

# Anisman v. Drabinsky: Claim to Set Aside Fraudulent Conveyance of Land Subject to Real Property Limitations Act 10-Year Limitation Period

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On February 25, 2020, the Ontario Superior Court of Justice (the “OSCJ”) released its decision in *Anisman v. Drabinsky*,<sup>1</sup> holding, among other things, that the limitation period for attacking a transfer of real property as fraudulent under the Ontario *Fraudulent Conveyances Act*<sup>2</sup> (the “FCA”) is the applicable ten-year limitation period under the Ontario *Real Property Limitations Act*<sup>3</sup> (the “RPLA”), rather than the two-year basic limitation period under the Ontario *Limitations Act, 2002*<sup>4</sup> (the “Limitations Act”).

The *Limitations Act* explicitly excludes from its application proceedings to which the RPLA applies.<sup>5</sup> Section 4 of the RPLA states:

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.

In *Anisman v. Drabinsky*, Justice Morgan followed the OSCJ’s earlier decision in *Conde v. Ripley et al.*<sup>6</sup> (“*Conde*”) to hold that a claim brought under the FCA to have a conveyance of real property declared void is a claim “to recover any land” to which section 4 of the RPLA applies.<sup>7</sup> In *Conde*, Justice Dunphy had reasoned:

An FCA claim, if successful, does no more or less than invalidate the impugned transfer as against “creditors or others” of whom the plaintiff is obviously an exemplar. Where the conveyance attacked is of real property, such an action is thus quite literally an “action to recover land” since the outcome of the action, if successful, is to “recover” the land to the estate of the transferor (in this case Mr. Ripley) so that - once so recovered - it can respond to the claims of creditors or others as if it had never been transferred. The outcome of the plaintiff’s claim against the transferor may well be a money judgment - the outcome of the claim against the transferee under the FCA is an order “to recover land” which is then available to satisfy that claim.<sup>8</sup>

Justice Dunphy’s conclusion in *Conde* was, however, previously rejected by Justice Faieta of the OSCJ in *Wilfert v. McCallum* (“*Wilfert*”), who held that an action to set aside a fraudulent conveyance of land is not an action to recover land for purposes of section 4 of the RPLA.<sup>9</sup> Citing two Ontario Court of Appeal decisions,<sup>10</sup> Justice Faieta interpreted the phrase “recover any land” in section 4 of the RPLA to mean “obtain any land by judgment of the Court” and held that a creditor does not obtain land by judgment of the Court simply because the creditor might benefit financially from a declaration setting aside a transfer of such land.<sup>11</sup> Because *Wilfert* was not considered by Justice Morgan in *Anisman v. Drabinsky*, the dispute over interpretation of the phrase “recover any land” is, unfortunately, left unresolved.

It can be noted that Justice Faieta’s logic in *Wilfert* would not apply to a trustee in bankruptcy or a receiver attacking a transfer of land under the FCA, as such a court officer would stand in the shoes of the debtor who regains title upon the transfer being set aside.

*Anisman v. Drabinsky* is the second recent decision to affirm the application of an *RPLA* limitation period over the two-year *Limitations Act* basic limitation period. In its December 18, 2019 decision in *Hilson v. 1336365 Alberta Ltd.*,<sup>12</sup> the Ontario Court of Appeal held that claims on personal guarantees of mortgage loans were subject to the ten-year limitation period under subsection 43(1) of the *RPLA*.<sup>13</sup>

The Financial Services Group at Aird & Berlis regularly advises creditors and court officers in actions under the *Bankruptcy and Insolvency Act*,<sup>14</sup> the *FCA* and the Ontario *Assignments and Preferences Act*<sup>15</sup> attacking preferential, fraudulent and undervalue transactions. Details are available at our **Financial Services webpage**.

<sup>1</sup>*Anisman v. Drabinsky*, 2020 ONSC 1197 (OSCJ).

<sup>2</sup>*Fraudulent Conveyances Act*, RSO 1990, c F.29.

<sup>3</sup>*Real Property Limitations Act*, RSO 1990, c L.15, section 43(1).

<sup>4</sup>*Limitations Act, 2002*, SO 2002, c 24, Sch B, at section 4.

<sup>5</sup>*Ibid*, at subsection 2(1)(a).

<sup>6</sup>*Conde v. Ripley et al.*, 2015 ONSC 3342, at paragraph 2.

<sup>7</sup>*Anisman v. Drabinsky*, *supra* note 1, at paragraphs 56 and 61.

<sup>8</sup>*Conde*, *supra* note 6, at paragraph 41. Justice Dunphy contrasted this, at paragraphs 2 and 43, with an action under the *FCA* to recover personal property which would be subject to the two-year *Limitations Act* period.

<sup>9</sup>*Wilfert v. McCallum*, 2017 ONSC 3853 (OSCJ).

<sup>10</sup>*Hartman Estate v. Hartfam Holdings Ltd.*, [2006] OJ No 69 (ONCA), at paragraph 57; and *McConnell v. Huxtable*, 2014 ONCA 86, at paragraph 19.

<sup>11</sup>*Wilfert*, *supra* note 9, at paragraphs 25 to 26.

<sup>12</sup>*Hilson v. 1336365 Alberta Ltd.*, 2019 ONCA 1000 (ONCA); upholding *Hilson v. 1336365 Alberta Ltd.*, 2018 ONSC 1836 (OSCJ).

<sup>13</sup> See: "Ontario Court of Appeal Holds Mortgage Guarantees Subject to Real Property Limitations Act 10-Year Limitation Period".

<sup>14</sup>*Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

<sup>15</sup>*Assignments and Preferences Act*, RSO 1990, c A.33.

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