

Limitation Periods: Fraudulent Concealment

What is a Limitation Period?

As explained in our article on limitation periods, the law operates to provide wrongdoers with an escape hatch to avoid liability. Under s.4 of the *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B, you cannot be successfully sued by someone for a civil wrong after the second anniversary of the discovery of the wrongful act. Moreover, under s.5(2) of the *Act*, discovery is presumed to have occurred at the time the time of the act or omission that constitutes the civil wrong.

As a concise summary on the operation of the *Limitations Act*, the case of *Reynolds v. Harwood Plumbing*, 2017 ONSC 4899 serves well. At Paragraphs 10 and 11, the Court held as follows:

10 In *Fennell v. Deol*, 2016 ONCA 249 (CanLII) at paragraphs 20 and 21, the court summarized the following: The basic two-year limitation period begins to run on the day the claim was discovered. The date of discovery is the earlier of the two dates under s. 5(1) – when (a) the person with the claim had knowledge of, or (b) a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have had knowledge of, the matters referred to in s. 5(1)(a)(i) to (iv). If either of these dates is more than two years before the claim was issued, the claim is statute-barred. Section 5(1)(a) considers when the person with the claim had actual knowledge of the material facts underlying the claim. Unless the contrary is proved, under s. 5(2), the person is presumed to have known of the matters in s. 5(1)(a)(i) through (iv) on the date of the events giving rise to the claim.

11 Based on the above, central to the application of the “discoverability rule” is when the Plaintiff acquired or ought to have reasonably acquired knowledge of the facts on which his claim is based.

However, as discussed in our limitation period article, there are exceptions to the harsh operation of the *Act*, such as the discoverability principle. One interesting application of the discoverability principle is the doctrine of fraudulent concealment.

What is Fraudulent Concealment?

Starting with the *Act*, fraudulent concealment is included as part of s.15. S.15 provides an ultimate limitation period of 15 years, save for some limited claims. Under s.15(4)(c)(i), the limitation period in this section does not run if the defendant

wilfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or...

Essentially, if a defendant has, by act or omission, made the Plaintiff incapable of discovering the wrongful act, the limitation period stops until the wrongful act becomes discoverable.

Outside of the ultimate limitation period, the doctrine has been applied by the courts as a doctrine of common law. The required elements of fraudulent concealment are found in the seminal case of *Giroux Estate v. Trillium Health Centre*, 2005 CanLII 1488 (ON CA). However, for a more concise summary of the

constituent elements of fraudulent concealment, the Ontario Superior Court in *Colin v Tan*, 2016 ONSC stated as follows at paragraph 45:

[45] The constituent elements of fraudulent concealment are threefold: (1) the defendant and plaintiff have a special relationship with one another; (2) given the special or confidential nature of the relationship, the defendant's conduct is unconscionable; and (3) the defendant conceals the plaintiff's right of action either actively or the right of action is concealed by the manner of the wrongdoing: *M. (K.) v. M. (H.)*, supra; *Guerin v. Canada*, supra; *Authorson (Litigation Administrator of) v. Canada (A.G.)* (2007), 86 O.R. (3d) 321 (C.A.) at paras. 120-131, leave to appeal to S.C.C. ref'd. [2007] S.C.C.A. No. 472; *Giroux Estate v. Trillium Health Centre*, supra at para. 29; *Rajmohan v. Norman H. Solmon Family Trust*, 2014 ONCA 352 at para. 3.

In short, the doctrine applies where there is a special relationship between the parties and there is an unconscionable act committed by one party against the other party that has the effect of concealing the wrongdoing, or the defendant party commits a separate act of concealment that prevents the reasonable discovery of the wrong.

Conclusion

In a nutshell, the limitation period will operate while a cause of action is discoverable. If the cause of action is not discoverable because of the defendant's conduct, the courts may "toll" the limitation period and permit a claim to proceed.

If you are getting sued before the Small Claims Court, or have been wronged and want to sue someone, speak with a legal professional. At Cochrane Moore LLP, we have an excellent team of paralegals with the skills and experience needed to serve your needs. Call us today for a free consultation.