

PLEASE NOTE: LEAF WAS DENIED LEAVE TO INTERVENE IN THIS APPEAL, BY ORDER OF BINNIE J., DATED JANUARY 16, 2006.

S.C.C. No. 30808

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)**

B E T W E E N:

D.B.S.

APPELLANT
(Respondent)

- and -

S.R.G.

RESPONDENT
(Appellant)

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND

PROPOSED INTERVENER

**FACTUM OF THE INTERVENER,
WOMEN'S LEGAL EDUCATION AND ACTION FUND**

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PART 1: FACTS

1. LEAF adopts and relies on the summary of facts as stated by the Respondent.

PART 2: POINTS IN ISSUE

2. The issue before this Court is whether child support pursuant to the *Divorce Act* and the *Child Support Guidelines* remains a presumptive legal entitlement, even when the payor fails to voluntarily share the benefit of his financial circumstances, and the recipient does not immediately commence a proceeding for increased support.

Child Support Guidelines, S.O.R./97-175, and as incorporated into provincial legislation in the common law provinces ["Guidelines"]; *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3 ["*Divorce Act*"].

PART 3: ARGUMENT

A. OVERVIEW OF LEAF'S ARGUMENT

3. It is LEAF's position that the Court of Appeal's approach in *D.B.S. v. S.R.G.* should be upheld, such that any increase in the payor's annual income presumptively results in a corresponding obligation of increased child support for the year. This accords with the Guidelines and *Divorce Act* and promotes women's substantive equality. In some provinces, awards of retroactive support are exceptional remedies, and the result is to create incentives for a father whose income rises not to increase his child support. This interpretation is contrary to the legislative text and objectives, and exacerbates women's poverty, contrary to the values embodied in s. 15 of the *Canadian Charter of Rights and Freedoms* and Canada's international human rights commitments.

Canadian Charter of Rights and Freedoms, s. 15, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ["*Charter*"]; *D.B.S. v. S.R.G.*, 2005 CarswellAlta 18 (C.A.) ["*D.B.S.*"]; *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N.Doc. A/44/49(1989) (entered into force Sept. 2, 1990); *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) (1981) 1249 U.N.T.S. 13; *International Covenant on Civil and Political Rights* 19 December 1966, 999 U.N.T.S. 171, Can T.S. 1976 No. 47, 6 I.L.M. 368 (Entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*

G.A. Res. 2200 A (XXI), 21 U.N. GAOR, (Supp. No. 16) 49, Doc. A/6316 U.N. (1966) [collectively, “international human rights commitments”]

4. Women are overwhelmingly recipients of support and men, payors. While same-sex and different-sex parents may include male recipients and/or female payors, the sex equality implications of child support must be addressed, not effaced by gender-neutral language.

B. REVIEW OF THE LEGISLATIVE FRAMEWORK: PURPOSE AND OBJECTIVES OF THE GUIDELINES

5. The Guidelines came into effect on May 1, 1997 after extensive consultation directed towards remedying failures of the existing child support regime. The reform package was designed to ensure more consistent child support awards across the country, and to address the concern that child support orders were inadequate in quantum. The Guidelines included child support tables (“Tables”) that presumptively based payment of child support on the income of the payor, so as to enhance uniformity and improve the standard of living of women and children post-separation.

Guidelines, ss. 3(2), 4, 5, 9, 10; Federal/Provincial/Territorial Family Law Committee, (1991) *Child Support: Public Discussion Paper*. Ottawa: Queen’s Printer for Canada at 3 (relied on data from Department of Justice, Bureau of Review. (1990) *The Divorce Act Evaluation, Phase II: Monitoring and Evaluation* May 1990) [“Federal/Provincial/Territorial Family Law Committee”]; Proceedings of the Standing Committee on Social Affairs, Science & Technology, *Social Affairs - Evidence* (December 1996-February 1997) Ottawa.

6. The Guidelines were also introduced to address the high cost to women of obtaining an award of child support. Prior to the introduction of the Guidelines, a child support claim required lengthy and expensive examinations of means and needs. For the most part, after the passage of the Guidelines, these enquiries are a thing of the past.

Federal/Provincial/Territorial Family Law Committee, *supra* at 5; *Francis v. Baker*, 1998 CarswellOnt 931 (C.A.) at para 48.

7. The objectives of the Guidelines must dictate the considerations governing awards of retroactive child support. Those objectives are:

- a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;

- b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- d) to ensure consistent treatment of spouses and children who are in similar circumstances

Guidelines, s. 1 [emphasis added]

C. DIVERGENT JUDICIAL APPROACHES TO RETROACTIVE CHILD SUPPORT: THE D.B.S. APPROACH BEST PROMOTES WOMEN’S EQUALITY

8. As a general matter, the competing judicial interpretations of the circumstances in which retroactive¹ child support should be awarded are represented by the approach in the court below (“the *D.B.S.* Approach”) on the one hand and by the restrictive approach of the British Columbia Court of Appeal in *S.(L.) v. P.(E.)* (“the Restrictive Approach”) on the other.

S.(L.) v. P.(E.), 1999 CarswellBC 1402 (C.A.)

9. The *D.B.S.* Approach fulfills the objectives that drive the Guidelines, recognizing recipients’ presumptive entitlement to child support, and dismantles the barriers to retroactive awards constructed by the Restrictive Approach. The Restrictive Approach focuses on out-dated notions of need and blame: whether the payor was guilty of some blameworthy conduct, whether the recipient had to encroach on capital or incur debt in order to meet expenses in relation to the children in her care, whether there was ability to pay on the part of the payor, whether the recipient had an adequate excuse for any delay and further, whether a retroactive award of child support would create an unreasonable burden on the payor or would “redistribute capital” to the recipient.

¹ As a matter of language, the term “retroactive” is inaccurate. An order is only truly retroactive if it deems the law to have been different from what it actually was when the facts occurred and so interferes with existing legal rights. A child support order that requires support to be paid in relation to a period prior to the order merely acknowledges the pre-existing obligation of support; it does not deem the law to be different in the past so as to interfere with existing legal rights. Such an order is therefore not retroactive; it is the quantification of a pre-existing obligation that was improperly withheld. While the term “retroactive” is a misnomer, this language will be used throughout, for convenience.

10. The Restrictive Approach denies mothers and children fair support, and encourages non-disclosure and delay by payors. If the father does not pay, the worst that can happen from his perspective is that he can be forced to retroactively pay an amount of child support that corresponds to his increase in income. The best that can happen, from his perspective, is that the mother will not apply for retroactive support (given the costs associated with litigation, her desire to avoid antagonizing him, her fear of reprisals, or the difficulty of obtaining a retroactive support order), or if she does apply, that support either will not be awarded based on a discriminatory test, or increased support will be ordered only from the date of the application.

Charter, supra s. 15

11. As in *Moge v. Moge*, a modern, contextual approach to statutory interpretation here requires a focus on the larger context of women's poverty and the lived effects of the law of retroactive child support. The Restrictive Approach fails to recognize women's social and economic disadvantage, including women's restricted access to legal services. Rather than promoting substantive equality, the Restrictive Approach denies women ready access to a remedy -- the payment of appropriate child support -- that in some measure addresses the disadvantage experienced by women on separation. Given its failure to comply with the text or purpose of the *Divorce Act* and Guidelines, and its discriminatory effects, the Restrictive Approach must be rejected.

As... recognized by L'Heureux-Dubé J. in *Moge*, "there is no doubt that divorce and its economic effects" are playing a role in the "feminization of poverty". A statutory interpretation which might help defeat this role is to be preferred over one which does not.

Marzetti v. Marzetti, [1994] 2 S.C.R. 765 at para. 87 [emphasis added], citing in part *Moge v. Moge*, [1992] 3 S.C.R. 813 paras. 56, 57 ["*Moge*"]

D. WOMEN'S SOCIAL AND ECONOMIC DISADVANTAGE ASSOCIATED WITH PRIMARY CAREGIVING OF CHILDREN IS A SEX EQUALITY ISSUE

12. As the Chief Justice has noted, "separated... custodial parents considered as a group have historically been subject to disadvantageous treatment. ...[E]ven today evidence of disadvantage suffered by such persons is overwhelming." The personal and financial obligations arising from women's primary responsibility for children continue to play a role in the economic disenfranchisement of women. While presumptive entitlement to retroactive child support would

not eliminate the poverty of single mothers and children, it would help relieve women's economic disadvantage by requiring that the personal and financial obligation to support children be fairly shared by both parents.

Thibaudeau v. Canada, [1995] 2 S.C.R. 627 at para. 182 per McLachlin J. (as she then was) [*Thibaudeau*"]

(1) Division of Labour is Gendered Pre-Separation & Contributes to Women's Inequality

13. Women have been, and continue to be, primarily responsible for unpaid caregiving, including childcare and household labour. A Statistics Canada study found that the major factor in the wage gap is the presence of children, rather than age, marriage or education. Women are still largely responsible for household chores and childcare, and this gendered division of labour has an enduring and pernicious effect.

...Women are expected to cut down on their paid work, quit their jobs, take emergency leave from work, or refuse promotions, in order to care for children, elderly parents, or in-laws, or disabled relatives. Men are not. This has a lifelong impact on a woman's wages, accumulation of pension benefits, and experience in her chosen occupation.

Ontario Human Rights Commission, "Human Rights & the Family in Ontario: Discussion Paper" (March 30, 2005) at 7-8, 29-30 [*Human Rights & the Family in Ontario*"]; *Moge, supra* at 861; K. Marshall, "Employed Parents and the Division of Housework" *Perspectives on Labour and Income*, Autumn 1993 at 26; Statistics Canada study cited in CRIAW, *Women and Poverty Fact Sheet, 2005* at 3; "Woman in Poverty", CRIAW Fact Sheet, 3rd ed., 2005, online: Canadian Research Institute for the Advancement of Woman Homepage <<http://www.criaw-icref.ca/factSheets/Woman%20&%20poverty%202005.pdf>> at 2 (Date Accessed: 15 December 2005) [*Woman in Poverty*] at 2, 4; Pay Equity Task Force Final Report 2004, "Pay Equity: A New Approach to a Fundamental Right" [*Pay Equity*] at 13

14. Childcare is largely treated as a private responsibility. The work world is predominantly structured on the assumption that women take responsibility for domestic work and childcare, and is generally unresponsive to family needs.

Moge, supra at 861; R. Abella (as she then was), *Report on the Commission on Equality in Employment, Royal Commission on Equality in Employment* (1984) at 28-32; J. Williams, *Unbending Gender: Why Family and Work Conflict and What To Do About It* (Toronto: Oxford University Press, 2000) at 16-17, 24, 47, and 54

15. Women earn less than men generally; in 2000, average employment income for full-time full-year female workers was equal to 70.8 percent of average employment income for men. Further, women's ability to maintain full-time full-year positions in the workplace is jeopardized by their role as primary caregivers, with women disproportionately engaged in part-time work. In 2004, 33.7% of female part-time workers aged 25 to 44 chose part-time work in order to balance work and childcare responsibilities whereas the same held true for only 3.2% of men.

Women in Poverty, supra at 2; Human Rights & the Family in Ontario, supra at 29-30

(2) Childcare is Gendered Post-Separation & Contributes to Women's Inequality

16. A recent national survey of over 50,000 divorces or variation orders found:

- a) fathers were the payors in 92.8% of the cases;
- b) mothers had sole custody in 78.5% of the cases; shared custody orders (orders pursuant to which a child spends at least 40% of their time with the payor parent) constituted 6.7% of the sample; and split custody cases were granted in 5.1% of the cases; and
- c) the median income of payors was \$37,000 and the median income of recipients was \$26,000.

L.D. Bertrand, et al., Phase 2 of the Survey of Child Support Awards: Final Report (Department of Justice Canada, 2005) at v, vi ["The Survey"]; E. J. Hughes, The Language and Ideology of Shared Parenting in Family Law Reform: A Critical Analysis (2003) 21 CFLQ 1, especially n. 155: Of the children in a "shared physical custody" arrangement, 69% lived only with their mother.

17. According to a 1994/1995 survey, "after separation, mothers were given custody of children in an overwhelming proportion of cases. Close to 80% of children under the age of 12 were placed in their mother's custody in cases where a court order existed. Almost 7% were placed in their father's custody, and for 13% of children, a shared custody arrangement was established." These surveys make it is clear that women continue to take primary responsibility for children on divorce, and these women are parenting in situations of relative economic inequality.

Selected Statistics on Canadian Families and Family Law: Second Edition, Research Unit, Child Support Team (Ottawa: Department of Justice Canada, 2000) at 16.

(3) Women are Socially and Economically Disadvantaged as a Result of Having Primary Responsibility for Children Post-Separation

18. This Court in *Moge* highlighted the economic disadvantage suffered by women post-divorce. Over a decade later, women in Canada still experience significant economic disadvantage in comparison to men, and that disadvantage is compounded for single mothers, and racialized, Aboriginal and disabled women. In 2003, 38% of female lone-parent families lived below the low-income cut-off, whereas the low-income rate of lone-parent families headed by men was 12.6%. Lone-parent female-headed families in Canada in 2003 had average market income of \$23,800.00 and lone-parent male-headed families had average market income of \$48,800.00.

Statistics Canada, "Income in Canada 2003" Catalogue No. 75-202-XIE; *Women in Poverty*, *supra* generally; "BC Campaign 2000: Child Poverty by Family Type: Fact Sheet #4", BC Child and Youth Advocacy Coalition, November 24, 2005, online: <<http://www.firstcallbc.org/2005factsheet.pdf>> (Date Accessed: 15 December 2005); F. Sampson, "Globalization and the Inequality of Women with Disabilities" (Spring 2003) 2:1 J. of Law & Equality 16 at 19-23

19. Women's poverty arises out of a complex interplay of disadvantage experienced in the work force, in the division of household labour (both before and after separation), and in their role as primary caregivers of children. These disadvantages play out into retirement, such that 21.3% of senior women, and 43% of senior women who live alone, find themselves below the low-income cut-off.

CRIAW Fact Sheet, 3rd ed., 2005, online: Canadian Research Institute for the Advancement of Woman Homepage <<http://www.criaw-icref.ca/factSheets/Woman%20&%20poverty%202005.pdf>> at 2 (Date Accessed: 15 December 2005) [*Woman in Poverty*] at 2, 4

20. The systemic inequality experienced by women both prior to and after separation must not be exacerbated by an interpretation of the legislative child support regime that fails to recognize this disadvantage and that views child support paid on a retroactive basis as an exceptional remedy to be awarded only in exceptional circumstances.

S.B. Boyd, "Can Child Custody Law Move Beyond the Politics of Gender?" (2000) 49 U.N.B. L.J. 157 at 168

E. THE D.B.S. APPROACH IS GROUNDED IN PRINCIPLES OF STATUTORY INTERPRETATION: ATTENTION IS REQUIRED TO THE LEGISLATIVE TEXT, CHARTER VALUES, AND INTERNATIONAL HUMAN RIGHTS COMMITMENTS

(1) The Modern Approach to Statutory Interpretation Demands that Statutes be Interpreted in a Fashion that is Plausible, Efficacious, and Acceptable

21. The modern approach to statutory interpretation requires a textual, contextual and purposive analysis.

Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54 at para. 10

22. Since the meaning of legislation cannot be understood in isolation, in every case it is necessary to consider the consequences of proposed interpretations in light of the wider social context. This includes examination of the effects on those groups who lack political power and who have required protection under s. 15 of the *Charter*.

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context ... [T]he courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of its plausibility, that is, its compliance with the legislative text; its efficacy, that is, its promotion of the legislative purpose; and its acceptability, that is the outcome is reasonable and just.

R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 131, as cited in *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550 at paras. 5-7 [emphasis in original];

23. The approach to retroactive child support set out by *D.B.S.* accomplishes the interpretive task in a manner that meets legislative, *Charter*, and international human rights mandates. It accords with the statutory text and objectives, and promotes substantive equality within a social context of women's economic and social disadvantage linked to primary responsibility for care of children.

(2) D.B.S. Approach is Plausible: It Complies with the Legislative Text

(i) Jurisdiction to Make Retroactive Orders

24. Section 15.1 of the *Divorce Act* authorizes a court to make an order that relates to a period prior to the order. Since the duty of support arises from birth, a child support order under s. 15.1 relating to a period prior to the application acknowledges, but does not change, existing legal obligations. It is therefore not properly termed retroactive, and the drafters accordingly did not use the term in that section. Moreover, it must be possible to make a retroactive order in the context of an original application, given the objectives of the Guidelines and *Divorce Act*. The *Divorce Act* is directed to reconciliation and negotiation, not compelling recipients to immediately commence proceedings to obtain child support.

Schedule A to this factum lists provincial legislation relating to parents' legal obligation to support their children; *Divorce Act*, ss. 9, 10; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paras. 20-23, 40; Federal/Provincial/Territorial Family Law Committee. at 5; *Chartier v. Chartier*, [1999] 1 S.C.R. 242 at para. 42; *Symes v. Canada*, [1993] 4 S.C.R. 695 at 764; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627 at 719 per McLachlin J.; *Walsh v. Walsh* (2004), 46 R.F.L. (5th) 455 at 461, 462.

25. Express reference to the power to make a retroactive order was used in the context of variation under s. 17 of the *Divorce Act*, in contrast to s. 15.1, because variation orders change existing legal rights and obligations by changing, retroactively, the terms of existing court orders.

26. Those advancing the Restrictive Approach argue that, at least in variation cases, payors are entitled to rely on existing court orders as accurately setting out their obligations. The *Divorce Act* says otherwise: the court has specific authority to retroactively vary orders, and any retroactive order must be made in accordance with the Guidelines. The legislative text is clear: there is no issue of blameworthiness, but simply statutory recognition that finality cannot take precedence over fairness to children.

D.B.S., *supra* at para. 101; *Divorce Act*, ss. 17(1), (6.1)

(ii) Application of the Guidelines

27. Whenever the court makes a child support order, the language of the *Divorce Act* is mandatory: a court shall do so in accordance with the applicable Guidelines. A court has no discretion to deviate from the Guidelines, even on consent of the parties, unless special

provisions or reasonable arrangements have otherwise been made for the support of the child, having regard to the Guidelines. There is no discretion to reduce the amount because the order is retroactive. If Parliament intended that retroactive support should be treated differently, it would have said so.

Divorce Act, ss. 11, 15.1(3), 17(6.1), 15.1(5), 17(6.2), 15.1(7), 17(6.4)

28. The Appellant attempts to ground the Restrictive Approach in the language of the statute by reading s. 25 of the Guidelines and s. 25.1 of the *Divorce Act* in isolation. The Appellant's theory is that if there is a failure to request disclosure annually or government failure to enter into a s. 25.1 agreement, Parliament intended that recipients be denied fair child support in accordance with the payor's income. This is illogical. In fact, the existence of ss. 25 and 25.1 illustrate that Parliament contemplated regular recalculation based on the payor's income.

Divorce Act, s. 25.1; Guidelines, s. 25, see especially s. 25(8) which mandates that: "A provision in a judgment, order or agreement purporting to limit a spouse's obligation to provide documents under this section [the continuing obligation to provide income information] is unenforceable."

29. Section 25 of the Guidelines allows recipients to request income disclosure once per year, since the Guidelines require determination of annual income, generally using the most current income information for a tax year. That is, child support for 2006 will generally be based on the 2005 T1 income tax return (the most "current" information), subject to more current information in relation to that year (a notice of reassessment, for example). This interpretation accords with the statutory objectives and standard practice: experienced family law lawyers and judges generally include clauses for annual recalculation on the basis of the prior year's income tax disclosure. This method is simple, certain and fair.

Guidelines, s. 2(3), 15-20; *D.B.S.*, *supra* at paras. 143-150

(3) *D.B.S.* Approach is Efficacious: It Promotes the Legislative Purpose

30. The *D.B.S.* Approach fulfills the objectives of the Guidelines and *Divorce Act*: it ensures that "children continue to benefit from the financial means of both" parents, including payor fathers, "after separation," not only after mothers commence proceedings; it helps "reduce conflict" by eliminating incentives for fathers to play catch-me-if-you-can games of delay and non-disclosure which ultimately require mothers to commence annual proceedings to ensure

adequate child support, it ensures that children will be affected by their parents' separation as little as possible, and it promotes "efficiency" and "settlement" by ensuring that all child support orders are "consistent" in their compliance with the Guidelines, regardless of mothers' varied abilities and speed in pursuing fathers.

Guidelines, s. 1 [reproduced at para. 7 of this factum]; *Chartier v. Chartier*, [1999] 1 S.C.R. 242 at para. 32

(4) D.B.S. Approach is Acceptable: The Outcome is Reasonable and Just

31. As Justice L'Heureux-Dubé noted in *Willick v. Willick*, "Interpretation consistent with the values of substantive equality espoused by the *Charter* requires that both words and results be contemplated." The consequences of the *D.B.S.* Approach are reasonable and just; the effects of the Restrictive Approach are not. This Court has recognized "those who bear [and rear] children and benefit society as a whole thereby should not be economically or socially disadvantaged..." The Restrictive Approach must be rejected since it disentitles and disadvantages women as a result of their caregiving responsibilities.

Willick v. Willick, [1994] 3 S.C.R. 670 at para. 55 [emphasis in original] ["*Willick*"]; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at para. 43; *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, 2005 SCC 56 at para. 66 ["*Reference re E.I.*"]; *Moge*, *supra*; A. Harvison Young (as she then was), "The Changing Family, Rights Discourse and The Supreme Court of Canada" (2001) 80 *Can. Bar R.* 749 at 754-755, 778-783.

(5) Statutes Must be Interpreted in Accordance with the *Charter's* Equality Guarantees

32. The *D.B.S.* Approach is clearly mandated by the statute itself, and *Charter* values compel its adoption. "It has been firmly established by this court that statutory interpretations consistent with values embodied in the *Charter* must be given preference over interpretations which would run contrary to *Charter* values."

Given the profound economic impact on the parties that may follow from differing interpretations of the *Divorce Act's* support provisions, it follows that in the present case, as it did in *Moge*... this Court should seek to assure itself that its preferred interpretation is consistent with *Charter* values of substantive equality...

Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513 at para. 93; *Willick*, *supra* at para. 54; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 603; *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753 at para. 84; S. Boyd, "The Impact of the Charter of Rights and Freedoms on Canadian Family Law" (2000) 17

Can. J. Fam. L. 293 at paras. 38-50; C. L'Heureux-Dubé, "Making Equality Work in Family Law," (1997) 14(2) Can J. Fam. L. 103 at para. 4

33. This case implicates the equality guarantee of s. 15 of the *Charter* as an interpretative principle, because women are overwhelming the recipients of child support. The economic disadvantage women experience on separation is a sex equality issue. When payors fail to pay or underpay support, women are impoverished. Since financial resources are linked to social and political power, women's disentitlement to Guideline child support under the Restrictive Approach denies them substantive equality. This Court should adopt an interpretation that does not disproportionately and adversely affect women's equality rights.

34. This case also raises a sex equality issue because the *D.B.S.* Approach empowers women, and respects their autonomy, while the Restrictive Approach assigns women sole responsibility for child support collection and so contributes to sex-based inequality. Under the Restrictive Approach, women are required annually to spend time and money to pursue the payor for disclosure and commence a proceeding, or must incur debt or deplete capital, to be entitled to Guideline child support. Women with abusive partners face an impossible choice: they are forced into immediate, ongoing confrontation with the payor or are denied the appropriate level of economic support for their children.

Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System,
Final Report of Research Findings from the Woman and Abuse Welfare Research
Project, April 5, 2004 at 45-47

35. In contrast, although the recipient may still ultimately be required to bring an application forward, the *D.B.S.* Approach respects the recipient's decision-making about whether the timing is right to commence a proceeding, rather than punishing her because the father did not voluntarily share the benefit of his improved income, and her personal circumstances did not allow her to litigate earlier. Substantive equality requires that women not disproportionately bear the personal and financial costs of children.

36. Substantive equality requires the *D.B.S.* Approach: it best ameliorates the sex-based economic disadvantage resulting from relationship breakdown, and respects women's autonomous decision-making.

(6) Statutes Must be Interpreted in Accordance with Canada's International Human Rights Commitments

37. Even when not incorporated into Canadian law, our international obligations are part of the legal context in which legislation is to be interpreted and applied. Statutory interpretation of the *Divorce Act* and Guidelines must reflect Canada's legal commitment to advancing the rights of women and children, as a signatory to the *Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Social, Economic and Cultural Rights*.

Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241 at para. 30, citing R. Sullivan, ed. *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 330; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70

38. International human rights monitoring committees condemn the scope and severity of women's poverty in Canada, including the pervasive, deep poverty of single mothers. Women in poverty do not have substantively equal exercise and enjoyment of their economic, social and cultural rights and civil and political rights. The Restrictive Approach contributes to women's poverty by denying fair child support to mothers, and limits women's autonomy by requiring that mothers, rather than both parents, bear responsibility for the social and economic costs of children. It is therefore contrary to Canada's international human rights commitments.

CEDAW, *supra* articles 2 and 3; CEDAW /C/2003/I/CRP/3/Add/5/Rev.1 (31 Jan. 2003), "Consideration of Reports of States Parties: Canada", at paras. 33-36, <http://www.un.org/womenwatch/daw/cedaw/cedaw28/ConComCanada.PDF>; *International Covenant on Civil and Political Rights*, *supra*, articles 3, 24 and 26; U.N. Human Rights Committee (28 Oct. 2005), "Concluding Observations on Canada" at para. 24, http://www.ohchr.org/english/bodieshrc/docs/CCPR_C-CAN_CO_5.doc

F. AN ANALYSIS OF THE D.B.S. APPROACH THROUGH AN EQUALITY LENS

39. The eight principles established by the D.B.S. Approach, discussed individually below, accord with the statutory framework, best fulfill the objectives of the Guidelines, and further women's human rights and substantive equality by ameliorating the disadvantage women and children suffer on relationship breakdown.

D.B.S., *supra* at para. 66-142, 153 [numbered principles below are those listed at para. 153 of the judgment]

(1) “A child is entitled to child support. Need is presumed.”

40. The law of retroactive support should reflect parents’ joint obligation to support children, including their joint responsibility for ascertaining the support obligation, rather than encouraging non-disclosure and avoidance by payors. Denying children appropriate support not only deprives them of their rightful entitlement, it furthers the poverty of single mothers and children.

Reference re E.I., *supra* at para. 73; *Richardson v. Richardson*, [1987] 1 S.C.R. 857 at para. 14; Schedule A and paragraph 10, *supra*, of this factum

(2) “The Guidelines presume an ability to pay on the part of the payor in accordance with his or her income as established in accordance with s. 16 of the Guidelines.”

41. Child support orders require payors to support their children in accordance with their income. Payors should expect to pay increased support after their income increases, in accordance with the Guidelines. Applying the Guidelines to retroactive orders would ensure that women would not have to face annual costs of pursuing income disclosure and variation applications in order to be entitled to appropriate child support.

(3) “Blameworthy conduct on the part of the payor is not required.”

42. Child support is to be paid based on the payor’s income, whether or not the payor has misrepresented or concealed income. The *D.B.S.* Approach does not treat the retroactive award as punishment for fault: the court simply requires child support be paid pursuant to the Guidelines, as required by the statute. To require blameworthy conduct on the part of the payor would deny women and children the fair support to which they are entitled.

(4) “The payee does not need to demonstrate an encroachment on his or her capital.”

43. Demanding that women prove “need” for retroactive support through debt or depletion of capital furthers women’s inequality, requiring personal financial and material deprivation. It insists that recipients assume full financial responsibility for children, rather than recognizing the

joint responsibility of both parents, contrary to women's equality interests. This is not only unfair; it is frequently unrealistic, since most women do not have capital to deplete or the ability to obtain credit. Instead, many women are forced to direct the bulk of their financial resources to their children and thereby expose themselves to ongoing and long-term poverty.

D.B.S. at para. 73

(5) “Notice of an intention to pursue child support is not a prerequisite to a retroactive award.”

44. Unless the payor is unaware that he has a child, he is aware of his moral *and legal* obligation of support, and in most cases,² he has all the necessary income information on which to base his child support payments. Requiring notice as a condition to receipt of support unreasonably shifts the onus to the party who lacks the requisite information, and unfairly imposes on women the costs of obtaining appropriate child support.

45. It is unfair to impose a general requirement that the recipient give notice. “Very often all of the custodial parent's resources -- financial, physical and emotional -- are used up in caring for the child.” Most women cannot afford to commence proceedings and, in some jurisdictions, there is no legal aid coverage available for these cases. Certainly, most women cannot afford to litigate the issue annually, but must consider whether the potential support amount is high enough to justify the significant emotional and financial costs of litigation. Women often lack information about the income of the payor, and how to compel production of such information. Recipients may be emotionally incapable of immediately, and regularly, pursuing support. Many women fear reprisals, including physical, verbal or emotional abuse, intentional under-employment or unemployment by the payor, and unfounded, manipulative applications for shared parenting or sole custody. Women are also, for a variety of culturally-determined reasons, more likely to behave in “risk-averse” ways and to avoid litigation, particularly when the test for retroactive support is highly discretionary. Women are also unlikely to commence proceedings when they are members of communities that tend to distrust the legal system, such as Aboriginal women, racialized women, and immigrant women. In this manner, the Restrictive

² According to the Survey, *supra* at vii, special expenses were ordered in 31.9 percent of cases, with the monthly amount of the paying parent's share of special or extraordinary expenses ranging from \$2 to \$1,534 with a median amount of \$117. The type of expense ordered most often was child/daycare (11.8 percent of total cases), expenses for extracurricular costs followed at 10 percent and medical/dental insurance premiums followed at 9.3 percent.

Approach not only furthers women's systemic inequality generally, it has particularly pronounced effects on those women already most politically and economically marginalized.

D.B.S., supra at para. 121, citing *Haisman v. Haisman* (1994), CarswellAlta 179 (C.A.) at para. 46; D.A.R. Thompson, "No Lawyer: Institutional Coping with the Self-represented", (2001) 19 C.F.L.Q. 455; D.A.R. Thompson and L. Reiersen, "A Practicing Lawyer's Field Guide to the Self-Represented", (2001) 19 C.F.L.Q. 529; *Access to Justice Denied: Women and Legal Aid in BC, A Report*, Women's Access to Legal Aid Coalition, July, 2000; A. Brewin with L. Stephens, *Legal Aid Denied: Women and the Cuts to Legal Services in BC*, September 2004; A. Brewin, *Legal Aid and Family Law: Women's Access to Justice Affidavit Campaign Coordinated by West Coast LEAF, Update Report*, January 2005; C. Bedont, "Gender Difference in Negotiations and the Doctrine of Unconscionability in Domestic Contracts" (1994-95) 12 C.F.L.Q. 21 at 31; C. Martin, "Unequal Shadows: Negotiation Theory and Spousal Support under Canadian Divorce Law" (Winter 1998) 56 U.T. Fac. L. Rev. 135 at 137; N. Bakht, "Arbitration, Religion and Family Law: Private Justice on the Backs of Women", report published by Law Commission of Canada and National Association of Women and the Law, (Ottawa: LCC, 2005) 1-68. ISBN #: 0-895996-90-2, online: http://www.lcc.gc.ca/research_project/bakht_mainen.asp; Hon. M. Sinclair, "A Presentation to the Western Workshop of the Western Judicial Education Centre" in J. Abell & E. Sheehy, *Criminal Law & Procedure: Cases, Context, Critique*, 3rded. (Toronto: Captus Press, 2004)) 78 at 82; M. Gordon, Q.C., "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2005) 23 CFLQ 244 at 253-254

- (6) **“Whether there is an unreasonable burden placed on the payor should not be assumed, but must be established; it must be incapable of alleviation by creative payment options. Further, the reason for or the cause of the inability to pay must be considered and any burden must be balanced against the corresponding deprivation to the payee and the child.”**

46. As noted above, if child support is rightly regarded as the entitlement of the child, the non-payment or underpayment of support creates a valid debt that must be paid, the same as any other financial obligation. Other forms of debt must be paid even if the quantum is significant; even in bankruptcy, arrangements are made for some measure of debt repayment. Non-payment or under-payment of a financial obligation should not be treated differently when recipients are overwhelmingly women and children.

- (7) **“A lump sum payment is not precluded merely because it involves a transfer of capital.”**

47. Most retroactive support orders will be for modest amounts. However, “the sheer size” of an award of retroactive support should not be used as an excuse to deprive women and children of the fair standard of support owing. Since child support takes priority over spousal support, a retroactive child support award may appropriately contain elements that to some

degree redress the mother's economic disadvantage. Certainly, the recipient will have suffered financially by the denial or underpayment of child support, and it is well established that the economic welfare of children cannot be separated from that of the parent with whom they live. A retroactive support payment is rightly regarded as re-capitalization for a period in which the mother subsidized the father's non-payment or underpayment, and is required by the statutory text and objectives; it should not be described as an illegitimate "windfall." A retroactive child support order simply recognizes the entitlement of women and children to receive appropriate support.

Francis v. Baker, 1998 CarswellOnt 931 (C.A.) at para. 44; *C. (S.E.) v. G. (D.C.)* (2003), 2003 CarswellBC 1414 at para. 136 (B.C.S.C.); *Divorce Act*, s. 15.3(1); *D.B.S., supra* at paras. 112, 113

- (8) **"The date of the increased income as defined by the Guidelines is the presumptive date for the commencement of a retroactive award unless the payor has satisfied the additional financial obligation in some other manner, has taken all reasonable steps to fulfill the obligation, has a previous arrangement for child support that contemplates the provisions of the Guidelines, or the payee fails to act diligently without reasonable excuse."**

48. Recipients are presumptively entitled to child support, but there will be cases in which claims for retroactive support should be dismissed, or in which the total amount should be different from that contemplated under the Tables [where reasonable arrangements or special provisions have been made for the support of the child, for example]. These exceptions should accord with the statutory objectives, as well as the *Charter* and international human rights principles.

49. A few cautions need to be raised with respect to the exceptions to retroactive awards. The Appellant attempts to valorize "the recipient's freedom to choose" whether to seek variation. As discussed, economic and social constraints limit women's ability to seek retroactive support. The Appellant's focus on "choice" threatens to reify women's inequality. Women do not "choose" to be disentitled to appropriate child support.

D. Majury, "Women Are Themselves to Blame: Choice as a Justification for Unequal Treatment" in F. Faraday, M. Denike and M.K. Stephenson, eds. *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law Inc., forthcoming 2006)

50. The *D.B.S.* requirement that there be no delay “without *reasonable* excuse” raises the spectre of a reasonable person standard that enforces dominant conceptions and excludes the experience of marginalized communities. The law of retroactive support, including exceptions to its award, must utilize a reasonable person standard that is informed by the lived experiences of marginalized women, to thereby advance substantive equality and our international human rights obligations.

M. Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Toronto: Oxford University Press, 2003) at 275; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 61; J. Radbord, “Lesbian Love Stories: How We Won Equal Marriage in Canada” (2005) 17:1 *Yale J. of Law & Feminism* 99 at 111-114

G. CONCLUSION: THE D.B.S. APPROACH IS REQUIRED

51. The *D.B.S.* Approach advances women’s equality and complies with Canada’s international human rights commitments. It is required by the statutory text, and meets the objectives of the Guidelines and *Divorce Act*: establishing a fair standard of support by which children benefit from the means of both spouses after separation, reducing conflict, promoting cooperation and ongoing full and fair disclosure, ensuring consistent child support payments based on income, minimizing the impact of separation on children, and encouraging resolution without litigation.

52. Women cannot fairly be required to annually monitor and litigate over child support, at great emotional and financial expense. While affirming the *D.B.S.* Approach might generate complaints from a few payors, these are temporary “growing pains” as the law advances. The *D.B.S.* Approach supports best legal practice, ensuring that the psychological and economic burdens of pursuing adequate child support do not fall so harshly on the shoulders of recipients, mostly women. Payor fathers would no longer have incentives to non-disclosure and delay, and so would more cooperatively pay the appropriate level of Guideline child support, sparing women the costs of litigation and increasing women and children’s economic and emotional well-being. The *D.B.S.* Approach would promote the values of substantive equality and advance our international human rights commitment to ending the poverty of women and children.

C. Davies, Q.C., “Retroactive Child Support: the Alberta Trilogy” 24 *C.F.L.Q.* 1; *Thibaudeau*, *supra* at 719

53. Ultimately, it is a public, not merely private, responsibility to collect the fair quantum of support for children.³ Accordingly, LEAF takes the position that women's substantive equality would be advanced if provincial child support services recalculated, at regular intervals, the amount of child support orders in accordance with s. 25.1 of the *Divorce Act*. This would save women the time, expense and vulnerability of having to deal with payors directly. They would no longer need to invoke the litigation process to receive the support to which their children are entitled. This approach would best fulfill the legislative requirements, objectives of the Guidelines, and domestic and international human rights commitments.

PART 4: ORDER REQUESTED

54. LEAF seeks that the appeal be dismissed, and the *Divorce Act*, Guidelines, and law of retroactive support be interpreted in accordance with domestic and international equality obligations.

PART 5: COSTS

55. LEAF does not seek its costs, and submits that there should be no costs ordered against it.

56. More generally, LEAF submits that costs orders should promote substantive equality, and not economically punish recipients for attempting to ensure appropriate support for their children.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS ____ DAY OF JANUARY, 2006

CLAIRE KLASSEN

JOANNA RADBORD

³ More broadly, it is a public responsibility to ensure a reasonable standard of living for all children, regardless of the income of their parent(s) or their parents' marital status. M. J. Mossman, "Child Support or Support for Children? Rethinking "Public" and "Private" in Family Law" (1997) 46 UNBLJ * 62, 64; B. Cossman, "Family Feuds: Neo Liberal and Neo-Conservative Visions of the Reprivatization Project" in B. Cossman and J. Fudge, eds., *Privatization, Law and the Challenge to Feminism* (Toronto: U. of T. Press, 2002) 169