

Sample appeal factum: Facts

Court File No. 31350

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

B E T W E E N:

LEAKA HELENA DELIA DICKIE

Appellant (Respondent)

– and –

KENNETH EARLE DICKIE

Respondent (Appellant)

**FACTUM OF THE APPELLANT,
LEAKA HELENA DELIA DICKIE**

PART I – STATEMENT OF FACTS

A. Introduction

1. Dr. and Mrs. Dickie, husband and wife, lived in Sarnia, Ontario. Some time later, Dr. Dickie left his wife and fled to the Bahamas. He also left behind Scott, Erin and Mark, his children. Most of the family's assets, however, did not stay behind. Dr. Dickie took them to the Bahamas.
2. Ontario Courts made support orders against Dr. Dickie. But Dr. Dickie ignored them all, hurting his family which, by the time of Dr. Dickie's default, had moved to St. Albert, Alberta.
3. In St. Albert, necessities were sacrificed: for example, no more educational and special needs assistance for the children. In the Bahamas, luxury was enjoyed: for example, lots of playthings like a black Porsche, a white Mercedes sports car and a jet boat scattered around a leafy, waterside estate.

4. A little later, Dr. Dickie came back briefly to Ontario. The Ontario Superior Court of Justice found him in contempt and punished him with imprisonment. Dr. Dickie appealed to the Court of Appeal for Ontario, seeking to set aside the finding of contempt. Yet he continued to defy all court orders against him. Having done no justice and having flouted justice, he came to the Court of Appeal seeking justice.

5. The majority of the Court of Appeal for Ontario had a choice. It could have adjourned his appeal until he obeyed all of the outstanding court orders against him. It didn't make that choice.

6. Dr. Dickie won in the Court of Appeal. In the face of plenty of case law against his position and despite the fact that continued to defy orders of the court, the Court of Appeal found that he could not be punished for contempt. Dr. Dickie even won his costs of the appeal.

7. Mrs. Dickie now appeals. She submits that Dr. Dickie's appeal should not have been heard. She also submits that the courts' contempt power is not as limited as the Court of Appeal for Ontario found.

B. Background facts

8. Dr. and Mrs. Dickie were married in 1979 and had three children: Erin (21), who is learning disabled, Mark (23) and Scott (18). Dr. and Mrs. Dickie separated in 1991 and were divorced in 1994.

Reasons of the Court of Appeal for Ontario, paras. 5 and 67; *Appellant's Record*,
Tab 6

C. Economic dependence of the family on Dr. Dickie

9. Dr. Dickie was a highly successful cosmetic plastic surgeon in Sarnia, Ontario. In 2000, his income was \$915,000; in 2001, his income was \$656,000. Mrs. Dickie was a registered nurse. She stopped working full-time when the couple's first child was born. Today, she and the children are "almost entirely dependent on [Dr. Dickie] for support".

Reasons of the Court of Appeal for Ontario, paras. 6, 68 and 70; *Appellant's Record*, Tab 6

10. After the parties separated, Dr. Dickie paid support under the terms of a separation agreement made in 1993. Spousal support lapsed under that agreement on May 1, 2001, after which Mrs. Dickie applied for more support.

Reasons of the Court of Appeal for Ontario, paras. 7-9 and 69; *Appellant's Record*, Tab 6

D. Mrs. Dickie applies for child support and spousal support

11. In response to Mrs. Dickie's application, on July 5, 2001, the Ontario Superior Court of Justice (*per* Kiteley J.) ordered interim support, retroactive support and ongoing child support in accordance with the *Guidelines*. Effective January 1, 2001 and until trial, Her Honour ordered Dr. Dickie to pay child support of \$9,047.42 per month and spousal support of \$2,500.00 per month.

Reasons of the Court of Appeal for Ontario, paras. 10 and 70; *Appellant's Record*, Tab 6

E. The anonymous letter

12. In late June 2002, Mrs. Dickie received an anonymous letter: “Ken Dickie is secretly preparing to flee the country within a couple of weeks, to the Bahamas, where he chooses to avoid all Canadian laws that are not to his liking”.

Reasons of the Court of Appeal for Ontario, para. 71; *Appellant’s Record*, Tab 6

F. Dr. Dickie flees the country with the assets to avoid his obligations to his family

13. Four days after receiving the anonymous letter, Mrs. Dickie learned that Dr. Dickie moved to the Bahamas, breaching an undertaking he had given. Mrs. Dickie brought an urgent motion to restrain Dr. Dickie from dealing with his RRSPs. She also applied for an order that the child support and the spousal support be paid from the proceeds of Dr. Dickie’s home in Sarnia. But she was too late. Dr. Dickie had cashed his RRSPs and took the proceeds. He also had mortgaged his home to the hilt, allowing the bank to have priority over the proceeds to the extent of the loan.

Reasons of the Court of Appeal for Ontario, paras. 11, 13 and 73-74; *Appellant’s Record*, Tab 6

14. All Mrs. Dickie and her children could get from Dr. Dickie was one month’s support. The Bahamas does not have legislation permitting reciprocal enforcement of judgments. Accordingly, Mrs. Dickie and her children were powerless to enforce their support order. The inference that Dr. Dickie moved to the Bahamas “to frustrate Kiteley J.’s order, and to avoid his obligation to support his children and former wife, is overwhelming”.

Reasons of the Court of Appeal for Ontario, paras. 74-75; *Appellant’s Record*, Tab 6

G. Mrs. Dickie seeks security for the payment of support

15. In December 2002, Mrs. Dickie sought help from the Ontario Superior Court of Justice. Greer J. made two orders: for Dr. Dickie to provide an irrevocable letter of credit in the amount of \$150,000 to secure his child and spousal support obligations, and for Dr. Dickie to provide security for costs in the amount of \$100,000, which amount was to be held in an interest bearing account by Mrs. Dickie's solicitors pending further order.

Reasons of the Court of Appeal for Ontario, paras. 12 and 76; *Appellant's Record*, Tab 6

H. Legitimate means of challenge not pursued

16. Dr. Dickie had a right to appeal the original court orders of Kiteley J. for spousal and child support. Dr. Dickie had a right to appeal the court orders of Greer J. He could have moved to vary or stay any of these court orders. He did none of these things. He simply chose to disobey both courts and, instead, flout their orders. Dr. Dickie has never explained his conduct.

Reasons of the Court of Appeal for Ontario, para. 14; *Appellant's Record*, Tab 6

I. The contempt motion

17. In June 2003, Mrs. Dickie brought a motion for contempt of the orders of Greer J. On January 28, 2004 the Ontario Superior Court of Justice, *per* Stewart J., held Dr. Dickie in contempt. Dr. Dickie was given a month to purge his contempt. Dr. Dickie did not do so. On February 26, 2004, Stewart J. conducted the penalty phase of the contempt proceedings and Dr. Dickie was present in Court. After hearing the parties' submissions, Stewart J. ordered that Dr. Dickie be jailed for 45 days and pay costs in excess of \$16,000. Dr. Dickie served his sentence. He then launched an appeal to the Court of Appeal for Ontario. The judgment of the Court of Appeal is the judgment from which the Applicant, Mrs. Dickie, appeals.

Order and Reasons for Judgment of Stewart J. dated January 28, 2004;
Appellant's Record, Tabs 2-3

Order and Reasons for Judgment of Stewart J. dated February 26, 2004;
Appellant's Record, Tabs 4-5

Reasons of the Court of Appeal for Ontario, para. 14; *Appellant's Record*, Tab 6

18. At the time of the hearing in the Court of Appeal, Dr. Dickie had not complied with the support orders of Kiteley J., had not complied with the security orders of Greer J., had not complied with the order for costs made by Stewart J. and had offered no valid explanation for his conduct. He continued his non-compliance – with grave effects on his children and Mrs. Dickie.

Reasons of the Court of Appeal for Ontario, paras. 23, 77 and 80-82; *Appellant's Record*, Tab 6

J. Effects of Dr. Dickie's non-compliance

19. The effects of Dr. Dickie's non-compliance are tragic. Dr. and Mrs. Dickie's two eldest children, Erin and Mark, stopped their education because they could not afford it. Tragically, Erin, who has a learning disability, dropped out of high school because she could not continue without a special needs tutor. The youngest child, Scott, also needed a tutor. The children and Mrs. Dickie, deprived of the support that the court has ordered, had no money to hire tutors. Extracurricular activities for the children have simply been out of the question. Mrs. Dickie has depleted all of her RRSPs and has no savings left. She is now even at risk of losing the family home. (See Reasons of the Court of Appeal for Ontario, para. 78; *Appellant's Record*, Tab 8). While the lives of Mrs. Dickie, Erin, Mark and Scott spiral down into tragedy:

- Dr. Dickie lives under the palm trees in a beautiful large two story home in Freeport, Bahamas (Pictures 1 and 12; *Appellant's Record*, Tab 8H).
- Dr. Dickie lives in a home with attractive, comfortable luxury furnishings (Pictures 4, 6 and 7; *Appellant's Record*, Tab 8H).

- His home is surrounded by a spacious, leafy, well-tended estate (Pictures 8, 10, 11, 12 and 13; *Appellant's Record*, Tab 8H).
- The estate is behind a large gate (Picture 9; *Appellant's Record*, Tab 8H) and has a beautiful view of the water (Picture 4; *Appellant's Record*, Tab 8H).
- That beautiful view of the water can be seen from a gorgeous, sunny deck (Picture 5; *Appellant's Record*, Tab 8H).
- And even away from the deck, life is good (Picture 14; *Appellant's Record*, Tab 8H).
- Armed with a RBC Visa credit card with a credit limit of \$75,000, Dr. Dickie visited the Great Abaco Beach Hotel, the Dolphin Beach Resort and Tranquility Beach in the space of just one week (Affidavit of Leaka Helena Delia Dickie, para. 7; *Appellant's Record*, Tab 8).
- Dr. Dickie can tour Freeport, Bahamas in his black Porsche (Pictures 2 and 3; *Appellant's Record*, Tab 8H) or a white Mercedes sports car convertible (Picture 15; *Appellant's Record*, Tab 8H) or, when he is tired of land, he has options: he can rent a boat (Affidavit of Leaka Helena Delia Dickie, para. 7; *Appellant's Record*, Tab 8), use his own jet boat or scoot around on his own "sea-doo" (Reasons of the Court of Appeal for Ontario, para. 79; *Appellant's Record*, Tab 6).

K. The majority of the Court of Appeal rules in favour of Dr. Dickie and awards \$15,000.00 in costs against Mrs. Dickie

20. Dr. Dickie appealed from the contempt orders of Stewart J. He argued that the contempt power exercised by Stewart J. was not available because the order of Greer J. was an order for “the payment of money”. Ontario Rule 60.11, a rule similar to that of other Canadian jurisdictions, prohibits the use of the contempt power for “the payment of money”.

See also, to similar effect, Ontario’s *Family Law Rules*, O.Reg. 114/99, r. 31

21. Mrs. Dickie submitted in the Court of Appeal that that Court had the discretion not to entertain Dr. Dickie’s appeal until he complied with the orders of Greer J. Further, Mrs Dickie submitted that the contempt power exercised by Stewart J. was available in this case, as the order of Greer J. was not an order for “the payment of money”.

22. The majority of the Court of Appeal entertained the appeal despite Dr. Dickie’s flouting of all of the court orders made against him and the terrible effects wrought upon Mrs. Dickie and her family. Further, the majority of the Court of Appeal for Ontario accepted Dr. Dickie’s submissions, holding that Stewart J. did not have jurisdiction to exercise the contempt power under Rule 60.11. The majority of the Court of Appeal ordered \$15,000 costs against Mrs. Dickie.

Reasons of the Court of Appeal for Ontario, paras. 1-64; *Appellant’s Record*, Tab
6

23. The majority of the Court of Appeal made no critical comment respecting Dr. Dickie’s non-compliance with the court orders in this case.

24. Laskin J.A. dissented. He held that the Court of Appeal should have adjourned the hearing of the appeal until Dr. Dickie complied with the orders of Greer J. On the merits of the appeal, he held that the finding of contempt was correct because the order of Greer J. – an order that Dr. Dickie secure his support obligations by an irrevocable letter of credit and that he post

security for costs – did not impose a fixed debt obligation upon Dr. Dickie to pay money to Mrs. Dickie and so it was not an order for “the payment of money” within the meaning of Rule 60.11.

Reasons of the Court of Appeal for Ontario, paras. 65-125; *Appellant’s Record*, Tab 6

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

25. This appeal raises the following two issues:

ISSUE ONE: Should a court entertain an appeal by a party who is in wilful default of court orders including orders for spousal and child support?

ISSUE TWO: Is default of an order to provide security for costs or security for the payment of support obligations punishable by contempt?

PART III – STATEMENT OF ARGUMENT

ISSUE ONE: Should a court entertain an appeal by a party who is in wilful default of court orders, including orders for spousal and child support?

26. This Honourable Court has never set out the proper approach to this issue. Mrs. Dickie submits, as detailed below, that the proper approach to this issue is for courts:

- A. to exercise their discretion on a case-by-case basis (see paragraphs 27-30, below);
- B. in exercising that discretion, to consider certain general factors (see paragraph 31, below);