The Tolling of a Limitation Period As a Result of Fraudulent Concealment

by William E. McNally and Barbara E. Cotton[1]

Section 4 of the *Limitations Act*, R.S.A. 2000, c. L-12[2] incorporates the equitable doctrine of fraudulent concealment. The important thing to note about this doctrine is that it incorporates a concept of "fraud" which is much broader than the common law concept. The definition of equitable fraud is set out in *Kitchen* v. *Royal Air Force Association*[3] and is 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.[4]

The concept of equitable fraud does not involve any degree of moral turpitude, nor does it require any positive act of concealment. It has been recently stated that the requirements to establish equitable fraud are minimal, and can include a mere failure to inform the other party of information which would make them aware of their cause of action.[5]

A fraudulent concealment argument is different than an argument based on the discoverability doctrine and the cases make it clear that the two arguments can be pleaded in the alternative. An important difference is that the 10 year drop dead rule applies to actions argued to be extended by the discoverability doctrine, whereas in the case of fraudulent concealment the drop dead rule does not apply and the limitation period is tolled while there is fraudulent concealment[6].

The doctrine of fraudulent concealment has a long history in Canada and seems to have been first articulated by the Supreme Court of Canada in the case of *Massie & Renwick* v. *Underwriters' Survey Bureau Ltd.*[7] In this case Duff C.J., writing for the court, stated at p. 244:

> "I have come to the conclusion, however, that the principle applied in *Bulli Coal Mining* v. *Osborne*, [8]cannot not be limited to underground trespasses, but it covers this case in that there was ample evidence in support of the conclusion of the learned trial

> judge that there had been fraudulent concealment within the meaning of the rule; with the consequence that the limitation period began to run only on the discovery of the fraud, or at the time when, with reasonable diligence, it would have been discovered."

The next leading Supreme Court of Canada case to adopt the doctrine of fraudulent concealment was *Guerin* v. *Canada*,[9] wherein Dickson J., writing for the majority, stated at p. 390:

> "It is well established where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common-law fraud. Equitable fraud, defined in *Kitchen* v. *Royal Air Force Association*, [1958] 1 W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for one to do towards the other", is sufficient. I agree with the trial judge that the conduct of the Indian Affairs Branch towards the Band amounted to equitable fraud. Although the Branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the Band, in my view their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the Branch and the Band . . ."

The most recent discussion of the doctrine of fraudulent concealment by the Supreme Court of Canada is in *M. (K.)* v. *M. (H.)*[10] This case involved an action by a victim of incest against her father. The incest occurred from the time the plaintiff was aged ten or eleven. She suppressed the abuse, however, and it was not until she was aged twenty-eight that she sued her father for damages arising from the incest and for breach of her parent's fiduciary duty. At issue was whether the action was statute barred under the Ontario *Limitations Act*. The Supreme Court of Canada applied the discoverability doctrine to hold that the limitation period did not begin to run until the harm done to the plaintiff came to the forefront of her consciousness. La

Forest J., for the majority, also discussed fraudulent concealment as an alternate ground for postponing the limitation period. He first noted that the fusion of common law and equity meant that fraudulent concealment was applicable to actions both at common law and in equity. He then discussed the scope of the doctrine of fraudulent concealment at pp. 56-57:

> "There remains the issues of determining the meaning of fraudulent concealment, and its application to cases of incest . . .
>
> The leading modern authority on the meaning of fraudulent concealment is *Kitchen* v. *Royal Force Association*, [1958] 2 All. E.R. 241 (C.A.), where Lord Evershed, M.R. stated, at p. 249:
>
>> "It is now clear . . . that the word "fraud" . . . is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman* v. *A.R.T.S., Ltd.*, [1949] 1 All E.R. 465, that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for one to do towards the other."
>
> While stated in the context of statutory "fraud", I have no doubt that this formulation is drawn from the ancient equitable doctrine and is applicable to today's common law concept of fraudulent concealment. I note also that Lord Evershed's formulation has been adopted by this Court; see *Guerin* v. *The Queen* . . . What is clear from *Kitchen* and *Guerin* is that "fraud" in this context is to be given a broad meaning, and is not confined to the traditional parameters of the common law action . . .
>
> There is an important restriction in the scope of fraudulent concealment, which Halsbury's, 4th ed., vol. 28, para. 919, at p. 413, describes as follows:
>
>> "In order to constitute such a fraudulent concealment as would, in equity, take a case out of

> the effect of the statute of limitation, it was not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner was ignorant of his rights; there had to be some abuse of the confidential position, some intentional imposition, or some deliberate concealment of facts."

The Alberta Court of Appeal has discussed the doctrine of fraudulent concealment on several occasions. In *Photinopoulos* v. *Photinopoulos*[11], Stratton J.A., writing for the court, stated at p. 125:

> "In the English case of *Archer* v. *Moss*, [1971] 1 All E.R. 747, the Court of Appeal had to consider the meaning of "fraud" as used in this section of the English **Limitation Act** in a factual situation wherein a builder covered up inadequate work so it was not discovered for some years. At page 750 Lord Denning, M.R. had this to say:
>
> > ". . . It has long been settled that "fraud" in this context does not necessarily involve any moral turpitude: see *Beaman* v. *A.R.T.S. Ltd*. It is sufficient if what was done was unconscionable: see *Kitchen* v. *Royal Air Force Association*. . . Those cases show that "fraud" is not used in the common law sense. It is used in the equitable sense to denote conduct by the Defendant or his agent such that it would be "against conscience" for him to avail himself of the lapse of time . . ."

Stratton J.A. further rejected the concept that overt acts were required to constitute fraudulent concealment.

Another leading Alberta Supreme Court, Trial Division case is *Joncas* v. *Pennock*[12]. In this case the plaintiff brought the action as administratix of the estate of H. Houle. Mr. Houle had lived for many years in Alberta and was the owner of two quarter sections of

land. The defendant practiced law in Alberta and acted for the late Mr. Houle in connection with a series of transactions involving the land and at the end became the registered owner of the lands. The plaintiff sued to restore the lands to the estate. It was argued that the action was out of time. *Kitchen* v. *Royal Air Force* was applied to hold that the acts of the lawyer amounted to fraudulent concealment and the limitation period was held to have been tolled.

Joncas v. *Pennock* was subsequently applied in *Reidy Motors Ltd.* v. *Grimm* [13], a decision of Deyell J. of the Alberta Court of Queen's Bench, which was subsequently affirmed[14]. In this case the plaintiff was an owner of twelve lots located in the downtown of Medicine Hat. He knew the defendant, who was a former mayor of the city and who then worked for a realty company. He entered into a listing agreement with the defendant to sell the property. The plaintiff knew that the city was redeveloping property in the area and discussed the prospect of a sale of the land to the city with the defendant. The defendant wrote to the city asking if it was interested in purchasing the property, but the city responded that it was not interested at that time. The defendant realtor then purchased the property from the plaintiff himself and flipped the purchase over to the city for a substantial profit. Nine years after the sale of the land to the city the plaintiff obtained copies of the records from the city and brought an action for a breach of the defendant's duty as a real estate agent. The *Limitations of Actions Act* was raised as a defence but it was held that the conduct of the defendant real estate agent amounted to fraudulent concealment. *Joncas* v. *Pennock* and *Kitchen* v. *Royal Air Force Association* were reviewed and it was stated at p. 144:

> "It would appear that a court of equity will not allow a limitation statute to be used to shield a fiduciary from the consequences of profiting at the expense of one to whom he owes a duty. Williams, in *Limitation of Actions in Canada*, 2nd ed. (Toronto: Butterworths, 1980), takes a slightly different view of *Joncas* v. *Pennock*, at 212:
>
> > "As noted above, a fiduciary or other special relationship may place upon the potential defendant the duty of speaking when, without such relationship, he would not have had that duty. *The failure to speak may then amount to a concealed*

> *fraud so as to prevent the Limitations of Actions Act from being relied upon*. In *Joncas* v. *Pennock (No. 2)* the Alberta Court of Appeal decided that a barrister and solicitor who engaged in a transaction with his client from which the former benefited could not be allowed to rely on the Act for this reason . . ."

Another leading English case is *King* v. *Victor Parsons & Co. (a firm)*[15], a decision of the English Court of Appeal, Civil Division. In this case the defendants, a firm of estate agents, acquired a plot of land. They surveyed the site and discovered that it was located on an old chalk pit which had been filled in 1954. They were advised by architects that, before building on the site, it would be necessary to have a reinforced concrete raft or a series of piles driven into the ground connected by concrete ground beams. The defendants employed a builder to build a house on the site and gave them a plan which made no provision for a concrete raft or for piles. The builder then discovered that the ground was unsuitable for building and made some makeshift reinforcement in the concrete flooring. The plaintiff agreed to buy the home. The plaintiff then discovered large cracks in the walls of the house and learned that the home had been built on the site of the chalk pit. The house was so unsafe that it had to be pulled down. The plaintiff sued the defendants for breach of an implied term that the work which constituted the foundations of the home was proper and workmanlike and that the foundations were reasonably fit for dwelling. The trial judge held that the defendants ought to have known that the house was to be built on the site of a chalk pit and that their failure to disclose these facts constituted fraudulent concealment which tolled the running of the limitation period. The appeal to the Court of Appeal was dismissed, with Denning M.R. stating the following oft-quoted passage at pp. 209, 210:

> "The word "fraud" here is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be "against conscience" for him to avail himself of the lapse of time. The cases show that, if a man knowingly commits a wrong (such as digging underground another man's coal); or a breach of contract (such as putting in bad foundations to a house), in such circumstances that it is unlikely to

> be found out for many a long day, he cannot rely on the Statute of Limitations as a bar to the claim: see *Bulli Coal Mining Co.* v. *Osborne* and *Archer* v. *Moss*. In order to show that he "concealed" the right of action "by fraud", 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. By saying nothing he keeps it secret. He conceals the right of action. He conceals it by "fraud" as those words have been interpreted in the cases. To this word "knowingly" there must be added "recklessly": see *Beaman* v. *A.R.T.S. Ltd.* Like the man who turns a blind eye he is aware that what he is doing may well be a wrong, or a breach of contract, but he takes a risk of it being so. He refrains from further inquiry lest it should prove to be correct; and says nothing about it. The court will not allow him to get away with conduct of that kind. It may be that he has no dishonest motive; but that does not matter. He has kept the plaintiff out of the knowledge of his right of action; and that is enough: see *Kitchen* v. *Royal Air Force Association*. If the defendant was, however, quite unaware that he was committing a wrong or a breach of contract, it would be different. So if, by an honest blunder, he unwittingly commits a wrong (by digging another man's coal), or a breach of contract (by putting in an insufficient foundation) then he could avail himself of the Statute of Limitations." [16]

The English House of Lords has recently addressed the doctrine of fraudulent concealment in *Cave* v. *Robinson*, *Jarvis & Wolf (a firm)*[17] In this case the claimant instructed the defendant firm of solicitors to act for him in connection with a transaction under which a company was to grant him mooring rights over its land for one hundred years. The solicitors drafted the document by which the rights were to be granted and the transaction was completed in 1989. The company went into receivership and in 1994 the receivers informed the claimant that his mooring rights were no longer exercisable. In 1998 the claimant sued the lawyers for negligence and the lawyers pleaded that the action was time barred. The claimant argued the doctrine of fraudulent concealment and pleaded that the negligent drafting of the agreement by the solicitors, though not done in the knowledge that it constituted a breach of duty, had been an intentional act done in circumstances in which the breach was unlikely to be discovered for some

time. The trial judge accepted this argument and held that the limitation period did not apply. This was affirmed by the English Court of Appeal. On further appeal to the House of Lords it was held that the action was time barred. The doctrine of fraudulent concealment did not apply where the defendant lawyers were unaware that they were committing a breach of duty. The doctrine deprived a defendant of a limitation defence in two situations: first, where he took active steps to conceal his own breach of duty after he had become aware of it; and secondly, where he was guilty of deliberate wrong-doing, and, he concealed or failed to disclose it in circumstances where it was unlikely to be discovered for some time. It did not, however, deprive a defendant of a limitation defence where he was charged with negligence if, being unaware of his error or his failure to take proper care, there had been nothing for him to disclose. The House of Lords applied Lord Denning's passage from *King* v. *Victor Parsons & Co. (a firm)* and stated: "Concealment and non-disclosure are different concepts, but they have this much in common; they both require knowledge of the fact which is to be kept secret. A man cannot be said to either conceal or to fail to disclose something of which he is ignorant . . ."

The recent Alberta Court of Appeal case of *V.A.H.* v. *Lynch et al.*[18] per Wittmann J.A. is of interest in that it held that a limitation period did not begin to run because of fraudulent concealment on the basis of the defendant's failure to inform. In this case the plaintiff Huet was hospitalized for emotional difficulties in the Holy Cross Hospital in Calgary in 1977. She was kept at the hospital for over a month notwithstanding her frequent request to be discharged. Some sixteen years later she obtained a copy of her hospital records and brought an action against the doctors, the hospital, and the staff. The defendants moved to strike the claim on the basis that the action was time barred. The plaintiff took the position that the defendants had fraudulently concealed the cause of action from her and she had only discovered all the facts when she obtained her hospital records. Wittmann J.A. first reviewed the definition of fraudulent concealment set out in *Kitchen* v. *Royal Force Association* and noted that the broad definition of equitable fraud was accepted in Canadian law as evidence by the Alberta Court of Appeal cases of *Photinopoulos* and *Joncas* v. *Pennock*. He then stated at p. 366:

"To overcome a limitation defence under s. 57 of the **LAA**., it is

> not sufficient for a plaintiff to simply prove that there has been some type of fraud, such as equitable fraud, perpetrated by the defendant. The plaintiff must also show that the fraud concealed the existence of the plaintiff's cause of action. That is, the fraud must have concealed some material fact which the plaintiff has to prove to succeed at trial . . ."

He then stated at p. 368:

> "To succeed with a claim of equitable fraud, V.A.H. would have to show conduct on the part of the defendants which, having regard to the special relationship between the parties, was "unconscionable": **Kitchen***,* supra. Such unconscionable conduct could be a defendant's act of concealment of some wrongdoing, or it could be his passive failure to inform the plaintiff of some wrongdoing he knowingly or recklessly committed: **Wilson v. McDonald Douglas Canada Ltd** . . . Lack of malice or dishonest motives on the part of defendant when he carried out his wrongdoing may be relevant: **Wilson**, supra.

In *Nadon* v. *Voloshin*[19] a decision of Johnstone J. of the Alberta Court of Queen's Bench, the defendant doctor performed a mamoplasty and an abdominal lipectomy on the plaintiff and apparently left a Penrose drain in her body. The surgery was performed in 1979 and the drain was discovered to be still within her abdomen in 1996 following ultrasound testing. She commenced her statement of claim and it was argued that the action was statute barred by the passage of nearly fourteen years. The defendant brought an application for summary judgment dismissing the claim. Johnstone J. reviewed *V.A.H.* v. *Lynch et al.* and stated:

> "The Alberta Courts have adopted the definition of equitable fraud as set out in *Kitchen* v. *Royal Air Force Association* . . .
>
> For there to be equitable fraud, certain elements must be proven at trial. To defeat an application under Rule 159, the same elements need only be shown to possibly exist. These elements are:
>
> 2. there existed a fiduciary or a special relationship;

> 3. the conduct on the part of the Defendant, having regard to the special relationship between the parties was unconscionable;
>
> 4. there was concealment of the cause of action;
>
> 5. the plaintiff exercised reasonable diligence in view of all the circumstances
>
> In *Huet* v. *Lynch*, supra, at p. 670 the Court of Appeal indicated that a passive failure by a physician to inform his or her patient of certain facts could amount to equitable fraud . . ."

In the result the defendant's application for summary judgment was denied.

In *Halloran* v. *Sargeant et al.*[20] a decision of the Ontario Superior Court of Justice, the applicant was employed by Crown Cork for thirty-one years. When he was fifty-nine years old his employment was terminated and he received a letter offering him two options, either unreduced pension or a termination package. He accepted the unreduced pension. Shortly thereafter the plant was closed and a number of employees were dismissed. These employees then sued the company and successfully received termination pay in addition to the pension. The claimant awaited the outcome of these lawsuits before he started his own claim as against the defendant to receive the termination pay. It was argued that the limitation period barred the action. The matter proceeded before several referees. One referee decided that the claim was statute barred. This was overturned by the Ontario Superior Court of Justice, with Meehan J., for the majority, stating at p. 289:

> "The fraudulent concealment necessary to suspend the operation of the statute need not amount to deceit or common law fraud. There is no need for any finding of dishonesty or improper motive. Equitable fraud can prevent the running of the limitation period. Equitable fraud is conduct which, having regard to some special relationship between the parties concerned, is an unconscionable thing for the one to do towards the other. If the plaintiff is unaware of his cause of action owing to the wrong of the defendant then the court will refuse to permit the defendant to raise a

> limitation defense. **Kitchen v. Royal Air Force Association**; **Guerin v. The Queen** . . .
>
> To constitute fraudulent concealment it is not necessary that there be proactive steps to conceal the equitable fraud. **Acts amounting to fraudulent concealment may be minimal and may consist of a mere failure to inform**. **V.A.H. v. Lynch et al.** . . .; **Photinopoulos** . . . ; **Matravers et al. and Bookman & Harris** (1980), 28 O.R. (2d) 607 . . ." (Emphasis added.)

In the result the claimant was awarded his termination pay.

Thus it can be seen that a broad net may be cast in arguing that a limitation period is tolled as a result of fraudulent concealment. A necessary first step in establishing equitable fraud is the establishment of a "special" relationship between the parties. A fiduciary relationship would seem to quite clearly meet this definition, and it seems likely that lesser relationships such as the duty of good faith between an insurer and insured would qualify as well. As a secondary matter unconscionable conduct must be established. The plaintiff must show that equitable fraud has concealed the existence of the plaintiff's cause of action. In Alberta it would seem that no degree of moral turpitude is required and there need not be a positive act of concealment. According to our appellate court a mere passive failure by the defendant to inform the plaintiff of some wrongdoing the defendant has knowingly or recklessly committed may be enough. In view of further judicial suggestions that the requirements of equitable fraud may be only minimal, the net may perhaps be cast very far indeed.

ENDNOTES

---

1. William E. McNally is the senior partner of McNally Cuming Allchurch, Calgary, Alberta and practices extensively in the personal injury and class action areas; Barbara E. Cotton is the principal of Bottom Line Research & Communications, Calgary, Alberta.

2. 4 (1) The operation of the limitation period provided by section 3 (1) (b) is suspended during any period of time that the defendant fraudulently conceals the fact that the injury for which a remedial order is sought has occurred.

3. [1958] 1 W.L.R. 563

4. *Guerin* v. *Canada*, [1984] 2 S.C.R. 335; *M. (K.)* v. *M. (H.)*, [1992] 3 S.C.R. 6

5. *V.A.H.* v. *Lynch et al.*(2000), 255 A.R. 359; *Nadon* v. *Voloshin* (2001), 289 A.R. 372; *Halloran* v. *Sargeant et al.* (2001), O.A.C. 286

6. s. 4(1) of the *Limitations Act*

7. [1940] S.C.R. 218

8. [1899] A.C. 351

9. [1984] 2 S.C.R. 335

10. [1992] 3 S.C.R. 6

11. (1988), 92 A.R. 122

12. (1961), 32 D.L.R. (2d) 756

13. (1996), 38 Alta. L.R. (3d) 131

14. (1997), 200 A.R. 206

15. [1973] 1 All E.R. 206

16. *King* v. *Victor Parsons & Co. (a firm)* has been applied in Canada: see *Wilson* v. *McDonnell Douglas Canada Ltd.* (1985), 52 O.R. (2d) 74, affirmed (1986), 55 O.R. (2d) 415.

17. [2002] 2 All E.R. 641

18. (2000), 255 A.R. 359

19. (2001), 289 A.R. 372

20. (2001), 142 O.A.C. 286