



Equitable doctrine of fraudulent concealment

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Introduction

Fraudulent concealment is an equitable doctrine that, if proven, operates to toll the applicable limitation period until the plaintiff can reasonably discover his or her case. Fraudulent concealment exists where:

- the litigious parties have a special relationship with one another;
- the defendant's conduct amounts to an unconscionable act towards the plaintiff, given the confidential nature of their relationship; and
- the defendant concealed the plaintiff's right of action.**(1)**

Once established, this equitable doctrine operates to restrict wrongdoers from inappropriately concealing pertinent information and, in turn, leveraging a limitation period to cause an injustice.

General principles

The jurisprudence relating to fraudulent concealment has remained relatively stable over the past three decades. In 1984 in *Guerin v R* the Supreme Court of Canada considered whether a limitation period defence could apply in light of an allegation of fraudulent concealment. The court determined that when such concealment is used to shield a cause of action, the limitation period will not start until the plaintiff discovers the fraud or when, with reasonable diligence, he or she ought to have discovered it.**(2)** Notably, the court provided that the concealment need not be 'fraudulent' or 'deceitful' as defined in common law – rather, the concealment must only be 'unconscionable' given the special relationship between the two concerned parties. As such, even where there is no fraudulent concealment *per se*, the limitation period will be suspended.

In 1992 the Supreme Court of Canada revisited this issue in *M(K) v M(H)*, a sexual assault case, and affirmed that fraudulent concealment will toll the limitation period of either a common law or equitable claim until the plaintiff can reasonably discover his or her cause of action. The court also discussed three key underlying

rationales for the statutes of limitations: certainty, evidentiary and diligence. With respect to certainty, defendants should be secure in their reasonable expectation that they will not be held liable for ancient obligations.(3) The evidentiary rationale is based on the justice system's concern of foreclosing cases based on stale evidence.(4) Finally, the diligence rationale is rooted in the concept that plaintiffs are expected to act diligently and enforce their rights in a timely fashion.(5) While there are clear policy reasons for enforcing limitations periods strictly, in *Nielsen v Kamloops (City)*(6) the Supreme Court of Canada provided that preventing the injustice of a statute bar to a plaintiff's claim before it is discoverable will take precedence over "any difficulty encountered in the investigation of the facts many years after the occurrence of the allegedly tortious conduct".(7) Similarly, in the case of a fraudulent concealment, the rules of equity favour the suspension of a limitation period to prevent an injustice from occurring against the plaintiff.

This was further addressed in *Giroux Estate v Trillium Health Centre*,(8) where Justice Moldaver for the majority of the Court of Appeal confirmed that the doctrine of fraudulent concealment is not dependent on the particular wording of a statutory limitation provision, but is an equitable principle aimed at preventing a limitation period from acting as an instrument of injustice.(9) In doing so, he differentiated the statutory discoverability rule from the common law doctrine of fraudulent concealment. Whereas discoverability is a necessary element of a statute of limitation, the common law doctrine of fraudulent concealment removes the matter from the scope of a statute and suspends the operation of the statute.

Special relationship

The courts have not delineated a strict test to determine the scope of the 'special relationship' required for fraudulent concealment. Nevertheless, examples of relationships sufficient to surpass this threshold include:

- doctor-patient;(10)
- parent-child;(11)
- Aboriginal groups-crown;(12)
- solicitor-client(13); and
- bailor-bailee.(14)

Notably, however, Justice Hourigan in a summary judgment motion held that no special relationship will exist where there were business dealings between two relatively sophisticated businesspeople.(15)

Unconscionable act and the concealment of the right of action

The unconscionable act need not satisfy the definition of either common law or statutory 'fraud'. The word 'fraud' within the doctrine of fraudulent concealment is to be given a "broad meaning, and is not confined to the traditional parameters of the common law action".(16) While fraud is not required, there must be 'active concealment'. 'Active concealment' can arise either:

- by concealing a right of action after it has arisen; or
- from the manner in which the act which gives rise to the fraudulent concealment is performed.(17)

For example, in *M(K)* the court found that a parent concealing the wrongfulness of incest from his or her child constituted concealment of the right of action. Ultimately, the common theme is that active concealment requires the defendant to hide, secret, cloak, camouflage, disguise, or cover up the wrongdoing.(18) By the same token, where there is no duty to disclose information, concealment requires something more than mere non-disclosure – such non-disclosure is not active concealment.(19)

Comment

Most recently in *Colin v Tan*, Justice Perrell for the Ontario Superior Court of Justice summarised and affirmed the jurisprudence and longstanding doctrine of fraudulent concealment.**(20)** In short, fraudulent concealment prevents a person standing in a special relationship with an injured party from using a limitation period as an instrument of fraud or injustice.

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Endnotes

- (1) [1992] 3 SCR 6, 36 ACWS (3d) 466 at para 61 [*M(K)*]; *Colin v Tan*, 2016 ONSC 1187 at para 45, 2016 CarswellOnt 2437.
- (2) *Guerin v R*, [1984] 2 SCR 335, 6 WWR 481 at para 111.
- (3) *M(K)*, *supra* note 1 at para 22
- (4) *Ibid* at para 23.
- (5) *Ibid* at para 24.
- (6) [1986] 2 SCR 147 at paras 105-110, [1984] 5 WWR 1 [*Kamloops*].
- (7) *M(K)*, *supra* note 1 at para 27.
- (8) *Giroux Estate v Trillium Health Centre*, 2005 CarswellOnt 241, 136 ACWS (3d) 778 (Ont CA) [*Giroux Estate*].
- (9) *Ibid* at paras 28-29.
- (10) *Giroux Estate*, *supra* note 8; *Colin*, *supra* note 1.
- (11) *M(K)*, *supra* note 7.
- (12) *Guerin*, *supra* note 2.
- (13) *Kitchen v Royal Air Force Association*, [1958] 1 WLR 563, 2 All ER 241 [*Kitchen*].
- (14) *Beaman v ARTS. Ltd*, [1949] 1 KB 550.
- (15) *PNA Holdings Ltd v Rydon Homes Ltd*, 2011 ONSC 3858 at para 29, 206 ACWS (3d) 197.
- (16) *M(K)*, *supra* note 7 at para 63; *Kitchen*, *supra* at 249.
- (17) *M(K)*, *supra* note 7 at para 64.
- (18) *Johnson v Studley*, 2014 ONSC 1732, 2014 CarswellOnt 3286 at para 83.
- (19) *Ibid*.
- (20) *Colin*, *supra* note 1 at para 45.

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