

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

B E T W E E N:

NANCY RICK also known as NANC RICK

Appellant
(Respondent, Appellant on Cross-Appeal)

-and-

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

Respondents
(Appellants, Respondents on Cross-Appeal)

-and-

WOMEN'S LEGAL EDUCATION AND ACTION FUND

Proposed Intervener

**MOTION FOR LEAVE TO INTERVENE OF THE PROPOSED
INTERVENER, WOMEN'S LEGAL EDUCATION AND ACTION FUND
(Pursuant to Rules 47 and 55-59 of the Rules of the Supreme Court of Canada)**

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Court File No. 32098

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

B E T W E E N:

NANCY RICK also known as NANC RICK

Appellant
(Respondent, Appellant on Cross-Appeal)

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(Appellants, Respondents on Cross-Appeal)

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WOMEN'S LEGAL EDUCATION AND ACTION FUND

Proposed Intervener

NOTICE OF MOTION FOR LEAVE TO INTERVENE
(Pursuant to Rules 47 and 55-59 of the Rules of the Supreme Court of Canada)

TAKE NOTICE that the Women's Legal Education and Action Fund (LEAF) hereby applies to a Judge of this Court, at a date to be fixed by the Registrar pursuant to Rules 55-59 of the *Rules of the Supreme Court of Canada*, for an order granting leave to intervene in the present appeal, to file a factum of not more than twenty (20) pages, and leave to present oral arguments not exceeding fifteen (15) minutes, or such further or other Order that the said Judge may deem appropriate.

AND FURTHER TAKE NOTICE that the said motion shall be made on the following grounds:

BACKGROUND OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)

1. LEAF is a national, federally incorporated, non-profit organization founded in April 1985 to advance the equal rights of women and girls in Canada as guaranteed by the Canadian *Charter of Rights and Freedoms* (the "*Charter*"). To this end, LEAF engages in equality rights litigation, research, and public education.

2. As an intervener, LEAF will provide a unique perspective and expertise on the public interest issues raised in this appeal because:

- a) it represents a diversity of women across Canada;
- b) it has particular expertise concerning family law and equality law; and
- c) it has particular expertise concerning the systemic discrimination experienced by women in the practice of family law in Canada.

LEAF'S PAST INVOLVEMENT IN PUBLIC INTEREST AND HUMAN RIGHTS LITIGATION

3. The Supreme Court of Canada has granted LEAF leave to intervene to make written and oral equality arguments in numerous cases: *The Queen v. Canadian Newspapers Co.*, [1988] 2 S.C.R. 122; *The Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 892; *Borowski v. The Attorney General of Canada*, [1989] 1 S.C.R. 342; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Janzen and Govereau v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *The Queen v. Keegstra*, [1990] 3 S.C.R. 697; *Taylor v. The Canadian Human Rights Commission*, [1990] 3 S.C.R. 892; *Sullivan v. The Queen*, [1991] 1 S.C.R. 489; *Seaboyer v. The Queen*, [1991] 2 S.C.R. 577; *Canadian Council of Churches v. The*

Queen, [1992] 1 S.C.R. 236; *Butler v. The Queen*, [1992] 1 S.C.R. 452; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *M.(K) v. M (H)*, [1992] 3 S.C.R. 6; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Conway v. The Queen*, [1993] 2 S.C.R. 872; *R. v. M.L.M.*, [1994] 2 S.C.R. 356; *Whitley and Mowers v. The Queen*, [1994] 3 S.C.R. 82; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *O'Connor v. The Queen*, [1995] 4 S.C.R. 411; *L.L.A. v. Beharriell*, [1995] 4 S.C.R. 536; *Goertz v. Gordon*, [1996] 2 S.C.R. 27; *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624; *Winnipeg Child and Family Services v. G.(D.F.)*, [1997] 3 S.C.R. 925; *Vriend v. Alberta*, [1998] 1 S.C.R. 3; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *M. v. H.*, [1999] 2 S.C.R. 3; *J.G. v. Minister of Health and Community Services*, [1999] 3 S.C.R. 46; *BCGSEU v. British Columbia (Public Service Employee Relations Commission)*, [1999] 3 S.C.R. 3; *L.C. v. Mills*, [1999] 3 S.C.R. 668; *British Columbia Human Rights Commission v. Blencoe*, [2000] 2 S.C.R.; *R. v. Darrach*, [2000] 2 S.C.R. 443; *R. v. Shearing*, [2002] 3 S.C.R. 33; *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees (NAPE)*, [2004] 3 S.C.R. 381; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657; and *Barney v. Canada and the United Church of Canada*, [2005] S.C.J. No. 59. LEAF also intervened as an added party before this Court in *Schachter v. The Queen*, [1992] 2 S.C.R. 679. Another recent intervention was in *Dickie v. Dickie* [2007] 1 S.C.R. 346, 2007 SCC 8. Finally, late last year LEAF also intervened before this Court and is still awaiting judgment in the *Keays v. Honda Canada Inc.*, [2007] O.J. No. 1151.

4. LEAF has developed and argued approaches to equality law in contexts where sex inequality must be understood in relation to other prohibited grounds of discrimination such as race, class, aboriginal status, sexual orientation, and/or disability, as well as socio-economic conditions such as poverty. LEAF has analyzed the relationship between equality guarantees, the guarantee of life, liberty and security of the person, and other sections of the *Charter* as they arise in these cases.

implications of this appeal for Canadian women generally, not on the specific facts relating to the appellant or the respondent. LEAF will argue that the Court of Appeal's decision compounds the women's experience of systemic inequality as a result of marriage breakdown, and fails to address substantive equality rights and dignity interests of women as provided for in the *Charter of Rights and Freedoms*.

LEAF'S PROPOSED POSITION IN THIS APPEAL

10. LEAF is concerned with the feminization of poverty that characterizes relationship breakdowns in Canada and advocates that the law be applied to address this concern. In particular, LEAF will argue that the law should not be applied so as to encourage or facilitate a lack of full financial disclosure in family breakdown situations, or so as to disadvantage those who make full financial disclosure relative to those who do not.. LEAF's position will be that fairness, particularly in relation to financial disclosure, should not be sacrificed to finality. LEAF's expertise on the diverse groups of disadvantaged persons potentially affected by this appeal will inform LEAF's submissions.

11. If granted leave to intervene, LEAF anticipates that it will make the following submissions in this appeal:

- i) that the issues under appeal relate to the systemic discrimination experienced by women within the family law system, including the feminization of poverty upon relationship breakdown;
- ii) the application of *Charter* values and the principles of equality to the specific context of family law has been endorsed by this Court;
- iii) the application of a *Charter* values approach must include an analysis of the systemic vulnerabilities, and disadvantages that often underlie family law contracts, and which have the potential to result in unfair and ultimately unreliable settlements of family law issues;

iv) There should be significant repercussions for the withholding of full financial disclosure, including that there will be no presumption of deference to a family law contract that is based on a lack of full disclosure;

v) In assessing the finality of an agreement, the court should be alive to the conditions of the parties including whether there is evidence that, during the history of the relationship or the course of negotiations there were circumstances of oppression, pressure or other vulnerabilities, such as:

- a) lack of knowledge or access to the extent or value of family assets;
- b) abusive and/or dominant relationships;
- c) mental illness;
- d) disability or illness;
- e) inequality of education;
- f) inequality of knowledge about the legal system or the law;
- g) inequality of access to legal advice;
- h) inequality of financial resources;
- i) the withholding of access to children; and,
- j) a combination of these or other factors

and evidence of this nature should rebut the presumption of equality that is the basis for deference to the contract, and trigger a review of its substantive fairness.

vi) Parties and their legal counsel should be alive to the possibility that domestic contracts may be reviewed by the courts if advantage is taken of any of the above vulnerabilities; and,

vii) Access to legal advice should not be considered sufficient to ensure fairness of the process, or to prevent the review of the substantive fairness of a contract, where other vulnerabilities are found to be present.

ORDER REQUESTED

12. LEAF respectfully requests an order granting it leave to intervene in the present appeal for the purposes of presenting arguments by way of a factum and oral submissions according to the following terms:

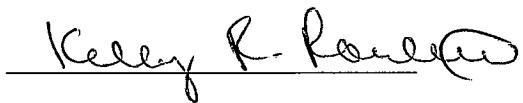
- a) LEAF will accept the record as is and will not file any additional evidence;
- b) LEAF will serve and file a factum of no more than 20 pages on such date as the Court may determine to be appropriate;
- c) LEAF will make oral submissions of no more than 15 minutes; and
- d) LEAF will not seek costs nor will costs be awarded against it.

AND FURTHER TAKE NOTICE that the following documentary evidence shall be submitted in support of this motion:

- 1. Affidavit of Zahara Suleman, sworn April 23rd, 2008;
- 2. Such further and other evidence as this Honourable Court may permit.

Dated at Vancouver, British Columbia this 23rd day of April, 2008.

SIGNED BY



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TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

AND TO:

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Respondents**

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is

filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.

3. LEAF seeks to intervene in this appeal on the basis that its special knowledge and expertise with respect to the issues in this case will be helpful to the Court.

BACKGROUND OF THE PROPOSED INTERVENER

4. LEAF is a national, federally incorporated, non-profit organization founded in April, 1985 to advance the equal rights of women and girls in Canada as guaranteed by the Canadian *Charter of Rights and Freedoms* (the "*Charter*"). To this end, LEAF engages in equality rights litigation, research, and public education.

5. As an intervener, LEAF would be able to provide a unique perspective and particular expertise on the public interest issues raised in this appeal because:

- a) it represents a diversity of women across Canada;
- b) it has particular expertise concerning family law and equality law; and,
- c) it has particular expertise concerning the systemic discrimination experienced by women through the practice of family law in Canada.

LEAF'S PAST INVOLVEMENT IN PUBLIC INTEREST AND HUMAN RIGHTS LITIGATION

6. The Supreme Court of Canada has accepted LEAF's intervention applications to make equality arguments in numerous cases, allowing both written and oral submissions, including: *The Queen v. Canadian Newspapers Co.*, [1988] 2 S.C.R. 122; *The Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 892; *Borowski v. The Attorney General of Canada*, [1989] 1 S.C.R. 342; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Janzen and Govereau v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *The Queen v. Keegstra*, [1990] 3 S.C.R. 697; *Taylor v. The Canadian Human Rights Commission*, [1990] 3 S.C.R. 892; *Sullivan v. The Queen*, [1991] 1 S.C.R. 489; *Seaboyer v. The Queen*, [1991] 2 S.C.R. 577; *Canadian Council of Churches v. The Queen*, [1992] 1 S.C.R. 236; *Butler v. The Queen*, [1992] 1 S.C.R. 452; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *M.(K) v. M*

(*H*), [1992] 3 S.C.R. 6; *Moge v. Moge*, [1992] 3 S.C.R. 813; *Conway v. The Queen*, [1993] 2 S.C.R. 872; *R. v. M.L.M.*, [1994] 2 S.C.R. 356; *Whitley and Mowers v. The Queen*, [1994] 3 S.C.R. 82; *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627; *O'Connor v. The Queen*, [1995] 4 S.C.R. 411; *L.L.A. v. Beharriell*, [1995] 4 S.C.R. 536; *Goertz v. Gordon*, [1996] 2 S.C.R. 27; *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624; *Winnipeg Child and Family Services v. G.(D.F.)*, [1997] 3 S.C.R. 925; *Vriend v. Alberta*, [1998] 1 S.C.R. 3; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *M. v. H.*, [1999] 2 S.C.R. 3; *J.G. v. Minister of Health and Community Services*, [1999] 3 S.C.R. 46; *BCGSEU v. British Columbia (Public Service Employee Relations Commission)*, [1999] 3 S.C.R. 3; *L.C. v. Mills*, [1999] 3 S.C.R. 668; *British Columbia Human Rights Commission v. Blencoe*, [2000] 2 S.C.R.; *R. v. Darrach*, [2000] 2 S.C.R. 443; *R. v. Shearing*, [2002] 3 S.C.R. 33; *Newfoundland (Treasury Board) v. Newfoundland Association of Public Employees (NAPE)*, [2004] 3 S.C.R. 381; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657; and *Barney v. Canada and the United Church of Canada*, [2005] S.C.J. No. 59. LEAF also intervened as an added party before this Court in *Schachter v. The Queen*, [1992] 2 S.C.R. 679. Another recent intervention was in *Dickie v. Dickie*, [2007] 1 S.C.R. 346, 2007 SCC 8. 1. Finally, late last year LEAF also intervened at the SCC and is still awaiting judgment in the *Keays v. Honda Canada Inc.*, [2007] O.J. No. 1151.

7. Commencing with work in *Andrews*, LEAF has contributed to the development of the meaning of substantive equality and equality rights jurisprudence in Canada. LEAF has also developed and argued approaches to equality law in contexts where sex inequality is compounded by other prohibited grounds of discrimination such as race, class, aboriginal status, sexual orientation, poverty and/or disability. As well, LEAF's arguments have included an analysis of the issues regarding the relationship between equality guarantees, the guarantee of life, liberty and security of the person, and other sections of the *Charter*.

8. Central to LEAF's mandate and legitimacy as a national, equality rights organization is our commitment to work on a consultative and collaborative basis to ensure that all LEAF arguments are informed by the diversity of women's experiences in Canada. The consultative

process ensures that LEAF's arguments are as inclusive as possible, and that the organization maintains its accountability to its constituency – the women of Canada.

9. The opportunity for LEAF to intervene before the Court in equality related cases such as the case under appeal is an excellent way to provide access to justice for disadvantaged persons, such as women.

10. LEAF's work is made possible by the following sources: government funding, individual private donors, corporations, and foundations. None of the government funds received are used for the payment of court costs.

INTEREST AND EXPERTISE OF THE PROPOSED INTERVENER

11. This appeal concerns the issue of the factors a court takes into consideration when making a determination of whether or not a family law agreement is unconscionable. It also involves the issue of whether legal representation effectively mitigates a power imbalance, thus making a potentially "unconscionable" agreement effectively immune from court review and variation.

12. LEAF is interested in this appeal because the perspective that it proposes to bring to the appeal will not otherwise be represented by the individual parties in the appeal. LEAF is interested in the equality implications of this appeal as they will affect women, and possibly men, across Canada, and not the specific facts as they relate to either the appellant or the respondent.

13. LEAF is concerned with family law issues because of the gender discrimination that often gets perpetuated within family law. Over 50 percent of the issues and cases brought to LEAF's attention involve women and some aspect of family law. This number is indicative of how family law affects many women of varying socio-economic backgrounds. This has enhanced LEAF's knowledge and expertise on the affect of settlement agreements on women experiencing a range of socio-economic issues and circumstances.

14. LEAF has intervened before this Court in the following family law cases: *Moge v. Moge*; *The Queen v. Thibaudeau*; *Goertz v. Gordon*; *M. v. H.*; *Boston v. Boston*; and *Dickie v. Dickie* [2007] (*supra*). LEAF also intervened before the Ontario Divisional Court in *Albrecht v. Albrecht* (1990), 31 R.F.L. (3d) 325.

15. LEAF has interest and expertise on how negotiated family law agreements have the potential to disadvantage women and children, and to leave women at an increased risk of poverty and disadvantage following relationship breakdown.

16. LEAF's expertise in this area includes:

- a) Insight into the consequences for a wide range of women in varying personal and economic situations when unconscionable contracts are not remedied through the judicial system; and
- b) the application of a Charter values approach to the interpretation and incremental development of the common law.

THE CASE AT BAR

17. This appeal demonstrates how unequal bargaining power between men and women in a situation of relationship breakdown, and the presence of an unconscionable or unfair contract, can compromise the outcome and integrity of a separation agreement. For example, the fairness of the negotiation process is undermined when one party withholds financial information. Research demonstrates that men disproportionately exercise control over family financial resources. It also indicates that access to legal advice does not always correct this inequality, particularly when the party's actual access or receipt of legal advice is significantly different. This inequality is further exacerbated when other vulnerabilities exist such as an abusive relationship, mental illness, lack of education, and lack of business experience. The magnitude

of the problem is significant and its adverse effect on women and children can be devastating, both in its economic and in its psychological consequences for women.¹

PROPOSED LEGAL ARGUMENT

18. If permitted to intervene, LEAF will argue that the issues in this appeal must be resolved consistently with constitutional equality principles, through an analysis of the impact of women's sex inequality in the context of relationship breakdown.

The Interpretation and Application of the Law in Compliance with s. 15 *Charter* Values:

19. This appeal is about the factors courts should consider when family agreements come before them. It is predominantly women, and their children, who are disadvantaged when ex-spouses enter into separation agreements that are unconscionable. For example, where one spouse wilfully withholds financial records during the negotiation of such agreements, the agreement might be rendered an unconscionable one. In this appeal, the Court must determine when a separation agreement is unconscionable, and the consequences of such an unconscionable contract. Specifically, is the unquestionably important principle of finality outweighed by the equally important principle of fairness in such situations? LEAF will argue that it is.

20. Just as *Charter* rights can be used to challenge legislation, *Charter* values can be used to support the appropriate incremental development of the common law. In *Hill v. Church of Scientology*, Justice Iacobucci stated:

It is clear from *Dolphin Delivery*, *supra*, that the common law must be interpreted in a manner which is consistent with *Charter* principles. This obligation is simply a

¹ Bernadette Landry, "What Comes First? A Report on the Payment of Support Orders in New Brunswick" (Fredericton: New Brunswick Advisory Council on the Status of Women, 1990); Carol Rogerson, "Women, Money and Equality: The Background Issues" in *Equality Issues in Family Law: Considerations for Test Case Litigation*, Karen Busby et al eds. (Winnipeg: Legal Research Institute of the University of Manitoba, 1990); Alderson-Gill Associates Consulting Inc., "Research on Compliance with Child Support Orders and Agreements in Prince Edward Island", Department of Justice, Canada, April, 2006, available at: <http://canada.justice.gc.ca/en/ps/sup/pub/2003-FCY-1/2003-FCY-1.html>

manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values.”²

21. The abuse of the family law system by those who, for example, withhold financial information often constitutes a continuation of power and control exercised by men in the personal relationship that has broken down. It constitutes a form of systemic discrimination against women when the legal system allows for the perpetuation of this abuse.

22. LEAF will argue that a more comprehensive understanding of the experience of the inequality of women within the family law context is necessary to the resolution of the issues in this appeal (for example, the appropriate understanding of when a separation agreement is unfair or unconscionable) in order that the law operate consistently with *Charter* values.

23. In *Miglin*³, this honourable court recognized that there is a significant public interest in ensuring that negotiated settlements are not pursued “with ...a vengeance”.

...we are of the view that there is nevertheless a significant public interest in ensuring that the goal of negotiated settlements not be pursued, through judicial approbation of agreements, with such a vengeance that individual autonomy becomes a straitjacket. Therefore, assessment of the appropriate weight to be accorded a pre-existing agreement requires a balancing of the parties’ interest in determining their own affairs with an appreciation of the peculiar aspects of separation agreements generally and spousal support in particular.⁴

LEAF proposes to argue that the equality interests of women be a consideration in the balancing of parties’ interests, as underlined in *Miglin*.

24. In addition, in the two most recent decisions before the court, *Miglin* and *Hartshorne*⁵, as in this case, the court was faced with fact situations of comparatively high-income individuals.

² *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130, at para. 91.

³ *Miglin v. Miglin* [2003] S.C.C. 24

⁴ *Ibid.* para. 67

⁵ *Hartshorne v. Hartshorne*, [2004] S.C.C. 22

LEAF proposes to provide the court with an approach that sets the women's equality interests into the full spectrum of women's family law experience. To that end, LEAF's expertise on the range of family law issues that arise when settlements are negotiated adds a range of voices to the public interest demanded by the exercise outlined in *Miglin*.

25. This Court has recognized that, "The primary policy objective guiding the courts' role in a division of property on marital breakdown in British Columbia is fairness."⁶ LEAF will argue that an unfair separation agreement should not be enforceable, and that courts should consider the circumstances surrounding the agreement's negotiation and execution in assessing its fairness.

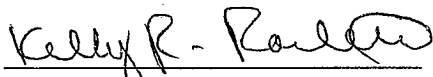
26. LEAF is concerned with family law issues because gender discrimination often gets perpetuated within family law. Over 50 percent of the issues and cases brought to LEAF's attention through our system involve women and some aspect of family law. LEAF's engagement reveals that many women experience male violence at separation; some are terrorized by men threatening sole custody; and many women are emotionally and financially overwhelmed. This Court has emphasized that choice is a critically important value, but in some circumstances, women do not exercise real "choice" in relation to the terms of a separation agreement. Women require recourse to the courts to override unfair property settlements to avoid poverty for themselves and, since women overwhelmingly have custody, to provide a measure of financial security for their children. Determining whether an agreement is unfair requires consideration of whether there are power imbalances. There should not be an assumption of equality of bargaining power in a context of systemic gender inequality.

27. *Charter* values require that judges exercise their discretion to vary or set aside family law agreements that have been negotiated and drafted in a way that renders them unfair or unconscionable.

⁶ *Ibid.* at para. 34.

28. This affidavit is made in support of a motion by LEAF for leave to intervene as a friend of the Court, to file a factum, and to present oral argument and for no other or improper purpose.

SWORN BEFORE ME at the City of
Vancouver, in the Province of
British Columbia, this 23rd day
of April 2008.



A Commissioner for taking
Affidavits in British Columbia

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