women or groups as well.

iii. Impact on legislation, regulations, and policy

A third key area of potential impact for FSL is on legislation, regulations, and policy. FSL may lead to the reversal or removal of problematic legislation, regulations, or policy. It may lead to the enforcement or effective implementation of existing law.[163] Or it may put an issue on the political agenda, and push political actors to enact new legislation or find political solutions rather than risk legal action.[164] At the same time, however, FSL may insulate laws from further scrutiny or provide cover to political actors who do not want to change the law – for instance, if a court finds that a particular provision or policy is constitutional.

iv. Impact on public discourse and perception

FSL may also have an impact on public discourse and perception. Publicly visible and "newsworthy" FSL can educate the public and shape public opinion.[165] It may change the way people think about a particular topic.[166] In some cases, litigation may humanize an issue or cause the public to recognize an issue which previously received little attention.[167] Even where litigation does not immediately bring about a change in law, it produces a narrative which may uplift issues in the public imagination.[168] In addition, it may bring a change in

[162] Lawrence, *supra* note 20 at 594.
[163] Kinghan & Vanhala, *supra* note 120 at 7.
[164] *Ibid*.
[165] Sáez, *supra* note 73 at 1.
[166] Interview of Janet Mosher by Kaitlin Owens and Nicole Biros-Bolton (12 November 2019).
[167] Duffy, *supra* note 64 at 72–74.
[168] Interview of Sunu Chandy by Kaitlin Owens, Gabrielle Aquino, and Emily Dutton (9 July 2019).

discourse – which can eventually bring about a change in law.[169] By framing or reframing issues in a way that conveys new meaning, political momentum may result.[170]

On the other hand, FSL may lead to hostility from the media, and from the public more generally.[171] Public discourse surrounding a case may reframe the issue in a way that is problematic, or that puts barriers up to future change. The increasing use of social media, and its powerful impact on public discourse, presents opportunities to impact public perception. But it also provides an increased risk of harassment by those who disagree, as well as opportunities for backlash and misinformation.

v. Legal impact

Key areas to look at in assessing FSL's legal impact include case law, legal systems and culture, and participants in the legal system.

Of course, the immediate result of a case is one area to look at for legal impact. Many argue, however, that what is more important is FSL's impact on future cases. Constantly "winning" cases may mean you are not taking hard enough cases, or pushing innovative enough arguments.[172] A judgment may result in the desired outcome, but is the reasoning behind it grounded in feminist jurisprudence?[173] Taking the long view is important here, as assessing whether FSL has caused a different result in a court's thinking or decision may be a gradual process as opposed to all in one case.[174] There is merit in pushing courts to change their frameworks, even though it may mean losing in the first few instances.[175] Even getting feminist thinking into a dissenting judgment may help to shape a certain narrative, and provide a useful basis for future arguments.[176] At the same time, FSL may lead to the

[169] Interview of Roxanne Mykitiuk by Kaitlin Owens and Nicole Biros-Bolton (29 November 2019).
[170] Kinghan & Vanhala, *supra* note 120 at 7.
[171] *Ibid*.
[172] Interview of Joanna Erdman (11 September 2019).
[173] Interview of Elizabeth Sheehy (25 June 2019).
[174] Interview of Kim Brooks (13 September 2019); Interview of Cheryl Milne by Kaitlin Owens and Nicole Biros-Bolton (22 November 2019).
[175] Interview of Roxanne Mykitiuk by Kaitlin Owens and Nicole Biros-Bolton (29 November 2019).
[176] Interview of Janet Mosher by Kaitlin Owens and Nicole Biros-Bolton (12 November 2019); Interview of Karen Segal by Kaitlin Owens, Gabrielle Aquino, and Emily Dutton (11 June 2019).

consolidation of "bad law" – decisions which make it harder for advocates to push for equality in the future.[177]

FSL may also have impacts on legal institutions, structures, and culture. It can change legal and political systems, for example by providing increased access to justice or by connecting something understood as a right to something not historically thought of as a right (such as same-sex marriage).[178] FSL may change legal culture, introducing new types of arguments or evidence (as FSL has done with legal scholarship, for example).[179] FSL can be an opportunity to educate parties and the judiciary, shifting their thinking.[180] It can push courts to take on a feminist lens in their analysis and create momentum that allows and encourages others to adopt similar arguments.[181] This "mainstreaming" of ideas and concepts may then shape decisions and the way members of the judiciary think.[182] FSL may also change the way advocates create arguments, build a strategy, and engage with the legal system.[183]

vi. Impact on social movements and empowerment

A final important site of impact for FSL is on social movements and empowerment. FSL may strengthen social movements or mobilize grassroots campaigns.[184] Using FSL may enhance the perceived legitimacy of movements or organizations.[185] On the other hand, FSL can present challenges for social movements. Choosing to focus on some legal arguments

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[177] Duffy, *supra* note 64 at 79.
[178] Kinghan & Vanhala, *supra* note 121 at 7; Interview of Janet Mosher by Kaitlin Owens and Nicole Biros-Bolton (12 November 2019).
[179] See the discussion of LEAF's work in this area in Manfredi, *supra* note 53 at 150–162. Manfredi explores how the Supreme Court responded to LEAF's use of extrinsic evidence in its arguments, including legal scholarship and reports.
[180] Interview of Janet Mosher by Kaitlin Owens and Nicole Biros-Bolton (12 November 2019); Interview of Diana Majury (26 June 2019).
[181] Interview of Jackie Esmonde, Leandra Louis, Marie Chen, and Nabila Qureshi by Kaitlin Owens and Gabrielle Aquino (7 August 2019).
[182] Interview of Adriel Weaver by Kaitlin Owens and Nicole Biros-Bolton (13 November 2019).
[183] Interview of Fay Faraday by Kaitlin Owens and Nicole Biros-Bolton (20 February 2020). In the context of LEAF, Faraday observes that LEAF created a unique way of working, which recognized the collaborative way the litigation strategy is built and arguments are peer-reviewed and stress-tested. That way of working, she notes, has become standard in high-level collaborative coalition work in litigation.
[184] Sáez, *supra* note 73 at 1.
[185] Kinghan & Vanhala, *supra* note 120 at 7.

and not on others may shape the broader narrative in a way that makes the movement's long-term goals harder to achieve.[186] The use of FSL may alienate members of a movement, causing them to lose motivation and become less engaged.[187] This risk is especially present where the matters at issue are the subject of debate among feminists.[188] In addition, FSL may have impacts on other social movements, including opposing social movements, leading to backlash and counter-mobilization.[189]

FSL may affect the individuals or organizations involved in litigating the case. The process of litigating a case can build the capacity of organizations to use litigation as a strategy, help them to better engage with the media, and increase their legal and rights literacy.[190] FSL can create connections between feminists and other stakeholders, as well as among unlikely allies.[191] These relationships may then spill over into work outside of the litigation, building capacity and encouraging collaboration.[192]

[186] Patel & Ezer, *supra* note 71 at 50.
[187] Cummings, *supra* note 118 at 190.
[188] Interview of Angela Campbell by Kaitlin Owens and Nicole Biros-Bolton (6 December 2019). See also e.g. the discussion of LEAF's involvement in pornography cases in Rosanna Langer, "Five Years of Canadian Feminist Advocacy: Is It Still Possible to Make a Difference?" (2005) 23 Windsor Yearbook of Access to Justice 115.
[189] Cummings, *supra* note 118 at 190.
[190] Patel & Ezer, *supra* note 71 at 17.
[191] Interview of Daphne Gilbert (26 June 2019); *Ibid*.
[192] Interview of Daphne Gilbert (26 June 2019); Interview of Kim Brooks (13 September 2019).

Conclusion

The dual roles of law – as oppressor, but also tool in the struggle against oppression – means that feminists are likely to continue to engage the law in their push for substantive equality. Feminist strategic litigation presents one way of using the law to challenge sexism, patriarchy, and other oppressive systems. FSL's power, and also the risks inherent to it, are reflected in the breadth of ways in which FSL can have an impact, positive, negative, or otherwise. Understanding these potential areas of impact allows feminist advocates to more precisely identify their goals in a particular case – and reveals who and what is prioritized and valued in their efforts. Reflecting on the impact of past cases allows advocates to think through what worked, what did not work, and why. These lessons can then help shape future strategies, and enable feminists to look to maximize the effectiveness of feminist strategic litigation.

Appendix A: Effectiveness Assessment Framework

Case Information

Case name:

Main issues:

Nature of involvement (e.g. party, intervener, background support):

Others involved (e.g. partners, coalitions, committees):

Level of court:

Planned indicators for success [193]:

Related advocacy efforts:

Relevant additional context:

Legal outcome of case:

Impact Assessment

Key considerations:

- *Consider customizing this list to reflect your organization's priorities and planned indicators for success, but keep in mind the potential for areas of unexpected impact*
- *Consider impact of both process and outcome*
- *Consider positive, negative, and neutral impact*
- *Remember that impact may shift over time, so there may be a need to revisit this assessment*

Impact on individual(s) involved in the case
Potential information sources: interview with individual(s), media or other coverage quoting individual(s), decision

1. What impact did the judgment and any remedy ordered have on the individual(s)?
2. What impact did the process and being involved in the case have on the individual(s)?

[193] To be identified prior to commencing the case, and revised as necessary as case unfolds.

Impact on broader communities or groups

Potential information sources: interview with communities or organizations representing communities, media or other coverage quoting members of communities or organizations, follow-up research or studies

1. What impact did the case have on broader communities or groups involved in the litigation or facing similar challenges?
2. What benefits or harms did the case have for broader communities or groups not immediately involved in the litigation?

Impact on legislation, regulations, and policy

Potential information sources: decision, media reports on legislative reform processes, Hansard, interviews with individuals or groups impacted by legislation, follow-up research or studies

1. What impact did the case have on existing legislation, regulations, or policy?
    a. Did the case contribute to the reversal or removal of legislation, regulations, or policy? How?
    b. Did the case contribute to the enforcement or implementation of legislation, regulations, or policy? How?
2. Did the case contribute to the creation of new legislation, regulations, or policy? How?
3. Did the case have other effects on legislation, regulations, and policy?

Impact on public discourse and perception

Potential information sources: media reports, social media posts, interviews, academic commentary

1. How did litigation frame or reframe issues?
2. What impact did the case have on public awareness?
    a. What kind of media coverage did the case generate?
    b. What kind of social media engagement did the case generate?
    c. What kind of academic commentary did the case generate?
    d. What kind of other engagement did the case generate (e.g. panel discussions, other events)?
3. Did the case generate backlash in public discourse? If so, what kind?

Legal impact

Potential information sources: decision, legal or academic commentary, individuals involved in the case

1. What was the outcome of the case?
2. What kind of precedent did it set (good, bad, neutral)? What impact might this have for future arguments?
3. Did the court adopt feminist or substantive equality arguments?

4. What impact did the case have on legal culture (e.g. education, mainstreaming of arguments or evidence)?

Impact on social movements and empowerment

Potential information sources: individuals and organizations involved in the case

1. Did the case mobilize support from individuals? Organizations? Other groups?
2. Did the case attract new supporters? Did the case cause a loss of supporters?
3. Did the case build or strengthen connections with individuals or organizations in the feminist movement? In other movements? Did it weaken these connections?
4. Did the case build or strengthen connections with influential actors? Did it weaken these connections?
5. What impact did the case have on organizational capacity?

Appendix B: Consultees

Adriel Weaver, Goldblatt Partners

Adrienne Buckland, Avalon Sexual Assault Centre

Alison Symington, Human Rights and Social Justice Consultant

Alyssa Brierley, Centre for Equality Rights in Accommodation (CERA)

Amy Poyer, California Women's Law Center

Angela Campbell, Faculty of Law, McGill University

Ann Wheatley, Abortion Access Now PEI

Avvy Go, Chinese and Southeast Asian Legal Clinic (CSALC)

Barbara Howell, Q.C., LEAF Edmonton

Beverley Baines, Faculty of Law, Queen's University

Bonnie Brayton, DisAbled Women's Network of Canada (DAWN Canada)

Cara Zwibel, Canadian Civil Liberties Association (CCLA)

Carissima Mathen, Faculty of Law – Common Law Section, University of Ottawa

Catherine Bell, Faculty of Law, University of Alberta

Cheryl Milne, David Asper Centre for Constitutional Rights

Chris Roberts, Canadian Labour Congress

Colleen MacQuarrie, Psychology Department, University of Prince Edward Island

Daphne Gilbert, Faculty of Law – Common Law Section, University of Ottawa

Dee Dooley, Avalon Sexual Assault Centre

Deepa Mattoo, Barbra Schlifer Commemorative Clinic

Denise Landry, Avalon Sexual Assault Centre

Diana Castillo, METRAC

Diana Majury, Department of Law and Legal Studies, Carleton University

Elizabeth Sheehy, Faculty of Law – Common Law Section, University of Ottawa

Elizabeth Shilton, Women's Legal Education and Action Fund (LEAF)

Elana Finestone, Native Women's Association of Canada (NWAC)

Emily Hill, Aboriginal Legal Services

Emma Cunliffe, Peter A. Allard School of Law, University of British Columbia

Fay Faraday, Faraday Law and Osgoode Hall Law School, York University

Gillian Hnatiw, Gillian Hnatiw & Co.

Gwen O'Reilly, Northwestern Ontario Women's Centre

Ingrid Dandanell, LEAF Edmonton

Isabel Grant, Peter A. Allard School of Law, University of British Columbia

Jackie Esmonde, Income Security Advocacy Centre (ISAC)

Jackie Stevens, Avalon Sexual Assault Centre

Jane Bailey, Faculty of Law – Common Law Section, University of Ottawa,

and The eQuality Project

Janet Mosher, Osgoode Hall Law School, York University

Jennifer M. Becker, Legal Momentum

Jennifer Reisch, Equal Rights Advocates

Jennifer Tomaszewski, LEAF Edmonton

Jessica Eisen, Faculty of Law, University of Alberta

Jo-Ann Kolmes, LEAF Edmonton

Joanne Kerrigan, Avalon Sexual Assault Centre

Joanna Erdman, Schulich School of Law, Dalhousie University

Dr. Jodi Lazare, Schulich School of Law, Dalhousie University

Julie Pinel, LEAF Québec

Karen Kennedy, LEAF Edmonton

Karen Segal, Women's Legal Education and Action Fund (LEAF)

Karine-Myrgianie Jean-François, DisAbled Women's Network of Canada (DAWN Canada)

Kevin Love, Community Legal Assistance Society (CLAS)

Kim Brooks, Schulich School of Law, Dalhousie University

Dr. Kim Stanton, Goldblatt Partners

Krisha Dhaliwal, Larlee Rosenberg Barristers & Solicitors

Krystyn Ordyniec, Nishnawbe Aski Nation (NAN)

Laura Johnston, Community Legal Assistance Society (CLAS)

Laura Myers, Pauktuutit Inuit Women of Canada

Leandra Lewis, Income Security Advocacy Centre (ISAC)

Linda Silver Dranoff, Lawyer, Activist, and Writer

Lisa M. Stone, Legal Voice

Lisa Swaren, LEAF Edmonton

Lise Gotell, Department of Women's and Gender Studies, University of Alberta

Lobat Sadrehashemi, Immigration and Refugee Legal Clinic

Lourdes Rivera, Center for Reproductive Rights

Lynn Hecht Schafran, Legal Momentum

Margot Young, Peter A. Allard School of Law, University of British Columbia

Marie Chen, Income Security Advocacy Centre (ISAC)

Marie Manikis, Faculty of Law, McGill University

Marie-Eve Imonti, LEAF Québec

Mary Eberts, O.C.

Megan Stephens, Women's Legal Education and Action Fund (LEAF)

Michelle Williams, Schulich School of Law, Dalhousie University

Nabila Qureshi, Income Security Advocacy Centre (ISAC)

Naiomi Metallic, Schulich School of Law, Dalhousie University

Nathalie Léger, Centrale des syndicats du Québec (CSQ) and LEAF Québec

Noa Mendelsohn Aviv, Canadian Civil Liberties Association (CCLA)

Rachelle Venne, Institute for the Advancement of Aboriginal Women (IAAW)

Raji Mangat, West Coast LEAF

Richard Elliott, Canadian HIV/AIDS Legal Network

Robert Lattanzio, ARCH Disability Law Centre

Rosel Kim, Women's Legal Education and Action Fund (LEAF)

Roxana Parsa, METRAC

Roxanne Mykitiuk, Osgoode Hall Law School, York University

Sam Smethers, Fawcett Society

Sam Wood, LEAF Halifax

Samantha Michaels, Pauktuutit Inuit Women of Canada

Sandra Ka Hon Chu, Canadian HIV/AIDS Legal Network

Seehaam Samaai, Women's Legal Centre

Shabnam Sobhani, Avalon Sexual Assault Centre

Sheila Wildeman, Schulich School of Law, Dalhousie University

Simone MacLennan, LEAF Halifax

Sunu Chandy, National Women's Law Center

Susan Boyd, Peter A. Allard School of Law, University of British Columbia

Tamar Witelson, METRAC

Tanisha Blackmore, LEAF Halifax

Vicky Smallman, Canadian Labour Congress