

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

B E T W E E N:

FREDERICK LEROY BARNEY

Appellant
(Appellant/Respondent)

-and-

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by
THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT and
THE UNITED CHURCH OF CANADA**

Respondents
(Appellants/Respondents)

A N D B E T W E E N:

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by
THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT**

Appellant
(Appellant/Respondent)

-and-

**THE UNITED CHURCH OF CANADA, R.A.F., R.J.J. and M.L.J., M.W. (2),
FREDERICK LEROY BARNEY and PATRICK DENNIS STEWART**

Respondents
(Appellants/Respondents)

-and-

THE ASSEMBLY OF FIRST NATIONS

Intervener

- and -

**WOMEN'S LEGAL EDUCATION AND ACTION FUND,
NATIVE WOMEN'S ASSOCIATION OF CANADA and
DISABLED WOMEN'S NETWORK OF CANADA**

Interveners

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THE NATIVE WOMEN'S ASSOCIATION OF CANADA (NWAC) AND DISABLED WOMEN'S
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PART I - STATEMENT OF FACTS

1. The Women's Legal Education and Action Fund (LEAF), the Native Women's Association of Canada (NWAC), and the DisAbled Women's Network Canada (DAWN) ("the Coalition") accept the Statement of Facts of the Appellant Frederick Leroy Barney in his factum, and accept the facts stated by the Respondent the United Church of Canada ("Church") in its factum at paragraphs 3, 5, and 10-16.

PART II – THE COALITION'S STATEMENT OF QUESTIONS IN ISSUE

2.

- i) Did the Courts below err in their application of "original position"?
- ii) Did the Courts below err in the calculation of general and aggravated damages?
- iii) Did the Court of Appeal err in awarding the plaintiff only a nominal award for loss of future opportunity?

PART III - STATEMENT OF ARGUMENT

A. Summary

3. The Coalition submits that the tort principles applicable to cases of institutional abuse, including Indian Residential School ("IRS") abuse, must be informed by the principles of substantive equality for disadvantaged persons. In this case, substantive equality is achieved by recognizing the unique and complex nature of IRS abuse so that the calculation of damages recognizes the entire physical and emotional harms suffered at IRS.

4. In this case substantive equality means recognizing that traditional understandings of assault and battery can only serve as crude legal descriptions of IRS abuse, and institutional abuse. A substantive equality approach would i) recognize the original position as pre-IRS internment; ii) recognize the indivisibility of the wrongs and harms inflicted and iii) exempt IRS abuse claims from the discriminatory burden of limitation periods, or if limitation periods are used, finding that they do not start to run until the time that the survivors can "reasonably"

discover their cause of action, taking into consideration the socio-political realities that must define “reasonable”.

5. The Courts below erred in treating the historic socio-political context as irrelevant, including the racism and the targeting of children, and also erred in making a rigid and formalistic analysis of tort principles.

6. An equality-based determination of redress for Mr. Barney must take into account the role of Canada and the Church in creating the institutional environment that allowed the abuse to happen.

7. This case is of great significance for Aboriginal persons who experience racist devaluation when, as IRS survivors, their claims are stripped of the racist context and they are under-compensated. This racism compounds the effects of the racism endured at IRS.

8. The principles relevant to this case are also of significance to disabled women who are extremely likely to be targets of institutional abuse. More than half (53%) of disabled women who have been disabled from birth or early childhood report being abused.

Dick Sobsey and Tanis Doe, “Patterns of Sexual Abuse and Assault” (1991) 9 *Sexuality and Disability* 243 at 248-9

Laurie E. Powers et al., “Barriers and Strategies in Addressing Abuse: A Survey of Disabled Women’s Experiences” *Journal of Rehabilitation*, Jan-March, 2002, http://www.findarticles.com/cf_dls/m0825/1_68/83910976/print.jhtml

B. Context

9. Canada’s IRS system was an integral part of its policy of Aboriginal cultural genocide, a policy deliberately intended to destroy the cultural heritage of a people or nation, in this case by forcibly removing Aboriginal children from their families, and forcing them into the custody of an IRS, thereby heightening their vulnerability.

Convention for the Prevention and Punishment of the Crime of Genocide (1948), 78 U.N.T.S. 277 [Genocide Convention] 2(e)

John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879-1986* (Winnipeg: University of Manitoba Press, 1999) at 42-43

J.R. Miller, “Troubled Legacy” (2003), 66 *Sask. L. Rev.* 357

10. Through its Aboriginal policy of cultural genocide, including IRS, the government sought to exercise its power and control over Aboriginal persons “to get rid of the Indian problem”.

E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986) at 50

11. Cultural genocide constitutes the gravest of atrocities committed against a population, one that is grounded in racism. It is a blatant violation of the population’s basic equality rights.

Catharine MacKinnon, “Genocide’s Sexuality” in *Political Exclusion and Domination*, Melissa S. Williams and Stephen Macedo eds. (New York: New York University Press, 2005) at 328

Iris Marion Young, *Justice and the Politics of Difference* (Princeton, New Jersey: Princeton University Press, 1990) at 48-65

12. The IRS system constitutes one of the worst human rights offences perpetrated in Canada’s history. It should shock the national conscience that Canada, abetted by religious institutions, created and maintained a brutal system of abuse intended to forcibly assimilate Aboriginal peoples by eliminating their languages and culture. The Canadian government targeted the most vulnerable members of the racial group, Aboriginal children. Aboriginal children were held captive in a school system that devalued and dehumanized them.

John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879-1986*, *supra* at p. 42-43

JR Miller, “Troubled Legacy”, *supra*

13. The Coalition submits that it is equally shocking that Canada now relies upon a formalistic and discriminatory interpretation and application of tort law principles to defend itself from providing full compensation, when the result is inequality for an Aboriginal person, whom the government has a legal duty to deal with honourably and, in the utmost good faith.

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 at para. 186

14. Extreme forms of corporal punishment were applied at IRS including but not limited to whippings, beatings, and running needles through children’s tongues for speaking Aboriginal languages. Personal humiliation was employed to secure children’s submission and included public nudity, haircutting, delousing, removal from peers and siblings, and starvation. Normal

external supports of family and community that may have enabled families to resist the abuse were removed; access by parents to their children was regularly prohibited.

Celia Haig-Brown, *Resistance and Renewal* (Vancouver: Arsenal Pulp Press, 1999) at 11
 John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879-1986*, *supra* at 129-155
 Agnes Grant, *No End of Grief: Indian Residential Schools in Canada* (Winnipeg: Pemmican Publications Inc., 1996) at 221-243

15. Canada focused on the assimilation of Aboriginal women to prevent the cultural transmission of original Aboriginal culture, language, and spirituality. Aboriginal women's education was directed to integrate Aboriginal women into Euro-Canadian communities. This displacement included targeting of Aboriginal women's central place within traditional governance structures, dismantling cultural principles of gender equality, and dislodging matrilineal and matriarchal cultures. Gendered racial impacts on Aboriginal female survivors, included impacts on Aboriginal women as caregivers, parents and family members, as well as on Aboriginal women's sexual and reproductive health, and on Aboriginal women's roles as community leaders.

John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879-1986*, *supra* at p.40-41
 Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 Can. J. Women & L. 174
 Kim Anderson, *Recognition of Being: Reconstructing Native Womanhood* (Toronto: Second Story Press, 2000) at 59-78

16. Sexual assault was an integral part of the abuse inflicted at IRS. Sexual assault is not experienced in a uniform and universal fashion. Racialized and disabled women experience sexual violence as an exercise of power and control rooted in racism, ableism and sexism, the effects of which cannot be separated. Sexual assault is definitely different for racialized women when it is used as a tool of genocide.

Patricia Monture-Angus, "Standing Against Canadian Law: Naming Omissions of Race, Culture, and Gender" in *Locating Law: Race/Class/Gender Connections*, Elizabeth Comack ed. (Halifax: Fernwood Publishing, 1999) at 84-86
 Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour" 43 Stan. L. Rev. 1241 1990-1991 at 1265-1282

Catharine MacKinnon, “Genocide’s Sexuality” in *Political Exclusion and Domination*, Melissa S. Williams and Stephen Macedo eds. (New York: New York University Press, 2005) at 332

17. The plaintiff in this case experienced the subject abuse as an Aboriginal child. There is a need to maintain an awareness of the power imbalances that make women and children, especially children outside of the dominant norm, targets for such abuse, and that justify a specialized equality based response, as outlined below.

C. The Application of an Equality Rights Analysis

18. The substantive equality rights of institutional abuse survivors, who are predominantly disadvantaged persons, can only be protected through the application of contextual equality analyses rooted in the values found in s. 15 of the *Charter*.

Section 15 of the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, as enacted by the *Canada Act 1981 (UK), 1982, c.11*

19. It is well established that the common law must be interpreted and applied in a manner that is consistent with the fundamental values enshrined in the *Charter*.

Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at 1169 - 1172
Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at 592-593 and 603

20. Sexual assault and abuse inflicted upon members of marginalized groups creates and reinforces inequality. Legal mechanisms for redressing such harm must conform to the principles of s.15.

Doe v. Metropolitan Toronto (Municipality) Commissioners of Police [1998] 39 O.R. (3d) 487
Osolin v. The Queen, [1993] 4 S.C.R. 595
R. v. Mills, [1999] 3 S.C.R. 668

21. In institutional abuse actions equality principles require a balancing of the interests of plaintiffs and defendants that takes account of the power imbalance between members of disadvantaged groups and powerful institutions.

22. When legal doctrine incorporates assumptions based exclusively on the experience of dominant groups, equal protection of the law is denied to disadvantaged groups. When such results are characterized as ‘political’ or ‘social’ and therefore beyond the scope of the law, this disadvantage is put beyond the reach of the common law to repair. This reinforces a discriminatory status quo.

Mary Jane Mossman, “Feminism and the Law: Challenges and Choices” 1998, 10 CJWL 1 at 5

Mary Jane Mossman, “Feminism and Legal Method: The Difference it Makes” (1986) 3 Australian Journal of Law and Society 30 at 44-46

Sherene Razack, *Canadian Feminism and the Law: The Women’s Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991) at 23

23. The trial judge in *Barney* incorrectly characterized the IRS experience as a “social matter” beyond his judicial role or function.

Blackwater et al v. Plint et al, [2001] B.C.J. No. 1446 (July 10, 2001) [“Reasons 2001”] J.R. v. p.72 at para. 333

24. Similarly, the Court of Appeal in *Barney* found that the appeals at issue were:

“... coloured by the context in which they arose. ... This treatment excites feelings of sympathy, disgust, and anger in all reasonable persons. However, such natural feelings cannot be allowed to distort the application of general legal principles.”

Blackwater et al v. Plint et al, [2003] B.C.J. No. 2783 (C.A.) [“Reasons BCCA”] J.R. v. 3, p. 417 at para. 127

25. The lower courts’ caution and discomfort in considering racism in the IRS context results in the restrictive application of tort law. As this Court held in *R.D.S.*, it is appropriate to take judicial notice of racism to ensure that justice is done. Consideration of “social matters” such as racism fall squarely within the judicial role and function.

R. v. R.D.S., [1997] 3 S.C.R. 484 at paras. 40-49

26. The lower courts’ characterization of the context of inequality as irrelevant and beyond the scope of the judicial decision-maker perpetuates disadvantage and makes it impossible for the law to recognize the unique and complex nature of IRS abuse, and impossible to provide for substantive equality by granting a remedy for all the harms suffered by the survivors.

Reasons 2001 at paras. 332-333

27. Without an equality-based contextualization of the claim, the power imbalances responsible for the discrimination at issue cannot be exposed and corrected. The failure of the lower courts to apply an equality-sensitive, race based analysis operates to reinforce the law's detachment, and its appearance of neutrality. This preserves substantive inequality by artificially dividing the wrongs and under-calculating the damages, and perpetuates the discrimination, while simultaneously relieving decision-makers of accountability for unjust decisions.

Mary Jane Mossman, "Feminism and Legal Method", *supra* at 44
Elizabeth Comack, "Theoretical Excursions" in *Locating Law: Race/Class/Gender Connections*, Elizabeth Comack ed. (Halifax: Fernwood Publishing, 1999) at 19-25

28. An interpretation and application of the law preserves substantive inequality 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. This Court has ruled that the overriding concern is to increase the substantive equality of those groups previously excluded from power and full participation in society.

Law Society of British Columbia v. Andrews, [1989] 1 S.C.R.143 at 174
Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219 at 1238
R. v. Turpin, [1989] 1 S.C.R. 1296 at 1329

29. The IRS system was introduced to achieve a racist goal. That racism is perpetuated if the law that is supposed to provide compensation for injury is applied in an inequitable way. Because the social impact of racism is so pervasive, ignoring it at law leads to formal equality, which in a case like this, results in inequality. The historical racism of Canadian society and the Canadian legal system is not just a relic but has ongoing resonance for contemporary law.

Richard F. Devlin, "Jurisprudence for Judges: Why Legal Theory Matters For Social Context Education" (2001) 27 Queen's L.J. 161-205 at para. 81
Joanne St. Lewis, "Race, Racism and the Justice System" in C.E. James, ed., *Perspectives on Racism and the Human Services Sector: A Case for Change* (Toronto: University of Toronto Press, 1996) 104
Sherene Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15:2 C. J. L. & Soc. 91 at 128
Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada* (Toronto: Osgoode Society for Canadian Legal History/University of Toronto Press, 1999) at 1-17

30. Denial of the right to seek a full civil remedy for institutional abuse, including IRS abuse, creates and perpetuates racism, gendered racism, and gendered disability discrimination for Aboriginal and disabled women and children who are already disadvantaged in society.

D. The Purposes of Tort Law

31. Tort law serves various social functions. It communicates messages about the aspects of human life and types of people that our society values and deems worth protecting. Human dignity, and integrity and security of the person are principles that underlie the law of battery. A central purpose of tort law is to restore the injured plaintiff to the position in which she would have been, absent the defendant's wrongful actions. Along with the compensatory function, tort also acts as a deterrent of wrongful conduct.

Elizabeth Adjin-Tettey, "Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies" (2004) 49 McGill L.J. 309 at 341-347
 Lucinda M. Finley "Female Trouble: The Implications of Tort Reform for Women" 1996-7 64 Tenn. L.Rev. 847 at 853
 L. Bender, "Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts and Responsibilities" (1990) Duke L.J. 848 at 857
 Denise Réaume, "Indignities: Making a Place for Dignity in Modern Legal Thought" (2002-2003) 28 Queen's L.J. 61
Norberg v. Wynrib, [1992] 2 S.C.R. 226 at paras.54 and 112

E. An Equality Rights Interpretation and Application of Torts Principles

i) Equality Based Interpretation of "Original Position"

32. The lower courts applied a very restricted interpretation of "original position." They found that the "original position" in this case is the position that existed directly prior to the first sexual assault. This allowed for a reduction of the damages due, and essentially allowed the institutional defendants to benefit from their own wrongdoing, by defining the "original position" as that immediately preceding the sexual assaults, i.e. the atrocious environment they created.

Reasons 2001 at paras. 334-336
 Reasons BCCA at paras. 152-155

33. The lower courts erred in law by adopting this approach and finding that the original position in this case was the abusive IRS environment created by the defendants, rather than recognizing that the environment was one of interlocking wrongs, impossible to separate, and that therefore the original position must be the position prior to institutionalization.

34. To find otherwise disregards the reality of the socio-political historical context. It imposes a tort analysis forged on significantly different fact scenarios than the case at bar. It denies the flexibility inherent in tort law, and mandated by equality law, to maintain a fair balance between the interests of the plaintiff and the defendant.

ii) Interconnected Wrongs

35. An indivisible web of violence and abuse was created by Canada at IRS. The Aboriginal children caught within the web were already under the power and control of the tortfeasors prior to the occurrence of any violence. They were vulnerable children without the benefit of parental oversight or assistance. They were completely at the mercy of Canada and the churches.

36. Canada and the churches created a “total institution” – an institution in which power differentials were enforced and maintained to achieve a predetermined goal – in this case the institutional imperative was the racist goal of forced assimilation and cultural genocide.

Roland Chrisjohn et al., *The Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada* (Penticton, B.C.: Theytus Books, 1997) at 68-76

Elizabeth Graham, *The Mush Hole: Life at Two Indian Residential Schools* (Waterloo: Heffle Publishing, 1997) at 40-42

37. The trial judge acknowledged the likely detrimental impact of the harsh and oppressive conditions of an IRS on a child. However, he erred in limiting his assessment of wrongdoing exclusively to Plint’s sexual misconduct and to whether the respondents failed to take reasonable care to detect and end that sexual abuse. The Coalition submits that the trial judge erred in failing to find that subjecting children to the physical and emotional abuse experienced at IRS was tortious because it is indivisible from the other abuses, including the sexual assaults.

38. The wrongs were all part and parcel of the institutional imperative of forced assimilation. Sexual assault, emotional and physical abuse, racism, isolation and starvation are in fact very much related – they are all exercises of power and control inflicted to achieve the oppression of the victim and the dominance of the perpetrator.

Elizabeth Graham, *The Mush Hole*, *supra* at 40-42

39. Mr. Barney's experiences of physical and sexual violence did not occur in a clear sequence commonly found in personal injury cases, and are impossible to compartmentalize. The harmful assaults at the school overlapped and enabled one another. For example, the trial judge found as a fact that the anal and oral rapes were extremely violent and accompanied by verbal threats. A specific example of the overlap of the abuse was that following one sexual assault by Plint, Mr. Barney attempted to drown himself in the bathtub; Plint punished him by strapping him naked in front of the other boys.

Reasons 2001 at para. 451; and Appellant Frederick Leroy Barney's factum at para. 32 citing L. Barney, A.R. v. 7, p. 1250

40. Imposing a linear timeline artificially divides the interconnected wrongs that made up a total environment at IRS, creates an advantage for Canada which intentionally created the environment, and disadvantages IRS survivors. It is critical to recognize that the interconnected wrongs inflicted at IRS acted to increase the vulnerability of the children to sexual assault, and to enforce the different power disparities between the interned children and the staff.

41. The lower courts' findings allowed the respondents to diminish their responsibility for the abusive environment that Mr. Barney was forced to endure, and then point to that very environment to claim that Mr. Barney would have been psychologically damaged by the IRS experience even if Plint had not sexually abused him. The respondents were then allowed to claim that Mr. Barney need only be returned to an original position that treats the non-sexual abuse as a *fait accompli*, and takes its long-term consequences as a given. The result of this argument is to deny Mr. Barney full compensation for all of the interlocking wrongs and indivisible harms.

42. The principle that a plaintiff is not entitled to be put in a better position than he would have been absent wrongdoing is meant to prevent a plaintiff from reaping an unjust windfall when he happens to be simultaneously injured by tortious conduct and by a natural or accidental event. Full compensation for a person brutalized in multiple ways in an IRS cannot be treated as an unjust windfall. On the contrary, to reduce compensation for sexual abuse because of the damage simultaneously done by other abuse would give an unjust windfall to a defendant ultimately responsible for multiple interconnected torts by using a statute-barred tort to obliterate much of the harm simultaneously done by interconnected torts.

43. Equality values demand that the rules of tort law not be so callously used to obliterate the causal connections between the totality of the respondents' racist treatment of Mr. Barney and the totality of the injury suffered.

iii) Indivisible Harms

44. Mr. Barney was subjected to isolation and brutal conditions that made him more vulnerable to Plint's predations. Those same harmful conditions combined with Plint's sexual misconduct to produce the overall psychological damage suffered. The events blurred into and reinforced one another, and their effect on Mr. Barney's self-esteem and psyche were equally intermingled. It is impossible to devise any system to ever know the exact causes or measurements of the different wrongs and harms.

45. While the harms flowing from the interconnecting wrongs at issue are indivisible, it is important to understand that sexual assault is especially damaging. Sexual assault necessarily inflicts serious bodily and mental harm. It is an intimate violation, which some victims describe as "worse than death", and from which injury to dignity should be assumed, and compensation awarded automatically without specific proof of psychological harm.

R. v. Osolin, [1993] 4 S.C.R. 595 at p. 669

R. v. Ewanchuk, (1999) 1 S.C.R. 330 at para. 69

Catharine MacKinnon, "Genocide's Sexuality", *supra* at 333

iv) Limitation Law as a Barrier to Civil Redress

46. It is the Coalition's position that the lower courts erred in the application of principles regarding the assessment of damages, and that this error flowed from the failure to recognize the unique nature of the abuse that constituted an indivisible web of violence. Limitation periods should not be a barrier in this case if the wrongs are analysed from an equality perspective, taking into consideration the racist motivations that lead to the creation of the indivisible web of violence.

47. The Coalition is not arguing that the statutory limitation period applicable to assault and battery in this case is unconstitutional. That legislation is not being challenged in this appeal, and it is the Coalition's position that it is not necessary to abolish limitation periods for ordinary assault and battery to provide a meaningful remedy and substantive equality for IRS survivors.

48. The abuse endured by IRS survivors does not constitute an ordinary assault and battery. IRS survivors endured a unique and complex form of abuse, including sexual assault. In order to provide for substantive equality in accordance with the equality values that underlie s. 15, the law must take account of the unique and complex nature of IRS abuse.

49. To inappropriately divide the wrongs and the harms experienced, and to rely on limitations barriers constitutes a continuing and current violation of an IRS survivor's right to equal protection and benefit of the law. The continuing discrimination lies in the ongoing protection afforded the powerful defendants in institutional assault cases from otherwise recoverable damages flowing from their wrongful acts, compared with the denial to primarily young racialized plaintiffs to access damages through civil action. It is an unconscionable abuse of power for governments to rely on limitations periods to defend claims of institutional abuse, and governments should be restrained from doing so.

The Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, Executive Summary (Ottawa: The Commission, 2000) at 20

50. It is the Coalition's position that this case demonstrates why there should be no limitation periods applied in actions arising from and related to institutional abuse. The circumstances of

institutional abuse demand an exemption from 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 a result of the very characteristics for which they were targeted by the abuser.

51. An expansive interpretation of limitations law in cases of institutional abuse would be consistent with the purposes and policies of tort and equality law. This Court has already recognized the need to accommodate limitations law in cases of historical sexual abuse.

M.K. v. M.H. [1992] 3 S.C.R. 6

52. Institutional abuse constitutes an egregious wrong, the deterrence of which is of greater social importance than the rights of the powerful institutional abusers to escape liability because of a limitation period. This balance can only be achieved if the institutional defendant is prevented from relying on a delay that, in many cases, was the result of its own conduct.

53. This Court decided in *M.K. v. M.H.* that limitations periods should be adapted in incest cases because the damages wrought in such cases are “peculiarly complex and devastating, often manifesting themselves slowly and imperceptibly, so that the victim may only come to realize the harms she (and at times he) has suffered, and their cause, long after the statute of limitations has ostensibly proscribed a civil remedy”. In *M.K. v. M.H.* this Court found that the patent inequity of allowing defendants to go on with their life without liability, while the victim continues to suffer the consequences of the tortious wrong, clearly militates against any guarantee of repose associated with limitations periods. The Court also recognized that a statute of limitations provides little incentive for victims of incest to prosecute their actions in a timely fashion if they have been rendered psychologically incapable of recognizing that a cause of action exists. This Court also called for legislative reforms that would abolish limitation periods in cases of incest.

M.K. v. M.H., *supra* at paras. 1, 18, 22, 23 and 52

54. The Coalition submits that institutional abuse cases should be subject to an exemption from limitation periods for the same reasons that the Court found that the limitation period in *M.K. v. M.H.* was inequitable. Manitoba has legislation that dispenses with limitation periods in cases of batteries where the victim was in an unequal relationship with the perpetrator. The

legislation makes it possible for claimants in Manitoba to sue in respect of both sexual and non-sexual historical abuse where there has been a relationship of intimacy or dependency. Claimants in other jurisdictions should be entitled to the same benefit, especially when the claims are against the same defendant(s).

The Limitations of Actions Act, C.C.S.M. cL150, ss. 2.1(1) and 2.1(2)

55. If the Court recommends instead that a standard of reasonable discoverability for institutional abuse cases should be adopted, the Coalition submits that what is ‘reasonable’ must be assessed through the lens of an equality-based analysis.

56. What is ‘reasonable’ in this context needs to be interpreted from an equality perspective, being alert to the societal norm of the day, without pathologizing the plaintiff. The concept of reasonableness can unthinkingly reflect non-disabled, white, male perspectives and experiences, imposed on the law as an allegedly “neutral” standard. This standard must be interpreted more inclusively so that it does not disadvantage those outside of the dominant norm, such as Aboriginal and disabled women and children.

Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Toronto: Oxford University Press, 2003) at 275

57. What is reasonable needs to take into consideration the socio-political context of the wrongs inflicted and the effect of the harm endured. For example, in this case, because IRS were run cooperatively by the church and state they enjoyed a moralistic camouflage which served to mask the racist aims of the policy. This mask of paternalistic benevolence made it difficult for both the victims of the policy and mainstream society to understand and appreciate the harm done. It is not “reasonable” to expect colonized peoples whose cultures were attacked by the defendant to comply with limitation periods designed to protect the defendant from the harm that they have inflicted upon Aboriginal persons.

Roland Chrisjohn, *The Circle Game*, *supra* at 62-63
M.K. v. M.H., *supra* at paras. 26 and 30

58. Once a plaintiff has proven that he or she survived abuse at an IRS, it should not be necessary for a plaintiff to introduce specific evidence of the delay in discoverability. It should

be presumed that a claim was not reasonably discoverable until it is clear that the socio-political and legal environment is accessible and amenable to such claims. The systemic disenfranchisement of Aboriginal persons and the hostility of the legal system towards Aboriginal persons created a situation which contributed to an environment in which it was not reasonable to expect Aboriginal persons to have confidence in the justice system. The court may take judicial notice of the fact that mainstream social and legal systems did not recognize the widespread and systemic racism experienced by Aboriginal people in general in Canada, and within the context of IRS specifically, until relatively recently. This fact, combined with proof of confinement, should give rise to a presumption of delayed discoverability; the onus of dislodging such a presumption must rest on the defendant.

Sherene Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15:2 C. J. L. & Soc. 91
 Royal Commission on the Donald Marshall, Jr., Prosecution, Commissioners Report, Findings and Recommendations, 1989 at 151-152
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 Amnesty International, "Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada", October, 2004 at 13-18 available at: http://www.amnesty.ca/resource_centre/reports/view.php?load=arcview&article=1895&c=Resource+Centre+Reports

F. The Calculation of Damages

59. The calculation of damages needs to take account of the interconnected wrongs that were inflicted on IRS survivors, exempt from the application of limitation periods, and to compensate them for the totality of the harm they endured. In the assessment of damages, consideration should be made of the fact that the subject abuse included multiple rapes, which constitute an extreme form of violence and injury to dignity.

60. The right to compensation for the totality of the harm inflicted has practical value only to the extent that it is vindicated by an adequate remedy. The award must be significant in order to provide meaningful justice for the survivors - justice that is consistent with prevailing social values and policies. To do otherwise would be a travesty of justice.

Jamie Cassels, *Remedies: The Law of Damages* (Toronto: Irwin Law, 2000) at Chapter 1, A “Scope and Significance of the Subject” (Quicklaw)

G. An Equality Based Analysis of Loss of Future Opportunity

61. Loss of future opportunity is often a very significant component of a plaintiff’s total financial recovery. In many cases involving psychological harms it represents the highest dollar figure of any head of damages. A fair and equitable calculation under this head of damages is central to fair and equitable compensation for IRS claimants.

62. In calculating loss of future earning capacity the calculation is based on the level of earning which the plaintiff would likely have achieved and the period that he or she would sustain it, subject to deductions made for the contingencies of life. Future economic loss is assessed on the basis of the “simple probability” standard of proof.

Ken Cooper-Stephenson, “Personal Injury Damages in Canada”, 2nd ed. (Toronto, Carswell, 1996) at 202-204 and 226-229

63. A failure to properly evaluate the impact of the tort on Mr. Barney’s economic future devalues the economic potential of this Aboriginal plaintiff. This devaluation violates the equality guarantees found in s.15 of the *Charter*.

64. In this case, Mr. Barney was a child in an educational setting at the time of the torts. The impact of the abuse on his attitudes both towards education and on his future earning capacity is likely to be profound and lifelong, thereby significantly diminishing his earning capacity.

65. Damages for past lost income simply replicate the unequal wage rates of the market, and thus make problematic assumptions about the relative worth of human lives. Earnings-based damages calculations signal that men who conform to the dominant norms are worth more than those outside of the dominant norm. In IRS cases, an industrial education was insufficient to ensure participation in economic mainstream. This has disproportionately affected Aboriginal women, who cannot participate in either traditional Aboriginal economies using traditional skills, or non-Aboriginal commercial economies. This, in turn, has contributed to the extreme poverty of many Aboriginal women.

Elizabeth Adjin-Tettey, “Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies”, *supra*

Lucinda Finley, “Female Trouble: The Implications of Tort Reform for Women” 1996-1997 64 Tenn. L. Rev. 847 at 861

Canadian Research Institute for the Advancement of Women, “Women an Poverty” at 2, available at: http://www.criaw-icref.ca/factSheets/Poverty_fact_sheet_e.htm

66. Aboriginal plaintiffs who attended IRS are entitled to a principled non-discriminatory analysis of their loss of future opportunity. Reliance upon “convention” in the calculation of these damages risks the importation of discriminatory assessments of the value of an Aboriginal plaintiff, and risks the denial of the plaintiff’s future potential.

H. Compensation for Forced Loss of Language and Culture

67. The Coalition supports Mr. Barney’s arguments that the forced loss of language and culture constitute, at a minimum, an aggravating factor in calculating damages.

68. The Coalition also submits that it is unsettled in law whether a tort claim for the loss of culture and language is possible. Mr. Barney’s claim was not advanced on this basis, however there are actions pending before the courts in which a tort claim for the loss of culture and language is being advanced. The disposition of this matter should not inadvertently dispose of these claims or adversely impact dispute resolution structures.

Kwakiutl v. Canada (Attorney General), [2004] B.C.J. No. 728

Cloud v. Canada (Attorney General), [2004] 247 D.L.R. (4th) 667 at paras. 80-81

69. The purpose of aggravated damages is to compensate the plaintiff for the humiliating, oppressive and malicious aspects of the defendant’s conduct which aggravated the plaintiff’s pain and suffering by causing, for example, a loss of dignity, pride, and self respect.

Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at 1205-1206

70. The loss of dignity, pride, and self respect caused by the forced loss of Aboriginal language and culture, and achieved through the infliction of the institutional abuse at issue,

including the sexual assaults, is undeniable. The devastation that the forced loss of Aboriginal language and culture brought upon Aboriginal communities is clear.

John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879-1986*, *supra*

Agnes Grant, *No End of Grief: Indian Residential Schools in Canada*, *supra* at 189-207 and 245-267

Cynthia C. Wesley-Esquimaux and Magdalena Smolewski, *Historic Trauma and Aboriginal Healing* (Ottawa: The Aboriginal Healing Foundation, 2004) at 55-63

Kim Anderson, *Recognition of Being: Reconstructing Native Womanhood*, *supra*

71. This Court has recognized the integral link between language, culture and human dignity:

... the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

Reference Re: Manitoba Language Rights (Man.), [1985] 1 S.C.R. 721 at para. 46

Mahe v. Alberta, [1990] 1 S.C.R. 342 at para. 32

Ford v. Quebec (Attorney General) [1988] 2 S.C.R. 712 at paras. 39-40, 42 - 43

72. This Court has found that “aboriginal rights lie in the practices, customs and traditions integral to the distinctive cultures of aboriginal peoples.” While it has not yet been established at law, Aboriginal language and culture may fall within the protection of s.35(1) of the *Constitution* as a protected Aboriginal right. Culture and language should be accorded a high value in the assessment of damages in consideration of the potential of s.35(1). The impact of the loss of dignity, pride, and self respect that results from the loss of something so integral to Aboriginal personhood should be reflected in the amount of the award.

R. v. Van der Peet, [1996] 2 S.C.R. 507, at para. 48

The Constitution Act, 1982, Part II, s. 35

Gordon Christie, “Aboriginal Rights, Aboriginal Culture and Protection” (1998) *Osgoode Hall Law Journal* 36 at 447

73. A significant award of damages for loss of Aboriginal language and culture is merited as a matter of justice. It would represent a judicial endorsement of the integral value of Aboriginal language and culture to Aboriginal persons, and indeed to Canadian society as a whole. It would

help to redress the inequality between Aboriginal people and non-Aboriginal people resulting from the Aboriginal residential school experience, and would further equality.

Patrick Macklem, *Indigenous Difference and the Constitution of Canada*, (Toronto: University of Toronto Press: 2002) at 71, 74

PART IV – SUBMISSIONS CONCERNING COSTS

74. The Coalition is not seeking costs in this matter and submits that no order for costs should be made against the Coalition.

PART V – ORDER REQUESTED

75. The Coalition respectfully requests:

- (i) that the appellant Frederick Leroy Barney's appeal be allowed;
- (iii) a recalculation of damages in accordance with equality rights values so that compensation is awarded in consideration of the totality of wrongs inflicted and harms experienced, including loss of Aboriginal language and culture; and
- (iv) a recalculation of damages for loss of future opportunity in accordance with equality rights values.

All of which is respectfully submitted this 23rd day of April 2005.

Per:

Marie Elena O'Donnell
Counsel for the Coalition of LEAF,
NWAC and DAWN Canada

PART VI

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