Court File No. 31350

IN THE SUPREME COURT OF CANADA
(Appeal from the Court of Appeal for the Province of Ontario)

BETWEEN:

LEAKA HELENA DELIA DICKIE

Appellant

-and-

KENNETH EARLE DICKIE

Respondent

-and-

WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervener

FACTUM OF THE INTERVENER, WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)

Counsel for the Intervener

WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)
60 St. Clair Avenue East, Suite 703
Toronto, Ontario M4T 1N5

E. Llana Nakonechny/Gillian Calder
Tel: (416) 927-0891
Fax: (416) 927-0385
E-mail: llana@dicksonlawyers.com

Agent for the Intervener

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa, Ontario K1P 1J9

Carole J. Brown
Tel: (613) 237-5160
Fax: (613) 230-8842
E-mail: cbrown@blgcanada.com

TO: *Counsel for the Appellant*

NIMAN ZEMANS GELGOOT
800 – 1235 Bay Street
Toronto, Ontario M5R 3K4

Harold Niman/Daryl Gelgoot/
John Schuman
Tel: (416) 921-1700
Fax: (416) 921-8936
Email: Niman@nzgfamlaw.com

-and

HEENAN BLAIKIE LLP
Suite 2600, 200 Bay Street
South Tower, Royal Bank Plaza
Toronto, Ontario M5J 2J4

David Stratas/Trevor Guy/Ryan Teschner
Tel: (416) 643-6846
Fax: (416) 360-8425
Email: dstratas@heenan.ca

Agent for the Appellant

HEENAN BLAKIE LLP
55 Metcalfe Street, Suite 300
Ottawa, Ontario K1P 6L5

Joy Noonan
Tel: (613) 236-1668
Fax: (613) 236-9632
Email: jnoonan@heenan.ca

AND TO: *Counsel for the Respondent*

ROCHELLE F. CANTOR
Barrister and Solicitor
180 Spadina Road
Toronto, Ontario M5R 3K4

Tel: (416) 861-1625
Fax: (416) 861-1466
Email: Rochelle.cantor@bellnet.ca

Agent for the Respondent

LANG MICHENER
300 – 50 O'Connor Street
Ottawa, Ontario K1P 6L2

Marie-France Major
Tel: (613) 232-7171
Fax: (613) 231-3191

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PART I: FACTS

1. The Women's Legal Education and Action Fund ("LEAF") adopts and relies upon the summary of facts as stated by the Appellant.

PART II: POINTS AT ISSUE

2. The issues before this Court are as follows:

   a. What principles apply to the exercise of the Court's discretion in determining whether to hear an appeal by a party in willful default of a family court order?; and,

   b. Whether default of an order, in this case orders to provide security for costs and the posting of a letter of credit as security for the payment of support obligations, is punishable by a contempt order pursuant to Rule 60.11 of the Rules of Civil Procedure?

   Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 60.11(1) and (5).

PART III: ARGUMENT

A. Overview of LEAF's Argument:

3. This case demands a contextual approach informed by the underlying constitutional principle of substantive equality with attention to the systemic discrimination experienced by women in the Canadian family justice system at the breakdown of relationships.

4. The reality for many, if not most, Canadian women, is that they will receive little or no compensation for the economic cost of their household labour and childcare. Although substantive equality mandates that the state recognize the important economic value of women's unpaid work within the home, at the breakdown of relationships the legislature has instead placed the primary obligation of support on spouses and former spouses.

J. Hough "Mistaking Liberalism for Feminism: Spousal Support in Canada" (1994) 29(2) *Journal of Canadian Studies* 147; *Moge v. Moge*, [1992] 3 S.C.R. 813 at 873; A. Harvison Young, "The Changing Family, Rights Discourse and the Supreme Court of Canada" (2001) 80 *Canadian Bar Review* 749 at 780–781; 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: University of Toronto Press, 2002) 169 at 169-171.

5. Even where women are successful in obtaining orders of support for their children and themselves at the end of a spousal relationship, they still face serious, sometimes insurmountable, difficulties enforcing those orders. Non-payment of spousal support and child support is a recognized phenomenon which disproportionately impacts women and children in Canada, and is a contributing factor in the feminization of poverty following relationship breakdown.

R. Finnie, "Women, Men and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data" (1993) 30(2) *Canadian Review of Sociology and Anthropology* 205 at 205-208, 231; D. Galarneau and J. Sturrock, "Family Income After Separation" *Perspectives on Labour and Income 75-001-XPE*, Vol. 9, No. 23 (Ottawa: Statistics Canada, 1997) pp. 18-26; M. Gordon, "What, Me Biased? Women and Gender Bias in Family Law" (2001) 19 *Canadian Family Law Quarterly* 53 at 56-68, 76-81.

6. Limited access to enforcement mechanisms, particularly in the context of willful non-compliance with spousal support and child support orders by men with the means to pay, exacerbates women's poverty. In considering what remedies and recourses are available for non-compliance with family court orders, LEAF submits that his Court should adopt a contextual approach, informed by the constitutional principles of substantive equality.

Canadian Centre for Justice Statistics, Statistics Canada, *Maintenance Enforcement Programs in Canada: Descriptions of Operations 1999/2000* (Ottawa: Statistics Canada, 2001) at 4-7, available at: http://dsp-psd.communication.gc.ca/Collection-R/Statcan/85-552-XIE/0010085-552-XIE.pdf; Canadian Centre for Justice Statistics, *Child and Spousal Support: Maintenance Enforcement Survey Statistics, 2004/2005* (Ottawa: Statistics Canada, 2006), available at: http://www.statcan.ca/english/freepub/85-228-XIE/0000685-228-XIE.pdf

7. This factum employs gender specific language in describing support recipients as female and support payors as male. This choice reflects the fact that the economic consequences of marriage and relationship breakdown are gendered. In most cases, women are disadvantaged as

a result of the sex-based division of labour within their relationships and by their inequality of earning power in the paid labour market. Although families headed by same-sex and different-sex parents may include male recipients and/or female payors, the sex equality implications of child and spousal support must be addressed, not effaced by gender-neutral language.

> Finnie, *supra*, at 228-233; Canadian Centre for Justice Statistics, *supra*, at 19; D. Majury, "The *Charter*, Equality Rights, and Women: Equivocation and Celebration" (2002) 40(3 and 4) *Osgoode Hall Law Journal* 297 at 322-323.

8. Since judicial discretion must be exercised in accordance with *Charter* values, the Court of Appeal erred when it failed to bring a substantive equality lens to the exercise of its discretion in determining whether to hear this appeal. The Court was required to examine the effects of its approach in light of the larger social and economic context of women's systemic inequality and widespread poverty.

9. The Court of Appeal also erred in the manner in which it conducted its interpretation of Rule 60.11. LEAF submits that a textual, contextual and purposive interpretation of the phrase "payment of money" should have been employed. A reasonable and just interpretation of this phrase must recognize the consequences to disadvantaged women and children of non-compliance by payors.

10. In LEAF's submission, both questions before the Court require attention to the context in which the questions have arisen. In particular, it is necessary to consider the effects of differing approaches upon already marginalized and disadvantaged groups.

11. The specific factual context of this case is the willful refusal by Dr. Dickie to comply with family court orders designed to protect the interests of his former wife and children. The Court accepted that Dr. Dickie had the means to pay support and to post security. He repeatedly and willfully disobeyed the July 2001 child and spousal support order of Justice Kiteley, accumulating arrears in excess of $100,000. He also failed to comply with the December 2002 order of Justice Greer to secure payment of support and costs. At the Court of Appeal Justice Laskin in dissent held: "Dr. Dickie did not appeal these orders. He did not apply to vary them. He simply refused to comply with them."

Reasons of the Court of Appeal for Ontario, paras. 74 and 77.

12. Dr. Dickie is a man of means and resources, who, rather than meet his obligations to his former wife and children, has chosen instead to use the courts to their further disadvantage. Both a contextual analysis and equity mandate that, until Dr. Dickie comes to court with clean hands, the remedy he seeks should be denied.

Reasons of the Court of Appeal for Ontario, paras. 14, 23 and 69.

B. Canada's International Obligations to Women and Children Should Inform the Court's Analysis of Domestic Legislation and the Common Law

13. Canada's international obligations are part of the legal context in which legislation is to be interpreted and applied, even when not incorporated into domestic legislation. The exercise of judicial discretion in determining whether to hear Dr. Dickie's appeal while he is in default of family law orders, and the interpretation of Rule 60.11, 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 Economic, Social and Cultural Rights.*

Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241 at 266, 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 861.

14. International human rights monitoring committees condemn the scope and severity of women's poverty in Canada, including the pervasive poverty of single mothers, racialized women, disabled women and Aboriginal women. Women in poverty do not have substantively equal exercise and enjoyment of their economic, social and cultural rights, nor their civil and political rights. When a court either exercises its discretion or interprets Rule 60.11 in a way that fails to provide a remedy for a willful breach of a family law order by a payor with means, it further exacerbates the poverty of women and children. Both of these actions by a court are contrary to Canada's international human rights commitments.

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*, 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/bodies/hrc/docs/CCPR_C_CAN_CO_5.doc.

C. Substantive Equality Principles must Guide the Court's Exercise of Discretion in Determining whether to Hear a Party in Willful Default of a Family Court Order

a. The Socio-Economic Context of Women's Inequality in Canada is Relevant to the Determination of the Issues in this Case

15. Despite significant shifts in social and legal policies geared towards ensuring women's equality, the promotion of programs that support shared family responsibilities and enhanced positions for women in the paid work force, and considerable feminist attention to the complex issues of sexual inequality in Canada, at the turn of the 21st century, the gendered division of labour in both the paid work force and the heterosexual nuclear family remains largely intact.

G. Calder, *Gender, Social Reproduction and the Canadian Welfare State: Assessing the Recent Changes to the Maternity and Parental Leave Benefits Regime* (Toronto: York University LL.M. Thesis, 2002) at 1-3; S.B. Boyd, "Challenging the Public/Private Divide: An Overview" in S. B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) at 6-7; Statistics Canada, *Women in Canada 2000: A Gender-Based Statistical Report* (Ottawa: Statistics Canada, 2000) at 97; Statistics Canada, *Women in Canada 2005: A Gender-Based Statistical Report* (Ottawa: Statistics Canada, 2005) at 113, 133.

16. Canadian families are changing; we are witnessing increasing numbers of heterosexual common-law relationships; a rise in lone parent families; a decline in birth rates; and greater acceptance of same-sex relationships. What has not changed, however, is the unequal sexual division of labour for social reproduction. The fundamental work of caregiving labour in Canada continues to be undertaken by women and performed in the home, leaving women disproportionately shouldering the economic consequences of this labour at the breakdown of relationships.

Women in Canada 2005, *supra*, at 33, 35, 40-43, 45; J. Fudge and B. Cossman, "Introduction: Privatization, Law and the Challenge to Feminism" in B. Cossman and J. Fudge, eds., *Privatization, Law and the Challenge of Feminism* (Toronto: University of Toronto Press, 2002) at 6.

17. In *Moge*, this Court identified and sought to ameliorate the crisis of the feminization of poverty following divorce. The decision emphasized the importance of considering all the factors and objectives of the *Divorce Act* to ensure an equitable sharing of the economic consequences of the marriage and its breakdown. Its compensatory approach extended the duration of women's entitlement to spousal support following a traditional marriage. Although 14 years have passed since this decision was rendered, relationship breakdown still results in poverty for an alarming number of women and children.

> C. Rogerson, "Spousal Support after *Moge*" (1997), 14 *Canadian Family Law Quarterly* 281 at 283, 303-04; *Moge*, *supra*, at 852, 854, 866-67, 879; *Willick v. Willick*, [1994] 3 S.C.R. 670 at 713-715.

18. Mothers are still predominantly the sole-custodians of children at the breakdown of relationships. In 2003, mothers were sole custodians in 48% of all settled custody cases compared to 8% of fathers. As lone-parents, mothers continue to devote long hours to parenting and other domestic responsibilities to the detriment of their own future economic well-being and security. In 2003, 38% of all families headed by lone-parent mothers, who are generally support recipients from male payors, had incomes which fell below the after-tax Low Income Cut-Offs. In the same year, 43% of all children in a low-income family were living with a single female parent, whereas these families accounted for only 13% of all children under age 18 that year.

> Galarneau and Sturrock, *supra* at 9; Women in Canada 2005, *supra* at 40, 144; *Young v. Young*, [1993] 4 S.C.R. 3 at 51-52; Canadian Centre for Justice Statistics, *Child and Spousal Support: Maintenance Enforcement Survey Statistics, 2004/2005*, *supra*.

19. The gendered nature of the family and family responsibilities is compounded by issues of race and ability. Racialized women are more likely than non-racialized women in Canada to have low incomes. They are also more likely to experience considerable unemployment—when employed—than other women. Aboriginal women, in particular, are less likely than non-Aboriginal women to be part of the paid workforce in Canada. And, while racialized women in Canada are more likely to be employed full-year, full-time than non-racialized women, they generally earn less at their jobs than do other women.

> N. Iyer, "Some Mothers are Better than Others: A Re-examination of Maternity Benefits" in S. B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) 168 at 174; Women in Canada 2005, *supra* at 198, 249, 253-254.

20. In addition, women with disabilities are among the poorest Canadians. In 2000, 26% of all women with disabilities aged 15 and over had incomes below the after-tax Low Income Cut-Offs, compared with 20% of men with disabilities and 16% of non-disabled women. In 2001 just 40% of women aged 15 to 64 with disabilities were part of the Canadian paid work force, compared with 69% of women in this age range without disabilities. What these factors of race and ability demonstrate is that the feminization of poverty, as accepted by this Court in cases like *Moge*, is compounded for racialized women, disabled women and Aboriginal women.

Women in Canada 2005, *supra* at 294-296, 305-307.

21. Further, permitting men to willfully default in payment of support orders exacerbates women's disadvantage at relationship breakdown and contributes to the feminization of poverty. It allows men to abuse the family court system. It impedes the course of justice to allow an appeal when a payor is willfully in default of family court orders. Courts must prevent these kinds of actions, ones that contravene the community's basic sense of decency and call into question the integrity of the system. Only by providing meaningful remedies for women seeking to enforce support orders will courts correct and prevent discrimination and contribute to women's substantive equality.

Department of Justice Canada, "Summary of Report on Research Strategy for Studying Compliance/Default on Child Support Orders" September, 1999, available at: http://canada.justice.gc.ca/en/ps/sup/pub/strat/rap0299.html; S.B. Boyd, "The Impact of the Charter of Rights and Freedoms on Canadian Family Law" (2000), 17 *Canadian Journal of Family Law* 293 at 320-323.

22. The use of ongoing litigation in the family law system by men in non-compliance with family court orders often represents a continuation of the abusive power and control those men exercised in the personal relationships that have broken down. It is systemic discrimination against women when the legal system enables the perpetuation of this abuse.

Department of Justice Canada, "Summary of Report on Research Strategy for Studying Compliance/Default on Child Support Orders", *supra*.

23. Although granting remedies on a case-by-case basis will not correct the overall disadvantage suffered by women and children in the family law context, in determining

individual cases, the Court should, and has, taken a substantive equality approach and has held that the development of the common law and, as discussed below, the interpretation of family law legislation, should be made in a manner that is consistent with the equality guarantees and values enshrined in the *Canadian Charter of Rights and Freedoms*. This approach will ensure the protection of vulnerable recipients and deter payors with the ability pay from defaulting on payment of support orders.

> M. Eichler, "The Limits of Family Law Reform, or, The Privatization of Female and Child Poverty" (1990) 7 *Canadian Family Law Quarterly* 59-84; M. J. Mossman, "Conversations about Families in Canadian Courts and Legislatures: Are there 'Lessons' for the United States?" (2003) 32(1) *Hofstra Law Review* 171 at 175-178; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15(1).

b. The Common Law Must be Interpreted in Accordance with *Charter* values

24. In any exercise of discretion, judicial decision-making must be consistent with the *Charter* and underlying constitutional principles, including the democratic value of "a commitment to social justice and equality."

> P. Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22(2) *Dalhousie Law Journal* 5 at 13, 41-42; *R. v. Demers*, [2004] 2 S.C.R. 489 at 535-537 per LeBel J.; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 49, 64; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1077-1078; *Baker v. Canada, supra*, at 853-854.

25. This Court has held that,

> [t]he Charter constitutionally enshrines essential values and principles widely recognized in Canada, and more generally, within Western democracies. Charter rights, based on a long process of historical and political development, constitute a fundamental element of the Canadian legal order upon the patriation of the Constitution. The Charter must thus be viewed as one of the guiding instruments in the development of Canadian law.
>
> *R.W.D.S.U. Local 558 v. Pepsi-Cola Canada Beverages West Ltd.*, [2002] 1 S.C.R. 156 at 167.

26. The *Charter* promises substantive, not formal, equality under s. 15(1) of the *Charter*, the "broadest of all guarantees." This guarantee ought to ensure that a court's inherent discretion is

exercised so as to "prevent and remedy discrimination" ensuring, as nearly as possible, "an equality of benefit and protection."

> *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143 at 163-171; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 25.

27. This Court has mandated that when pursuing substantive equality it is necessary to analyze "the full context surrounding the claim and the claimant" from the perspective of the equality claimant. A contextual analysis involves a determination of whether "the legislation which imposes differential treatment has the effect of demeaning [his or her] dignity having regard to the individual's or group's traits, history and circumstances." This same contextual approach, focused on effects, is required whether analyzing the direct breach of the *Charter*'s equality guarantee by discriminatory government action, or the application of *Charter* values in the exercise of judicial power.

> *Law v. Canada*, *supra* at para. 6; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at 464-465.

28. It is settled law that, even in a private dispute, courts should apply and develop the rules of common law in accordance with the values and principles enshrined in the *Charter*. Here, the "discretion [whether to hear a party in default of a family law order] must be exercised within the boundaries set by the principles of the Charter." In its application to family law, "the *Charter* value of substantive equality has facilitated the introduction of a social context analysis into judicial determinations, especially of economic issues."

> *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835 at 875; *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 603-604; *R. v. Salituro*, [1991] 3 S.C.R. 654 at 675; *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at paras. 83, 94; *R.W.D.S.U. Local 558 v. Pepsi-Cola Canada Beverages West Ltd.*, *supra* at 167-168; S.B. Boyd, "The Impact of the Charter of Rights and Freedoms on Canadian Family Law," *supra* at 317-326; *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753 at 799 per McLachlin J. (as she then was).

29. The court has inherent jurisdiction to control its own processes and avoid proceedings that are contrary to the interest of justice. In doing so, the court may exercise its discretion not to hear a party who is in breach of a court order. LEAF submits that where, as here, a court exercises its discretion, it must do so in accordance with the *Charter* value of substantive equality. The Court of Appeal's failure to do so is an error in law.

Halpern v. A.G. Canada (2003), 65 O.R. (3d) 161 (C.A.) at para. 29; *Hill v. Church of Scientology, supra* at para. 83; *Dolphin Delivery, supra* at 603.

c. Equality Considerations when a Court Exercises its Discretion Whether to Hear a Party in Default

30. LEAF supports recognition of the factors set out by the appellant in her factum at paragraph 31 when a court is called upon to exercise its discretion in the context of willful non-compliance with family law orders. Since it is necessary to consider *Charter* values in the exercise of discretion, a court should also address whether there is an abuse of power or power imbalance between the parties; the effects of its approach in light of the larger social and economic context, including women's systemic inequality and poverty; and a risk of violence or threat to the security of the person.

Factum of the Appellant, para. 31.

i. Abuse of Power or Power Imbalance

31. Applying a substantive equality lens to the exercise of discretion involves considering whether or not the context in which the discretion is being exercised is one that further entrenches or reinforces an imbalance of power in a way that perpetuates a pre-existing disadvantage or leads to the social or political domination of certain groups over others.

S. Moreau, "The Wrongs of Unequal Treatment" (2004) 54 *University of Toronto Law Journal* 291 at 303-307.

32. In order to address systemic discrimination in the family justice system that allows for the perpetuation of spousal abuse through litigation, discriminatory norms must be challenged. Discriminatory norms reflect and naturalize the needs, realities, and circumstances of relatively more powerful groups, relationally ignoring or devaluing the needs, realities and circumstances of relatively less powerful groups. When spouses are allowed to abuse the family system, for example, by willfully breaching court orders, the power of abusive men gets perpetuated to the disadvantage of less powerful women who do not have the financial, emotional, or psychological means to defend against this abuse. To ensure substantive equality, discriminatory norms such

as tolerance of abuse of the family law system by abusive spouses, must be challenged by exposing the construction of difference and the power of the dominant group.

> M. Minow, *Making all the Difference: Inclusion, Exclusion and American Law* (Ithaca, New York: Cornell University Press, 1990) at 110-112.

33. A *Charter* values approach to the exercise of discretion should not permit a person to take unfair advantage of their stronger economic circumstances or position of knowledge to the disadvantage of one in a weaker position. Justice requires that inequality of power be recognized as such, and that where judicial discretion is being exercised, judges should be attentive to the institutionalized social processes that lead to material deprivation and maldistribution as well as the institutional conditions which leave bargaining imbalance unchecked.

> S. Moreau, *supra* at 303-305, 322-324; I.M.Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) at 33-38.

34. In his dissent Justice Laskin states that a court has the inherent power not to hear a litigant who is in willful breach of a court order when to do so would abuse the court's processes, impede the course of justice, or undermine the court's ability to enforce its own orders. His Honour found that Dr. Dickie's "flagrant and systematic disregard for orders of the court over a period of four years" which had "disastrous consequences" for the recipient spouse and her children, required the court to exercise its discretion to adjourn the appeal until the security ordered to enforce the arrears of support was posted.

> Reasons of the Court of Appeal for Ontario, paras. 78, 83, 85, and 98.

35. Where, as here, the defaulting party is seeking to exercise power over a weaker party by bringing repeated motions or procedural steps in a case, judicial discretion should be exercised against hearing the defaulting party. Where, as here, a party is in non-compliance with an existing court order, the court determining whether to hear the appeal should consider whether the process creates or perpetuates a pre-existing disadvantage to the other party.

ii. Detrimental Economic Consequences

36. Applying a substantive equality lens to the exercise of discretion involves considering whether or not the action the Court is being asked to condone exacerbates women's economic inequality.

37. In *Law v. Canada*, this Court has adopted an approach that requires applying a substantive equality lens to the law to prevent disadvantage to vulnerable groups. Without the application of a substantive equality analysis, women and children are at risk of continued economic disadvantage when support orders are willfully breached and orders to provide security for costs or posting of security for the payment of support orders cannot be enforced and there is no accountability for their breach.

Law v. Canada, *supra* at paras. 40 – 55.

38. The court must consider the relative need of the recipient women and children and the capacity of payor men to pay support in determining whether the failure to pay support is contrary to the interests of justice. In *Brophy* the Ontario Court of Appeal, in exercising its discretion not to hear the appeal of a husband in breach of a support order, found that the arrears of support of $52,000 were "substantial." However, a court must be mindful of the fact that, to economically disadvantaged women and children, a much smaller amount of arrears could have a severe financial impact.

Brophy v. Brophy (2004), 180 O.A.C. 389 (C.A.), paras. 8, 14 and 15.

39. Where a party is in non-compliance with an existing court order, as in the within appeal, the court in determining whether to hear the appeal should consider the relative economic consequences of its decision to both parties.

iii. Risks of Violence or Threats to the Security of the Person

40. Applying a substantive equality lens to the exercise of discretion involves considering whether or not the context in which the discretion is being exercised is one in which there is a risk of violence or a threat to security of the person. There will be cases where an appeal by an individual in default is warranted and should be heard, based on the context of the original order and the circumstances surrounding its breach.

41. When a court considers whether or not to hear a party in breach of a court order, it must weigh whether hearing or not hearing the litigant will put a disadvantaged party's security of the

person at risk. To not hear the appeal of an impecunious man in arrears of a support order could unfairly put him at risk of incarceration. To hear the appeal of a man in breach of a restraining order could put the security of the partner he has physically abused at risk of further violence.

> J. Mosher, P. Evans and M. Little et. al., "Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System," Final Report of Research Findings from the Women and Abuse Welfare Research Project, April 5, 2004 at 42–47, available at: http://www.yorku.ca/yorkweb/special/Welfare_Report_walking_on_eggshells_final_report.pdf

42. If the party seeking to be heard is in breach of a restraining order or a support order where there is evidence of domestic violence, the court must refuse to hear the litigant where there could be an immediate threat to the security of the party for whose benefit and physical protection the order was made.

> J. Mosher, P. Evans and M. Little et. al., "Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System," *supra*.

43. LEAF submits it would be legitimate to hear the appeal of a party in default in situations where the appellant reasonably believes that compliance with the original order would jeopardize her own physical safety or that of another person. For example, if a custodial parent refused to provide access, believing she was acting in the best interests of her children, and was found in contempt of an order, the Court might be justified in exercising its judicial discretion to hear her appeal without the necessity that she first purge the contempt, if her rationale for breaching the order was a reasonable fear that the child's safety would be jeopardized if access was permitted.

44. Where a party is in non-compliance with an existing court order, as in the within appeal, the court in determining whether to hear the appeal should consider the impact on the safety and security of the person of the parties involved.

d. The Application of Equality Promoting Considerations to the Case at Bar Means that Dr. Dickie's Appeal Should Not be Heard.

45. The Court should not hear the appeal of a litigant who has refused to comply with an order to secure payments of child and spousal support until the contempt is purged. This approach is most consistent with the *Charter* value of substantive equality and best ameliorates

the traditional economic disadvantage that women and children suffer on relationship breakdown. This approach provides women with an effective remedy to enforce support orders against men in non-compliance with those orders and prevents those men from abusing their power to the further disadvantage of their former partner and children. If the majority of the Court of Appeal had exercised its discretion in accordance with *Charter* values, the Court would have refused to hear Dr. Dickie's appeal on the basis that he was willfully non-compliant with the family court orders below, which put the economic security of his family at risk.

D. The Court Must Ensure that Statutory Interpretation Considers the Context of Women's Disadvantage upon Relationship Breakdown

a. The Court Must Bring a Textual, Contextual and Purposive Approach to Statutory Interpretation

46. Rule 60.11(1) provides, *inter alia*, that a court on a motion "may make a contempt order to enforce an order requiring a person to do an act, other than the payment of money." Rule 60.11(5) provides that where a finding of contempt is made, a court may order that the person in contempt be imprisoned for such a period and on such terms as are just.

Rules of Civil Procedure, Rule 60.11(1) and (5).

47. LEAF submits that the proper approach to statutory interpretation in this case requires a textual, contextual and purposive approach. On this approach, the words "payment of money" should be interpreted in a manner consistent with the underlying purpose of Rule 60.11; an interpretation that does not further the disadvantage of those who are not able to pay their debts, but that finds in contempt those who do not comply with enforcement mechanisms, for their willful non-compliance with steps taken to secure payment of obligations owed for child and spousal support.

Canada Trustco Mortgage Co. v. Canada, [2005] 2 S.C.R. 601 at 610.

48. A textual, contextual and purposive interpretation recognizes that the meaning of legislation cannot be understood in isolation. Thus, it is necessary to consider the consequences

of proposed interpretations in light of the wider social context, including examination of the effects on groups who lack political power.

> 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 para. 6 by L'Heureux-Dubé, J. [emphasis in original].

i. Textual

49. A textual interpretation is one that can be justified in terms of its plausibility and, as here, accords with case law that has considered the definition of "payment of money":

(i) "If the appellant had been ordered to pay the money to the receiver of the court in discharge of an obligation to which he had been declared liable, that might be different. But that is not so here; he is to deposit the money in court or to give security for it. That is not within the meaning of the words ...(payment of money)." *Bates v. Bates* (1888), 14 P.D. 17 (C.A.) as cited in *Forrest v. Lacroix Estate* (2000), 48 O.R. (3d) 619 at para. 39 (C.A.).

(ii) "... an order for the payment of money is one that would ordinarily result from a judgment requiring one party to pay money to another. This order gives no 'monetary relief' to the applicant. I therefore conclude that it is not an order for the payment of money..." *Noble v. Noble* (2003), 66 O.R. (3d) 165 (Div. Ct.) at 168 .

(iii) "...an Order for the payment of money into court as security, while having an immediate monetary consequences, is not "an order for the payment of money" ... Such an order does not attract interest and cannot be enforced by a Writ of Seizure and Sale." *Websports Technologies Inc. v. Cryptologic Inc.*, [2005] O.J. No. 1732 (S.C.) at para. 10.

(iv) "It is readily apparent that to come within the meaning of the noted phrase, ["an order for the payment of money"] the order must give monetary relief from one party to another party. It is equally apparent that a declaration of an entitlement to money falls short of having the same effect." *Janda Products Canada Ltd. v. Canada (M.N.R.)*, [2004] F.C.J. No. 1824 (T.D.) at para. 26.

ii. Contextual

50. A contextual interpretation is one that is acceptable, that promotes a just and reasonable outcome. Here a contextual interpretation of Rule 60.11 acknowledges that women's economic disadvantage arises generally from the gendered construction of the family and particularly from the breakdown of relationships. The Rule must be interpreted and applied with attention to this context and the consequences of the proposed interpretations.

51. Further, a contextual interpretation accords with the historical purpose and legislative intent of Rule 60.11, which is to protect the liberty of the person by ensuring that persons are not imprisoned for inability to pay a civil debt.

> *Forrest, supra*, at pp. 626 and 628 – 629; Reasons of the Ontario Court of Appeal, para 107; *R. v. Wu*, [2003] 3 S.C.R. 530 at 536-537.

52. A contextual interpretation also accords with the interpretation of the Rule articulated by Justice Laskin in his dissent. His Honour held that:

> "...to determine whether an order is an order for the payment of money under Rule 60.11(1), one must consider to whom the money is being paid and the effect of the order for payment. Where the money is ordered to be paid not to the creditor but into court – or its functional equivalent, to a solicitor to be held in trust – and where the effect of the order is not to create a fixed debt obligation but to secure a debt obligation, then the order is not an order for the payment of money..."
>
> Reasons of the Court of Appeal for Ontario at para. 104.

iii. Purposive

53. A purposive interpretation is one that can be justified in terms of its efficacy. Here, Rule 60.11 codifies the important principle that "debtor's prison for impoverished people is a Dickensian concept that ... has largely been abolished." We do not imprison poor people in Canada for non-payment of their debts. A purposive interpretation of the words "payment of money" foregrounds that a genuine inability to pay is not a proper basis for imprisonment. However, in a civil context, such as the within case, LEAF submits that the Court should

recognize that there is a difference between a party who can't pay and a party with the means to meet their financial responsibilities who simply chooses not to comply.

Wu, *supra*, at 536, 558-559; Reasons of the Court of Appeal for Ontario, paras. 24 and 79.

54. Rule 60.11 permits contempt orders where, as in the within case, there is non-compliance with an order to post security for an outstanding debt. Willful non-compliance with enforcement orders, particularly orders related to child and spousal support in Canada, is an acknowledged factor in the feminization of poverty of women and children at the breakdown of relationships.

b. The Court Must Consider the Socio-Economic Consequences of Women's Inequality in Canada as part of the Context of Statutory Interpretation

55. A textual, contextual and purposive approach to statutory interpretation requires the court to focus on the larger context of the poverty of women and children, including racialized women, disabled women and Aboriginal women. The majority of the Court of Appeal disregarded the text of Rule 60.11, its context and its purpose in including legitimate enforcement mechanisms, such as the posting of a letter of credit or payment of security for costs, in the meaning of "payment of money".

Willick, supra, at 704-706, citing *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765 at 801.

56. As the Chief Justice has stated, "separated or divorced custodial parents considered as a group have historically been subject to disadvantaged treatment...[E]ven today evidence of disadvantage suffered by such persons is overwhelming. Separated or divorced custodial parents as heads of single-parent families confront economic, social and personal difficulties not faced by non-custodial parents or those in two-parent families." If payor spouses (statistically overwhelmingly men) who have the ability to pay support choose to willfully breach court orders and recipient spouses (statistically overwhelmingly women) have no effective recourse or remedy to enforce these orders, women and children continue to suffer financial disadvantage after relationship breakdown.

Thibaudeau v. Canada, [1995] 2 S.C.R. 627 at para. 208 per McLachlin, J., (as she then was); H. Lessard, B. Ryder, D. Schneiderman and M. Young, "Developments in

Constitutional Law: The 1994-1995 Term" (1996) 7 *Supreme Court Law Review* 81 at 111-113.

57. This Court in *Moge* also highlighted the economic disadvantage suffered by women post-divorce. Women in Canada still experience significant economic disadvantage in comparison to men, and that disadvantage is compounded for single mothers, and racialized, disabled and Aboriginal women.

Statistics Canada, "Income in Canada 2004", Catalogue No. 75-202-XWE, available at: http://dsp-psd.pwgsc.gc.ca/Collection/Statcan/75-202-XIE/75-202-XIE2004000.pdf at 93-148; F. Sampson, "Globalization and the Inequality of Women with Disabilities" (Spring 2003) 2:1 *Journal of Law and Equality* 16 at 19–23.

58. Women's poverty arises out of a complex interplay of disadvantage experienced in the workforce, in the division of household labour (both before and after separation) and in their role as the primary caregivers of children. Systemic inequalities experienced by women both prior to and after relationship breakdown must not be exacerbated by an interpretation of "payment of money" that enables men to evade responsibility for their willful non-compliance with payment of arrears of child and spousal support.

Canadian Research Institute for the Advancement of Women, *Women and Poverty*, Third Edition, 2005, at 2-4 available at: http://www.criaw-icref.ca/factSheets/Women%20and%20Poverty/Women%20&%20Poverty%202005.pdf

c. If Rule 60.11 Does Not Prevent and Remedy Discrimination, It is Unconstitutional

59. This Rule cannot operate in a way that permits discrimination on the basis of gender. Statistically, after relationship breakdown, women are most likely to be custodial parents and men support payors. LEAF submits that it would be a perverse and discriminatory outcome if a woman who breaches a court order for access out of real concern for the well-being of her children could face incarceration under Rule 60.11 but a man who willfully disregards a court order to secure payment of outstanding support to his former spouse and children to their economic peril will not. This differential impact violates the equality provisions of the *Charter*.

d. The Application of a Textual, Contextual and Purposive Approach to the Case at Bar Means that Dr. Dickie's Appeal has No Merit

60. A textual, contextual, and purposive approach to the interpretation of Rule 60.11 results in a finding that the order of Justice Greer for the payment of security for costs and the posting of a letter of credit by Dr. Dickie is not a "payment of money" and, therefore, subject to a finding of contempt based on Dr. Dickie's flagrant breach.

61. There is no genuine ambiguity in this case. Case-law confirms that a "payment of money" does not include the payment of money into counsel's trust account for security or the posting of a letter of credit. Although both of these payments have immediate monetary consequences for the debtor, neither provides monetary relief to the creditor and neither is a payment between the parties.

> *Forrest, Noble, Websports Technologies* and *Janda Products, supra;* Appellant's Factum para 51(b) and (c) and *Appellant's Book of Authorities* referenced therein.

62. The legislative purpose of Rule 60.11 is to prevent impecunious persons from being imprisoned for their genuine inability to pay civil debts. Justice Stewart and the Ontario Court of Appeal both held that there was no evidence that Dr. Dickie was unable to comply with the order of Justice Greer, only that he was unwilling to comply. He did not appeal this order or the support order of the Honourable Justice Kiteley, for which Dr. Dickie has been in arrears since it was made in 2001. A textual, contextual and purposive approach to this case supports the finding of contempt against Dr. Dickie on these facts.

PART IV: COSTS

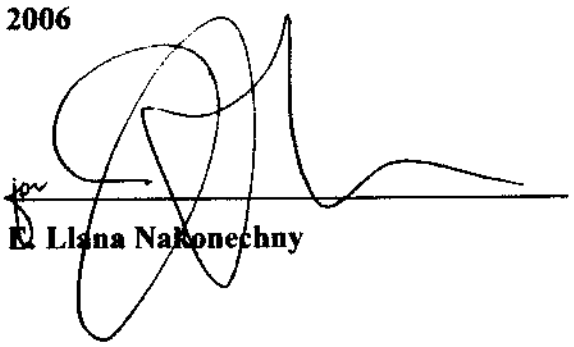
63. LEAF does not seek its costs, and submits that there should be no costs awarded against it.

PART V: ORDER REQUESTED

64. LEAF requests that the Court allow the appeal, affirm that the appropriate analysis on an exercise of discretion is to apply a *Charter* values analysis, and apply a textual, contextual and purposive approach to their interpretation of Rule 60.11.

65. LEAF requests that the Court restore the order of the Honourable Justice Stewart.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19th DAY OF DECEMBER, 2006



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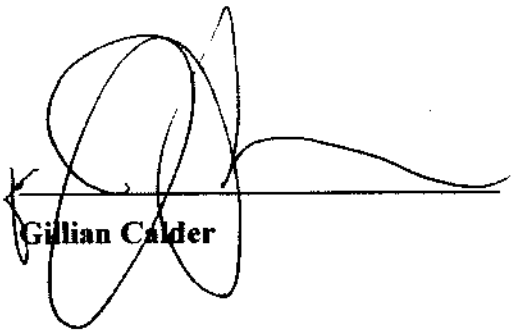

Gillian Calder

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PART VII: LEGISLATION

Legislation **Paragraph Nos.**