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S.C.C. Court File No. 32098

IN THE SUPREME COURT OF CANADA
On Appeal from the Court of Appeal for British Columbia

B E T W E E N:

NANCY RICK also known as NANC RICK

Appellant
(Plaintiff)

A N D:

BEREND BRANDSEMA also known as BEN BRANDSEMA and BRANDY FARMS LTD.

Respondent
(Defendants)

A N D:

WOMEN'S LEGAL EDUCATION AND ACTION FUND

Intervener

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INTERVENER'S FACTUM

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PART I – STATEMENT OF FACTS

1. For the purposes of LEAF's position in this appeal, the following undisputed facts are relevant:

a) the parties negotiated a separation agreement addressing property division and other matters;

b) the Respondent provided financial information, including a sworn statement, for the purposes of that negotiation;

c) the Respondent's information was materially inaccurate;

d) the Appellant had specific vulnerabilities in relation to the negotiation known to the Respondent; and

e) the Appellant had some access to legal and other professional advice.

PART II – POINTS IN ISSUE

2. Underlying the five fact-specific issues framed by the Appellant are the following broader legal questions:

a) Is there a duty on spouses to provide full and accurate disclosure during the negotiation of a property agreement? If so, what are the consequences where a spouse fails to do so?

b) When should a separation agreement regarding property division be set aside as unconscionable?

c) Does the doctrine of *res judicata* preclude judicial intervention if a spouse's property claim has been dismissed pursuant to a consent order?

3. LEAF submits that answering these questions will provide much-needed guidance to lower courts in determining whether a separation agreement is valid where financial information has been misrepresented during negotiations or a spouse has taken advantage of the other's known vulnerabilities. LEAF's position on these questions is as follows:

a) Separating spouses have a common law duty to provide full and accurate financial disclosure. Where a party has materially misrepresented his or her financial circumstances during negotiations, whether actively or by failure to correct a false assumption, the court

should intervene to ensure that the misrepresenting party does not benefit from his or her misconduct.

b) Where a spouse has exploited the known vulnerabilities of the other to obtain an unfair bargain, the agreement should be set aside as unconscionable.

c) A consent order dismissing claims that have been addressed in a separation agreement does not preclude subsequent judicial intervention to set aside the agreement for misrepresentation of financial information or unconscionability.

PART III - ARGUMENT

A. Overview of Argument

4. Negotiation of separation agreements is desirable because it allows the parties to proceed with their lives, arrange their affairs to meet their families' unique needs, and avoid the significant costs of litigation. Courts should respect the finality of good faith bargains. However, it is equally important that courts set aside agreements marked by the misrepresentation of financial information or the exploitation of power imbalances between the spouses. Judicial intervention in these circumstances creates a strong and necessary incentive for spouses to deal fairly with each other when negotiating separation agreements. It is also consistent with the legislative goal of equal sharing of the financial consequences of marriage, and it advances women's substantive equality.

B. Relevant Contextual Considerations

(i) *Charter* Values and Family Law

5. It is well-settled that the values and principles enshrined in the *Charter*, must guide the application and development of the common law. *Charter* values have informed judicial resolution of a variety of family law disputes.

Halpern v. Canada (A. G.) (2003), 65 O.R. (3d) 161 (C.A.).
Susan Boyd, "The Impact of the Canadian Charter of Rights and Freedoms on Canadian Family Law" (2000), 17 Can. J. Family Law 293.
Dagenais v. C.B.C., [1994] 3 S.C.R. 835 at 875.

6. More particularly, the principle of substantive sex equality and consideration of the relevant social context developed by the courts in s. 15(1) cases have informed the development of equitable principles governing the resolution of economic issues in family law. For example, in *Peter v. Beblow*, this Court affirmed that the non-financial domestic contributions to the family, which are still disproportionately made by women, are as valuable as financial contributions, and should be treated equally for constructive trust purposes.

Peter v. Beblow, [1993] 1 S.C.R. 980 at 993-94.

7. LEAF submits that this Court should continue to draw upon the value of substantive sex equality in s. 15(1) of the *Charter* to inform its development of common law principles governing the validity of separation agreements. In this context, the constitutional value of sex equality mandates recognition of the disproportionately negative economic impact of family breakdown on women, and of the systemic disadvantages experienced by women relative to men in the negotiation of separation agreements. LEAF submits that this recognition should inform the Court's determination of what constitutes an unconscionable bargain, and when a separation agreement should be set aside on grounds of financial misrepresentation or unconscionability. Development of the common law regarding the validity of separation agreements in accordance with the value of sex equality can level the playing field, ensuring that both spouses are equally equipped with the information to settle the financial affairs of the marriage in their own best interests and that neither is able to take unfair advantage of the other.

(ii) Evolution of Family Law Framework

8. A default regime of equal division of marital assets was adopted by all provinces in the massive reform of family law statutes beginning in the 1970s, premised on the presumptive equal contribution of spouses to the marriage and equal sharing of the financial consequences of marriage dissolution. By the 1990s, every province had enacted legislation that provided for equal division of assets between married spouses at separation, with limited exemptions and residual judicial discretion. Thus, with the exception of women living on Aboriginal reserves, all married Canadian women were presumptively entitled to an equal division of the family's assets at separation. As Freda Steel put it in her review of these developments, "Marriage is now

perceived as an economic partnership where the contributions of both spouses are of equal weight."

Freda M. Steel, "The Ideal Marital Property Regime – What Would it Be?" in E. Sloss, ed., *Family Law in Canada: New Directions* (Ottawa: Canadian Advisory Council on the Status of Women 1985) 127 at 128.
Women's Issues and Gender Equality Directorate, *After Marriage Breakdown: Information on the On-Reserve Matrimonial Home* (Ottawa: Indian and Northern Affairs Canada 2003) at 6.

9. Some provinces were more explicit than others in their articulation of the purpose and importance of the "equalization" principle. However, all embraced the notion that, in general, the assets of the marriage should be divided equally between the spouses regardless of who bought or paid for them, because of the fundamental equality and economic interdependence inherent in the marriage relationship.

Matrimonial Property Act, R.S.A. 2000, c. M-8, s. 7(4).
Family Relations Act, R.S.B.C. 1996, c. 128, s. 56(2).
Family Property Act, C.C.S.M., c. F 25, s. 13.
Family Law Act, R.S.N.L. 1990, c. F-2, ss. 8, 19, 21.
Marital Property Act, S.N.B. 1980, c. M-1.1, ss. 2, 3.
Matrimonial Property Act, R.S.N.S. 1989, c. 275, Preamble, s. 12.
Family Law Act, R.S.O. 1990, c. F.3, Preamble, s. 5.
Civil Code of Quebec, C.c.Q., L.Q. 1991, c. 64, s. 416.
Family Law Act, R.S.P.E.I. 1988, c. F-2.1, s. 6.
Family Property Act, S.S. 1997, c. F-6.3, ss. 20, 21(1).

10. In *Moge*, this Court accepted that the presumption of equal contribution by the spouses to the mutual economic well-being of the family during the marriage required a similarly equitable distribution of the financial consequences following breakdown of the marriage, whether this is achieved through division of assets, support payments or a combination of the two.

Moge v. Moge, [1992] 3 S.C.R. 813 at 848-49 [*Moge*].

11. Family law underwent another major change in the 1980s and 1990s. Litigation to apportion the financial consequences of relationship breakdown was discouraged in favour of alternative dispute resolution mechanisms, such as court-affiliated education programs, mediation, active judicial case management, mandatory settlement conferences, and collaborative family law. As a result of the evolution of this "settlement culture", fewer than 5% of family law

cases are now resolved by trial. Judicial determination of the financial consequences of marriage breakdown is increasingly available only to the wealthy.

Craig Martin, "Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998) 56 U. Toronto Fac. L. Rev. 135 at 137.
Marie Gordon, "Spousal Support Guidelines and the American Experience: Moving Beyond Discretion" (2002) 19 Can. J. Family Law 247 at 294-96.
Family Law Rules, O. Reg. 114/99, R. 2(2)-(5), 8.1, 17, 18, and 39-41.

12. Since the vast majority of separating spouses now have no real choice but to reach a resolution between themselves, it is essential that the legal framework within which negotiations take place cannot be used to exacerbate the systemic inequalities between the parties. Unfortunately, however, this has occurred. Separating spouses are frequently assumed to approach negotiations on an equal footing in the same way as parties to a commercial negotiation.

Sandra Goundry et al., *Family Mediation in Canada: Implications for Women's Equality* (Ottawa: Status of Women Canada 1998) at 2.

13. But separating spouses are not akin to parties negotiating commercial contracts, equally able to exercise their freedom to contract in their own self-interests. In other contexts, the law has recognized systemic social differences in the positions of contracting parties, such as between employee and employer or insured and insurer, and has ensured that the legal framework governing such contractual relationships mitigates systemic inequalities in bargaining power. Such an approach enhances the ability of both parties to negotiate in their best interests. The systemic social differences between spouses at separation demonstrate that a legal framework that mitigates systemic inequalities in bargaining power is also desirable to guide judicial consideration of separation agreements.

Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 968 at para 31.
Somersall v. Friedman, [2002] 3 S.C.R. 109 at para 47.

14. Courts and commentators have recognized that the negotiation of separation agreements presents a unique set of circumstances and power relations as compared to the negotiation of commercial contracts. This recognition provides the foundation for developing an equitable legal

framework within which spouses may settle their financial affairs with adequate safeguards against exploitation of the systemic vulnerabilities of women relative to men on separation.

Miglin v. Miglin, 2003 SCC 24 at paras. 74-75 [*Miglin*].
Stark v. Stark (1990), 47 B.C.L.R. (2d) 99 at 4-5 (C.A.)(QL).
Brenda Cossman, "A Matter of Difference: Domestic Contracts and Gender Equality" (1990) 28 Osgoode Hall L.J. 303 at 313-317.
Penelope Bryan, "Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion," (1999) 47 Buffalo L. Rev. 1153.

(iii) Systemic Inequality of Women Affecting Separation Negotiations

15. Upon separation, there are at least three kinds of sex-based systemic disadvantage that detrimentally affect women's ability to negotiate in their own best interests: economic, informational, and psychological.

16. The significant economic disadvantage to women at separation is well-established. In its 1992 decision in *Moge*, this Court described the negative economic impact of divorce on women as "a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice." Studies referred to in that decision and subsequently affirm that, after separation, women's income persistently decreases by 20%-40%, while men's declines much less and may even increase.

Moge, *supra*, at 873-4; see also 853-873.
Anne-Marie Ambert, "Divorce: Facts, Causes and Consequences" in *Contemporary Family Trends* (Ottawa: Vanier Institute of the Family 2005) at 15.
Statistics Canada, " Family Income After Separation," by Diane Galarneau and Jim Sturrock (Summer 1997) 9(2) Perspectives on Labour and Income 18-28.

17. A woman's earning potential is often compromised because she is more likely to have custody of any children post-separation. Also, both during marriage and after separation, she is likely to have less income from employment or other independent sources than her spouse. The older a woman is at the time of separation, the more acute her economic vulnerability because she is less likely to be able to obtain or maintain employment or to have adequate pension income.

Statistics Canada, "Highlights," in *Women in Canada: A Gender-based Statistical Report, 5th ed.* (Ottawa: Statistics Canada 2006) [*Highlights*].

Lynn McDonald and A. Leslie Robb, "The Economic Legacy of Divorce and Separation for Women in Old Age" (Supplement 2004) 23 Canadian Journal on Aging S83 at S95.
Monica Townson, *Reducing Poverty Among Older Women: The Potential of Retirement Income Policies* (Ottawa: Status of Women Canada August 2000) at 1-4.

18. The systemic economic disadvantage experienced by women impairs their ability to negotiate in their own best interests. They may not have the funds to pay for legal advice, to obtain as extensive professional advice as their spouses, or to retain appropriate experts. Women's relative financial insecurity often makes them risk-averse, which is a significant disadvantage in negotiations. Present economic distress can compromise women's ability to protect their long-term economic interests.

Bryan, *supra* para. 14 at 1170-1181.
Marcia Neave, "Resolving the Dilemma of Difference: A Critique of the Role of Private Ordering in Family Law" (1994), 44 U. Toronto L.J. 97 at 99-110.

19. Many women are disadvantaged relative to their spouses with respect to the information they have about the financial affairs of the marriage. As the facts of this and other cases illustrate, many women who work in family businesses, even those who hold shares or other business or investment property, have less information than their spouses about the worth of these assets or the extent and nature of their ownership interests, and exercise no real control over them. This informational deficit impairs women's ability to negotiate both directly, because they have less knowledge than their husbands of the family property, and indirectly, in that they have less awareness of what matters should be explored or proposals made to achieve an agreement that is in their interests. Women tend to be less well informed than men about pensions and post-retirement economic needs.

"Highlights", *supra* para. 17.
Neave, *supra* para. 18 at 117.

20. Women also experience at least two kinds of systemic psychological disadvantage relative to men upon separation. First, a significant number of women experience spousal violence during the relationship, and the risk of violence increases with separation. The psychological effects of violence persist well past separation and seriously undermine a woman's ability to negotiate with her abuser. Few professionals are trained to recognize victims of spousal violence

or to understand the complex impact of violence on negotiation. Commentators have questioned whether it is ever possible to negotiate fairly against a backdrop of violence.

Canadian Centre for Justice Statistics "Spousal Violence After Marital Separation" by Tina Hotton 21(7) Juristat (Ottawa: Statistics Canada 2001) at 1.
Federal-Provincial-Territorial Ministers Responsible for the Status of Women, *Measuring Violence Against Women: Statistical Trends 2006* by Holly Johnson (Ottawa: Statistics Canada 2006) at 16-18.
Jane Murphy and Robert Rubinson, "Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens" (2005), 39 Fam. L. Q. 53 at 53-57

21. Second, research shows that many women are socialized to prioritize the interests of others over their own. For many women, values of cooperation, caring, and the preservation of relationships tend to predominate over their individual self-interest. This is especially true in family matters, particularly where children are involved. For example, Penelope Bryan describes the socialized tendencies of wives at separation as follows: trusting in their husbands and the justice of the legal system, a care orientation, lower status than their husbands, poor self-esteem, depression, having lower expectations and lacking assertive conflict resolution styles. Such a psychological orientation impairs many women's ability to perceive or act in their individual economic self-interest at separation.

Bryan, *supra* at para. 14 at 1181-1191
Barbara Bedont, "Gender Differences in Negotiations and the Doctrine of Unconscionability in Domestic Contracts" (1994) 12 Fam. L. Q. 21 at 35-41.

22. Women are typically in the position of claimants in divorce negotiations. Negotiation theory demonstrates that claimants are at a structural disadvantage, leading to generally poorer outcomes for women at separation, and exacerbation of the feminization of poverty. Game theory also demonstrates that women generally end up worse off than men in bargaining. Since women are widely expected to be more risk-adverse and to compromise, they tend to be less successful in negotiations. Greater risk aversion not only leads to a preference for a settlement, it also tends to undermine both bargaining position and resolve. Notwithstanding the advice of independent legal counsel, a more risk-averse party may accept less in a settlement than would be awarded by a court.

Martin, *supra* para. 11 at 138.
Gordon, *supra* para. 11 at 290-295.

Carol M. Rose, "Women and Property: Gaining and Losing Ground" (1992) 78 Virginia L. Rev. 421 at 421-23, 431-33.

23. The combined operation of these systemic economic, informational and psychological deficits puts women at a significant strategic disadvantage when negotiating a separation agreement. Marie Gordon details the impact on negotiation behaviour:

> Those with more experience in business transactions, those with higher self-esteem, those who embrace a competitive (as opposed to cooperative) model of dispute resolution, those who are comfortable with achievement-oriented behaviour, and those who acknowledge the legitimacy of "bluffing" as an expected component of successful negotiating behaviour will tend to engage in highly strategic behaviour. This sort of strategic behaviour will meet with most success on issues where the outcome is the least certain, and where the opposing party is most risk-averse.

Gordon, *supra* para. 11 at 292.

24. Thus, while consensual resolution holds the promise of a mutually agreeable settlement that minimizes expense and conflict, consideration of social context demonstrates that women as a class suffer systemic disadvantage that can impair their ability to bargain. Given this social context, the law must be particularly vigilant to ensure that the legal framework within which such negotiations occur is structured to ensure that bargaining is fair. Directing courts to intervene on common law grounds where there has been misrepresentation of financial information or where exploitation of a power imbalance has led to an unfair bargain provides a fair framework for negotiations and ensures that negotiated settlements do not exacerbate systemic sex-based vulnerabilities.

C. Judicial Intervention in Separation Agreements

25. Courts have narrowly delineated the grounds upon which the validity of contracts may be attacked in the commercial context. The unique circumstances of family law and development of the common law in accordance with *Charter* values requires an approach to the validity of domestic contracts that recognizes the systemic inequality of bargaining power between spouses.

Miglin, *supra* para. 14 at para. 82.

26. LEAF submits that, as many lower courts have done, this Court should recognize a duty upon spouses to act in utmost good faith, *uberrimae fidei*, in the negotiation of separation agreements:

> During the negotiations for a separation agreement and upon its execution, each spouse is under a duty to deal with the other in utmost good faith and this involves an obligation to make full disclosure of the existence and value of all assets held by him or her.

Swanson v. Swanson (1983), 34 R.F.L. (2d) 155 at para. 39 (B.C.S.C.) (QL).
Leopold v. Leopold (2000), 51 O.R. (3d) 275 at para. 102, 123-133 (S.C.J.) (QL).
Klassen v. Klassen 2001 BCCA 445 at paras. 62-63.
Lamers v. Lamers (1978), 6 R.F.L. (2d) 283 at para. 13 (Ont. H.C.) (QL).
Couzens v. Couzens (1982), 34 O.R. (2d) 87 at 3-4 (C.A.) (QL).
Schultz v. Schultz 2000 ABQB 866 at para. 37.

See also *Family Law Act*, R.S.O. 1990 s. 56(4)(a);
British Columbia *Rules of Court* r. 60D.

27. Provincial statutory property division regimes are explicitly premised on the presumed equal contributions of the spouses and their economic interdependence during the marriage. Consistent with these principles, the negotiation of property agreements must also be premised on the assumption that spouses have equal information about their assets and liabilities, and are negotiating on a level playing field. This Court's articulation of a spousal duty of good faith negotiation, both with respect to disclosure of financial information and the application of the doctrine of unconscionability, will provide a necessary correction to the systemic inequality of bargaining power between separating spouses and, thereby, promote sex equality.

(i) Material Misrepresentation of Financial Information Invalidates the Agreement

28. The failure to make full and accurate disclosure of assets is a pervasive and profoundly destructive feature of family law cases. In *Leskun v. Leskun*, this Court cited with approval the following passage:

> Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained women simply to give up and walk away with only a share of the assets they know about, taking with them

> the bitter aftertaste of a reasonably-based suspicion that justice was not done. Non-disclosure also has a tendency to deprive children of proper support.

Leskun v. Leskun 2006 SCC 25 at para. 34.
Cunha v. da Cunha (1994), 99 B.C.L.R. (2d) 93 (S.C.) at para. 9 [*Cunha*].

29. In *Cunha*, the BC Supreme Court recognized that it should not punish non-disclosure merely by an award of costs, and allow the division of assets to proceed based only on those assets that were known. Such a result would wrongly reward the non-disclosing party to the extent that he or she had successfully concealed assets.

Cunha, *supra* at para. 28 at para. 10.

30. Where the division of assets is achieved through a settlement agreement rather than a trial, the approach of the court should be no different. The failure to make full and accurate disclosure during negotiations where, as in this case, the party has actively concealed information or has knowledge that he has made a false statement is, to use the language of the common law tort of deceit, a fraudulent misrepresentation that has the effect of vitiating consent.

33. Courts will allow an action for deceit in civil cases even where a statement was true when it was first made, but becomes false to the defendant's knowledge before the agreement is entered into and the statement is not corrected by the defendant. In *Brownlie v. Campbell*, Lord Blackburn of the House of Lords said this:

> I quite agree in this, that whenever a man in order to induce a contract says that which is in his knowledge untrue with the intention to mislead the other side, and induce them to enter into the contract, that is downright fraud; .. I further agree in this: that when a statement or representation has been made in the bona fide belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on … upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly perservered in. That would be fraud too …

Brownlie v. Campbell (1880), 5 App. Cas. 925 at 950 (H.L.).
K.R.M. Construction Ltd. v. British Columbia Railway Co. (1982), 40 B.C.L.R. 1 at para. 62 (C.A.).

37. When considering the consequences that ought to flow from non-disclosure and misrepresentation, it is useful to refer to the general law of contract outside of the family law context. Intention to misrepresent is not necessarily required to set aside a contract. In cases of innocent misrepresentation, it has been held that even without fraud or any knowledge on the part of the wrongdoer that the representation made was false, the innocent party is entitled to rescind the contract.

Redican v. Nesbitt, [1924] S.C.R. 135 at 149.

38. Certainly, it should be no more difficult to set aside a family law contract for non-disclosure. A party to a matrimonial property dispute should not be granted any greater latitude than that which is afforded parties to an arm's length transaction. Indeed, given the duty of good faith, a separation agreement should be voidable even if a spouse makes no express representation, but knowingly takes advantage of the other spouse's incorrect financial assumptions.

Simpkins v. Simpkins (2004), 187 O.A.C. 325 at paras 20-23 (QL) [*Simpkins*].
Underwood v. Underwood (1995), 11 R.F.L. (4th) 361 (DivCt) (QL) [*Underwood*]
Montreuil v. Montreuil, [1999] O.J. No. 4450 at paras. 101-02 (S.C.J.) (QL)

39. In this case, the Respondent's failure to make full and accurate disclosure is not excused by the fact that, had the Appellant exercised due diligence, she might have discovered the true value of the assets and the existence of undisclosed assets. It is a well-settled doctrine of equity that if the wrongdoer has induced a party into a contract by a false representation, the contract will not be saved by the defence of due diligence. This principle applies equally to an order of the court. A finding of fraud vitiates both a contract induced by fraud and an order of the court, even if the fraud could have been established by due diligence. In *Meek v. Flemming*, the English Court of Appeal explained the principle:

> Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so) it would be wrong to allow him to retain the judgment thus unfairly procured ... Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials. In every case it must be a question of degree, weighing one principle against the other.

Meek v. Flemming, [1961] All E.R. 148 at 6 (C.A.) (QL).
Redgrave v. Hurd (1882), 20 Ch.D. 1 at 3-4 (C.A.) (QL).
Sager v. Manitoba Windmill Co. (1914), 23 D.L.R. 556 (S.C.C.) (QL).

40. In the present case, the Trial Judge found that the husband had failed to disclose certain assets (a finding that was not appealed), and that the valuation of the assets that the husband had provided throughout the various negotiations, including in a sworn statement, was unreliable and inaccurate.

41. On appeal, the Court did not express any concern about the husband's actions. It criticized (at paragraph 61) the Trial Judge's finding that the agreement was unconscionable as based on "inchoate obligation of the husband not to accept a proposal that was advantageous to him." It focussed on the fact that the wife made an offer during negotiations and asked rhetorically (at paragraph 58), "Should the husband have been obliged to tell the wife that her proposal was not enough and that she should demand more?"

42. With respect, LEAF submits that the answer to the Court of Appeal's question should have been "yes." The husband was under a positive legal obligation to act in utmost good faith. As a result, he was required to disclose all relevant information he had about the family's assets and liabilities, including any changes in their value. The Court of Appeal erred by blaming the wife in the face of the Trial Judge's finding that the husband misrepresented his financial circumstances to her.

43. The Court of Appeal's approach to the negotiations and to the $750,000 "offer" made by the wife ignores the circumstances surrounding those negotiations. In particular, it overlooks the fact that the offer was based on materially inaccurate information provided by the husband both with respect to the value of the assets disclosed and the existence of other undisclosed assets. Nor does the Court of Appeal anywhere address the fact that the offer was expressly described as "an equalization payment," which suggests an understanding that the payment would achieve an equal sharing of the family property.

44. The circumstances of this case illustrate the systemic economic, informational and psychological deficits faced by many women on marriage breakdown. Allowing the husband to benefit from an agreement that was premised on his misrepresentation, which he made no attempt to correct when he knew it was wrong, creates an incentive for others to do the same. This undermines the full and fair disclosure that is essential to the equitable division of family assets on separation. Such an approach runs contrary to the constitutional value of sex equality by exacerbating the systemic disadvantage of women and impairing their ability to achieve fair negotiated settlements.

45. The Court of Appeal's analysis effectively punished the wife for relying on her husband's information in circumstances where an arm's length negotiating party would likely have acted differently. The Court's approach failed to take any account of the social context in which separation agreements are negotiated, the systemic disadvantages facing women, or the circumstances of these particular individuals. Imposing a positive duty of disclosure on the spouse with relevant information about the marital property does not necessarily mean that an equal division of assets will "trump fairness," as the Court of Appeal worried (at paragraph 63). It merely ensures that both parties have the same information about those assets, alleviating a systemic gender-based disadvantage in a way that is consistent with principles of fairness, finality, and the value of sex equality.

(ii) An Unconscionable Agreement is Invalid

46. A separation agreement may be set aside as unconscionable if the claimant was in a vulnerable position at the time of contracting, and the other spouse took advantage of the situation to extract an unfair bargain. As recognized by this Court, the test for unconscionability should be less onerous in relation to separation agreements as compared to commercial contracts because of the unique circumstances in which such negotiations occur.

Miglin, *supra* para. 14 at para. 82.
Simpkins, *supra* para. 38 at para. 22.

47. Although women disproportionately experience vulnerabilities in relation to bargaining, there should be no presumption that women are incapable of negotiating valid separation

agreements. The court must scrutinize the individual circumstances of each case to determine whether there were circumstances of oppression or other vulnerabilities that vitiated a party's consent to the bargain. Although it is impossible to set out an exhaustive list, circumstances of vulnerability may include: a history of abuse prior to or during the marriage, or post-separation; a disability that impairs a spouse's ability to negotiate; a spouse's limited education or facility with the language of the agreement; a spouse's lack of business, legal or financial experience relative to the other spouse; and a spouse's poverty or inability to readily access funds.

Miglin, *supra* para. 14 at paras. 81-82.

48. In this case, the Trial Judge found (at paragraphs 26-27) that the Appellant was vulnerable based on psychiatric evidence that her "perception of reality [was] very significantly affected by an unhealthy condition of the mind." As noted by the Trial Judge (at paragraph 87), the husband himself testified that he knew the wife was mentally unstable when negotiations commenced, describing her as paranoid and delusional. The Court of Appeal (at paragraphs 49-52, 55) nevertheless declined to accept that the wife's "mental instability" put her in a weaker position relative to the husband, apparently on the basis that she had professional advice and decided not to act on her advisors' recommendations.

49. Quite apart from the question of when an appellate court is entitled to interfere with a trial court's findings of fact, LEAF submits that the Court of Appeal's determination that the Appellant's access to professional advice necessarily overcame any vulnerabilities is a misreading of this Court's judgement in *Miglin*.

50. In *Miglin*, the majority of this Court did <u>not</u> say that professional advice will always sufficiently correct for any vulnerabilities of a spouse; it only stated that such advice may have this effect in particular cases:

> … where vulnerabilities are not present, or are <u>effectively</u> compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation.

Miglin, supra para. 14 at para. 83 [emphasis added].

51. As *Miglin* recognizes, a separation agreement may be found to be unconscionable where a vulnerable spouse declined available professional assistance, or indeed, where a vulnerable spouse had legal advice and other expert assistance. Whenever vulnerabilities exist, the court must determine whether the spouse's vulnerability has been exploited leading to a substantively unfair agreement. The legal and other professional advice received by the vulnerable spouse is a factor to consider in making this determination; it is not an automatic guarantee that the bargain is not unconscionable.

52. Psychological harm, for example, from abuse, may prevent a spouse from understanding and acting on expert advice, including legal advice. In such cases, the effect is akin to the spouse not having had independent legal advice. In some jurisdictions, a domestic contract is invalid or unenforceable unless the parties had counsel. While the absence of independent legal advice will not invalidate a separation agreement at common law, such agreements should receive closer judicial scrutiny. The same level of scrutiny should be applied where a spouse's vulnerability has impaired his or her ability to understand or act on such advice.

Miglin, *supra* para. 14 at para. 218.
Simpkins, *supra* at para. 38 at para. 23.
Lang v. Lang 2003 MBCA 158 at para. 3.

53. The Court of Appeal also found that the Appellant was not vulnerable because she ostensibly offered the impugned bargain to the husband (at paragraphs 55-60). A spouse may be vulnerable, and have that vulnerability exploited, even if that spouse appears to be actively participating in negotiations and therefore does not conform to the image of a purely passive "victim" of an aggressor spouse. Given the spousal duty to negotiate in good faith, it is not acceptable to take advantage of a spouse, known to be vulnerable, who makes an improvident offer. If a spouse has known vulnerabilities, the party seeking to uphold the separation agreement has the onus to show that "his conduct throughout was scrupulously considerate of the other's interests." If the onus is not met, the court should find the contract invalid.

Mundinger v. Mundinger, (1968), 3 D.L.R. (3d) 338 at para. 7 (Ont. C.A.)
(citing B.E. Crawford, (1966) 44 Can. Bar Rev. 142 at 143).
Simpkins, *supra* at para. 38.
J. McLeod, "Annotation to Simpkins", 2004 CarswellOnt 2402 at 4 (W.L.)
Miglin, *supra* para. 14 at para. 82.

54. In the matrimonial property context, an unfair bargain should be scrutinized whenever a vulnerable complaining party receives substantially less than their presumptive legal entitlement. In *Miglin*, the Court contrasted spousal support with child support and division of family property. Spousal support is highly discretionary, rests on no social consensus and lacks any legislative scheme for calculation. However, entitlement to property, like child support, offers limited judicial discretion for deviation to respond to individual circumstances. Therefore, while wide latitude is warranted to spouses to determine what is "fair" in relation to spousal support depending on their unique family circumstances, there should be less room for deviation from statutory norms in relation to property sharing.

Miglin, *supra* para. 14 at para. 56.

55. Research demonstrates that only 6.2% of women obtain an order for spousal support at separation. The economic fate of dependent spouses often rests on an equal sharing of the fruits of the relationship through property division. Unfair property settlements may be particularly devastating to older women, and to women with children. The 91% of custodial mothers who do not obtain spousal support orders may still share in the income of former spouses through child support, but the quantum is variable and collection uncertain. Where there are sufficient assets, property settlements are a once-and-for-all opportunity for women to secure a measure of security for themselves and their children.

Marie Gordon, "What, Me Biased? Women and Gender Bias in Family Law" (2001) 19 C.F.L.Q. 53 at 76-77 and notes 69, 72.
Martin, *supra* para. 11 at 137.
Research Unit, Child Support Team, *Selected Statistics on Canadian Families and Family Law: Second Edition*, (Ottawa: Department of Justice Canada, 2000) at 25-26.

56. Thus, while spousal support invites a wide variety of possibly fair results, the division of property should generally track the statutory regime, unless there are compelling reasons for the parties to have agreed otherwise. Where one spouse has known vulnerabilities, it is particularly critical that the agreement reflect the statutory objective of equal sharing of the economic consequences of the relationship. In circumstances of vulnerability, where the agreement is substantially unfair, the bargain should be set aside as unconscionable. This will provide an incentive for spouses to act fairly towards each other consistent with the duty of good faith, will

reinforce the importance of the default equalization principle and the premise of economic interdependence, and will advance women's substantive equality.

(iii) Consent Order Does Not Bar Judicial Intervention

57. The Respondent concedes that a court may set aside a consent order if the underlying agreement is invalid on contract grounds. In this case, the Trial Judge held that the separation agreement was unconscionable. Since the consent order that dismissed the property claims was based on an invalid agreement, LEAF submits that the doctrine of *res judicata* has no application.

Monarch Construction Ltd. v. Buildevco Ltd. (1988), 26 C.P.C. (2d) 164 (Ont. C.A.) (QL).

58. Even in circumstances in which contracts are not voidable at common law, the presence of a consent order should not prevent judicial review where provided for by statute, as in s. 65 of the *Family Relations Act*. Like issue estoppel, *res judicata* is an equitable doctrine that must be exercised to achieve fairness according to the circumstances of each case:

> The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case.

Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44 at para. 33; see also paras. 19, 62-66.

59. In family law cases, LEAF submits that there should be no distinction between a consent order incorporating the terms of or arising from a separation agreement, and a separation agreement standing alone. In practice, consent orders frequently receive limited judicial examination; they are not a determination on the merits that should give rise to an estoppel. This approach accords with this Court's statement in *Miglin* that there should not be different treatment of agreements as compared to agreements incorporated into an order.

Miglin, *supra* para. 14 at para. 60.

60. Upon concluding that the separation agreement was invalid in this case, the Trial Judge held that rescission was unavailable because restitution was unavailable. LEAF submits that this is an overly strict approach and separation agreements should be rescinded in appropriate cases

even without complete restitution. Judges should ensure a fair distribution of family resources, making whatever order is necessary to appropriately alter the contract terms in the circumstances. As Justice Abella has noted, "fairness is the Holy Grail in family law." The courts should act to ensure that equitable principles, originally developed in relation to commercial contracts, are developed to do justice in family law matters, in accordance with *Charter* values and equalization principles.

DBS v. S.R.G. 2006 SCC 37 at para. 167, Abella J.
B. (J.F.) v. B. (M.A.) (2001), 203 D.L.R. (4th) 738, (Ont. C.A.)
leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 280.
Underwood, supra para. 38.
I.C.F. Spry, *The Principles of Equitable Remedies, 3rd ed.* (Toronto: Carswell 1984), at 25-26.

PART IV – COSTS

61. LEAF does not seek costs, and respectfully submits that no order for costs should be made against it.

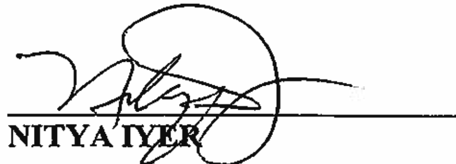
PART V – ORDERS SOUGHT

62. LEAF respectfully requests:

(a) that it be granted the right to make oral submissions at the hearing of this appeal; and

(b) that the appeal should be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF August, 2008.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PART VI: AUTHORITIES

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PART VII : LEGISLATION

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Note: Pursuant to Rules 42(2)(g) and 44(2(b) of the *Rules of the Supreme Court of Canada,* the excepts from the foregoing legislation are located in the Intervenor's Brief of Authorities.