

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

B E T W E E N:

K M

APPELLANT
(PLAINTIFF)

AND

H M

RESPONDENT
(DEFENDANT)

AND

THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

INTERVENER

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

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PART I: FACTS

1. The Intervener, the Women's Legal Education and Action Fund (LEAF), is a national advocacy organization engaged in public education, research and test case litigation. Its objective is to secure women's equality rights as guaranteed by the Canadian Charter of Rights and Freedoms. LEAF has developed extensive expertise regarding sexual violence against women and children and access to justice for sexual assault survivors.
2. The Intervener adopts the facts as set out in the Appellant's Factum.

PART II: POINTS IN ISSUE

3. The Intervener submits that the limitation of actions by victims of childhood sexual assault entails issues of both sex and age equality and, accordingly, the interpretation and application of limitations law to such actions must be consistent with the principles and values enshrined in section 15 of the Charter of Rights and Freedoms.
4. LEAF submits that an interpretation of limitations law which is consistent with constitutionally protected sex and age equality rights would preserve actions for childhood sexual assault by:
 - (1) an application of the doctrine of delayed discovery which recognizes the dynamics of childhood sexual assault;
 - (2) an application of equitable principles which would prevent a perpetrator from relying on his own misconduct to escape liability by raising the statute of limitations as a defence; and
 - (3) recognizing that a parent owes a fiduciary duty to his child and that childhood sexual assault by a parent constitutes a breach of that duty, an action for which there is no statutory limitation period.

PART III: ARGUMENT

A. Childhood Sexual Assault Is an Equality Issue

5. Child sexual abuse is a largely hidden yet pervasive problem that has damaged the lives of tens of thousands of Canadian children. The most comprehensive Canadian study reveals the following findings:

- (1) At some time during their lives, about one in two females and one in three males have been victims of one or more unwanted sexual acts;
- (2) About four in five of these unwanted sexual acts had been first committed against these persons when they were children or youths;
- (3) Four in one hundred of young females have been raped;
- (4) About three in four persons who have been sexually assaulted for the first time as children were females (71.8 percent) and about one in four (28.2 percent) was a male;
- (5) About one in four assailants is a family member or a person in a position of trust;
- (6) At least one in eleven children under the age of seven is sexually assaulted by someone in a position of parental authority;
- (7) Virtually all assailants are males; one in one hundred is female;
- (8) About ninety percent of the victims of child sexual assault are female.

Report of the Committee on Sexual Offences Against Children and Youth: Sexual Offences Against Children, Vol. I (Ottawa: Canadian Government Publishing Centre, 1984) (Chair: R.F. Badgley) at 1-2, 196-198, 213-215

6. Other Canadian authorities confirm that the targets of child sexual abuse are predominantly female while men make up the overwhelming majority of the perpetrators.

Finkel, K. "Sexual Abuse of Children in Canada" (1984) 130 The Canadian Medical Association Journal 345 at 345, 348

Report of the Manitoba Advisory Council on the Status of Women: The "System's" Response to Victims of Incest in Manitoba (Manitoba, 1985) at 2-4

Report of the Special Adviser to the Minister of National Health and Welfare on Child Sexual Abuse in Canada: Reaching for Solutions (Ottawa: Ministry of Supply & Services, 1990) (Chair: Rix Rogers) at 17, 22

7. Women are socially defined as inferior and as appropriate targets for forced sex. As a result of these perceptions, women are made vulnerable to sexual assault. Not only are women targeted for sexual assault, their accusations of sexual assault and their claims of injury are systematically disbelieved because of their gender. Children are targeted for sexual assault because of age and sex, that is, because of their vulnerability, accessibility, powerlessness and lack of credibility.

Rogers Report on Child Sex Abuse in Canada, supra at 17-18

8. Just as women are sexually harassed based on their sex, women are sexually assaulted based on their sex. This Court has quoted with approval a scholar's argument that sexual harassment is used in a sexist society to "underscore women's difference from, and by implication, inferiority with respect to the dominant male group" and to "remind women of their inferior ascribed status". The same is true of sexual assault.

Janzen and Govereau v. Platty Enterprises, [1989] 1 S.C.R. 1252 at 1285

9. Sexual assault is categorical and group-based. Just as "no man would have been subjected to [sexual harassment]", men are not under most circumstances subjected to sexual assault by women; nor are adult men treated in the way children of both sexes are treated by those who sexually assault them. Just as "[a]ny female considering employment at the ... [r]estaurant was a potential victim ... and as such was disadvantaged because of her sex", any woman and child in an unequal society is a potential victim of sexual assault and as such is disadvantaged because of age and sex.

Janzen and Govereau v. Platty Enterprises, supra at 1288 - 1290

10. It is submitted that childhood sexual assault constitutes discrimination on the basis of sex and age. Its treatment by the legal system therefore implicates the equality rights of women and children. For purposes of the laws concerning sexual assault, women and children are groups disadvantaged by social inequality within the meaning of section 15 of the Charter of Rights and Freedoms.

11. The appellant's gender and age made her vulnerable to abuse of power by someone already powerful in the relationship by virtue of his parental status. On the basis of sex, the appellant suffered "the unwanted imposition of a sexual requirement in the context of unequal power." That power imbalance, and the previous abuse of that power, affected her ability to bring a civil action against her father.

Janzen and Govereau v. Platy Enterprises Ltd., supra at 1280

12. LEAF therefore submits that the denial of effective civil redress for this plaintiff and for victims of childhood sexual assault generally is a denial of equal protection and equal benefit of the law.

B. The Charter as an Interpretive Aid to Limitations Law

13. The Charter is the supreme law of the land and, accordingly, the common law and statutes must be interpreted and applied in a manner which is consistent with the fundamental values enshrined in the Charter. LEAF submits that this Court has jurisdiction to consider Charter arguments in this case even though they were not raised at trial or on appeal.

Corporation Professionnelle Des Medecins Du Quebec v. Thibault, [1988] 1 S.C.R. 1033 at 1039
Hills et al. v. Canada (Attorney-General), [1988] 1 S.C.R. 513 at 558
R. v. Thomson, [1990] 2 S.C.R. 1111 at 1158
RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at 592-593, 603
Swain v. R., (Unreported May 2, 1991), Reasons for Judgment by Lamer, C.J.S. (S.C.C.) at 8

14. This Court has identified equality as one of the fundamental values of our society, against which the objects of all legislation must be measured. This Court has also stated that "the section 15(1) guarantee is the broadest of all guarantees [in the Charter]. It applies to and supports all other rights guaranteed by the Charter."

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 185

15. In this Court's developing jurisprudence, while section 15 does not itself guarantee social equality, equality law is seen as a means to attaining an equal society. Thus, the purpose of section 15 "is to ensure

equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration".

Andrews, supra at 171

16. This Court has acknowledged the importance of promoting the equality of disadvantaged groups. In the words of Madam Justice Wilson, (as she then was), "...s.15 is designed to protect those groups who suffer social, political and legal disadvantage in our society..."

Andrews, supra at 154

17. LEAF submits that limitations law including the doctrines of reasonable discoverability and fraudulent concealment, where it impacts on equality rights, must be interpreted and applied in a manner consistent with the rights and values enshrined in the Charter, and in particular, the equality standards articulated by this Court.

18. Where a statute can reasonably bear a meaning which would accord with Charter values, such an interpretation should be favoured. In interpreting legislation, "the values embodied in the Charter must be given preference over an interpretation which would run contrary to them".

Hills et al v. Canada (Attorney General), supra at 558

19. Common law rules should be formulated and developed on the basis of the rights and values guaranteed by the Charter.

RWDSU v. Dolphin Delivery, supra at 603
Swain v. R., supra at 8

20. This Court now considers the social and economic context in which women live their lives to ensure its decisions afford true equality for Canadian women. It has recognized that the specific reality of women's experience of social and sexual subordination must be appreciated in order to ensure that women are truly accorded equal protection and benefit of the law. For example, the "Battered Wife Syndrome" was recently recognized as a valid defence to a charge of murder. This entails an appreciation that it is predominantly women who experience spousal assault and that, in the interests of equality, legal doctrine must be responsive to women's experience. The issue of whether the accused's apprehension of death or

grievous bodily harm was reasonable was assessed in light of her particular circumstances, as elucidated by expert opinion on the "Battered Women Syndrome". Similarly, the reasonableness of a sexual assault victim's delay in commencing suit must be assessed in light of her particular circumstances and expert opinion on "Post-Traumatic Stress Disorder" or the "Post-Incest Syndrome" experienced by sexual assault victims.

R. v. Lavallee, [1990] 1 S.C.R. 852 at 877

21. In determining that pregnancy discrimination and the abuse of sexual and economic power in the workplace constituted discrimination on the basis of sex, this Court assessed and recognized the impact of women's social, sexual and economic disadvantage in society. This case also commands a fresh approach in light of the reality of sexual assault in the lives of children, the majority of whose victims are female.

Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219 at 1238

Janzen and Govereau v. Platy Enterprises Ltd., *supra*

22. Limitations law is, by its very nature, a balancing of the interests between plaintiffs who wish to pursue legal action for recovery of damages and defendants who expect to be free of stale claims. In actions arising from childhood sexual assault, the Charter requires that this balancing of interests must be done in a manner that does not impose a disproportionately detrimental burden on women and children as compared to men. It is submitted that the legal analysis adopted by the trial judge does not meet this requirement and is therefore discriminatory.

23. An interpretation of the law is discriminatory when it has the effect of imposing burdens, obligations or disadvantages or when it withholds or limits access to opportunities, benefits and advantages available to others. In formulating its approach to equality, this Court has ruled that the overriding concern is to increase the substantive equality of those groups previously excluded from power and full participation.

Andrews v. Law Society of British Columbia, *supra* at 174

Brooks v. Canada Safeway Ltd., *supra* at 1238

R. v. Turpin, [1989] 1 S.C.R. 1296 at 1329

24. Denial of the right to seek a civil remedy for childhood sexual assault creates and perpetuates the relative powerlessness of women and children, who are already disadvantaged in society. It does so to the advantage of men who wield their power to sexually exploit and abuse women and children.

25. LEAF submits that the interpretation of limitations law in childhood sexual abuse cases which is consistent with the principles and values enshrined in the Charter would:

- (1) toll any applicable limitations period until:
 - (a) the injuries resulting from the sexual assault or assaults are substantially manifested; and
 - (b) the plaintiff knows or ought reasonably to have known that the injuries are attributable to sexual assault; and
 - (c) a reasonable person, in the particular circumstances of the plaintiff, ought to be able to bring an action without harm to his or her own interests and without aggravating the injuries of the sort pleaded in the statement of claim.
- (2) disentitle a defendant from relying on a limitation period to bar childhood sexual assault where it would be inequitable to do so; and
- (3) where there exists a dependency relationship between the plaintiff and defendant permit a victim to recover damages for childhood sexual assault through an action for breach of fiduciary duty.

26. It is submitted that such an interpretation is consistent not only with the principles and values enshrined in the Charter, but also with pre-Charter principles and policies of common law: an interpretation of common law made through the filter of Charter values magnifies the aptness of such an approach. Such an interpretation can be reached through an application of the existing principles with consideration of the following:

- (1) the unique dynamics of the childhood sexual assault;

- (2) the policy and principles both of limitations law and the law of tort; and
- (3) principles of equity.

27. It is submitted that the Intervener is not seeking a retrospective application of the Charter for the following reasons:

- (1) The Charter is being relied upon, not to strike down the statute of limitations, but as an aid to its interpretation. Because the action was commenced after Section 15 came into effect, a proper legal analysis of the limitations defence, which raises equality issues, must take into account the principles and values of the Charter.
- (2) The Ontario limitations statute does not operate to extinguish personal causes of action. Therefore LEAF submits the issue of statutory interpretation does not arise until the statute of limitations is pleaded as a defence.
- (3) Reliance on a statute of limitations to bar the plaintiff's action constitutes a continuing and current violation of her right to equal protection and benefit of the law. The continuing discrimination lies in the ongoing protection afforded primarily male defendants in sexual assault cases from otherwise recoverable damages flowing from their wrongful acts compared to the denial to primarily female/infant plaintiffs to access to damages through civil action.
- (4) Alternatively, the Intervener submits that the respondent's arguments on retrospectivity do not apply to a Charter analysis of a cause of action for breach of fiduciary duty given the absence of a statutory limitation period for such an action.

Corporation Professionnelle Des Medecins Du Quebec v. Thibault, *supra* at 1046-1047

Dubois v. R., [1985] 2 S.C.R. 350 at 359 - 360

Limitations Act, R.S.O., 1980 c. 240, as amended, section 15 and 245

R. v. Gamble, [1988] 2 S.C.R. 595

Whittman et al v. Emmott et al (1991), 77 D.L.R. (4th) (B.C.C.A.)

C. The Dynamics of Childhood Sexual Assault

28. The particular injuries caused by childhood sexual assault arise from the fact that the sexual abuse occurs within the context of a relationship of trust and dependency. Adult authority or parental power is exercised not only to perpetrate the sexual exploitation of the dependent, innocent child but to prevent recognition and revelation of the abuse.

Case on Appeal: Volume I at 279, lines 23-30
Finklehor, D. and Brown, A. "The Traumatic Impact of Child Sexual Abuse: A Conceptualization" 55(4) American Orthopsychiatric Association Inc. 531 (1985) at 532-533
Summit, R.C. The Child Sexual Abuse Accommodation Syndrome 7 Child Abuse and Neglect 177 (1983) at 182-184

29. The abuser wields his power to secure silence about the incestuous relationship through threats of physical harm or more subtle means, such as inducements or promises. The adult may convince the child that disclosure will lead to the disintegration of the family, the child's removal from the home, or that the child will be disbelieved and rejected.

Case on Appeal: Volume I, at 59, 60, 64, 67, 68, 71, 74-75, 110, 135-136, 137, 141-142
Allen, Margaret J., "Tort Remedies for Incestuous Abuse" 13 Golden Gate University Law Rev. 609 (1983) at 630
Finklehor & Brown, supra at 532
Handler, B. "Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Burden" 15 Fordham Urban Law Journal 709 (1987) at 715-717
Salten, Melissa G. "Statutes of Limitations in Civil Incest Actions: Preserving the Victims Remedy" 7 Harvard Women's Law Journal 206 (1984) at 196-197

30. Silencing is particularly powerful and effective within the parent-child relationship. The thought of "betraying" the person on whom the child is entirely dependant for all the necessities of life may evoke feelings of guilt and disloyalty and precipitate terrible uncertainty about the consequences for herself and her family. Victims often maintain their silence in the hope of protecting a sibling, or preserving the integrity of the family unit.

Case on Appeal: Volume I at 67, lines 28-29; at 220, lines 3-6
Allen, supra at 615
Salten, supra at 197
Summit, supra at 181-182

31. A child's involuntary participation in the 'conspiracy of silence' will foster feelings of guilt and shame. The abuser may, as he did in this case, construct the sexual encounters in such a way that she is made to feel she instigated the sexual contact. She will come to perceive herself as an accomplice in her own exploitation. Thus victims lose their nascent ability to determine right from wrong and real from unreal, as they become entrapped in the abuser's definition of what he is doing to them.

Case on Appeal: Volume I at 66, lines 26-32; at 95, lines 6-11; at 107, lines 28-30; at 217, lines 27-28; at 218, lines 3-6; at 277, lines 24-30; at 306, lines 12-20; at 327, lines 23-28
Allen, supra at 616
Salten, supra at 197-199

32. Child victims develop an array of defensive mechanisms in order to accommodate or survive the reality of ongoing sexual molestation. These include dissociation, repression and denial. Their particular constellation is peculiar to childhood sexual assault and has been coined "Post-Traumatic Stress Disorder" or "Post-Incest Syndrome".

Case on Appeal: Volume 1 at 66, lines 3-6; at 101, lines 9-12; at 193, lines 18-32; at 196, lines 9-10; at 207, lines 21-28; at 208, lines 26-32; at 209, lines 3-23; at 225, lines 15-30; at 304, lines 7-19
Handler, supra at 716-719
Lamm, J. "Easing Access to the Courts for Incest Victims: Towards an Equitable Application of the Delayed Discovery Rule" 100 Yale Law Journal 2187 (1991) at 2198
Rosenfeld, A. "The Statute of Limitations Barrier in Childhood Sexual Abuse Cases; The Equitable Estoppel Remedy" [1989] 12 Harvard Women's Law Journal 206 at 208-210
Summit, supra at 184-186

33. Victims of childhood abuse often experience a sense of powerlessness, particularly relative to the perpetrator, a loss of self-esteem and a loss of confidence of those traditionally in a position of trust or authority.

Case on Appeal: Volume I at 105, lines 27-32
Volume II at 410, lines 7-8
Finklehor & Brown, supra at 532
Salten, supra at 200-201

34. Despite the operation of these overwhelming psychodynamics, some victims disclose their abuse while it is still occurring. The response to

the disclosure is critical. If the child's disclosure is validated and she receives appropriate professional intervention, her chance of proceeding onto a path of recovery is good. If family members pressure her to suppress or retract her story or if her disclosure is met with disbelief or lack of understanding, her victimization will become intensified. She will likely recant and repress the abuse.

Case on Appeal: Volume I at 74, lines 2-33; at 75, lines 4-9; at 134, lines 8-32; at 135, lines 3-8, 14-32; at 136, lines 3-32; at 234, lines 7-23; at 280, lines 20-22; at 306, lines 27-30
Summit, supra at 186-188

35. Until recently few professionals had the knowledge or skill to handle a disclosure effectively. Some even held the view that a disclosure was as apt to be a lie or fantasy as it was to be the painful revelation of a terrible truth.

Case on Appeal: Volume I at 211, lines 8-32; at 212, lines 3-29; at 204, lines 20-32; at 235, lines 23-28
Volume II at 476, lines 25-30
Summit, supra at 190

36. Disclosure of the sexual abuse by a victim does not mean she understands that it is wrong or appreciates the injuries. There is a difference between a child feeling the acts are unwanted and invasive and knowing that her father is wrongfully abusing his parental power. It is yet a further step to understanding that wrongful abuse gives rise to legal redress.

Case on Appeal: Volume I at 132, lines 24-32
Salten, supra at 199

37. The injuries of childhood sexual assault are extremely complex and many of them do not manifest themselves until many years after the abuse ceases. In addition to the loss of self-esteem, self-respect, confidence and trust in others is the experience of extreme fear and phobias. Sexual permissiveness or promiscuity is a common reaction. Childhood sexual assault victims frequently encounter difficulties in intimate relations, including sexual intimacy. They may experience a variety of psychosomatic problems, such as nightmares, insomnia, headaches, gastro-intestinal problems, or numbness. They commonly suffer from addictive behaviour, depression, suicidal periods, self-mutilation and anxiety.

Case on Appeal: Volume I at 86, lines 3-16; at 87, lines 16-18; at 88, lines 12-32; at 90, lines 3-11; at 98, lines 21-27; at 103, lines 3-32; at 104, lines 21-32.

Volume II at 311, lines 18-23, at 317, lines 30-32, at 318, lines 3-11, at 409, lines 17-18, at 410, lines 7-8, 10 at 411, line 13.

Gelinas, D. "The Persisting Negative Effects of Incest", 46 Psychiatry 312 (1983) at 315-323

Lamm, supra at 2192-2195

38. A mishandled disclosure reinforces the conditioned silencing by the perpetrator and results in further psychological repression and damage. It also reinforces the victim's view that she is to blame.

Case on Appeal: Volume I at 326, lines 7-28; at 329, lines 22-32; at 330, lines 3-22.

39. It is submitted that the dynamics of childhood sexual assault as described above prevent the victim from perceiving and discovering her injuries until mature adulthood, for the following reasons:

- (1) The very nature of the injuries and their latent manifestation render them inherently imperceptible;
- (2) She has been subjected to years of conditioning by her perpetrator to remain silent about the abusive relationship;
- (3) If she has attempted to disclose the abuse and this disclosure was accompanied by family pressure to recant or inappropriate professional advice, the pressure to remain silent will be reinforced;
- (4) As a result of the abuse and any outside reaction to it she has developed deep mistrust of authority figures and has been conditioned to believe any further revelation of the abuse will be met with disbelief;
- (5) In order to survive psychologically she is actively engaged in ways to repress, forget, minimize or deny the realities of the abuse;
- (6) She feels guilty and complicit about the abuse and therefore does not identify the perpetrator as the wrongdoer;
- (7) Society has yet to fully recognize, understand and be receptive to the problem.

40. As a result of these factors, and because the injuries do not manifest themselves until much later in life, victims of childhood sexual assault do not appreciate the nexus between their injuries and the sexual assault. It is necessary for a victim to make the causal connection between the assault and her injuries, for her to identify the perpetrator as the wrongdoer or potential defendant.

Case on Appeal: Volume I at 100, lines 4024; at 101, lines 9-32; at 107, lines 20-32; at 108, lines 3-8; at 215, lines 7-17; at 218, lines 19-23; at 219, lines 3-16; at 222 at line 29, at 307, lines 305; at 313, lines 8-10, at 314, lines 23-25; at 319, lines 20-24; at 320, lines 14-18,; at 330, lines 11-32; at 338, lines 26-30; at 335, lines 3-22.

41. Victims often require appropriate professional intervention before they are able to realize that they are innocent victims and shift the blame to where it belongs. Appropriate therapy assists victims in appreciating the cause of their injuries and in overcoming their overwhelming sense of powerlessness in order to do something about it.

Case on Appeal: Volume II at 285, lines 16-21; at 328, lines 11-26; at 331, lines 3-9; at 340, lines 14-16; at 367, lines 18-21; at 386, lines 16-29; at 389, lines 6-23.

42. Professionals with experience or expertise in childhood sexual abuse realize that even when a victim discloses abuse she may be psychologically unready to relate the details or deal with it. Until she is ready, it would be inappropriate, and perhaps negligent, to insist that she explore the issue in her therapy.

Case on Appeal: Volume I at 261, lines 5-30

43. LEAF submits that in light of these dynamics, a victim of childhood sexual abuse should not be expected to commence suit until:

- (1) there is a substantial manifestation of her injuries;
- (2) she appreciates that the conduct of the perpetrator is wrongful;
- (3) she causally connects the tortious act with her injuries; and
- (4) having regard to all the particular circumstances, it would be reasonable for her to do so.

To bar a victim of sexual assault from legal action against the perpetrator before these conditions are met would fail to provide her with equal protection and benefit of the law.

D. Limitation Law As A Barrier to Civil Redress

44. Limitation periods have been framed to embrace the interests of individual litigants as well as broader societal interests, with the particular rationale of limitation periods being identified as follows:

- (1) the desirability of having an assessment of the evidence while the memories of witnesses are relatively fresh and reliable;
- (2) a concern for potential defendants in granting them a period of repose in which they need no longer be concerned about potential lawsuits;
- (3) a need for diligence on the part of potential claimants to ensure that the resources of the judicial system are directed towards current problems. The imposition of limitation periods is thought to prompt early settlement thereby minimizing the disruptive effects of unsettled claims on commercial intercourse.

Handler, supra at 719-721

Hartnett, E. "Use of Massachusetts Discovery Rule by Adult Survivors of Father-Daughter Incest" 24 New England Law Review 1243 (1990) at 1253

Rosenfeld, supra at 211-212

45. An application of the rationale for limitation periods to childhood sexual assault does not disclose a need for a strict interpretation in that:

- (1) Due to statutory tolling of limitation periods until the age of majority evidence in these cases is inevitably stale in any event;
- (2) There is no equitable rationale for allowing perpetrators of this intentional tort to move on with their lives without liability or worry while their victims suffer the consequences for the rest of their lives;
- (3) Failure to initiate early action results, not from lack of diligence on the part of victims but rather an inability which is a direct result of the tortious act.

W.K.L. v. R., (Unreported May 16, 1991), Reasons for Judgment by McLachlin, J. (S.C.C.) at 11
Lamm, J., supra at 2198

46. In recognition of the principles and policies on which it is founded, the law of limitations allows for an extension beyond strict time frames in order to preserve actions in appropriate circumstances. This is achieved through statutory extensions in cases of minority or unsoundness of mind. Additionally, through the application of the doctrine of reasonable discoverability courts have tolled the application of a limitation period until the plaintiff discovers, or ought to have discovered by exercise of reasonable diligence, the material facts on which the cause of action is based. Furthermore, the courts have applied the principle of fraudulent concealment to extend limitation periods in circumstances where it would be inequitable to allow the defendant to assert such a bar.

Section 47 of the Limitations Act, R.S.O. 1980 c. 240,
as amended

Central Trust Company v. Rafuse, [1986] 2 S.C.R. 147
Guerin v. R., [1984] 2 S.C.R. 355

47. Courts have recognized that limitation periods should be interpreted liberally in order to satisfy the objective of securing an opportunity for a plaintiff to seek redress for wrongdoing. "Where two interpretations of the statute are possible, reason favours the one which enables the plaintiff to bring his action."

Papanolopoulos v. Bd. of Education for the City of Toronto (1986), 56 O.R. (2d) 1 (Ont. C.A.) at 7

48. It is submitted that the circumstances of childhood sexual abuse demand an accommodation of limitations law so as not to deny recovery to victims whose delay in bringing an action is not a result of their own lack of diligence but is generally the result of the very attributes for which they were targeted by the abuser.

49. LEAF submits that an expansive interpretation of limitations law as applied to childhood sexual assault would also be consistent with the purposes and policies of tort law. While the principal purpose of tort law is to compensate the plaintiff for damages, deterrence is also recognized as one of its fundamental purposes. This is particularly so for torts of

intention.

Linden, Allen M., Studies in Canadian Tort Law
(Toronto: Butterworths, 1982) at 6, 23
Williams, Granville "The Aim of Tort Law" Current Legal
Problem 137 (1951) at 144, 172

50. The suit of a victim of childhood sexual assault should be preserved in order to ensure that both policy objectives of tort law are achieved. The ongoing and insidious nature of the injuries resulting from childhood sexual assault can result not only in significant ongoing expense for the individual plaintiff, but can constitute a drain on the public's resources required to rehabilitate plaintiffs. Public policy would dictate a shifting of these financial burdens to the perpetrator of the injuries.

51. Similarly, the concern for deterrence demands an expansive interpretation of limitations law. The intentional tort of childhood sexual abuse is an egregious wrong, the deterrence of which is of greater social importance than the individual right of a sexual offender to escape liability by the operation of a limitation period. This balance can only be achieved if the defendant is prevented from relying on a delay which, in many cases, his own conduct has created.

52. In holding that a sexual assault case pending before the criminal court should proceed, notwithstanding delay, this Court confirmed that delay in reporting sexual abuse is understandable and affirmed that a "judicial statute of limitations would mean sexual abusers would be able to take advantage of the failure to report which they themselves, in many cases caused." This principle is equally germane to the civil context.

W.K.L. v. R., supra at 10-11

E. The Doctrine of Reasonable Discoverability as Applied to Childhood Sexual Assault

53. The traditional limitations rule that the date of accrual of a cause of action is the date of the wrongful act giving rise to the claim, "developed against the relatively unsophisticated backdrop of barroom brawls, intersection collisions, and slips and falls..." In many contexts, including assault, this rule is not unreasonable as the connection between the defendant's act and the plaintiff's injuries is usually apparent at the time. For example, it is not unreasonable to expect the victim of a car

accident to realize that injury has resulted or will likely result.

Martinez-Perrer v. Richardson-Merrell, Inc. (1980), App.
164, 105 Cal. Rptr. 591 (Cal. C.A.) at 595

54. Canadian Courts have recognized circumstances where this connection is not readily apparent. Courts have held that it would be an injustice to bar a plaintiff from bringing a claim if she was unaware of its existence, even if a lengthy delay has passed. This Court has held that a cause of action in tort could not accrue until the plaintiff had discovered or ought reasonably to have discovered by the exercise of reasonable diligence the material facts on which to base a claim. While this could lead to greater exposure for defendants, it would be a greater injustice to deny relief to the plaintiff.

Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147 at
223-224
City of Kamloops v. Nielson, [1984] 2 S.C.R. 2 at 40
Consumers Glass Co. Ltd. v. Foundation of Canada Ltd.
(1985), 51 O.R. (2d) 385 (Ont. C.A.) at 399-400

55. The term "injury" is not synonymous with "wrongful act" but is a separate legal concept referring to the damages caused by the wrongful act. Thus, discovery of "injury" means discovery of the damaging effects of the wrongful acts, not discovery or knowledge of the acts themselves. The discovery rule will apply in cases where the defendant's act would not serve to put the reasonable plaintiff on notice that injury will ensue from that act.

Central Trust Co. v. Rafuse, supra at 223-224
Consumers Glass Co. Ltd. v. Foundation of Canada Ltd.,
supra at 399-400

56. In actions for personal injury or professional negligence, the running of the limitation periods pursuant to the British Columbia limitation statute is postponed until such time as a reasonable person acquires appropriate advice. The law recognizes that it may be difficult, even impossible, for persons to ascertain the casual connection between an wrongful act and a subsequent injury without such advice. The statute also directs the court to consider the plaintiff's own interests and circumstance in determining when the plaintiff ought to be able to bring an action. Accordingly, circumstances such as the relationship of the

plaintiff to the defendant (for example an employee-employer relationship) and the availability of appropriate advice would be circumstances relevant to the determination of the date the limitation period commences.

Evans v. Vancouver Port Corporation, (1989) 42 B.C.L.R. (2d) 174 (B.C.C.A.) at 183
Limitations Act, R.S.B.C. 1979, c. 236 Section 6

57. Even in the absence of specific statutory language, American Courts have adopted a similar approach in products liability actions. Until a plaintiff receives the relevant medical diagnosis which connects the symptomatology to the noxious substance or device, the limitation period is postponed.

Allied Resin Corp. et al v. Barry J. Waltz 559 N.E. 2d 390, at 393 (Ind. App. 1 Dist. 1990)
Hando v. P.P.G. Industries Inc., 881 P.2d 956 (Mont. 1989) at 961-962

58. In medical malpractice suits, the cause of action accrues when the plaintiff becomes aware of his or her injury and when he or she discovers the causal relationship between the harm and the defendant's misconduct, an awareness that almost invariably requires medical or professional knowledge.

Gaudet et al v Levy et al (1984), 47 O.R. (2d) 577 (Ont. H.C.) at 582-583
Raymond v. Eli Lilly & Co. 371 A2d 170 (New Hampshire S.C.) at 172-174

59. In all of the aforementioned authorities, the date for determining when the limitation period starts running depended upon the nature of the harm and how that harm could reasonably be ascertained. Since the injuries occasioned by childhood sexual assault are primarily psychological and extremely complex, and because long-standing blocking mechanisms have to be overcome, survivors often require professional assistance to recognize the connection between the sexual acts and the resulting emotional, psychological, and social damage they have suffered. Generally it is only when a survivor enters therapy that any meaningful understanding of her injuries can be developed. Accordingly, a reasonableness standard for the harms caused by sexual assault would postpone the limitation period until a plaintiff, acting diligently, receives appropriate professional advice.

Case on Appeal: Volume I at 97, lines 8-32; at 101, lines 11-30; at 207, lines 18-28
Salten, supra at 202

60. Delayed discovery must also be understood within the context of a society in which childhood sexual assault, until very recently, was never publicly acknowledged or very well understood. Survivors have been powerfully silenced by the social unwillingness to deal with the problem and by the stigmatization of those survivors who dared to name the harm. Such an atmosphere impeded survivors like the appellant, and thousands like her, from uncovering the link between their injuries and the abuse they suffered as children. Instead, it contributed to keeping the connection obscured. Precisely because childhood sexual assault is poorly understood and its manifestations primarily psychological, professional intervention is usually required before the victim can discover her injuries and their cause.

Allen, supra at 630-631

61. Childhood sexual assault causes deep-rooted injuries which are more subtle and complex than those caused by other tortious acts. Their latent manifestation makes them more analogous to injuries caused by toxic exposure, than to injuries caused by a car crash or simple assault. While there is no Canadian caselaw directly on point, courts in the United States have carefully considered the particular dynamics of incest in applying the delayed discovery doctrine.

Evans et al v. Eckelman et al, 265 Cal. Rptr. 605 (Cal. App. 1 Dist. 1990)

Hammer v. Hammer, 418 N.W. 2d 23 (Wis. App. 1987).

Hildebrand v. Hildebrand, 736 F. Supp. 1512 (S.D. Ind. 1990)

Johnson v. Johnson and Johnson, 701 F.Supp. 1363 (N.D.Ill. 1988)

Lindabury v. Lindabury, 552 S.O. 2d 1117 (Fla. App. 3 Dist. 1989)

Osland v. Osland, 442 N.W. 2d 907 (N.D. 1989)

Petersen v. Bruen 792 P.2d 18 (Nev. 1990)

62. A recent decision in the English Court of Appeal recognizes that delayed discovery must be applied in a manner that is responsive to the unique dynamics of childhood sexual assault and, further, in a way that recognizes that the delay is a direct result of the wrongdoing of the

abuser. While interpreting a different statutory regime that Court held that the limitations period was tolled until the plaintiff:

- (a) knew that her injuries were "serious" and sufficiently serious to institute proceedings; and
- (b) knew or ought reasonably to have known that the injuries were attributable in whole or part to the actions of the defendant.

In assessing the later criteria the Court took into account the nature of the injuries, the impact of those injuries and the lack of public awareness concerning child abuse.

Stubbings v. Webb (1991), 3 WWR 383 (Eng. C.A.)

F. Fraudulent Concealment as Applied to Childhood Sexual Assault

63. The principal of fraudulent concealment has been applied to temper the strict application of limitation periods in circumstances where it would be inequitable for the defendant to rely on such a defence. Fraud, in this context, is used in the broadest sense to include not only common law fraud but other intentional wrongdoing, where it would be against conscience to allow the defendant to avail himself of the lapse of time.

64. The statutory limitation period will be tolled, as a result of concealed fraud, until the plaintiff discovers the fraud or with reasonable diligence ought to have discovered it.

Archer v. Moss, [1971] 1 All E.R. 746 (Eng. C.A.) at 750
Massie & Renwick Ltd. v. Underwriters' Survey Bureau Ltd. et al, [1940] S.C.R. 218 at 244
Nesbitt, Thompson & Co. v. Pigott, [1941] S.C.R. 520 at 530
Pigott et al v Nesbitt Thompson & Co. Ltd., [1939] O.R. 66 (Ont. C.A.) at 82-83
Underwriters' Survey Bureau Ltd. et al v Massie & Renwick Ltd., [1937] Ex.C.R. 103 (Ex. Ct.) at 126-128

65. The classic definition of equitable fraud adopted in fraudulent concealment jurisprudence is as stated by Lord Evershed:

"It is I think, clear that the phrase covers conduct which, having regard to some special circumstances between the parties concerned it is an unconscionable thing for one to do towards the other."

Kitchen v. Royal Air Forces Ass'n et al, [1958] 2 All E.R. (241 Eng. C.A.) at 246

66. While the finding of equitable fraud has not been restricted to circumstances where some duty is owed by the defendant to the plaintiff, the nature of their relationship is taken into account in determining whether equity should intervene on behalf of the plaintiff to relieve against a statutory limitation period.

Guerin et al v. R., supra at 389-390
Kitchen v Royal Air Forces Ass'n et al, supra at 246
Photinopoulos v. Photinopoulos et al (1989), 31
C.P.C. (2d) 267 (Alta.C.,A.) at 273-275
Public Trustee v. Mortimer, et al (1985), 49 O.R. (2d)
741 (Ont. H.C.) at 753-754

67. For an application of the doctrine of fraudulent concealment, it is not necessary for the wrongdoer to take active measures to prevent detection. By saying nothing the tortfeasor keeps it secret. In an assault action where the nature of the assault is "furtive and secret" the doctrine will be invoked to the benefit of the plaintiff.

Guerin et al v. R., supra at 389-390
Kitchen v. Royal Air Forces Ass'n et al, supra
Massie & Renwick Ltd. v. Underwriters' Survey Bureau
Ltd. et al, supra at 241
Nesbitt, Thompson & Co. v. Pigott, supra at 530
Photinopoulos v. Photinopoulos et al, supra at
273-275

68. LEAF submits that, in the context of childhood sexual abuse, the concept of fraudulent concealment arises because the perpetrator's conduct is both wilful and secret. In many cases, the perpetrator goes further and takes active steps to ensure that his victim does not disclose the abusive relationship to either members of the family, outsiders or both. A perpetrator can conceal the relationship and his wrongdoing through one or more of the following ways:

- (1) by applying subtle intimidation through the use of authority over the child;
- (2) by creating a context of physical punishment or domination;
- (3) by threatening the victim about what might happen to her or the family if she were to disclose;
- (4) by the use of rewards or inducements aimed at soliciting compliance with the unwanted sexual contact and at maintaining the silence;

- (5) by placing pressure on the victim and the family if the victim discloses to outsiders.

Handler, supra at 715-717

Salten, supra at 196-199

Summit, supra at 181-184

69. It is submitted that the reliance on equitable principles is particularly compelling to relieve against antiquated limitation periods which were developed without consideration for the vulnerabilities of certain groups such as women and children and which are out of touch with modern conditions.

Public Trustee v. Mortimer, supra at 753-754

70. To the extent that the Ontario statute of limitations may bar actions such as this one it is submitted that it was formulated in an era when professional and public awareness did not appreciate the dynamics and extent of childhood sexual assault and is neither reflective of nor responsive to a contemporary analysis of the problem.

Report of The Limitations Act Consultation Group:
Recommendations for a New Limitations Act (Ontario
Ministry of the Attorney General, March 1991)

71. It is submitted that in recognition of the equality rights of both women and children under the Charter, equitable doctrines such as fraudulent concealment should prevail over a narrow application of limitations law.

72. LEAF submits that this Court should give consideration to the application of fraudulent concealment in this case notwithstanding the lack of specific reference to the doctrine as a reply to the limitations defence in the pleadings or in argument at trial.

73. An appellate court will consider an issue on appeal which was not pleaded, proceeded with, nor argued at trial, if it is satisfied beyond doubt, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial. Accordingly, a new issue will not be allowed if there is no evidentiary basis at trial or if the opposing party has missed an opportunity for rebuttal.

Canadiana Towers Ltd. v. Fawcett et al (1978), 21 O.R.
(2d) 554 (Ont. C.A.) at 163-164

Connecticut Fire Insurance Company v. Kavanaugh, [1892] A.C. 473 (Eng. H.L.) at 480
K.M. v. H.M. (Unreported, November 14, 1989), Reasons for Judgment by Howland, C.J.O.) (Ont. C.A.)
Lamb and Miller v. Kincaid and Krober, [1907] 38 S.C.R. 516 (S.C.C.) at 539
Scarborough Golf & Country Club Ltd. v. City of Scarborough et al., (1988), 66 O.R. (2d) 257 (Ont. C.A.) at 269
Shaver Hospital for Chest Diseases v. Slesar et al., (1979), 27 O.R. (2d) 383 (Ont. C.A.) at 386
Thomson v. Lambert and Lambert, [1938] S.C.R. 253 at 269

74. It is submitted that all evidency aspects of fraudulent concealment, including the nature of the unconscionable act, the relationship between the parties, the role of the defendant in concealing the wrongdoing and the "discoverability" of the cause of action by the plaintiff were all fully canvassed, both in the pleadings and the evidence at trial. Although fraudulent concealment is a new legal formulation of the plaintiff's case it raises the identical evidenciary issues as do the issues of fiduciary duty, unsoundness of mind and reasonable discoverability, all of which issues were raised in response to the limitations defence.

Case on Appeal: Volume I, Statement of Claim, pages 1-13, Statement of Defence of the Defendant Herbert Metzger, pages 15-22

75. The issue of whether the plaintiff discovered or ought reasonably to have discovered her cause of action was central to the theory of the case as litigated at trial. As such, a substantial portion of the trial entailed evidence regarding her ability to discover her cause of action and injuries.

Case on Appeal: Volume I; Preliminary Objection at 47; Volume VI; Ruling of the Honourable Mr. Justice Malony, dated January 22, 1988 at 1133-1136

76. Extensive questioning of the appellant, the respondent and numerous experts at trial was specifically directed at the perpetrator's attempts to conceal the abusive relationship to demonstrate to the court the unique dynamics of childhood sexual assault and, in particular, to convey to the court how this conditioned silencing affected the plaintiff's ability to discover her injuries.

77. Considerable evidence was tendered at trial on the respondent's use of rewards and inducements, physical punishment, direct threats and other attempts to ensure the appellant's silence and later recantation once she had disclosed the sexual activity to outsiders.

Case on Appeal: Volume I, Karen Marciano, examination-in-chief at 59, 60, 64, 67, 68, 71, 74 and 75; Karen Marciano, cross-examination at 110, 135, 136, 137, 141, 142; Barbara Pressman, examination-in-chief at 213, 214, 219, 220, 224; Barbara Pressman, cross-examination at 233, 234; Volume II, Dr. Lionel Mausberg, examination-in-chief at 326, 329; Volume III, Herbert Metzger, examination-in-chief, at 650, 659, 662, 680, 781, 682; Volume IV, Herbert Metzger, cross-examination in chief, at 737, 741, 742, 743, 744, 745, 746, 747; Dr. Ronald Langevine, examination-in-chief, at 847, 850, 851; Volume V, Dr. Ronald Langevine, cross-examination at 911, 913

78. It is respectfully submitted that the appellant placed in issue at trial her father's attempts to conceal his conduct and secure her silence. The respondent had ample opportunity to cross-examine the appellant on this issue and did so.

Case on Appeal: Volume I, Karen Marciano, examination-in-chief at 59, 60, 64, 67, 68, 71, 74 and 75; Karen Marciano, cross-examination at 110, 135, 136, 137, 141, 142

79. The respondent was also questioned by his counsel and subjected to cross-examination on these allegations. He had ample opportunity to provide explanation regarding his alleged concealment while in the witness box.

Case on Appeal: Volume III, Herbert Metzger, examination-in-chief, at 650, 659, 662, 680, 681, 682; Volume IV, Herbert Metzger, cross-examination in chief, at 737, 741, 742, 743, 744, 745, 746, 747.

80. The fact that a perpetrator must conceal the abusive relationship in order to ensure his victim's sexual accessibility was discussed by many of the experts at trial. Evidence was tendered by these experts both in relation to the appellant's allegations that the perpetrator attempted to conceal his conduct and in the larger context of how this conspiracy of silence affects victims of sexual abuse. The respondent had ample

opportunity to cross-examine the experts on this evidence and in fact did so.

Case on Appeal: Volume I, Barbara Pressman, cross-examination at 233, 234; Volume II, Dr. Lionel Mausberg, examination-in-chief at 326, 329; Volume IV, Dr. Ronald Langevine, examination-in-chief, at 847, 850, 851; Volume V, Dr. Ronald Langevine, cross-examination at 911, 913

81. LEAF submits that the facts bearing on the issue of the respondent's attempt to secure the appellant's silence, thereby concealing his conduct, were all included in the extensive examination-in-chief and cross-examination of numerous witnesses. Therefore, it is respectfully submitted that the court had before it all the facts bearing upon this new issue of fraudulent concealment as completely as would be the case had it been pleaded and argued at trial.

82. A perpetrator's concealment of the abusive relationship, commonly referred to in the social science literature, case law and scholarly articles, as his "silencing" is a key factor in understanding the dynamics of childhood sexual abuse and its impact on the victim.

Handler, supra at 715-717
Salten, supra 196-199
Summit, supra 1281-184

83. Having regard to the special relationship between the plaintiff and the defendant, particularly in cases of childhood sexual assault, LEAF submits that equity compels relief against any applicable limitation period which works to the benefit of a defendant. It is submitted that fraudulent concealment is an appropriate legal characterization of an abuser's "silencing" behaviour.

84. The applicability of the doctrine of fraudulent concealment or equitable fraud to cases of childhood sexual assault has been advanced by several legal scholars and, it is submitted, ought to be considered by this Court.

De Rose, D. "Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages" (1985) 25 Santa Clara Law Review 191 at 197-199
Handler, supra at 722-729
Rosenfeld, supra at 216-219
Salten, supra at 208-211

85. The Intervener submits that this Court ought to consider the application of the principle of fraudulent concealment because:

- (1) the factual basis for it was pleaded in the Statement of Claim and elaborated in evidence at trial;
- (2) all of the facts bearing upon this argument are as completely before this Court as they would be had the argument been advanced at trial;
- (3) the legal analysis adopted by this Court in this case will have a significant impact on the sex equality rights of many Canadian women and children and, therefore, this Court ought to consider every applicable argument; the correct legal characterization of an abuser's "silencing" conduct is key to this analysis.

G. Childhood Sexual Assault is a Breach of Fiduciary Duty

86. It is respectfully submitted that a parent stands in a fiduciary relationship to his or her child and therefore owes a duty to that child, a breach of which will give rise to a cause of action for which there is no statutory limitation period. The equitable defence of laches may, however, be invoked to limit an action for breach of fiduciary duty in appropriate circumstances.

87. Although the parent-child relationship does not fall within the traditional categories in which fiduciary obligations have been imposed, it possesses the three general characteristics, which if present, should attract the imposition of a fiduciary obligation. The categories of fiduciary relationships are not closed and should be found to exist where the recognized characteristics exist. These are:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power of discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Frame v. Smith and Smith, [1987], 2 S.C.R. 99 at 134, 136

Guerin et al v. R., supra at 384

88. A parent has considerable scope for the exercise of power and discretion over his or her child. Parental power includes the ability to make decisions regarding a child's health, education and spiritual or religious upbringing. Parents have the authority to seek compliance with certain rules and to impose a system of discipline involving a variety of measures such as physical punishment, the deprivation of social contact, the withdrawal of privileges or the giving of benefits and rewards. A parent has power or discretion over virtually every aspect of a child's life.

89. Furthermore, the parent is able to unilaterally exercise the power or discretion so as to affect the child's legal or practical interests. A child is essentially powerless to control or consent to the exercise of parental power and, accordingly, the parent-fiduciary is able to exercise his or her discretion unilaterally. In the context of incest, this is often achieved by misrepresenting the nature of the perpetrator's actions to the victim; he may define the abuse as sex education, a game or natural.

90. The exercise of parental power or discretion affects the interests of the child as beneficiary in both the legal and practical sense. Only a parent or legal guardian has the authority, in law, to consent to medical treatment on behalf of the child, to register the child in an educational institution, to obtain a passport for the child, to change the child's name. It is assumed that in exercising this authority a parent will act in the child's best interests. The exercise of parental power or discretion also affects the practical interests of the child, in so far as a child's social and material realities are largely created by parental choices, decisions and means.

91. Madam Justice Wilson, (as she then was), comments in dissent that "To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be arbitrary in the extreme... non-economic interests should also be capable of protection in equity through the imposition of a fiduciary duty." A child's interest in his or her physical or psychological integrity should be afforded equitable protection through

the imposition of a fiduciary duty upon his or her parent.

Frame v. Smith and Smith, supra at 143

92. The final feature, namely, that the beneficiary is peculiarly vulnerable to the fiduciary holding the discretion, is considered by Mr. Justice Sopinka to be "indispensable to the existence of the relationship."

Lac Minerals v. International Corona Resources, supra at 599

93. The hallmark of a fiduciary relation is one in which there is implicit dependency, where one party is in a position of disadvantage or where one party is at the mercy of another's discretion.

Lac Minerals v. International Corona Resources, supra at 599-600

94. Relying upon the Oxford English Dictionary definition of "vulnerable", this Court stated that "Persons are vulnerable if they are susceptible to harm, or open to injury. They are vulnerable at the hands of a fiduciary if the fiduciary is the one who can inflict harm".

Lac Minerals v. International Corona Resources, supra at 662-663

95. A child is dependent upon his or her parent not only for physical survival but for his or her social, psychological, emotional, intellectual and spiritual development and well-being. A child's vulnerability or susceptibility to harm at the hands of a parent cannot be compared to any other relationship. The harm can be physical, psychological or material in nature; it can even be fatal. Trust is implicit in the nature of the relationship. A child's peculiar vulnerability is recognized in law. Family service agencies are vested with statutory authority to apprehend children in need of protection. Parental failure to provide the necessities of life for a child under the age of sixteen years is specifically recognized as a criminal offence.

Criminal Code, R.S.C. 1970, c. C-34, Section 214-215

96. LEAF submits that all of the essential elements of a fiduciary relationship exist between a parent and his or her child. It is further submitted that sexual interference, sexual exploitation, sexual assault or incest perpetrated by a parent against his own child is a breach of a

parent's fiduciary obligation to act loyally and in the child's best interests.

97. Canadian Courts have specifically referred to the parent-child relationship as an example of a fiduciary relationship. Legal scholars confirm that the parent-child relationship fits within the fiduciary principle.

Follis v. Albenaste TP et al, [1941] 1 D.C.R. 178
Henderson et al v. Johnson et al, [1956] 5 D.C.R. (2d)
524 at 533
Lac Minerals, supra at 606
Shepherd, C.J., "Fiduciary Classifications" (1936)
The Law of Fiduciaries 21 at 30

98. When the same conduct gives rise to alternative causes of action, a Court ought to permit the action to be framed so as to afford the appropriate remedy.

Frame v. Smith and Smith, supra at 149-150
Lac Minerals, supra at 631

99. Further, if a cause of action at common law is statute barred by a limitation period but the facts also give rise to an equitable claim to which the limitations period does not apply, the Court ought to permit the claim in equity and provide equitable relief.

Nocturn v. Lord Ashburton, [1914] A.C. 932 (Eng.H.L.) at
957

100. It is respectfully submitted that this Court ought to permit sexual assault survivors to frame their causes of action in equity to escape the effect of any statutory limitation period, so as to ensure their access to justice.

101. This Court held that "The essence of the imposition of fiduciary obligation is its utility in the promotion and preservation of desired social behaviour and institutions..." The imposition of a remedy which restores an asset to the party who would have acquired it but for a breach of fiduciary duties or duties of confidence acts as a deterrent to the breach of duty and strengthens the social fabric those duties are imposed to protect".


Lac Minerals, supra at 672-673

102. It is submitted that the imposition of a remedy on incestuous parents will act as a deterrent to the breach of parental duties, will promote healthier familial relations and will afford child victims the protection from sexual assault they currently lack.

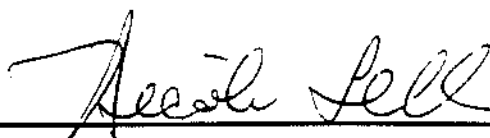
PART IV: ORDER REQUESTED

103. It is submitted that the Judgment of the Honourable Mr. Justice Maloney, dated January 22, 1988 be set aside either to let the jury verdict stand or so that the defendant can be found liable for damages for breach of his fiduciary duty.

ALL of which is respectfully submitted



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October 25, 1991

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