

2014 ONCA 86
Ontario Court of Appeal

McConnell v. Huxtable

2014 CarswellOnt 1152, 2014 ONCA 86, [2014] W.D.F.L. 1032, [2014] W.D.F.L. 1070, [2014] O.J. No. 477, 118 O.R. (3d) 561, 237 A.C.W.S. (3d) 505, 315 O.A.C. 3, 370 D.L.R. (4th) 554, 41 R.P.R. (5th) 1, 42 R.F.L. (7th) 157

**Judith June Barry McConnell, Applicant (Respondent)
and Brian Wesley Scott Huxtable, Respondent (Appellant)**

John Laskin, M. Rosenberg, S.T. Goudge JJ.A.

Heard: September 16, 2013
Judgment: January 31, 2014^{*}
Docket: CA C56761

Proceedings: affirming *McConnell v. Huxtable* (2013), 113 O.R. (3d) 727, 2013 CarswellOnt 1454, 2013 ONSC 948 (Ont. S.C.J.)

Counsel: Bryan R.G. Smith, Lindsey Love-Forester, for Appellant
Bill Rogers, for Respondent

Subject: Civil Practice and Procedure; Property; Family; Estates and Trusts; Restitution

Headnote

Civil practice and procedure --- Limitation of actions — Real property — Adverse possession — Introductory — Declaration of title — Entitlement

Parties had relationship from 1993 or 1994 to 2007, and did not marry or have children — During parties' relationship, husband bought and sold two houses and owned third home at time parties' relationship ended in 2007 — All funds to acquire properties were provided by husband and properties were in his name — In 2007, wife retained lawyer who wrote to husband in attempt to settle issues arising from "joint ownership of property, cohabitation and separation", however, no settlement was reached and nothing occurred until 2012 when husband put home up for sale — Husband was served with material in present proceeding, including ex parte order granting respondent Certificate of Pending Litigation (CPL) on husband's home — Wife's claims were based on unjust enrichment and constructive trust — Husband's motion for summary judgment was dismissed — Motion judge held that Real Property Limitations Act (RPLA), rather than Limitations Act, 2002 (LA), governed claim, finding that claim for unjust enrichment in which claimant sought remedial constructive trust in another party's property was "action to recover any land" within meaning of s. 4 of RPLA which established 10-year limitation period for claims for recovery of land — Husband appealed — Appeal dismissed — Although applicant in claim for constructive trust does not have any interest in property until court makes declaration to that effect, "recover" has been interpreted to mean "to obtain any land by judgment of court" — Plain language of s. 4 of RPLA was broad enough to encompass equitable claim for interest in land through imposition of constructive trust — Issue of whether RPLA applied to claim for constructive trust was same whether equitable claim for interest in land arises out of domestic relationship or purely business transaction — Fact that Family Law Act prescribed limitation period for claims under that Act was not determinative of limitation period issue — Wife made claim for recovery of land by seeking to obtain land by judgment of court, and that she might be awarded alternative remedy of monetary award did not change nature of claim — Alternative claim for monetary award shelters under s. 4 of RPLA was alternative or fallback position to ownership interest claim — Motion judge incorrectly held that if RPLA did not apply, there was legislative gap and no limitation period — Legislature's unequivocal intent was that LA applied to equitable claims unless claim fell within one of exceptions — Section 2(1) of LA excludes, inter alia, proceedings covered by RPLA — Even if RPLA did not apply, since equitable claims were covered by LA, there was no statutory gap.

Civil practice and procedure --- Limitation of actions — Family law proceedings — Family property — Upon marriage breakdown

Parties had relationship from 1993 or 1994 to 2007, and did not marry or have children — During parties' relationship, husband bought and sold two houses and owned third home at time parties' relationship ended in 2007 — All funds to acquire properties were provided by husband and properties were in his name — In 2007, wife retained lawyer who wrote to husband in attempt to settle issues arising from "joint ownership of property, cohabitation and separation", however, no settlement was reached and nothing occurred until 2012 when husband put home up for sale — Husband was served with material in present proceeding, including ex parte order granting respondent Certificate of Pending Litigation (CPL) on husband's home — Wife's claims were based on unjust enrichment and constructive trust — Husband's motion for summary judgment was dismissed — Motion judge held that Real Property Limitations Act (RPLA), rather than Limitations Act, 2002 (LA), governed claim, finding that claim for unjust enrichment in which claimant sought remedial constructive trust in another party's property was "action to recover any land" within meaning of s. 4 of RPLA which established 10-year limitation period for claims for recovery of land — Husband appealed — Appeal dismissed — Although applicant in claim for constructive trust does not have any interest in property until court makes declaration to that effect, "recover" has been interpreted to mean "to obtain any land by judgment of court" — Plain language of s. 4 of RPLA was broad enough to encompass equitable claim for interest in land through imposition of constructive trust — Issue of whether RPLA applied to claim for constructive trust was same whether equitable claim for interest in land arises out of domestic relationship or purely business transaction — Fact that Family Law Act prescribed limitation period for claims under that Act was not determinative of limitation period issue — Wife made claim for recovery of land by seeking to obtain land by judgment of court, and that she might be awarded alternative remedy of monetary award did not change nature of claim — Alternative claim for monetary award shelters under s. 4 of RPLA was alternative or fallback position to ownership interest claim — Motion judge incorrectly held that if RPLA did not apply, there was legislative gap and no limitation period — Legislature's unequivocal intent was that LA applied to equitable claims unless claim fell within one of exceptions — Section 2(1) of LA excludes, inter alia, proceedings covered by RPLA — Even if RPLA did not apply, since equitable claims were covered by LA, there was no statutory gap.

Family law --- Division of family property — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Constructive trusts generally

Parties had relationship from 1993 or 1994 to 2007, did not marry or have children — During parties' relationship, husband bought and sold two houses and owned third home at time parties' relationship ended in 2007 — All funds to acquire properties were provided by husband and properties were in his name — In 2007, wife retained lawyer who wrote to husband in attempt to settle issues arising from "joint ownership of property, cohabitation and separation", however, no settlement was reached and nothing occurred until 2012 when husband put home up for sale — Husband was served with material in present proceeding, including ex parte order granting respondent Certificate of Pending Litigation (CPL) on husband's home — Wife's claims were based on unjust enrichment and constructive trust — Husband's motion for summary judgment was dismissed — Motion judge held that Real Property Limitations Act (RPLA), rather than Limitations Act, 2002 (LA), governed claim, finding that claim for unjust enrichment in which claimant sought remedial constructive trust in another party's property was "action to recover any land" within meaning of s. 4 of RPLA which established 10-year limitation period for claims for recovery of land — Husband appealed — Appeal dismissed — Although applicant in claim for constructive trust does not have any interest in property until court makes declaration to that effect, "recover" has been interpreted to mean "to obtain any land by judgment of court" — Plain language of s. 4 of RPLA was broad enough to encompass equitable claim for interest in land through imposition of constructive trust — Issue of whether RPLA applied to claim for constructive trust was same whether equitable claim for interest in land arises out of domestic relationship or purely business transaction — Fact that Family Law Act prescribed limitation period for claims under that Act was not determinative of limitation period issue — Wife made claim for recovery of land by seeking to obtain land by judgment of court and that she might be awarded alternative remedy of monetary award did not change nature of claim — Alternative claim for monetary award shelters under s. 4 of RPLA was alternative or fallback position to ownership interest claim — Motion judge incorrectly held that if RPLA did not apply, there was legislative gap and no limitation period — Legislature's unequivocal intent was that LA applied to equitable claims unless claim fell within one of exceptions — Section 2(1) of LA excludes, inter alia, proceedings covered by RPLA — Even if RPLA did not apply, since equitable claims were covered by LA, there was no statutory gap.

During the parties' relationship from 1993 or 1994 to 2007, the husband bought and sold two houses. He owned a third home at the time the parties' relationship ended. All funds to acquire the properties were provided by the husband and each of the properties were in the husband's name.

In June 2007, the wife retained a lawyer who wrote to the husband in an attempt to settle the issues "arising from your joint ownership of property, cohabitation and separation". No settlement was reached and nothing else occurred until February 2012 when the husband put his home up for sale. On February 28, 2012, the husband was served with the material in this proceeding, including an ex parte order granting the wife a Certificate of Pending Litigation ("CPL") on the husband's home. The wife's claims were based on unjust enrichment and a remedy of constructive trust.

The husband's motion for summary judgment to have the action dismissed as out of time and to have the CPL removed was dismissed. The motion judge held that the Real Property Limitations Act (RPLA), rather than the Limitations Act, 2002 (LA), governed the wife's claim. The motion judge held that a claim for unjust enrichment in which the claimant seeks a remedial constructive trust in another party's property is "an action to recover any land" within the meaning of s. 4 of the RPLA, which establishes a 10-year limitation period for claims for recovery of land.

The husband appealed.

Held: The appeal was dismissed.

Section 4 of the RPLA creates a 10-year limitation period for an action to recover land. The motion judge noted that the term "recover" in ordinary language implies the return of something that the person previously held. Although an applicant in a claim for constructive trust does not have any interest in the property until the court makes a declaration to that effect, "recover" has been interpreted to mean "to obtain any land by judgment of the court".

The husband argued that a constructive trust is merely a remedy, not an independent claim and therefore, the claim in this case is for unjust enrichment and not an action for recovery of land. The plain language of s. 4 of RPLA, however, is broad enough to encompass an equitable claim for an interest in land through the imposition of a constructive trust.

The issue of whether the RPLA applies to a claim for a constructive trust will be the same whether the equitable claim for an interest in land arises out of a domestic relationship or a purely business transaction. The fact that the Family Law Act prescribes a limitation period for claims under that Act is not determinative of the limitation period issue.

The wife made a claim for recovery of land by seeking to obtain land by judgment of the court. The fact that she might be awarded the alternative remedy of a monetary award did not change the nature of her claim. The wife's alternative claim for a monetary award shelters under s. 4 of the RPLA as an alternative or fallback position to the ownership interest claim.

The motion judge incorrectly held that if the RPLA did not apply, then there was a legislative gap and no limitation period for the present claim. The legislature's unequivocal intent in the LA was that the LA applied to equitable claims unless the claim fell within one of the exceptions. Section 2(1) excludes, inter alia, proceedings covered by the RPLA. Even if the RPLA did not apply, since equitable claims were covered by the LA, there was no statutory gap.

APPEAL by husband from judgment reported at *McConnell v. Huxtable* (2013), 42 R.F.L. (7th) 93, 113 O.R. (3d) 727, 2013 CarswellOnt 1454, 2013 ONSC 948 (Ont. S.C.J.), dismissing his motion for summary judgment under R. 16 of *Family Law Rules*.

M. Rosenberg J.A.:

1 This appeal concerns the relationship between the *Limitations Act, 2002* and the *Real Property Limitations Act* in the context of a family law dispute. It is a matter of first impression in this court. The respondent Judith McConnell brings an action for unjust enrichment seeking a remedial constructive trust in a property owned by the appellant Brian Huxtable. In the alternative, she seeks a monetary award. By June 2007, the respondent was aware that she had claims or potential claims against the appellant including a claim for unjust enrichment and a remedy of constructive trust. Since she did not start this action until February 2012, her action may be out of time if the general two-year limitation period in the *Limitations Act, 2002* applies, but not if the ten-year limitation period in s. 4 of the *Real Property Limitations Act* applies. Thus, the issues in this appeal are: (1) which, if either, of these two limitation periods applies, or (2) whether neither Act applies, leaving a legislative gap such that there is no statutory limitation period.

2 The appellant brought a motion for summary judgment under s. 16 of the *Family Law Rules*. The motion judge, Perkins J., found that the *Real Property Limitations Act* applied. Alternatively, he found that there was a legislative gap and there was no limitation period for this action. I agree with the motion judge that the *Real Property Limitations Act* applies. I do not agree with the motion judge's alternative conclusion that there is a legislative gap. Accordingly, I would dismiss the appeal.

The Facts

3 As indicated, this appeal arises out of a motion for summary judgment brought by the appellant. There are significant factual disputes between the parties as to the nature of their relationship and what if any contribution the respondent made to the properties owned by the appellant. The respondent claims that she made significant contributions to improving the properties, particularly the most recent property on Royal York Road. The appellant alleges that she made minimal contributions, perhaps as little as 20 hours of work, and that her contributions were of little value. The factual dispute is not germane to this motion. The facts relating to the limitation period issue are not disputed.

4 The parties had a relationship from 1993 or 1994 to 2007. They did not marry and they did not have children. During their relationship, the appellant bought and sold two houses and owned a third at the time the parties' relationship ended. All properties were in the appellant's name. All funds to acquire the properties were provided by the appellant. The parties' relationship ended in June 2007 when the police removed the respondent from the home and charged her with attempting to extort the appellant. She did not live at the property after that time. The respondent does not admit the attempted extortion. She does admit that the parties' relationship ended in June 2007. The parties have not shared a residence, had any relationship, shared any financial responsibilities or had any financial obligations to one another since June 2007.

5 Following the end of the parties' relationship in June 2007, the respondent retained a lawyer who wrote to the appellant seeking an amicable settlement of issues "arising from your joint ownership of property, cohabitation and separation". There was an exchange of correspondence but no settlement was reached. Nothing else occurred until February 2012, when the respondent learned that the appellant was selling his home. On February 28, 2012, the appellant was served with the material in this proceeding including an *ex parte* order that granted the respondent a Certificate of Pending Litigation ("CPL") on the appellant's home. The relevant parts of the respondent's claim for the purposes of the appeal are the following:

- (a) A declaration that pursuant to the doctrines of resulting trust, constructive trust, or as a proprietary award for unjust enrichment, the Applicant has a 50% interest (traceable to any proceeds) in the house at [Royal York Road property], which is registered solely in the name of the Respondent;
- (b) A Certificate of Pending Litigation with respect to the abovementioned house, and an Order that it cannot be sold without the written consent of the Applicant;
- (c) In the alternative, an award to the Applicant of monetary damages for unjust enrichment in an amount to be determined;

6 The appellant brought the motion for summary judgment to have the action dismissed because it was out of time and to have the CPL removed. Correspondence between counsel on the motion for summary judgment confirmed discovery was not an issue. The parties included the following in an Agreed Statement of Facts:

On June 27, 2007, the Applicant Judith June Barry McConnell was aware that she had claims, or potential claims, against the Respondent Brian Wesley Scott Huxtable, in the nature of relief as against Mr. Huxtable's property, including but not limited to claims for unjust enrichment, and the remedies of constructive trust and/or damages flowing therefrom.

The Reasons of the Motion Judge

7 In lengthy and compelling reasons, the motion judge found that the *Real Property Limitations Act* governed the respondent's claim. While the *Limitations Act, 2002* seeks to enact a comprehensive scheme for limitation periods, s. 2(1)(a) expressly

exempts "proceedings to which the *Real Property Limitations Act* applies". The motion judge found that the respondent's claim came within s. 4 of the *Real Property Limitations Act*, which provides as follows:

4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

8 The motion judge held that a claim for unjust enrichment in which the claimant seeks a remedial constructive trust in another party's property is "an action to recover any land" within the meaning of s. 4. In reaching this conclusion the motion judge conducted a thorough review of the authorities and engaged in the statutory interpretation exercise mandated by the Supreme Court of Canada in decisions such as *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.). He considered the statutory history and the scheme and object of the statutory history and the scheme and object of the *Real Property Limitations Act* and the *Limitations Act, 2002*.

9 The motion judge also noted an apparent anomaly that would occur if the two-year limitation period under the *Limitations Act, 2002* applied. In family law cases involving a married couple, an unjust enrichment claim seeking a remedial constructive trust is often paired with a claim for equalization under the *Family Law Act*. The two claims typically cover, in part, the same property and subject matter, and the equalization claim ordinarily has a six-year limitation period by virtue of s. 7(3) of the *Family Law Act*. Section 19 of the *Limitations Act, 2002* preserves those limitation periods set out in the Schedule to that Act, including s. 7(3) of the *Family Law Act*.

10 The motion judge also concluded that the respondent's alternative claim for monetary compensation sheltered under her claim for recovery of land. Since the ten-year limitation period in s. 4 of the *Real Property Limitations Act* applied to the claim, the motion for summary judgment was dismissed.

11 Supposing in the alternative that the *Real Property Limitations Act* did not apply by virtue of the exemption in s. 2(1)(a) of the *Limitations Act, 2002*, the motion judge went on to consider whether the *Limitations Act, 2002* applied at all or whether there was instead a legislative gap. Again in comprehensive reasons in which he drew on his long experience conducting family law cases, the motion judge found that the *Limitations Act, 2002* could not apply to the respondent's claim and thus there was a legislative gap. In the result, there was no statutory limitation period. The motion judge left open the question of whether the equitable doctrine of laches could apply. That issue could only be determined on a full record and would not be suitable for resolution on the motion for summary judgment in the form it was brought in this case.

The ISSUES

12 The motion judge articulated the issues with clarity as follows:

1. Is a claim in a family law case in which the claimant pleads facts to establish a constructive trust and asks the court to award an ownership interest in land, with an alternative claim for monetary compensation, governed by the ten year limitation period set out in section 4 of the *Real Property Limitations Act* or by the two year limitation period set out in section 4 of the *Limitations Act, 2002*?

2. Is there a gap in the limitations legislation such that there is no applicable statutory limitation period for a constructive trust claim in a family law case, leaving scope for the court to devise a time limit using its equitable jurisdiction?

I will deal with the issues in the same order. As I agree with the motion judge's resolution of the first issue, in these reasons I will rely extensively upon his reasons.

Analysis

Application of the Real Property Limitations Act

13 The most relevant parts of the *Real Property Limitations Act* are the following:

1. In this Act,

"action" includes an information on behalf of the Crown and any civil proceeding;

...

"land" includes messuages and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties or any of them, any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interest or any of them, are in possession, reversion, remainder or contingency;

...

4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

14 Other parts of the Act are also of some assistance in interpreting the legislation and I will refer to those provisions later in these reasons. The *Real Property Limitations Act* is, with some modifications, what used to be Part I of the *Limitations Act*, R.S.O.1990, c. L-15. I will usually refer to this latter legislation as the *Old Limitations Act*. When the Legislature decided to overhaul the law of limitations in this province, it decided to leave the law as applied to real property largely untouched; hence the archaic and difficult language in the *Real Property Limitations Act*. For example the key definition in s. 1 of "land" uses the archaic term "messuages", which, as I understand it, means a dwelling house, its outbuildings, the area immediately surrounding the dwelling, and the adjacent land appropriate to its use.

15 To understand the application of s. 4, it will be helpful to remove those parts that do not directly apply to this case:

No person shall bring an action to recover any land, but within ten years next after the time at which the right to bring such action first accrued to the person bringing it.

Thus, s. 4 creates a ten-year limitation period for an action to recover land. The central question raised by this appeal is whether a claim for unjust enrichment in which the claimant asks the court to impose a constructive trust upon the respondent's real property is an action to recover any land. The motion judge broke the issue down into three parts: (1) is the respondent's claim an "action", (2) is the action to "recover", and (3) is the action to recover "land"? There is no dispute that the respondent's claim is an action within the meaning of s. 4. I therefore turn to the other questions.

Meaning of "recover"

16 The appellant challenges the motion judge's approach to defining "recover" and, of course, his decision. The motion judge considered both the ordinary meaning of the term as well as its meaning as used in legal contexts and this court's decision *Hartman Estate v. Hartfam Holdings Ltd.* (2006), 263 D.L.R. (4th) 640 (Ont. C.A.). The appellant submits that the motion judge did not go far enough and subject the term to the full *Rizzo & Rizzo Shoes Ltd.* interpretive analysis. I do not accept the appellant's submissions on this issue, for the following reasons.

17 As the motion judge noted, the term "recover" in ordinary language implies the return of something that the person previously held. A claim for a constructive trust does not fit comfortably within that definition since the applicant does not have any interest in the property until the court makes a declaration to that effect. However, legal dictionaries refer to a different usage of the term as that of gaining through a judgment or order. This was the definition adopted by this court in *Hartman Estate* at para. 57:

On a plain reading of s. 43(2), the word "recover" appears to mean "to obtain" the trust property. Such an interpretation accords with the meaning given to "recover" in s. 4 of the Act. In *Williams v. Thomas*, [1909] 1 Ch. 713 (C.A.) at p. 730, the English Court of Appeal held that the expression "to recover any land" in comparable legislation is not limited to obtaining possession of the land nor does it mean to regain something that the plaintiff had and lost. Rather, "recover" means to "obtain any land by judgment of the Court". See also *OAS Management Group Inc. v. Chirico* (1990), 9 O.R. (3d) 171 (Dist. Ct.) at 175 to the same effect.

18 The court in *Hartman Estate* was concerned with s. 43(2) of the *Old Limitations Act*, which has no exact equivalent in the *Real Property Limitations Act*, although there is some vestige of the provision in s. 42 of the *Real Property Limitations Act*, which I will discuss later. Section 43 was found in Part II of the *Old Limitations Act*, which was repealed when the *Limitations Act, 2002* came into force. Part II dealt with limitations in cases involving trusts and trustees where the trust was created by an instrument or an Act of the Legislature (s. 42). Section 43 allowed a trustee the benefit of any statutory limitation period, with some exceptions. One of those exceptions was to "recover trust property" still retained by the trustee. Having found that the exception applied, this court did not have to decide whether the limitation period in s. 4 (identical under the *Real Property Limitations Act* and the *Old Limitations Act*) applied.

19 It is therefore true, strictly speaking, that the *Hartman Estate* court's discussion of the meaning of "recover" in s. 4 was *obiter*, since the court was concerned with the exception in s. 43. However, while the court's consideration of s. 4 was *obiter*, its holding on the meaning of the term "recover" in s. 43 was not. That determination was a step towards finding that the trustees in that case could not rely upon a statutory limitation period, such as the limitation period in s. 4. It would be an odd result if "recover" had one meaning in s. 43 of the Act and a different meaning in s. 4, particularly given that s. 43 references s. 4, albeit in general terms ("any statute of limitations"). *Hartman Estate* was a considered decision of this court and I see no reason to depart from the determination of the term "recover" in that case.

20 The appellant places considerable emphasis on other parts of the *Real Property Limitations Act* that he says provide context for interpreting s. 4 and which should lead to a different result. In particular, he relies upon s. 15, which provides as follows:

At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the *right and title of such person to the land or rent*, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, is extinguished.

[Emphasis added.]

The appellant submits that s. 15 presumes that the claimant had right and title that were extinguished once the limitation period expired. He submits that a person with nothing more than a claim for a constructive trust had no right or title to be extinguished. The difficulty with this submission is that it gives a very narrow reading to s. 15. Once the limitation period expires, the applicant's right to recover the land through an action is extinguished. Section 15 does not depend upon the claimant being the former legal owner of the land. While it is true that the claimant's title cannot be extinguished since the claimant never had title, the effect of s. 15 is also to extinguish the right to the land. A claim for a constructive trust as a remedy for unjust enrichment is a claim for a right to the land. I see no inconsistency between s. 15 and the *Hartman Estate* definition of "recover". I agree with the motion judge's resolution of this issue.

Recovery of land

21 This brings us to the central question at issue in this appeal: whether the respondent's claim for a constructive trust based on unjust enrichment is an action for recovery of land. The appellant's broad submission is that, as developed in Canada, a constructive trust is "merely" a remedy, not an independent claim. Therefore, the claim in this case is for unjust enrichment and not an action for recovery of land.

22 *Hartman Estate* provides some guidance on this issue but there are material differences between s. 43 of the *Old Limitations Act* and s. 4 of the *Real Property Limitations Act*. Section 43 speaks of recovery of "trust property". Section 4 refers to recovery of "any land". It is therefore necessary, as did the motion judge, to delve more deeply into the interpretation exercise in accordance with the *Rizzo & Rizzo Shoes Ltd.* principles. Fortunately, I have the advantage of the motion judge's reasons on this matter, with which I agree.

23 The motion judge held that the plain meaning of recover any land includes seeking an equitable interest in land through imposition of a constructive trust. As he said at para. 59, "a case in which someone asks the court to award them ownership of part or all of a piece of land held by somebody else is an action to recover land." The motion judge then considered the entire context of s. 4 of the *Real Property Limitations Act*, the scheme and object of the Act and the intention of the Legislature. This context included the *Limitations Act, 2002*, and the historical context of limitations law in the province. The motion judge reviewed at some length the historical context beginning with a 1969 *Report on Limitation of Actions* by the Ontario Law Reform Commission through various reports and iterations of proposed Bills that resulted in the 2002 legislation that came into force in 2004. The conclusion of his analysis is found in paras. 74-80. For present purposes it is sufficient to set out para. 77:

A party seeking an ownership interest by way of constructive trust must plead and then prove facts establishing entitlement to it. The fact that a claimant must prove enrichment of the other party and a corresponding deprivation of the claimant, with no juristic reason for the enrichment in order to establish a constructive trust, and must also show that damages alone are insufficient and only a proprietary remedy is adequate, does not alter the fact that the claimant has asked the court from the beginning to award an interest in land. To me, all this means is that the claimant has to plead and prove those key elements, usually called "material facts" in litigation, to justify the order sought. It should not matter how many material facts there are or whether the entitlement to land requires a two step analysis, so long as the application makes a claim of entitlement to ownership of land.

24 The appellant argues that the motion judge erred in his treatment of the context in which s. 4 is found and the history of the *Real Property Limitations Act*. He makes two important points. First, s. 4, when it was found in Part I of the *Old Limitations Act*, tended to be used for adverse possession cases. Second, other parts of the *Real Property Limitations Act* suggest that Act was not intended to apply to constructive trusts.

25 I begin with the adverse possession point. Resolution of that issue requires a discussion of the Legislature's intent when it revised the limitation period scheme in this province. As the motion judge noted, originally the intent was to deal with limitation periods for all claims. However, this approach was abandoned apparently as a result of consultations that resulted in the March, 1991, *Recommendations for a New Limitations Act - Report of the Limitations Act Consultation Group*, published by the Ontario Ministry of the Attorney General. The Group reported that it did not have the necessary expertise to deal with actions to recover land. Thus, language in earlier drafts of the new limitation legislation dealing with limitations of actions to recover real property was stripped out of what eventually became the *Limitations Act, 2002*. This history strongly suggests that actions to recover land are outside the *Limitations Act, 2002*.

26 The Legislature's inability to deal with real property claims unfortunately detracts from the clarity that was a paramount objective of the new approach to limitation periods as represented by the *Limitations Act, 2002*. However, the fact that the Legislature did retain Part I of the *Old Limitations Act* demonstrates that the Legislature has not wholly abandoned the field of claims for recovery of real property. And, in my view, the objective of clarity should not be abandoned by a narrow reading of s. 4 to place artificial limits on its scope when the plain words of the section cannot fairly bear that interpretation. There is nothing in s. 4 to suggest it is limited to claims for adverse possession. The fact that the section itself refers to recovery of rent, not just land, tells against a narrow interpretation of the provision to adverse possession claims.

27 The appellant also relies upon other parts of the *Real Property Limitations Act*, particularly s. 42, which is as follows:

42. Where land or rent is vested in a trustee upon an express trust, the right of the beneficiary of the trust or a person claiming through the beneficiary to bring an action against the trustee or a person claiming through the trustee to recover the land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which the land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through the purchaser.

28 The appellant argues that since the legislation only refers to express trusts, the Legislature could not have intended the Act to apply to other types of trusts, particularly constructive trusts. I do not accept this submission, primarily because of the legislative history. The *Old Limitations Act* dealt in Part II with trusts created by instrument and by legislation. When the new legislation repealed Part II (and Part III) of the *Old Limitations Act*, it left no express provision for real property held by trustees. The Legislature apparently believed that in the case of express trusts there was the need for some clarification. At this point it is impossible to know why the Legislature did not deal more broadly with all kinds of trust. One can only guess that given the consultation group's lack of expertise and the constant, indeed, rapid evolution of equitable trusts, the Legislature was of the view that the area was not ripe for codification. I see nothing in the *Real Property Limitations Act* that suggests that the Legislature intended to exhaustively deal with trust cases involving land. To the contrary, the legislative history suggests that the Legislature intended to leave the area largely as it was. Thus, if s. 4 can fairly bear the interpretation of applying to recovery of real property through a constructive trust then I see no reason to impose an artificial and narrow interpretation on the section's very broad language.

29 In *Hartman Estate*, in dealing with s. 43 of the *Old Limitations Act*, Gillese J.A. speaking for the court did hold that the term "trust property" not only applies to express trusts but includes constructive trusts granted as a remedy for unjust enrichment as discussed in cases such as *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), which was the genesis of the modern principle of unjust enrichment discussed in *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.), which I will discuss more fully below. In doing so, she adopted a plain reading of the section. She left open the broader question of application of statutory limitation periods for claims to land based on resulting or constructive trusts, at para. 85:

It is apparent that there is no clear, general answer to the question of whether claims to land based on resulting or constructive trust are subject to a statutory limitation period and, if so, whether the exceptions in s. 43(2) apply to all trustees who hold property by way of resulting or constructive trust. In the case at bar, however, if the statutory limitation period does apply to such claims, for the reasons already given, I am not bound to apply *Taylor v. Davies*. I would give a plain reading to s. 43(2) with the result that the proposed trust claims fall within the second exception.

30 I adopt a similar approach to the interpretation of s. 4. Its plain language is broad enough to encompass an equitable claim for property based on the remedy of constructive trust. Thus I agree with the motion judge's conclusion on this point, at para. 79:

It seems odd, more than a century after the abolition of the common law forms of action and the merger of common law and equitable jurisdiction, more than 40 years after the debate on limitations reform began in Ontario and more than a decade since the enactment of a new limitations scheme, that we would be constrained to adopt the "traditional" approach of limiting section 4 of the *Real Property Limitations Act* to adverse possession claims. The plain words of the section, "action to recover any land", seem to apply comfortably to the applicant's claim in this case. The rest of the *Real Property Limitations Act* talks about various kinds of claims other than trust claims but does not indicate any intention that constructive trust claims are not properly within the meaning of section 4. The repeal of the former Parts II and III of the old *Limitations Act*, RSO 1990, c L.15, does not shed light on the meaning of section 4. A ten year period for constructive trust claims seeking ownership of land is not inconsistent with the rest of the *Real Property Limitations Act* or with the general scheme of the *Limitations Act, 2002*, which expressly defers to the *Real Property Limitations Act*.

31 The appellant also relies heavily on the judicial history of the treatment of constructive trust in Canadian courts and particularly on the most recent Supreme Court decision on the issue, *Kerr*, which emphasizes the nature of the constructive

trust as a remedy and the preference for a monetary award for all unjust enrichment claims, even those where the claimant is seeking a constructive trust in identified property.

32 *Kerr* was decided after this court's decision in *Hartman Estate*. It deals with some issues that are not germane to this appeal, such as the common intention resulting trust. The court held at para. 24 that the common intention resulting trust no longer has a role in resolving domestic cases. The respondent originally brought a claim based on resulting trust. The parties agreed that the respondent did not have the evidence to support a claim for resulting trust and that claim was dismissed.

33 In *Kerr*, the court dealt at length with unjust enrichment. At para. 33, Cromwell J. held that there is no separate line of authority for family cases developed within the law of unjust enrichment and reaffirmed the statement in *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 997, that "the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases." I refer to this point because, although this is a family law case, the determination of the limitation period issue will have ramifications beyond family law. The resolution of the limitation period issue cannot turn on the fact that this is a family law case. Thus, in my view, the fact that the *Family Law Act* prescribes a limitation period for claims under that Act cannot be determinative of the limitation period issue.

34 I recognize that Cromwell J. went on to hold at para. 34, again referring to *Peter*, at p.997, that the courts must "exercise flexibility and common sense applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases". Indeed, the family law context was front and centre when considering the remedy for unjust enrichment in such cases. But, in my view, the resolution of the strictly legal question as to the application of the *Limitations Act, 2002* and the *Real Property Limitations Act* turns on the interpretation of the relevant provisions of those Acts. The issue of whether the *Real Property Limitations Act* applies to a claim for a constructive trust will be the same whether the equitable claim for an interest in land arises out of a domestic relationship or a purely business transaction.

35 In *Kerr*, at para. 32, the court reiterated the by now well-known elements of a claim for unjust enrichment as developed in Canadian law: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff and the absence of a juristic reason for the enrichment. At this stage of the proceeding, those elements are not in issue. The motion judge was asked to deal with the legal issue on the assumption that the respondent could make out those elements: see para. 13 of the motion judge's reasons. This case turns rather on the remedy for the unjust enrichment and how the remedies should be characterized.

36 Remedies for unjust enrichment are restitutionary and the court in *Kerr* affirmed that proprietary and monetary remedies are available for unjust enrichment. At para. 46, Cromwell J. described the two available remedies in these terms:

A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 669, *per* La Forest J.).

Further, Cromwell J. also noted that the court should first consider whether a monetary award is sufficient; in most cases it is: para. 47. Most of *Kerr* is concerned with calculating the monetary award. The case does, however, refer to the proprietary award in several contexts. The first context is where the plaintiff, like this respondent, seeks a constructive trust. Justice Cromwell explains as follows at para. 50:

The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. *Pettkus* is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). *Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour* (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). *Pettkus* made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on

which the remedy of constructive trusts rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).

[Emphasis added.]

37 *Kerr* also makes the point that there must be a significant link between the plaintiff's contribution and the property that she seeks to have impressed with the trust. As Cromwell J. said at para. 51:

As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution will not suffice (*Peter*, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154, at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property (*Sorochan*, at p. 50; *Pettkus*, at p. 852).

38 With that background I return to the interpretive issue and specifically to the question of whether an application for the equitable remedy of a constructive trust in real property is an application for recovery of any land. In my view, the respondent is making a claim for recovery of land in the sense that she seeks to obtain land by judgment of the Court. That the court might provide her with the alternative remedy of a monetary award does not take away from the fact that her claim is for a share of the property. The repeated references to constructive trust as a remedy for unjust enrichment in *Kerr* demonstrate that a proprietary remedy is a viable remedy for unjust enrichment where there is a link or causal connection between her contributions and the acquisition, preservation, maintenance or improvement of the property.

39 In sum, I agree with the motion judge's conclusion at para. 80 of his reasons:

From the plain meaning of the words "action to recover any land" in section 4 of the *Real Property Limitations Act*, in their "entire context" as described above, I find that the applicant's claim in this case for an ownership interest in the house in question is an "action to recover any land" within the meaning of section 4 of the *Real Property Limitations Act*. It is subject to a ten year limitation period. Based on the record before me, it is not possible for me to conclude that the applicant's claim in this case is barred by the ten year limitation. Accordingly, this part of her claim is entitled to proceed.

40 I also agree with the motion judge that her alternative claim for a monetary award can shelter under s. 4 for the reasons he gave at para. 88:

My analysis of the question begins with the words of the section: "... bring an action to recover any land ...". In contrast to the *Limitations Act, 2002*, which deals with individual "claims", this provision deals with an "action" (extended by section 1 of the *Real Property Limitations Act* to include "any civil proceeding"). An action or application can and frequently does include a principal claim with an alternative claim, as in this case. Here the damages claim is an alternative or fallback position to the first claim advanced by the applicant, which is for an ownership interest. The statute does not say "action to recover *only* land". Further, it would not make sense to interpret section 4 of the *Real Property Limitations Act* as a sort of all or nothing proposition, forcing the court either to award a proprietary interest on what it finds to be a meritorious claim, when a monetary award would otherwise be an adequate and appropriate remedy, or to award nothing at all, because a shorter limitation period for a damage award bars that kind of remedy. To interpret the section as not protecting an alternative damage award would mean that a claimant would never be able to rely on the section in determining when to launch a court case involving land and would always have to meet the limitation period for a damages claim, for fear of being locked out at the end of the case.

41 The appellant also submits that the motion judge's interpretation of s. 4 will result in absurdity because there will be a different limitation period for unjust enrichment claims depending on the remedy sought. For example, the claimant may be

seeking an interest in a pension or a business to which s. 4 does not apply. The decision of this court in *Equitable Trust Co. v. 2062277 Ontario Inc.*, 2012 ONCA 235, 109 O.R. (3d) 561 (Ont. C.A.), is instructive in resolving that issue. In that case, the plaintiff brought an action against the guarantors of a mortgage loan. The loan was given in respect of real property and the guarantee was included in the mortgage document. One of the defendants sought summary judgment on the basis that the limitation period under the *Limitations Act, 2002* had expired because of s. 2(5) of the Act, which provides that the day on which the loss occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation. The defendant argued that the demand obligation was made when the plaintiff issued a notice of sale under the mortgage in December 2007. The action to recover the deficiency from the guarantors was not commenced until September 2010, more than two years after demand. This court agreed with the motion judge that, despite the broad language in the *Limitations Act, 2002*, the limitation period under s. 43 of the *Real Property Limitations Act* applied. That section provides for a 10-year limitation period for actions on a covenant contained in a mortgage. Speaking for the court, Perell J. (*ad hoc*) dismissed the argument that all guarantees should be treated the same. As he said at para. 30:

It is true that it may not always be easy to determine whether a particular guarantee, like the guarantee in *Bank of Nova Scotia v. Williamson*, is subject to the *Limitations Act, 2002* or, like the guarantee in the case at bar, is subject to the *Real Property Limitations Act*. However, it does not follow that all guarantees should be treated the same way. *It has been the case historically that guarantees associated with land transactions have different limitation periods from guarantees associated with contract claims.* Moreover, as already noted, it is my view that the Legislature intended that all limitation periods affecting land be governed by the *Real Property Limitations Act*.

[Emphasis added.]

42 Despite the advances in the application of constructive trust claims and unjust enrichment generally, it is open to the Legislature to prescribe different limitation periods for unjust enrichment actions where the claim is for a proprietary remedy. I would not give effect to the appellant's arguments. Accordingly, I would dismiss the appeal.

Is there a legislative gap?

The motion judge's reasons

43 Given my conclusion on the application of s. 4 of the *Real Property Limitations Act*, it is not strictly necessary to deal with the legislative gap argument. However, the matter was dealt with fully by the motion judge and his decision has potential application to other claims that may not be covered by the *Real Property Limitations Act*. In my view, it would be helpful to deal with that issue.

44 In short, the motion judge held that if s. 4 of the *Real Property Limitations Act* did not apply to the respondent's claim, there was no statutory limitation period because the *Limitations Act, 2002* could not apply to an unjust enrichment case in the family law context. The motion judge reached this conclusion because of the difficulty of applying ss. 4 and 5 of the *Limitations Act, 2002* to an unjust enrichment claim in the family law context. The motion judge dealt with this issue at length but I have reluctantly concluded that I cannot agree with his decision.

45 To appreciate the issue, it is necessary to consider the wording of ss. 4 and 5, especially the latter:

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made.

46 The motion judge's concern was with the exhaustive statutory definition of discoverability in s. 5(1)(a). He found that it was problematic as to when the injury, loss or damage occurred within the meaning of para. (i). He appears to have rejected the suggestion that in a family law case, ordinarily the separation date would be the date when the loss occurred. He was also concerned that the plaintiff would not know that the act or omission was that of the person against whom the claim was made. In his view, in many family law cases the defendant has done nothing more than be passively enriched by the plaintiff's actions. As he said at paras. 122-23:

On the third element, as set out in section 5(1)(a)(iii), I find that there will often, in fact usually, be constructive trust claims in family law where there is no act or omission of the respondent that caused or contributed to the claimant's loss. This could be true even where the claimant has made a request (direct or indirect) for a change in title or for compensation, which the respondent has neither accepted nor rejected. There is no duty to say yes.

With no act or omission of the respondent, the claimant could not reasonably have knowledge of suffering a loss caused or contributed to by an "act or omission" of the respondent. Without that knowledge, the third element is not satisfied, the claim has not been "discovered" and the limitation period never starts to run. I conclude that section 5(1)(a)(iii) simply does not work for family law constructive trust claims.

47 Finally, the motion judge considered the fourth element, "that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy". As I read his reasons, although he had some concerns, the motion judge found that, even in a family law case, a claimant would know whether the nature of an injury, loss or damage was such that a proceeding would be appropriate.

Analysis

48 I take a different approach to the application and interpretation of the *Limitations Act, 2002*. In my view, the starting point must be whether the Act was intended to apply to equitable claims. To resolve this issue it is necessary to consider the various sections of the legislation and in my view they point unequivocally to the Legislature's intent to apply the Act to such claims, unless the claim falls within one of the exceptions. For example, s. 2(1) not only excludes proceedings to which the *Real Property Limitations Act* applies (para. (a)), but "proceedings based on *equitable* claims by aboriginal peoples against the Crown" (para. (f)) [emphasis added]. Section 13 of the Act, which deals with acknowledgments states in para. (7):

An acknowledgment of liability in respect of a claim to recover or enforce *an equitable interest* in personal property by a person in possession of it is an acknowledgment by any other person who later comes into possession of it.

[Emphasis added.]

49 These references to equitable claims show that the Act was intended to be comprehensive and to apply to equitable claims, at least to claims other than for land that may be covered by the *Real Property Limitations Act* or other claims expressly

exempted from application by the Act. The few cases that have considered the issue have held that equitable claims were intended to be covered by the *Limitations Act, 2002*. See for example: *Bouchan v. Slipacoff*, 2010 ONSC 2693 (Ont. S.C.J.) and *Schneider v. State Farm Mutual Automobile Insurance Co.*, 2010 ONSC 4734 (Ont. S.C.J.). This court's decision in *Placzek v. Green*, 2009 ONCA 83, 307 D.L.R. (4th) 441 (Ont. C.A.), would also seem to support the view that the Act was intended to cover equitable claims.

50 A claim for equitable relief, including a claim based on unjust enrichment, fits within the broad definition of "claim" in s. 1 of the *Limitations Act, 2002* as a "claim to remedy an injury, loss or damage that occurred as a result of an act or omission". Since equitable claims are covered by the Act, there is no statutory gap. Thus, s. 4 of the Act applies and a proceeding "shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered".

51 The motion judge did find, at para. 109 of his reasons, that the definition of "claim" in s. 1 of the *Limitations Act, 2002* "fits comfortably enough in a family law constructive trust case." However, he also found, in the same paragraph (and again in para. 122), that ordinarily the only act or omission giving rise to a family law constructive trust claim is an act by the claimant, namely, "the claimant's contributions directly or indirectly to the property of another person". As the motion judge spelled out in his analysis, this latter finding raises a problem for the application of the s. 1 definition of "claim" to family law constructive trust claims, because the "act or omission" referred to in that definition must be that of the person against whom the claim is brought. This is made clear, for instance, in s. 5(1)(a)(iii), quoted above, which states that a claim is not discovered until, among other things, the claimant knows that the act or omission giving rise to injury, loss or damage is "the act or omission ... of the person against whom the claim is made".

52 I do not agree with the motion judge that a remedial constructive trust claim does not require any act or omission by the person against whom the claim is brought. Generally speaking, a claim of unjust enrichment requires that the defendant retain a benefit without juristic reason in circumstances where the claimant suffers a corresponding deprivation. In other words, the relevant act of the defendant is simply the act of keeping the enrichment (or the omission to pay it back) once the elements of the unjust enrichment claim have crystallized. In the family law context, this may typically occur on the date of separation, when shared assets, including real property, are divided and the possibility therefore arises of one party holding onto more than a fair share.

53 I agree with the motion judge that in some cases it may be difficult to apply the s. 5 definition of discoverability to equitable claims, including claims for unjust enrichment. But, that does not mean that the Act does not apply. It may well mean that the claim has not been discovered within the meaning of s. 5 and so the two-year limitation period does not run. This does not mean there is a gap in the legislation and there is no limitation period. Rather, the plaintiff will be able to pursue his or her claim until the ultimate limitation period in s. 15 applies, in most cases the period established by subsection (2):

No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

54 That said, I would think that ordinarily the claim should be taken not to have been discovered until the parties have separated and there is no prospect of resumption of cohabitation, see: Maddaugh and McCamus, *The Law of Restitution*, loose-leaf, release no. 11 (Toronto: Canada Law Book, 2013), at 3:500.30, and *Wilson v. Fotsch*, 2010 BCCA 226 (B.C. C.A.), at para. 10.

Disposition

55 Accordingly, I would dismiss the appeal. The respondent is entitled to her costs, which I would fix at \$15,000 inclusive of taxes and disbursements.

John Laskin J.A.:

I agree

S.T. Goudge J.A.:

I agree

Appeal dismissed.

Footnotes

* A corrigendum issued by the court on February 20, 2014 has been incorporated herein.

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