

Focus FAMILY LAW

Appeal could clarify Ontario limitation periods



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While unjust enrichment claims have been an integral part of family law and commercial cases for approximately 40 years, the interplay between those claims and the limitations acts of Ontario have not previously been before the Court of Appeal. However, on September 16, the Ontario Court of Appeal heard the appeal from the ruling of Justice Greg Perkins in *McConnell v. Huxtable*, which directly addressed this issue. The panel reserved.

The central issue in dispute in *McConnell v. Huxtable* [2013] O.J. No. 612 was whether a claim for unjust enrichment brought by a common-law spouse, seeking a remedy for a 50 per cent ownership interest in a home, is subject to the catch-all two-year limitation period under the *Limitations Act, 2002* or the ten-year limitation period under the *Real Property Limitations Act* (RPLA).

Justice Perkins held that in a common law family law matter, a ten-year limitation period applies where a claimant with an unjust enrichment claim seeks a remedial constructive trust in land, as such a claim is an "action to recover land" within the meaning of section 4 of the RPLA. He further held that an alternative claim for monetary damages is similarly afforded the protection of the ten-year limitation.

Justice Perkins noted in obiter

that unjust enrichment claims that are not covered by the RPLA would not be subject to any limitation period, as they are not discoverable within the meaning of section 4 and 5 of the *Limitations Act, 2002*. This reasoning suggests that where a claimant with an unjust enrichment claim seeks an interest in assets other than land (i.e. pensions, businesses, etc.), there is no applicable statutory limitation period. This is in contrast to Justice Margaret Eberhard's ruling in *Davies v. White* [2012] O.J. No. 5290, in which she held that constructive trust claims are subject to a two-year limitation period.

The legal analysis of these issues is interlaced with policy considerations which appear to have strongly influenced Justice Perkins' decision. This is particularly so with respect to his analysis of the discoverability sections of the *Limitations Act, 2002* and the conclusion that such claims are not discoverable. Justice Perkins concluded that there was a gap in the legislation and called for legislative reform, stating that "only a comprehensive legislative approach to these matters will result in a coherent and consistent limitation scheme."

The findings in *McConnell* raise a number of practical problems and policy considerations. If upheld, the effect of Justice Perkins' finding is that a common law spouse's right to claim proprietary relief is subject to a ten-year limitation, or no limitation period at all, whereas married persons are arguably subject to a six-year limitation under the *Family Law Act*. If Justice Perkins' ruling is over-



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turned, common law claimants will be subject to a two-year limitation period, while married persons will presumably enjoy the benefit of the six-year limitation period. As the parties in *McConnell* were not married, the interplay with section 7 of the *Family Law Act* was not directly at issue, and it is not clear how Justice Perkins' holding, upheld or not, might affect claims for proprietary ownership brought as part of the equalization process.

Although Justice Perkins' analysis took place within the family law context, the decision may have far-reaching implications, as unjust enrichment claims are often advanced in other areas such as commercial law and estate matters. For instance, if Justice Perkins is correct, a disgruntled business owner may be relieved to find that they have ten years to seek redress

provided that they have the foresight to claim an interest in the land of the business, not just the goodwill of it.

If the Court of Appeal reverses *McConnell* and holds that such claims are subject to the two-year limitation period, the discoverability principles codified in the *Limitations Act, 2002* will become of critical importance. Understanding early in a case what evidence is to be considered will be important, and facts will have to be reviewed

early on so as to ensure that limitation periods are not missed. In the family law context, the date of separation will generally be the date on which a claim was discovered. However, it has also been recognized that there will be exceptions to this rule and discoverability will ultimately depend on the facts of each case.

Given the uncertainty in this area, pending the release of the Court of Appeal's decision and hopefully some clarification of the applicable limitation period, caution would dictate that if there is concern that a potential limitation period is about to be missed, a claim should be issued or a tolling agreement should be entered into to preserve the claim.

Importantly, the claims in *McConnell v. Huxtable* were limited to unjust enrichment. The respondent's claim for resulting trust had been dismissed on consent as there was no evidence to support it. The application of the limitations acts to those claims may be a very different issue, as those claims are based on fundamentally different legal concepts.

Lindsey Love-Forester is an associate in the family law group at Lerner LLP. She was co-counsel for the respondent (applicant in the appeal), Brian Huxtable.

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