

“AN UNCONSCIONABLE THING FOR THE ONE TO DO TOWARDS THE OTHER:” THE DOCTRINE OF FRAUDULENT CONCEALMENT

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What tool is available to the courts to address conduct of the defendant which frustrates or impedes the plaintiff from discovering a cause of action? The doctrine of fraudulent concealment has developed at equity to attend to this issue, and has operated largely as a court-made rule in Canada. Curiously, the equitable doctrine does not actually speak to fraud per se in the common law sense, but rather operates to toll or suspend a limitation period where the defendant has acted unconscionably so as to conceal a cause of action from the plaintiff. The paper evaluates the constituent elements of fraudulent concealment as the test has been developed in Ontario, and with reference to other common law provinces and English jurisprudence. It also addresses the question of whether the doctrine is still relevant in light of the modern discoverability rule. Lastly, whether the doctrine has been applied consistently, and whether it may operate coherently in the class proceeding context will be examined.

De quels moyens disposent les tribunaux pour traiter de la conduite d'un défendeur qui entrave ou empêche le demandeur de découvrir une cause d'action? Les tribunaux canadiens ont recours à la doctrine de la dissimulation frauduleuse, fondée sur l'équity, qui a été élaborée à titre de règle prétorienne pour y répondre. Curieusement, cette doctrine en equity n'est pas en soi, basée sur la fraude au sens de la common law, mais vise plutôt à interrompre ou à surseoir un délai de prescription dans les cas où le défendeur a agi de façon abusive afin de dissimuler une cause d'action du demandeur. L'article évalue les différentes composantes de la dissimulation frauduleuse selon le critère élaboré en Ontario, par rapport aux autres provinces de common law et à la jurisprudence anglaise. L'article aborde également la question de savoir si la doctrine est toujours pertinente à la lumière de la règle de la possibilité de découvrir le dommage, qui s'avère plus moderne. Enfin, il examine dans quelle mesure la doctrine a été appliquée de façon régulière, et si elle pourrait trouver une application cohérente dans le contexte des recours collectifs.

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1. Introduction

Statutes of limitation have been described as “statutes of peace,” as they reflect the public policy that a defendant should be spared the injustice of having to face stale and unexpected claims. With the legislative codification of the discoverability rule, such limitation periods as a general rule are premised upon the requisite knowledge of the plaintiff. The judicial inquiry is focussed on when the plaintiff knew, or ought to have known, about the material facts forming the basis for his or her claim. As observed by Lord Millett, the analysis “assumes that the plaintiff knows or ought to know that he has a cause of action. In common justice a plaintiff ought not to find that his action is statute-barred before he has had a reasonable opportunity to bring it.”¹ What tool is available to the court to address conduct of the defendant which frustrates or impedes the plaintiff from gaining such knowledge? The doctrine of fraudulent concealment has developed at equity to attend to this issue, and in contrast to the more extensive legislative treatment in England, has operated largely as a court-made rule in Canada.² It is an equitable principle, and unlike the discoverability rule is not dependent upon the particular wording of a limitation provision. The doctrine is concerned with the operation of a limitation period, not its interpretation. Curiously, the equitable doctrine does not actually speak to fraud *per se* in the common law sense nor does it require a certain degree of moral turpitude or deceit. Rather, it operates to toll or suspend a limitation period where the defendant has acted unconscionably so as to conceal a cause of action from the plaintiff.

In light of the modern discoverability rule, the court will necessarily examine the plaintiff’s knowledge on both a subjective and objective basis in applying a limitation period. It remains worth asking whether the doctrine simply provides an alternate means to arrive at the same result, namely an objective determination of whether the plaintiff ought to have discovered the claim in the circumstances. It is suggested that the doctrine possesses continued significance in providing an equitable tool to the court to suspend the operation of a limitation period on the basis of a defendant’s conduct, where objective discovery would otherwise be found.

¹ *Cave v Robinson Jarvis & Rolf*, [2003] 1 AC 384 (HL) at para 7 [*Cave*].

² The common law provinces to varying degrees possess provisions to toll an ultimate limitation period. With respect to the Ontario *Limitations Act, 2002*, SO 2002, c 24 Sch B, a concealment provision is found in s 15, yet this has been held to apply only to the ultimate 15-year limitation period, and not the s 4 general two-year limitation; see *Lockrey v Kay*, 2013 CanLII 54056 (Ont Sup Ct (Sm Cl Div)). See also *Limitation Act*, SBC 2012, c 13, s 21(3); *Limitations Act*, RSA 2000, c L-12, s 4(1); *Limitations Act*, SS 2004, c L-16.1, s 17; *Limitation of Actions Act*, SNB 2009, c L-8.5, s 16; *Limitation of Actions Act*, RSNS 1989, c 258, s 29; *Statute of Limitations*, RSPEI 1988, c S-7, s 3.

The following paper seeks to evaluate the constituent elements of fraudulent concealment as the test has been developed in Ontario, and with reference to other common law provinces and English jurisprudence. The relevant case law has not developed in an entirely consistent manner, and with the exception of established cases of fiduciaries actively misleading plaintiffs as to material facts, the circumstances in which a Court will apply the doctrine are more fluid. Lastly, whether the doctrine has been applied coherently in the class proceeding context will be examined.

2. Origins and the Test from *Giroux Estate*

A limitation period may be extended, or possibly interrupted, by fraudulent concealment. The doctrine developed at equity and was incorporated into the English *Limitation Act, 1939*. It was first applied by the Supreme Court of Canada in *Massie & Renwick v Underwriters' Survey Bureau Ltd*, where it was briefly mentioned in the context of an appeal concerning copyright infringement.³ The English decision which was to have greatest influence on the development of the Canadian law followed in 1958. In *Kitchen v Royal Air Force Association*,⁴ the English Court of Appeal applied the notion of “equitable fraud” defined as “conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.” The case concerned the failure of solicitors to properly alert the plaintiff as to a cause of action against tortfeasors whose negligence had allegedly caused the death of the plaintiff’s husband. The tortfeasors offered an out-of-court payment of which the solicitors failed to inform the plaintiff, and the limitation period was allowed to expire through inadvertence.

Roughly forty years after *Massie & Renwick*, the Supreme Court applied the dicta from *Kitchen* in *Guerin v Canada*,⁵ to find that the Crown was not permitted in equity to rely upon a limitation period to bar a claim by an Indian band with respect to the lease of its lands. While the Crown did not act dishonestly or with improper motives in failing to make full disclosure to the band, its conduct was unconscionable having regard to the fiduciary relationship between the parties.

As held by the Supreme Court in *M(K) v M(H)*, a case involving an action by a victim of incest against her father, fraudulent concealment speaks to inequitable conduct (not fraud *per se*) aimed at deliberate concealment of facts which affects concealment of a right of action,

³ *Massie & Renwick v Underwriters' Survey Bureau Ltd*, [1940] SCR 218 [*Massie & Renwick*].

⁴ [1958] 2 All ER 241 (CA) [*Kitchen*].

⁵ [1984] 2 SCR 335.

coupled with an abuse of a position of confidence or special relationship.⁶ Applying the dicta from *Kitchen*, no degree of moral turpitude is necessary to establish such equitable fraud.

The leading Ontario case on the common law doctrine remains *Giroux Estate v Trillium Health Centre*, where it was alleged that a doctor was negligent in failing to diagnose and properly treat a cancerous tumour that ultimately took the life of the deceased.⁷ The deceased's estate commenced an action three and a half years after the death. The defendant alleged that the action was barred by the two year limitation period contained in the *Trustee Act*.⁸ When the family began to raise questions about the deceased's medical treatment, the doctor said that he had discussed the tumour with the deceased, who had declined radical surgery or radiation. He claimed that he had notes in his file that would corroborate his story. It was only after making a complaint to the College of Physicians and Surgeons, more than three years after the death, that the family discovered that the doctor had been lying to them, that he had never recommended radical treatment and that he had prepared a false set of notes.

In the motion decision at first instance Lederman J summarized the requirements to apply the doctrine of fraudulent concealment:

- (a) the defendant and plaintiff are engaged in a special relationship with another;
- (b) given the special or confidential nature of their relationship, the defendant's conduct amounts to an unconscionable thing for the one to do towards the other;
- (c) the defendant conceals the plaintiff's right of action (either actively, or as a result of the manner in which the act that gave rise to the right of action is performed).⁹

⁶ *M(K) v M(H)*, [1992] 3 SCR 6 [*M(K)*].

⁷ *Giroux Estate v Trillium Health Centre* (2005), 74 OR (3d) 341 (CA) [*Giroux Estate*].

⁸ RSO 1990. c T.23.

⁹ *Giroux Estate v Trillium Health Care* (2004), 69 OR (3d) 689 (Ont Sup Ct) at para 20, citing *Buell v CIBC Wood Gundy Securities Inc*, [1998] OJ No 2861 (Gen Div) (QL) where a financial advisor was alleged to have failed to comply with regulatory requirements, and hid those failures from Wood Gundy which in turn failed to monitor the broker and his compliance, and did not disclose that he was disciplined by the TSX and IDA and had been sued in an action in 1988 with respect to his activities for another customer's accounts in 1984-1987. The plaintiff asserted that as a result he attributed his losses to the market rather than his own broker's mismanagement of his accounts.

The Court of Appeal upheld the motion decision, finding that the doctrine of fraudulent concealment applied and that the action was not time-barred. It defined fraudulent concealment to include “conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for one to do towards the other.”¹⁰ It is an equitable principle, used to prevent an injustice, and not a rule of construction:

Unlike the discoverability rule, with which *Abella J.A.* was concerned [in *Waschkowski v Hopkinson Estate* (2000). 47 O.R. (3d) 370], the common law doctrine of fraudulent concealment is not a rule of construction. It is an equitable principle aimed at preventing a limitation period from operating “as an instrument of injustice” (see *M(K)*, *supra*, at para. 66). When applicable, it will “take a case out of the effect of statute of limitation” and suspend the running of the limitation clock until such time as the injured party can reasonably discover the cause of action (see *M(K)* *supra*, at paras. 65 and 66). Its underlying rationale is grounded in the well-established principle, reiterated in *Goldin (Trustee of) v Bennett and Co* 2003 CanLII 4764 (ON CA), (2003), 65 O.R. (3d) 691 at para. 35, that equity will not permit a statute to be used as an instrument of fraud.

In other words, unlike the discoverability rule, the doctrine of fraudulent concealment is not dependent upon the particular wording of the limitation provision. When applied, there is no risk that the limitation provision will be construed in a manner not intended by the legislature. Fraudulent concealment is concerned with the operation of the provision, not its interpretation. Stated succinctly, it is aimed at preventing unscrupulous defendants who stand in a special relationship with the injured party from using a limitation provision as an instrument of fraud.¹¹

The Court concluded on the facts that there was fraudulent concealment. Moldaver JA, speaking for the Court, stated that on the facts as pleaded it would be open for a trier of fact to find that as a direct result of the defendant’s duplicity the estate was “thrown off track” by the fictional account and by pitting the doctor’s credibility and reliability as a professional against that of elderly and distraught family members.

Interestingly, Moldaver JA observed that fraudulent concealment could “stop the clock from running” even after the limitation period had begun to run.¹²

¹⁰ *Giroux Estate*, *supra* note 7 at para 22.

¹¹ *Ibid* at paras 28, 29.

¹² *Ibid* at fn 6, citing *M(K)* at para 64 that fraudulent concealment may involve active concealment of a right of action after the action has arisen or, it may arise from the manner in which the act that gives rise to the right of action is performed.

While the decision has remained the guiding test in Ontario, how it has been applied reveals some ambiguities and tensions in the case law. This is particularly noteworthy when the law prevailing in the UK is examined.

3. *The House of Lords' Double-Barrelled Test*

In 2002, the House of Lords addressed the doctrine of fraudulent concealment in *Cave v Robinson, Jarvis & Wolf*.¹³ In sum, the plaintiff retained the defendant law firm to act for him in connection with a transaction to obtain mooring rights over land for one hundred years. The transaction was completed, and the company that owned the land subsequently went into receivership. The plaintiff was then informed that the mooring rights were no longer exercisable. Roughly four years later the plaintiff commenced an action against his solicitors for negligence, arguing fraudulent concealment on the basis that although the lawyers had not known at the time that their drafting of the agreement constituted a breach of duty, it was an intentional act in circumstances in which the breach was unlikely to be discovered for some time.

After success at trial and on appeal, the plaintiff's argument was ultimately rejected at the House of Lords. It was clarified that the doctrine applies in two situations, namely where the defendant 1) took active steps to conceal his own breach of duty after he became aware of it; or 2) was guilty of a deliberate wrong and concealed or failed to disclose it in circumstances where it was unlikely to be discovered for some time.¹⁴ The doctrine does not deprive a defendant of a limitation defence where mere negligence is asserted, and the defendant is unaware of his error or failure to take proper care. The distinction is between intentional wrongdoing on one hand and negligence or inadvertent wrongdoing on the other. While concealment and non-disclosure are different concepts, "they have this much in common; they both require knowledge of the fact which is to be kept secret."¹⁵

¹³ *Supra* note 1.

¹⁴ The House of Lords was interpreting s 32 of the *Limitation Act, 1980*, which states that the limitation period is postponed by a fact relevant to the plaintiff's cause of action has been deliberately concealed by the defendant, which is deemed to include a "deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time(.)" While of no import to the case, it appears the concurring reasons of Lord Scott would allow concealment to be found even where prior negligence comes to the attention of the defendant and he fails to disclose it to the plaintiff.

¹⁵ *Cave, supra* note 1 at paras 17, 21, 25. The decision has had limited treatment in Canada; see *Cimolai v Hall*, 2005 BCSC 31, [2005] BCJ No 81, aff'd 2007 BCCA 225, [2007] BCJ No 810 (QL).

4. Active Concealment or Mere Omission?

Whether an omission can support a pleading of fraudulent concealment is less than clear in Canadian law, with most dicta referring to active concealment. Absent deliberate conscious concealment, however, Canadian courts will find non-disclosure unconscionable and sufficient to trigger the doctrine where the underlying wrong was wilful and in the circumstances unlikely to come to light for some time. This formulation has its roots in *M(K)*, which did not involve deliberate concealment on the part of the defendant. Rather, La Forest J noted in *obiter dicta* that the nature of the act itself (incest) engendered a climate of secrecy and confusion in the victim as to the wrongfulness of the conduct. Quoting from Halsbury’s, concealment “may arise from the manner in which the act which gives rise to the right of action is performed.”¹⁶ The underlying conduct also constituted a grievous and intentional abuse of a position of confidence.

The most recent treatment of the doctrine by the Ontario Court of Appeal is in *Rajmohan v Norman H Solmon Family Trust*,¹⁷ which speaks to what form of conduct will support a finding of concealment through omission. On appeal from summary judgment, the appellant was the assignee of mortgages granted by the plaintiff to the deceased Solmon. The respondent was the estate trustee of Chandran, also deceased. Chandran acted as solicitor for both Solmon and the mortgagors on the transaction. The mortgages went into default, and the plaintiffs alleged they were wrongfully denied the mortgage proceeds. The appellant’s third party claim alleged Chandran was negligent in arranging the mortgages, and also alleged fraudulent concealment and special circumstances to avoid application of the limitation period found in section 38(3) of the *Trustee Act*. The motion judge dismissed the third party claim as statute-barred, and found fraudulent concealment inapplicable. The defendant appealed.

The motion judge’s decision was upheld on appeal. The solicitor-client relationship qualified as a “special relationship” within the meaning of *Giroux Estate*, and as Chandran’s errors were only apparent on a review of his file the concealment requirement was satisfied as well. The solicitor’s conduct was merely negligent, however, and not unconscionable. Neither Chandran nor his trustee caused the delay in making the file available to Chandran’s successor. While Chandran had failed to obtain written consent to his dual retainer and the advancement of mortgage funds, the motion

¹⁶ *M(K)*, *supra* note 6 at para 77, citing *Halsbury’s Laws of England*, 4th ed, vol. 28, para 919.

¹⁷ 2014 ONCA 352, (2014), 55 CPC (7th) 298, affg 2013 ONSC 6259, (2013), 55 CPC (7th) 287 [*Rajmohan*].

judge had made findings of fact that Solmon had likely gave verbal approval to his solicitor's actions.

The decision in *Rajmohan* seems to trace the distinction drawn by the House of Lords in *Cave*, albeit without such attribution. In particular, absent active "hiding" of one's actions, concealment may still be found where the nature of the act itself frustrates discovery "as a result of the manner in which the act that gave rise to the right of action is performed." To rise to the level of unconscionability, however, the acts complained of must constitute an intentional wrongdoing of which the defendant is aware. Mere negligence will not suffice. As noted by Lord Denning in the earlier case *King v Victor Parsons & Co*, in order to show that a party "concealed" the right of action, "it is not necessary to show that he took active steps to conceal his wrongdoing or his breach of contract. It is sufficient that he knowingly committed it and did not tell the owner anything about it. He did the wrong or committed the breach secretly."¹⁸ Conversely, if a defendant commits an honest blunder, he may rely upon a limitation period.¹⁹

The question of active concealment has arisen recently in a case of alleged financial advisor negligence. In *Johnson v Studley*, Perell J placed a gloss on *Giroux Estate* to the extent that the defendant must "wilfully conceal" the fact of injury (or the defendant's causing/contributing to that injury) or "wilfully mislead" the claimant about the appropriateness of proceedings as a means of remedying the loss. To conceal must mean to "hide, secret, cloak, camouflage, disguise, or mask the conduct or identity." Moreover, "where there is no duty to disclose, concealment is something more than mere non-disclosure(.)"²⁰

Apart from situations wherein a fiduciary relationship exists and with it a positive duty to disclose the particular conduct at issue, the contexts in which an omission will support an argument of fraudulent concealment remain open. Other common law provinces have been express and unequivocal in their treatment of omissions. For instance, the Alberta Court of Appeal has rejected the notion that overt acts are required in order

¹⁸ *King v Victor Parsons & Co*, [1973] 1 WLR 29 (CA) at 34 [*King*].

¹⁹ Lord Denning's further *dicta* allowing concealment to embrace "recklessness" or "turning a blind eye" to a possible wrong may not be reconcilable with *Rajmohan*.

²⁰ *Johnson et al v Studley et al*, 2014 ONSC 1732, [2014] OJ No 1232 at paras 80-83 (QL) [*Johnson*]. The language of Perell J's reasons seems to trace s 15(4) of the Ontario Act. However, the ultimate limitation period of 15 years was not at issue on the motion. Moreover, as noted at paras 28, 29 of *Giroux Estate*, the doctrine is not dependent upon the particular wording of a limitation provision.

to constitute fraudulent concealment.²¹ It is submitted that the *Cave* formulation strikes a fair balance. There is no rational justification for depriving a defendant of a limitation defence where neither his original wrongdoing nor his failure to disclose it to the plaintiff was deliberate.²² Yet where a defendant wilfully commits a wrong, safe in the knowledge that it will not be uncovered for some time due to the manner of its performance, the defendant should not be able to rely upon a limitation period in equity.

5. The Need for a “Special Relationship”

A consistent requirement of Canadian law, as stipulated by *M(K)* and *Giroux Estate*, is that the parties be in a “special relationship” such that conduct is rendered unconscionable. The vast majority of cases have arisen in the context of relationships that the law has long recognized as “special,” such as solicitor-client and physician-patient. That being said, earlier English jurisprudence where the doctrine was applied was not limited to such relationships; in *King*,²³ the facts in issue revolved around an alleged failure of a real estate firm to inform subsequent home purchasers that the home was built on the site of a chalk pit, and the builders they had contracted had not properly reinforced the flooring and piles. Similarly, the current English statute and test in *Cave* makes no express mention of a “special relationship” requirement. Moreover, in the concurring reasons of Lord Scott it was noted that while it would be difficult to think of a case of deliberate concealment or breach of duty that would not involve unconscionable behaviour, no further degree of unconscionability as a criterion need be satisfied.²⁴

Should such a relationship be necessary? While the underlying relationship may inform whether the alleged concealment can be considered “unconscionable,” it bears asking whether a “special relationship” should be a precondition to the application of the doctrine. If the equitable principle seeks to prevent limitation periods from being used as an “instrument of fraud,” the identities of the parties should be of secondary importance. The rule is aimed at conduct of the defendant which operates to keep the plaintiff out of knowledge of the existence of a legal claim. Where, for instance, the facts involve two arms-length and sophisticated parties, one of whom commits an intentional wrongdoing such as conversion, knowing that the act will not be easily uncovered, or

²¹ See *Photinopoulos v Photinopoulos* (1998), 92 AR 122 (CA); *VAH v Lynch et al* (2000), 255 AR 359 (CA).

²² *Cave supra*, note 1 at paras 25-27.

²³ *Supra* note 18.

²⁴ *Cave supra* note 1 at para 65.

for that matter where the wrongdoer denies involvement or misleads the other party, the wrongdoer could deny application of the doctrine on the basis that no “special relationship” exists. This could be viewed as an incongruous result.

Moreover, while *dicta* exist to the effect that equitable fraud does not impart a degree of moral turpitude on the part of a party, as a practical matter some form of culpability will be at issue. As discussed above, knowing and deliberate acts are necessary to trigger the doctrine, and so it is logical that moral culpability is also implicated. A defendant who deliberately uses defective materials could be caught by the doctrine even if he does not subsequently deliberately conceal what he has done, while if he used such materials inadvertently the rule in *Rajmohan* would apply. Unconscionability need not flow from the essence of the relationship alone.

It bears emphasis that where common law, or “actual” fraud is alleged a plaintiff does not need to rely on the equitable doctrine to defeat a limitation period. Similarly, the strictures of a special relationship are not necessary. In *Bell Expressvu Limited Partnership v Pieckenhagen*,²⁵ the motions judge was not dealing with the equitable doctrine, but rather with alleged underlying fraud and deceit, as well as direct, deliberate fraudulent misrepresentations uttered by the defendants for the purpose of deceiving the plaintiff and preventing the plaintiff from discovering the underlying unlawful acts. In view of the nature of the defendants’ conduct relied upon by the plaintiff to extend the limitation period, there was no requirement for the plaintiff to establish a “special relationship” between the plaintiff and the defendants. “No special relationship need be proven for fraudulent conduct at common law.”

6. *The Concealed Fact Cannot be an Additional Fact*

Assuming that some evidence is in fact concealed from the plaintiff, it remains open to the defendant to establish that the withheld information constitutes mere “additional facts,” the knowledge of which is not necessary to discovering a cause of action. Moreover, the concealed facts must be causally related and material to the explanation for why the plaintiff was delayed in commencing a claim. The circumstances in which the court may reject reliance on fraudulent concealment is illustrated by the 2010 Ontario Court of Appeal decision in *Dhaliwal v Lindsay*.²⁶ The plaintiff underwent a total abdominal hysterectomy at St Joseph’s Health

²⁵ 2013 ONSC 1567, [2013] OJ No 1803 (QL).

²⁶ 2010 ONCA 493, (2010), 418 NR 396, affg [2009] OJ No 4621 (Ont Sup Ct) (QL) [*Dhaliwal*].

in December 2003. Her post-operative condition deteriorated seriously, and she underwent a second surgery five days later as well as a third on January 1, 2004. While the plaintiff commenced an action in December, 2004 with respect to the first surgery, a further action concerning the remaining surgeries was not commenced until April, 2008.

The defendants claimed that the limitation period had expired, since the plaintiff had all the hospital records, including the decoded Ontario Health Insurance Plan (OHIP) statements documenting the treatment given by the defendants, by December 2005. In response, the plaintiff relied upon fraudulent concealment on the basis that initial records prior to 2005 did not reveal the involvement of several of the defendants in the subsequent surgeries.

The motion judge agreed with the defendants, noting that even if there had been some initial attempt to conceal the involvement of certain defendants, the fact of their involvement was made known to the plaintiff through the OHIP records in December, 2005. No explanation was given by counsel for the delay of over two years after receipt of the records:

The Plaintiffs argue that it would be inequitable to dismiss this action on a motion for summary judgment in light of their argument that the Defendants attempted to conceal their involvement on December 8 and 9, 2003, by failing to document their actions in the hospital record. The Defendants submit that such fraudulent concealment will only operate to suspend the expiry of the limitation period until a plaintiff could reasonably discover the claim.

I agree with the Defendants. The Plaintiffs argue, in effect, that an allegation of fraudulent concealment would operate to defeat a limitation period altogether. This interpretation cannot be sustained in light of the fact that the common law doctrine of fraudulent concealment is an equitable principle which operates to “stay the operation of a limitation period by the invocation of the Court’s equitable jurisdiction to prevent an injustice” (*Giroux Estate v Trillium Health Centre*, [2004] O.J. No. 557 (Ont. C.A.) at para. 22; See also: *M(K) v M.(H.)*, [1992] 3 S.C.R. 6). When applicable, it will “suspend the running of the limitation clock until such time as the injured party can reasonably discover the cause of action” (*Giroux Estate, supra*, at para. 28).²⁷

The effect of the alleged concealment was only to defer the date of discovery until the date upon which the plaintiff had the decoded OHIP statements and knowledge of all treating physicians.²⁸ Once the December 2005 disclosure was made, any suspension of the limitation period ceased.

²⁷ *Ibid* at paras 17, 18

²⁸ *Ibid*, Appeal Endorsement at para 4.

It may be asked how the reasoning in *Dhaliwal* can be reconciled with the *obiter* of Moldaver JA in *Giroux Estate* to the effect that fraudulent concealment could “stop the clock from running” even after the limitation period had begun to run. A finding that a limitation period has commenced is predicated on the conclusion that the plaintiff discovered his/her claim. It is unclear what further facts, which were concealed only to be uncovered at some point prior to the expiry of the limitation period, could be relied on to “stop the clock.”

Alleged concealment that occurs *after* the applicable limitation period has run out cannot resuscitate stale claims. In *Johnson*, fraudulent concealment was rejected on summary judgment in a financial advisor negligence action.²⁹ The plaintiffs had invested in a series of investments which ultimately failed. Their advisor, Studley, had recommended the investments. The defendant relied upon a limitations defence to argue the action with respect to the first investment was statute barred by 2007. In response, the plaintiffs asserted discoverability and in the alternative that the advisor’s conduct in 2009 constituted fraudulent concealment, namely not advising them of the fact that he had been sued by several other clients with respect to the same investment, had not renewed his professional liability insurance, and had brought a colleague onto their mutual fund accounts without revealing the true reason why he could no longer continue as their mutual fund advisor. It was argued that these facts spoke to whether the conduct of the advisor was known by the plaintiffs to be a cause of their losses.

Perell J found that the claim was statute-barred, and also rejected the fraudulent concealment argument. The acts complained of did not rise to the level of unconscionable or inequitable conduct. At its base, however, was the conclusion that the alleged acts of concealment came after the plaintiffs discovered their claim. By the time the defendant had transferred the plaintiff’s business to his colleague, and failed to disclose the lawsuits, lack of insurance and third party involvement, the limitation period had already run its course.³⁰

Similarly, in *Beaton v Scotia iTrade*,³¹ the Ontario Court of Appeal held that the motions judge was correct there was no evidence to support an argument of fraudulent concealment. The plaintiff, an experienced financial planner and securities trader, sued for trading losses resulting from a botched share transfer performed by the defendant in 2006 which prevented him from accessing his share account at a time he wanted to sell

²⁹ *Johnson*, *supra* note 20.

³⁰ *Ibid* at paras 79-84.

³¹ [2013] OJ No 6166 (Sup Ct), *aff’d* [2013] OJ No 4095 (CA) [*Beaton*].

shares before they dropped in value. The plaintiff alleged he did not discover his claim until the spring of 2010 when the defendant provided some additional information. However, within days of the share transfer, the plaintiff learned of the problem and that the error was the defendant's fault. He also knew he had sustained a trading loss. The plaintiff made a complaint to the Ombudsman for Banking Services and Investments in 2007 which was dismissed nine months later. It was held that the 2010 disclosures, namely a chronology prepared by a Scotia representative and transcripts of certain phone conversations, were not new or material such as to delay the commencement of the limitation period. The further information provided additional evidence of the botched transfer only.

Why then did almost five years go by before this action was commenced? In my view, the root problem was Mr Beaton's genuine but misguided preoccupation about *how* the transfer error was made – whether somebody at Scotia, to use his words, had “ticked the wrong box” or “pushed the wrong button.” Initially this line of inquiry made sense. Mr. Beaton had to know whether the mistake was RBC's or Scotia's. However, after Scotia admitted the error, and it did so on December 27, 2006, Mr Beaton continued with the “how” questions. This was, unfortunately, a time-consuming distraction. As the Court of Appeal made clear in *McSween v Louis*, discussed above, the “how” questions are best left for the litigation process – for discovery and expert reports.³²

Where subjective discovery is found, it remains unclear how fraudulent concealment may coherently apply. A finding of knowledge of material facts necessarily ousts the doctrine's operation. As held in *Johnson and Beaton*, the clock will run from the point of discovery even if some form of concealment subsequently occurs. Conversely, as illustrated by *Dhaliwal*, the doctrine may suspend a finding of “reasonable” – that is, objective – discovery. In this sense, the objective test for discovery and fraudulent concealment arrive at the same result. Where the doctrine is of continued relevance, however, is the scenario whereby the court is otherwise prepared to hold the plaintiff “ought” to have reasonably discovered his claim on the language of the limitation provision, yet the defendant's conduct should suspend and take the claim out of the effect of the statute bar in equity.

7. Fraudulent Concealment as a Common Issue: the Class Proceeding Context

The doctrine of fraudulent concealment has not been applied to a great degree in the class proceedings context. However, several decisions illustrate the point that where the focus of the inquiry is on the defendant's

³² *Ibid* at para 30

conduct, particularly in a systemic and institutional setting, the doctrine can be framed as an appropriate common issue. This reflects the general rule that in order to be certified, a valid common issue must be capable of extrapolation to each member of the class and not be dependent upon individual findings of fact with respect to each individual claimant.³³ In contrast to the discoverability question inherent to a limitations defence, which will usually require a determination after the common issues trial, a legal question predicated on the defendant's conduct affecting all class members may be tried as a common issue.³⁴

By way of example, in *TL v Alberta (Director of Child Welfare)*,³⁵ the premise of the action was that class members, who were members at the time and under the care of the defendant, suffered a personal injury at the hands of a third party. It was alleged that the defendant had a duty to sue the third party on behalf of the minors, but failed to do so. It was a lawsuit about lawsuits, with the notion that had the defendant fulfilled its duty, the plaintiffs would have been entitled to various damages and compensation. In response, the defendant relied among other things upon the applicable limitation period.

The motions judge held that questions of disability were individual issues not amenable to common determination. However, the argument that there was systemic fraudulent concealment by virtue of the manner in which the child welfare system was run 1966-2004 was accepted to represent an appropriate common issue. The determination of the common issue would avoid repetitive factual finding and legal analysis.³⁶

WP v Alberta (No 1) provides another example of the use of fraudulent concealment in the institutional abuse context.³⁷ The action pertained to allegations of students at a school for the deaf that they were subjected to physical, sexual, and emotional abuse by teachers, staff, and other students between 1955 and 1996. Alberta argued that the plaintiffs' claims were barred by the ultimate limitation period of ten years.

On summary judgment it was held that the representative plaintiffs could not establish an evidentiary basis to support the pleading. It was

³³ *Fairview Donut Inc v The TDL Group Corp*, 2012 ONSC 1252, [2012] OJ No 834 (Sup Ct) (QL), aff'd 2012 ONCA 867, [2012] OJ No 5775 (CA) (QL).

³⁴ See *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 (CA), leave to appeal to SCC refused [2005] SCCA No 50.

³⁵ 2006 ABQB 104, (2006), 58 Alta LR (4th) 23, further adjourned reasons 2008 ABQB 114, (2008), 436 AR 217.

³⁶ *Ibid* at para 115.

³⁷ *WP v Alberta (No 1)*, 2013 ABQB, (2013), 563 AR 32.

found that the plaintiffs knew the wrongs had been committed against them, and thus the special relationship that existed between them and the institution had not been utilized to conceal the fact of the wrongs committed. That being said, on a subsequent certification motion, the motions judge noted that the doctrine could have represented a valid common issue if a systemic approach to concealment existed.³⁸

On a preliminary motion to strike in *McNaughton Automotive Ltd v Co-Operators General Insurance Co*,³⁹ the Court was satisfied that the pleadings raised the issue of fraudulent concealment which could postpone the running of a one-year limitation period in the *Insurance Act*.⁴⁰ The class proceeding concerned alleged breaches by automobile insurers of a statutory condition pertaining to the payment of cash value for salvage of vehicles. Haines J held that the plaintiff validly pled that the class members were misled by the defendant insurance companies, who had a duty to act in good faith towards their insureds, into believing that they were receiving all that they were entitled to under their respective policies.

Just what form of conduct, falling short of fraud, will support application of fraudulent concealment remains an open question. In *Charette v Trinity Capital Corporation*, a representative plaintiff brought a putative class action arising out of 2002 participation in a leveraged donation program to obtain tax benefits.⁴¹ The credits were disallowed by the Canada Revenue Agency (CRA) after reassessment, and a subsequent “test case” was launched, which ultimately resulted in an upholding of the CRA position in 2010. The class action was brought against the program’s promoters, and accountants and counsel who provided opinions on the program’s tax efficacy. The action was commenced in 2011, and the defendants argued it was out of time since notices of reassessment were received in 2006.

Strathy J heard the motion for summary judgment brought by the defendants. While the representative plaintiff was a relatively sophisticated business person, Strathy J hinged his reasoning on the fact that the firm that Charette may have sued continued to act as his lawyer in the CRA test case and for the promoter of the program. As such, whether a conflict of interest existed and “clouded” the plaintiff’s understanding of his rights against the defendants could impact the running of the limitation period. The plaintiff

³⁸ *WP v Alberta (No 2)*, 2013 ABQB 296, (2013), 563 AR 47.

³⁹ (2003), 66 OR (3d) 112 (Sup Ct) at paras 83-89, rev’d on other grounds (2005), 76 OR (3d) 161 (CA).

⁴⁰ RSO 1990, c I.8.

⁴¹ *Charette v Trinity Capital Corporation*, 2012 ONSC 2824, [2012] OJ No 2328 (QL).

relied upon *Giroux Estate*, yet maintained he did not advance any allegation of actual fraud.

Strathy J set out the finding in *Giroux Estate* and concluded that a genuine issue requiring a trial existed.

Considering all these circumstances, as well as the confusing and intimidating nature of the CRA assessment and appeal process, a trial judge might conclude that even a sophisticated taxpayer like Charette did not and could not know that damage had occurred or that a legal proceeding against the defendants would be an appropriate remedy. The lawyers against which he might have a claim were acting for him in connection with the assessment – he could reasonably expect, indeed was entitled to expect, that their interests were not in conflict and that there was no issue between them.⁴²

It was open to a trial judge to find that a solicitor client relationship arose between the defendant FMC and the plaintiff, and that the plaintiff was not advised of the conflict and potential remedies. This fact pattern could be found to have the effect of delaying the running of the limitation period. The case raised novel and important questions of mixed fact and law, including whether a conflict arose, whether the conflict affected all the defendants, and whether a conflict affected discoverability or otherwise interrupted and extended the limitation period.⁴³

8. Conclusion

The doctrine of fraudulent concealment is a necessary equitable instrument to allow the court to evaluate defendants' conduct, and where necessary suspend a limitation period where its operation would be unconscionable. It is submitted that the doctrine is of continued relevance to inform the operation of the objective basis for discoverability, and when the clock "ought" to begin to run. Where discoverability does not strictly apply, such as for ultimate limitation periods and under particular legislative schemes, it follows that the doctrine is of enduring relevance. While the general framework is well established, the application of the doctrine's constituent elements is not wholly consistent. This is a reflection of the fact that the exercise of the court's discretion is fact specific. In particular, development by the courts may clarify what relationships can support the principle and whether it must be moored to a traditional "special" relationship, as well

⁴² *Ibid* at para 112.

⁴³ While the situation of the promoters and accountants were technically different than that of FMC, Strathy J held that the question of discoverability was so intertwined with that of the problem of conflict of interest that it was in the interests of justice to resolve all of the claims on a full factual record.

as the effect of omissions. Developing in tandem with English law, the Canadian doctrine has properly focused on wilful and knowing conduct of the defendant, constrained by the requirement of demonstrating a link between the alleged acts and the plaintiff's ability to discover a claim. Equity scrutinizes the defendant to temper the operation of statutory limitation periods, and ensure that a claim will not be rendered statute-barred in unconscionable or unjust circumstances.