

# KEEPING CURRENT

August 10, 2023

## Two-year limitation period applies to fraudulent conveyance actions (*Bank of Montreal v. Iskenderov*)

By Isabel Yoo

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An important consideration for determining whether (and when) to pursue litigation is the limitation period, which is the time limit by which a party must commence their claim against another party. If the claim is not commenced within the applicable limitation period, the claiming party loses its right to commence and pursue the claim. In Ontario, the [Limitations Act, 2002](#) outlines a basic two-year limitation for most claims commencing on the date on which the claim was or reasonably could have been discovered. There are some limited exceptions for certain types of "claims," which engage different limitation periods and occasionally the courts are called upon to determine whether or not the claim is subject to the [Limitations Act, 2002](#).

In [Bank of Montreal v. Iskenderov, 2023 ONCA 528](#), a five-judge panel of the Court of Appeal for Ontario determined the correct limitation period for a claim to declare a fraudulent conveyance void as against creditors under the [Fraudulent Conveyances Act](#).

The Bank of Montreal was a creditor of the defendant, Iskenderov. The bank sought to set aside Iskenderov's transfer of his residence to his wife as an alleged fraudulent conveyance. The action was brought more than two years after the transfer. The defendants (Iskenderov and his wife) moved for summary judgment, seeking to dismiss the action as time-barred for missing the two-year limitation period.

The motion judge disagreed with the defendants, held that the ten-year limitation period under section 4 of the [Real Property Limitations Act](#) ("RPLA") applied, and set aside the transfer as a fraudulent conveyance. In reaching his conclusion, the motion judge relied on the Court of Appeal for Ontario's decision of [Anisman v. Drabinsky, 2021 ONCA 120](#) for the principle that a ten-year limitation period under the RPLA applied to a fraudulent conveyance action rather than the two-year limitation period under the [Limitations Act, 2002](#).

Iskenderov appealed to the Court of

Appeal, which convened a five-member panel to determine the applicable limitation period because the appeal may have involved overruling the court's prior decision in *Anisman*.

Determining the applicable limitation period for fraudulent conveyances required the court to consider three factors:

1. The historical approach to the limitation period of such actions
2. The nature of relief sought in a fraudulent conveyance action
3. The court's approach in interpreting section 4 of the *RPLA*

The *Limitations Act, 2002* introduced a new and comprehensive structure of limitation periods in Ontario. The basic limitation period under the Act is two years after the claim is discovered. Conversely, section 4 of the *RPLA* provides a ten-year period for an action to "recover any land".

The Court of Appeal determined that prior to the enactment of the *Limitations Act, 2002*, section 4 had never been held to apply to a fraudulent conveyance action. Before the *Limitations Act, 2002* came into effect, there was essentially no limitation period for bringing a fraudulent conveyance action. Following the introduction of the *Limitations Act, 2002*, judges of the Superior Court could not agree on the applicable limitation period. In *Anisman*, the Superior Court held that a claim to set aside a conveyance of real property, on its face, is a claim to recover any land to which the 10-year period under the *RPLA* applied.

The Court of Appeal in *Iskenderov* held that the relief in a fraudulent conveyance action under the *Fraudulent Conveyances Act* does not lead to the "recovery of any land". A fraudulent conveyance is deemed void as against creditors or others, but the case law makes it clear that the transaction remains valid as between the

transferor and the transferee. If a transferor sells property to a *bona fide* purchaser, the purchaser gets good title, but the proceeds stand in the stead of the property for the benefit of the creditors of the transferor.

Because the transfer remains valid as between these parties, the *Fraudulent Conveyances Act* does not operate so as to "re-vest" the conveyed property to the transferor, nor does the creditor recover land in the sense of obtaining any rights to the land because a fraudulent conveyance is declared void. As such, section 4 of the *RPLA* does not apply to such proceedings. Rather, section 4 of the *RPLA* has been held to apply to actions in which the judgment of the court grants a property right in land or in money that was paid for land. It is not enough that the subject matter of the action is real property.

Therefore, the Court of Appeal concluded that *Anisman* was wrongly decided.

The *Iskenderov* court was then required to determine the correct applicable period under the *Limitations Act, 2002* – was it either section 16(1)(a) under which there is no limitation period, or under section 4 which provides the two-year period?

Section 16(1)(a) states that there is no limitation period in respect of a proceeding for a declaration if no consequential relief is sought.

In the case at bar, the bank sought three orders: a declaration that the transfer of the property was a fraudulent conveyance, an order setting aside the conveyance, and a certificate of pending litigation. The court determined that a fraudulent conveyance judgment is remedial. A declaration that a transfer is void includes the remedy of setting aside the transfer as against creditor. Therefore, since consequential relief was being sought, section 16(1)(a) was not applicable.

By the process of elimination, the court determined that this meant that the two-year limitation period under section 4 of the [Limitation Act, 2002](#) applied. The court allowed Iskenderov's appeal and ordered that the matter proceed to trial to determine the remaining issues.

Determining the correct limitation period is an important step both for litigants and their lawyers. The decision of *Iskenderov* has cleared up the confusion in the lower courts for claims relating to fraudulent conveyances and is important guidance for litigants contemplating such claims.

Given the importance of this decision, it remains to be seen whether the bank seeks leave to appeal the Court of Appeal for Ontario's ruling to the Supreme Court of Canada and whether leave to appeal will be granted.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [Isabel Yoo](#), at 416.865.6655 or [iyoo@grllp.com](mailto:iyoo@grllp.com).

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