

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

ONTARIO SECURITIES COMMISSION

Applicant

- and -

BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE GP INC., BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, BRIDGING MJ GP INC., BRIDGING INDIGENOUS IMPACT FUND, BRIDGING FERN ALTERNATIVE CREDIT FUND, BRIDGING SMA 2 LP, BRIDGING SMA 2 GP INC., and BRIDGING PRIVATE DEBT INSTITUTIONAL RSP FUND

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 129 OF THE
SECURITIES ACT (ONTARIO), R.S.O. 1990, c. S. 5, AS AMENDED

**FACTUM OF WOODS LLP, IN ITS CAPACITY AS COURT-APPOINTED QUEBEC
REPRESENTATIVE COUNSEL
(Unitholder Priority Motion returnable November 16-17, 2022)**

November 3, 2022

Woods LLP
2000 McGill College Avenue, Suite 1700
Montreal, QC H3A 3H3

Sylvain Rigaud (srigaud@woods.qc.ca)
Eric Bedard (ebedard@woods.qc.ca)
Émilie St-Pierre (estpierre@woods.qc.ca)
Simon-Alexandre Poitras
(sapoitras@woods.qc.ca)

Tel: 514-982-4545 / Fax: 514-284-2046
Quebec Representative Counsel

TABLE OF CONTENTS

PART I – OVERVIEW	1
PART II – FACTS	2
PART III – ISSUES	4
PART IV – LAW & ANALYSIS	5
A. QUEBEC LAW: PRIORITIES AND LAW APPLICABLE TO POTENTIAL QUEBEC PRIORITY CLAIMS.....	5
1) <i>Priorities under Quebec law</i>	5
2) <i>Law Applicable to Potential Quebec Priority Claims</i>	6
a) Quebec Redemption Claims.....	6
b) Quebec Statutory Rescission Claims.....	6
B. EQUAL TREATMENT OF UNITHOLDERS AND THE APPLICATION OF THE <i>PARI PASSU</i> RULE.....	10
C. THE RECEIVER SHOULD BE DIRECTED TO HONOUR POTENTIAL QUEBEC REDEMPTION CLAIMS.....	12
D. THE RECEIVER SHOULD BE DIRECTED TO HONOUR POTENTIAL QUEBEC STATUTORY RESCISSION CLAIMS.....	17
PART V – RELIEF REQUESTED	23
SCHEDULE “A”.....	25
SCHEDULE “B”.....	27

PART I – OVERVIEW

1. Should the Receiver honour the rights of Unitholders,¹ resident in Quebec at the time of their subscription for Units, with Potential Priority Claims (“**Quebec Claimants**”)² or should it instead ignore specific contractual rights granted to all Unitholders (but only exercised by certain) and imperative statutory protection aimed at protecting the Quebec investing public and treat same as subordinated rights?
2. The Appointment Orders were granted on the basis of section 129 of the Ontario Securities Act.³ The Receiver was appointed pursuant to provincial legislation alone and cannot invoke federal paramountcy or principles of bankruptcy and insolvency to oust the application of mandatory statutory provisions aimed at protecting the Quebec investing public or to impose the same treatment to Unitholders with different legal rights resulting from the valid exercise of redemption rights.
3. Redemption rights were a fundamental characteristic of the investment vehicles created and promoted by BFI designed to raise capital and provide liquidity absent a secondary market. The investors subscribed their units offered in the Bridging Funds pursuant to offering memoranda,⁴ investing in either limited partnership or trust agreements, which are all governed by Ontario law. Potential Quebec Redemption Claims are contractual in nature and as such are also governed by Ontario law, which is not supplanted or supplemented by mandatory provisions of Quebec law.
4. The equal treatment of creditors requires that this Court direct the Receiver to honour Vested Redemption Rights (as defined below) given that redemption rights were granted to all

¹ Capitalized terms not otherwise defined herein shall have the meaning ascribed thereto in the Agreed Statement of Facts for the Unitholder Priority Motion (the “**Agreed Statement of Facts**” or “**ASF**”), Schedule “A” of the Receiver’s Motion Record dated October 12, 2022 (the “**Motion Record**” or “**MR**”).

² Potential Statutory Rescission Claims by Quebec Claimants hereinafter referred to as “**Potential Quebec Statutory Rescission Claims**” and Potential Redemption Claims by Quebec Claimants as “**Potential Quebec Redemption Claims**” or collectively as “**Quebec Potential Priority Claims**”.

³ [Securities Act](#), RSO 1990, c S.5 [OS4].

⁴ MR, ASF, Appendix “D”, pp 80-788.

Unitholders, which could opt to exercise same by providing a redemption request in accordance with the applicable limited partnership or trust agreements. It would be unfair to disregard the valid exercise of a contractual right generally made available to all Unitholders and impose the same treatment to all Unitholders under the guise of fairness irrespective of the vesting in their favour of Redemption Rights.

5. The Quebec Securities Act (“QSA”)⁵ which applies to Potential Quebec Statutory Rescission Claims is a law of public order, of mandatory and immediate application, aimed at protecting the Quebec investing public. For the purpose of the Unitholder Priority Motion, which assumes that the applicable offering memoranda contained a misrepresentation,⁶ no obstacle to allowing Potential Quebec Statutory Rescission Claims can be found. Indeed, the Quebec legislature granted the Quebec investor an exceptional right to rescind the subscription of securities and claim the restitution of the purchase price in presence of misrepresentations.
6. Courts have no discretion to deprive the Quebec investor of the exercise of that recourse, which would amount to forcing the investor to claim for damages, or to indefinitely stay such a recourse, absent invoking paramountcy and the application of overriding federal legislation. Simply put Potential Quebec Rescission Claimants, as a result of the rescission, are entitled to the return of their property – their investment principal (less distributions received) – which no longer forms part of the estate of the Bridging Funds to be distributed amongst its creditors, granting them a *de facto* or functional priority.

PART II – FACTS

7. Quebec Representative Counsel has worked cooperatively with both Redemption Representative Counsel and Misrepresentation Representative Counsel to streamline documentation and information requests to the Receiver, and to prepare the Agreed Statement of Facts and supporting Notice of Motion, the whole with a view of ensuring a diligent and efficient hearing of the Unitholder Priority Motion.

⁵ [Securities Act](#), CQLR c V-1.1. [QSA]

⁶ MR, ASF, para 5.

8. Quebec Representative Counsel agrees with the factual overview provided by the Receiver in its factum⁷. Quebec Representative Counsel further adopt the factual overview provided by Redemption Representative Counsel and detailed description of the redemption process⁸ and Misrepresentation Representative Counsel in their respective facta and only adds specific facts in relation to Potential Quebec Redemptions Claims.
9. Of the ten Bridging Funds, half are structured as limited partnerships established pursuant to the Ontario *Limited Partnership Act*⁹ (BIF, BIF LP; BPDI; MMF; BRLE) and the others as unincorporated investment trust established under the laws of Ontario (BIF RSP; BIIF; BPDI RSP; FERN; MMF RSP).¹⁰
10. Quebec Claimants are involved in seven of the Bridging Funds, namely BIF, MMF, BPDI (Potential Redemption Claims only), BIF RSP, MMF RSP, BIIF and FERN (Potential Statutory Rescission Claims only).
11. Quebec Claimants with Potential Redemption Claims are numbered and valued as follows:

Fund Name and Organizational Structure	Number	Value¹¹
Bridging Income Fund LP (“ BIF ”) <i>Limited Partnership</i>	56,577	5.63
Bridging Mid-Market Debt Fund (“ MMF ”) <i>Limited Partnership</i>	75,835	7.61
Bridging Private Debt Institutional Fund (“ BPDI ”) <i>Limited Partnership</i>	366	0.04
Bridging Income RSP Fund (“ BIF RSP ”) <i>Trust</i>	39,973	4.20
Bridging Mid-Market Debt Fund RSP (“ MMF RSP ”) <i>Trust</i>	26,182	2.64
Bridging Indigenous Impact Fund (“ BIIF ”) <i>Trust</i>	529	0.06
TOTAL¹²	199,462	20.18

⁷ Receiver’s Factum at para 13 to 37.

⁸ Redemption Representative Counsel, Part II, section B.

⁹ [Limited Partnership Act](#), RSO 1990, c L.16 [*OLPA*].

¹⁰ MR, ASF, para 7.

¹¹ CAD, in millions.

¹² MR, ASF, Appendix “C”, p 78.

12. Quebec Claimants with Potential Statutory Rescission Claims are numbered and valued as follows

Fund Name and Organizational structure	Number	Value¹³
Bridging Income Fund LP (“BIF”) <i>Limited Partnership</i>	156,855	15.69
Bridging Mid-Market Debt Fund (“MMF”) <i>Limited Partnership</i>	39,824	4.08
Bridging Income RSP Fund (“BIF RSP”) <i>Trust</i>	65,478	6.55
Bridging Mid-Market Debt Fund RSP (“MMF RSP”) <i>Trust</i>	4,830	0.48
Bridging Indigenous Impact Fund (“BIIF”) <i>Trust</i>	44,875	4.58
Bridging Fern Alternative Credit Fund (“FERN”) <i>Trust</i>	400	0.05
TOTAL¹⁴	312,262	31.43

13. The aggregate estimated value of Quebec Potential Priority Claims is \$51,610,000.

PART III – ISSUES

14. The two main issues are whether this should Court direct the Receiver to honour Potential Quebec Redemption Claims and Potential Quebec Statutory Rescission Claims.

15. Before addressing these two issues we shall first outline general principles of Quebec law in relation to priorities and hypothecs, and applicable conflict rules to identify the applicable law governing the issues raised by the Unitholder Priority Motion, and second criticize the arguments advanced by the Receiver and Representative Counsel based on the equal rights principle and *pari passu* rule without regard to the fundamental nature of the Potential Priority Claims.

¹³ CAD, in millions.

¹⁴ MR, ASF, Appendix “C”, p 77. We understand that this estimation only includes Potential Québec Rescission Claims that subscribed to Units no less than 180 days prior to the Appointment Order, while the limitation period for the exercise of this right under the QSA is in fact of 3 years: MR, ASF, Appendix “R”, p 1543.

16. Quebec Representative Counsel views that certain factual questions, including the proposed amendment of the notice period for the redemption and status of partially fulfilled redemption requests, fall outside the scope of the Unitholder Priority Motion and may need to be dealt with at a later stage.

PART IV – LAW & ANALYSIS

A. QUEBEC LAW: PRIORITIES AND LAW APPLICABLE TO POTENTIAL QUEBEC PRIORITY CLAIMS

1) Priorities under Quebec law

17. Under Quebec law, to invoke priority over the general body of unsecured creditors one must have a legal cause of preference, either priorities or hypothecs.¹⁵ Priorities rank ahead of conventional security and even hypothecs and are specifically listed at section 2647, of the Quebec Civil Code.¹⁶
18. Contractual redemption rights and statutory rescission rights are not protected by way of a priority within the meaning of article 2651 CCQ, nor by way of hypothec.
19. Nevertheless, and as discussed below, Quebec Claimants' right to assert "priority" over the General Unitholders in the distribution of the Bridging Funds stems from the fact that they have exercised or are entitled to exercise rights made available to Unitholders. As a result, certain Quebec Claimants hold distinct and different legal rights and should be treated accordingly, as more fully argued below.

¹⁵ Art. [2647](#) *Civil Code of Quebec*, CQLR c CCQ-1991 [*Civil Code* or *CCQ*].

¹⁶ Art. [2650](#) and [2657](#) CCQ.

2) Law Applicable to Potential Quebec Priority Claims

a) Quebec Redemption Claims

20. The applicable Limited partnership and trust agreements are all governed by Ontario law.¹⁷ Potential Quebec Redemption Claims are contractual in nature and as such are also governed by Ontario law, which is not supplanted or supplemented by mandatory provisions of Quebec law.¹⁸
21. The Receiver and Representative Counsel do not take the view that the exercise of redemption rights by Unitholders is governed by section 15 OLPA. Quebec Representative is of the same view as the exercise of redemption rights does not provide for the repayment of the redeeming Unitholders' contributions, but rather payment of the Applicable Net Asset Value per Unit as defined and calculated pursuant to the applicable constating documents, as further evidenced by sections 10.1(f) of the applicable limited partnership agreements, which provides that the limited partners have no right to request a return of their contribution except upon dissolution.¹⁹

b) Quebec Statutory Rescission Claims

22. The QSA governs the distribution of securities by Quebec residents and is a law of necessary application. Therefore, Potential Quebec Statutory Rescission Claims are governed by the QSA.
23. The Civil Code is the foundation of Quebec law, and therefore of all other Quebec laws that draw mainly or incidentally on civil law concepts.²⁰ It governs persons, relations between persons, and property:

The Civil Code of Québec, in harmony with the Charter of the French language (chapter C-11), the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs persons, relations between persons, and property.

¹⁷ See for example s. 1.4 BIF LP, MR, ASF, Appendix "E", p 801.

¹⁸ Art. [3111](#) and [3114](#) CCQ; *Huang c Yan*, 2021 QCCA 1473, paras [9-11](#). (Tab 1)

¹⁹ See for example s. 10.1(f) BIF LP, MR, ASF, Appendix "E", p 824.

²⁰ *Doré v Verdun (City)*, [1997] 2 SCR 862, paras [15-16](#). (Tab 2)

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.²¹

[our emphasis]

24. To specifically regulate securities, the Quebec legislature adopted the QSA. Yet, the provisions of the Civil Code that are not modified by the QSA remain applicable, and the Civil Code serves to interpret the provisions of the QSA. The Quebec legislature enacted the QSA in 1982 to grant Quebec subscribers of securities the utmost degree of protection, hence the status of the QSA as a statute of public order and necessary application. Two objectives underly all provisions of the QSA: the protection of investors and the proper functioning of the market.²² The Quebec Court of Appeal has confirmed, notably in *Infotique Tyra Inc v Québec (Commission des valeurs mobilières)*, that the protection of investors is in fact the primary objective of the QSA:

[TRANSLATED] In *Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 S.C.R. 112, the Supreme Court had to decide whether an agreement constituted an investment contract within the meaning of the Ontario Securities Act. De Grandpré J. first explained the purpose of Ontario's securities legislation (p. 126):

... It is clearly the protection of the public...

De Grandpré J. went on to refer to the case *Re Ontario Securities Commission and Brigadoon Scotch Distributors (Canada) Limited (1970)*, 1970 CanLII 436 (ON SC), where Hartt J. wrote (p. 717):

... the basic aim or purpose of the Securities Act, 1966,... is the protection of the investing public through full, true and plain disclosure of all material facts relating to securities being issued.

This protective purpose of the statute is highlighted in section 276, which specifies the role of the Commission.²³ [our emphasis]

²¹ [CCQ](#), Preliminary Provision.

²² Stéphane Rousseau, *L'encadrement du secteur des valeurs mobilières par les provinces*, 2012, Montreal, Themis Editions, p 21 (**Tab 22**); Stéphane Rousseau, "Qualité et intégrité de l'information sur les marchés financiers : quel rôle pour les sanctions civiles au Canada?" in Paul-Henry Antonmattei, ed, *Études à la mémoire de Philippe Neau-Leduc : Le juriste dans la Cité* (Paris; LGDJ, 2018), p 918. (**Tab 23**)

²³ *Infotique Tyra Inc v Québec (Commission des valeurs mobilières)*, 1994 CanLII 5940 (QC CA) [*Infotique Tyra*], pp 8-10. (**Tab 3**)

25. The same legislative intent is shared by legislatures across Canada in relation to the regulation of securities. In *Infotique Tyra*, the Quebec Court of Appeal referred to the Supreme Court’s opinion in *Pacific Coast Coin Exchange v Ontario Securities Commission*,²⁴ a case pertaining to the OSA, as did the Supreme Court in deciding *Brosseau v Alberta Securities Commission*,²⁵ a case emanating from Alberta.

26. The importance of the intent to protect investors is underscored by the particular status of the provisions of the QSA in Quebec law. In *Savard v 2329-1297 Québec Inc.*, the Quebec Court of Appeal found that the QSA protects personal interests and is therefore a statute of public order:

[TRANSLATED] [56] Rightly, the Superior Court judge concluded that the QSA is of a public order of protection and not of direction. When the rule violated is one of public order of protection, the resulting nullity is a relative nullity. Only the person whom the rule is intended to protect can invoke nullity. He may, moreover, waive this right.²⁶

27. To further its objective of maximizing the protection of Quebec securities holder, the Quebec legislature dictated that the application of the QSA cannot be avoided. Section 236.1 QSA mandates the application of the QSA in matters pertaining to the distribution of securities where the subscriber resides in Quebec. The Quebec Court of Appeal confirmed that section 236.1 QSA elevates the QSA to one of immediate application, or “*loi (de) police*”:

[89] It should also be pointed out that section 236.1 of the Securities Act specifically provides, in dealing with civil sanctions, that “in matters pertaining to the distribution of a security, the laws of Quebec are applicable where the subscriber or purchaser resides in Quebec, regardless of the place of the contract” and that any action may be brought before the court of the plaintiff’s residence. Also, “[a]ny contrary stipulation as to the jurisdiction of the courts or the applicable legislation is without effect”. This provision confers upon the Securities Act the status of a law of immediate application (“*loi d’application immédiate*”, also known as “*loi police*”) by virtue of article 3076 C.C.Q., “by reason of its particular object”. In my view, in this context, it would defy logic to submit the administrative sanctions to the private international law rules of the C.C.Q. restricting the FMAT’s jurisdiction or the application of the Securities Act,

²⁴ *Pacific Coast Coin Exchange v Ontario Securities Commission*, [1978] 2 RCS 112, p 117. (Tab 4)

²⁵ *Brosseau v Alberta Securities Commission*, [1989] 1 SCR 301, p 314. (Tab 5)

²⁶ *Savard v 2329-1297 Québec Inc.*, 2005 QCCA 705 [Savard]. (Tab 6)

when said Act stipulates that these rules are without effect with respect to civil sanctions.²⁷

[our emphasis]

28. Quebec laws of immediate application (or *lois de police*) are meant to apply imperatively, even in a foreign forum, irrespective of the application of the rules regarding conflicts of laws.²⁸ This follows from the purpose of laws of immediate application in protecting the interest of the weaker party – here, the investor.²⁹ The QSA further mandates that “[a]ny contrary stipulation as to [...] the applicable legislation is without effect.³⁰ In any event, parties cannot derogate from the rules of the QSA, a statute of public order, in accordance with the definition of rules of public order found in the Civil Code.³¹
29. The Court should therefore only refuse to recognize or enforce the QSA if contrary to the fundamental public policy of Ontario or if mandated by Ontario law, as is the case in Canadian common law courts.³² Nothing of the sort prevents the Court from recognizing or enforcing the QSA. On the contrary, the Ontario Superior Court of Justice has for instance certified three class actions including claims for misrepresentation under the QSA for the purpose of settlement, without raising any concern in that respect.³³
30. Even by subscribing to units distributed further to offering memoranda providing for the relationship between the unitholders and the issuer to be governed by Ontario law and the laws applicable in that

²⁷ [Langford Sharp v Autorité des marchés financiers](#), 2021 QCCA 1364, para [89](#). (Tab 7)

²⁸ Gérald Goldstein, “Lois de police québécoises”, in *JurisClasseur Québec*, coll. “Droit civil”, *Droit international privé*, fasc. 6, Montreal, LexisNexis Canada, ss. 4, 6. On the basis of s. 236.1 QSA, the author identifies the QSA as an “express” law of immediate application: *id.*, ss. 8, 10. (Tab 24) See also Claude Emmanuelli, *Droit international privé québécois*, 3rd ed., 2011, Montreal, Wilson & Lafleur, paras 388, 391, 392. (Tab 25)

²⁹ Gérald Goldstein, “Situation de la règle de conflit au sein du droit international privé”, in *JurisClasseur Québec*, coll. “Droit civil”, *Droit international privé*, fasc. 2, Montreal, LexisNexis Canada, s. 13. (Tab 26)

³⁰ S. [236.1](#) QSA.

³¹ Art. [9](#) CCQ, [Doré v Verdun \(City\)](#), [1997] 2 RCS 862, paras [15-16](#). (Tab 2)

³² Janet Walker, *Conflict of Laws*, 2020 reissue, LexisNexis (Tab 27). See for instance [R v. Thomas Equipment Ltd.](#), [1979] 2 SCR 529, pp 536, 539, 542, 545-546, where the Supreme Court found that performance of a contract governed by the law of New Brunswick could breach public order statutory obligations imposed on the parties to the contract by Alberta statute (Tab 8) and [243930 Alberta Ltd v. Wickham](#), [1990] O.J. No. 1781 (ON CA) (Tab 9)

³³ [Cappelli v Nobilis Health Corp.](#), 2019 ONSC 4521, para [2](#) (Tab 10); [CC&L Dedicated Enterprise Fund \(Trustee of\) v Fisherman](#), 26 BLR (3d) 281, para [5](#) (Tab 11); [CC&L Dedicated Enterprise Fund \(Trustee of\) v Fisherman](#), [2001] OJ No 4622 (QL), para [3](#). (Tab 12)

province,³⁴ the Quebec Unitholders did not waive their rights under the QSA. Indeed, the Supreme Court uniformly recognizes that public order statutory rights cannot be waived in advance.³⁵

31. As a result of the immediate application of the QSA, the rights of Quebec Unitholders “pertaining to the distribution of”³⁶ units by the Bridging Funds are governed by the QSA.
32. The assessment of the Potential Statutory Rescission Claims by Quebec Unitholders should therefore proceed with great consideration for this intent. It must be noted that his exceptionally high degree of protection afforded to Quebec investors is limited in time. In that respect as well the intent of the Quebec legislature to grant Quebec investors a particularly strong protection against misrepresentations is evident: the exercise of QSA Rescission Rights is “prescribed by the lapse of three years from the date of the transaction”, at least twice as long as in other Canadian jurisdictions.³⁷

B. EQUAL TREATMENT OF UNITHOLDERS AND THE APPLICATION OF THE *PARI PASSU* RULE

33. We respectfully submit that the fallacy in the equal rights argument developed by the Receiver³⁸ and the *pari passu* argument developed by Representative Counsel³⁹ is twofold. First, contractual redemption rights are granted to all Unitholders pursuant to the applicable limited partnership and trust agreements, whereas statutory rescission rights are also granted to all unitholders in accordance with the applicable legislation as provided by the offering memoranda. Second, the equal right/*pari passu* argument ignores the fact that Potential Redemption Claimants, having validly exercised their

³⁴ MR, ASF, Appendix “D”, pp 108, 192, 263, 344, 424, 507, 666.

³⁵ *Garcia Transport Liée v Royal Trust Co.*, [1992] 2 SCR 499, p 528. (Tab 13). See also: *Association des courtiers et agents immobiliers du Québec v Proprio Direct Inc.*, 2008 CSC 32, paras 34-38 (Tab 14); *Isidore Gagnon Liée v Tremblay*, [2006] 1 SCR 27, para 60. (Tab 15)

³⁶ S. 236.1 QSA.

³⁷ S. 234 QSA, in contrast with the 120- or 180-day delay after the date of the transaction under equivalent Canadian securities legislation. MR, ASF, Appendix “R”, p 1543.

³⁸ Receiver’s Factum, paras 41-50.

³⁹ Representative’s Counsel Factum, paras 29-52. As adopted by the Receiver in their factum, para 61.

contractual redemption rights, and Potential Statutory Rescission Claimants both hold different and distinct legal rights from those of the other Unitholders with no such Potential Priority Claims.

34. The applicable limited partnership and trust agreements provide that the Bridging Funds provide for different classes of units with different eligibility criteria, currency, fee structure and administrative expenses.⁴⁰ Unitholders of the same class have the same rights and privileges.⁴¹

35. For this motion, the equal treatment of Unitholders is not engaged as they hold the same redemption rights under the applicable agreements. The fact that only certain Unitholders elected to exercise their contractual rights and that only certain Unitholders are eligible to exercise their statutory rescission rights set them part from the other Unitholders with General Unitholders Claims who have not elected to exercise their redemption rights or can no longer exercise their statutory rescission rights. Clearly the situation of the Potential Priority Claimants, as described in the following section, gives rise to very distinct rights from the ones of the general body of Unitholders with no such Potential Priority Claims, especially Unitholders with subordinated claims pursuant to the OLPA.

36. Although decided in a formal insolvency context the *Urbancorp* decision⁴² illustrates that the application of *pari passu* rule is not universal. In *Urbancorp*, this Court held that a landlord with a contractually vested right or interest in the transfer value of a lease could invoke a distinct right which did not form part of the estate and did not run afoul the *pari passu* rule.⁴³

37. Invoking principles derived from bankruptcy and insolvency legislation only further compounds the fallacy of the *pari passu* argument in the present circumstances where the Receiver was appointed under

⁴⁰ See for example the definition of “Offering by the Fund”, “Description of Units of the Fund” and “Management Fees payable by the Fund” in the MMF RSP OM. MR, ASF, Appendix “D”, pp 86, 87, 89; See also s. 3.6(g) in the BIF LP Agreement. MR, ASF, Appendix “E”, p 808.

⁴¹ See for example s. 3.6 (a) and (f) of the BIF LP Agreement, MR, ASF, Appendix “E”, p 807-808.

⁴² [Urbancorp Toronto Management Inc.](#), 2021 ONSC 5073, leave to appeal refused: [Urbancorp Toronto Management Inc. \(Re\)](#), 2022 ONCA 181 [*Urbancorp*] (Tab 16)

⁴³ [Urbancorp Toronto Management Inc.](#), 2021 ONSC 5073, para 65 (Tab 16).

provincial law and where this Court has made no formal finding of insolvency at the time the Appointment Orders were granted. The insolvency of the Bridging Funds, collectively or on an individual basis, is not admitted and is not a factual issue to be determined by this Court as part of the Unitholder Priority Motion.

C. THE RECEIVER SHOULD BE DIRECTED TO HONOUR POTENTIAL QUEBEC REDEMPTION CLAIMS

38. Redemption rights were a fundamental characteristic of the investment vehicle designed and promoted by BFI designed to provide liquidity absent a secondary market and to attract investors in the Bridging Fund.⁴⁴ The offering memoranda specifically emphasises that Units were subject to resale restrictions and there is no secondary market, and none is expected to develop.⁴⁵ These considerations are clearly expressed on the first page of the various Offering Memoranda:

There is no market for these Units and no market is expected to develop, therefore, it may be difficult or even impossible for a purchaser to sell their Units other than by way of a redemption of their Units on a Valuation Date.⁴⁶

[...] In addition, Unit transfers are subject to approval by the advisor. Accordingly, it is possible that Limited Partners, including the Fund, may not be able to resell their LP Units other than by way of a redemption of their LP Units on a Partnership Valuation Date, subject to the limitations described under “The Limited Partnership Agreement - Redemption of LP Units”.⁴⁷

39. Honoring Vested Redemption Rights (as defined below) is not in breach of equal treatment of Unitholders as the right to redeem Units is awarded to every Unitholders, independent of the Class or Series of Units.⁴⁸ This grant to all Unitholders does not encroach on the equality of rights principle and is specifically referenced in the general provisions of the applicable limited partnership and trust agreements. The different and distinct legal rights of Potential Redemption Claimants are derived from

⁴⁴ Although Units are said to be transferable, subject to section 13 of the applicable limited partnership agreements, the various offering memoranda limits any transfer to those operated by law. See for example MMF RSP OM, MR, ASF, Appendix “D”, p 123.

⁴⁵ MMF RSP OM, MR, ASF, Appendix “D”, p 81.

⁴⁶ MMF RSP OM, MR, ASF, Appendix “D”, p 123.

⁴⁷ MMF RSP OM, MR, ASF, Appendix “D”, p 143.

⁴⁸ Each unit may be redeemed in accordance with the Agreement. See for example s. 3.6(b) of the BIF Agreement, MR, ASF, Appendix “E”, p 807.

the valid exercise of a contractual afforded right to all Unitholders of the Bridging Funds and formed part of the bargain entered into by all Unitholders.

40. The applicable limited partnership and trust agreements set out the process to redeem Units, described as follows:⁴⁹

- (a) the Unitholder submits a written request to redeem Units,
- (b) the redemption can occur on the last business day of each calendar month, and on additional dates determined by the general partner or manager (a “**Valuation Date**”),⁵⁰ provided that the request is submitted at least 30 or 90 days prior such a date;
- (c) the redemption value equals the Series Net Asset Value per Unit, calculated at 4:00 p.m. (the “**Valuation Time**” or the “**Close of Business**”) on that Valuation Date (the “**Redemption Date**”);
- (d) the redemption proceed is paid not later than 30 days following the Redemption Date.

41. The applicable length of the redemption notice period for the Bridging funds was extended from 30 days to 90 days as of December 18, 2020, except for the BIF and MMF funds where the validity of amendment is in dispute.⁵¹

42. Once the redemption request was submitted, no other steps were required by the Unitholder. The request remained subject to the specified discretion of the general partner or manager to refuse the redemption but only up to the Redemption Date.

43. The terms of the applicable limited partnership and trust agreements indicate that Units may be redeemed “on a Valuation Date”. A Valuation Date is defined as:

“**Valuation Date**” means any date as of which the Net Asset Value is calculated, which shall be December 31 of each year, the last Business Day in each calendar

⁴⁹ The redemption process under the limited partnership and trust agreements is explain in detail in the Redemption Representative Counsel at Part II, section B.

⁵⁰ See for example MR, ASF, Appendix “E”, p 801.

⁵¹ As explained in detail in the Redemption Representative Counsel factum at Part II, section F.

month, and such other or additional dates as the General Partner may determine.⁵²

44. The value of said redemption is however calculated at Valuation Time, i.e. 4:00 p.m. (EST).

“**Valuation Time**” means the particular time on a Valuation Date at which the value of the Class Net Assets of a Class and the Series Net Asset Value of a Series is determined by or under the authority of the Manager.⁵³

“The Net Asset Value of the Fund will be determined for the purposes of subscriptions and redemptions as at 4:00 p.m. (EST) on each Valuations Date [...]”⁵⁴

“**Valuation Time**” means the Close of Business on a Valuation Day [...]”⁵⁵

“**Close of Business**” means 4:00 pm (Toronto time) [...]”⁵⁶

[our emphasis]

45. The Valuation Date and the Valuation Time, under the applicable limited partnership and trust agreements, are distinct. The redemption request crystallizes at 12:01 a.m. of the Valuation Date,⁵⁷ notwithstanding that the value of same is established at 4:00 p.m. on the Valuation Date, at which time the Potential Redemptions Claimants hold a vested redemption right (“**Vested Redemption Right**”).

46. The Fund Administrator’s internal practice with regards to the redemption, as described in the Agreed Statement of Facts,⁵⁸ is irrelevant for the purpose of this motion as it does not displace the Unitholders contractual rights.⁵⁹

47. It is the position of Quebec Representative Counsel that many of the Potential Quebec Redemption Claimants hold Vested Matured Redemption Rights as the Redemption Date of April 30, 2021, at 12:01 or opening business or market hours which was in either case prior to the Appointment Order being

⁵² MR, ASF, Appendix “E” p 801.

⁵³ See for example MR, ASF, Appendix “E”, p 801.

⁵⁴ See for example MR, ASF, Appendix “D”, p 123.

⁵⁵ See for example MR, ASF, Appendix “E”, p 1029.

⁵⁶ See for example: MR, ASF, Appendix “E”, p 1089.

⁵⁷ See s. 6(1) of the *Interpretation Act*, RSC 1985, c I-21; s. 9(1) of the *Legislation Act*, 2006, SO 2006, c 21, Sch F, both of which state that where time is not specified, legislation comes into force at the first instant of the day.

⁵⁸ MR, ASF, para 33-34.

⁵⁹ The Quebec Representative Counsel adopts the Redemption Representative Counsel position, Part II, section C.

issued later that same day.⁶⁰ The following table summarized the latest redemption request, whether the applicable notice period is 30 or 90 days, which have matured before the Appointment Order.

	30-day notice period	90-day notice period
Date of the redemption request	In March 2021	In January 2021
Valuation Date	April 30, 2021, at 12:01 a.m.	April 30, 2021, at 12:01 a.m.
Redemption Date	April 30, 2021	April 30, 2021
Value of the redemption	Series Net Asset Value per Unit at 4:00 p.m. on April 30, 2021	Series Net Asset Value per Unit at 4:00 p.m. on April 30, 2021
Date of payment	May 30, 2021	May 30, 2021

48. Upon Redemption Date, the applicable trust agreements provided that the Unitholder ceased to have any further rights with respect to such Units except to payment:

Following a redemption, the Unitholder shall cease to have any further rights with respect to such Units except the redemption price for such Units which shall be deemed to be outstanding until payment therefore is made.⁶¹

49. The offering memoranda for the limited partnership funds provide similar language:

A Unit of a class of the Partnership being redeemed or a Unit that has been redesignated as no longer being a part of that class shall be deemed to remain outstanding as part of that class until immediately following the Valuation Date at which the applicable Class Net Asset Value per Unit that is the redemption price or redesignation basis of such Unit is determined; thereafter, the redemption price of the Unit being redeemed, until paid, shall be deemed to be a liability of the Partnership attributable to the applicable class and the Unit which has been redesignated will be deemed to be outstanding as a part of the class into which it has been redesignated.⁶²

[our emphasis]

50. Once a Unitholders redemption request matured, the value of the Redemption Claim became vested and an enforceable liability of the limited partnership or trust:

[...] thereafter, until paid, the redemption or redesignation price of such Unit shall be deemed to be a liability of the Fund attributable to the applicable Class.⁶³

⁶⁰ MR, ASF, para 25, footnote 2.

⁶¹ S. 6.3 *in fine* MR, ASF, Appendix “E”, p 1036; See also: s. 6.3(a) *in fine*: MR, ASF, Appendix “E”, p 1102.

⁶² MR, ASF, Appendix “D”, p 207.

⁶³ S. 4.3(c) BIF RSP Agreement, MR, ASF, Appendix “E”, p 1097.

[...] thereafter, the redemption price of the Unit being redeemed, until paid, shall be deemed to be a liability of the Partnership attributable to the applicable class and the Unit which has been redesignated will be deemed to be outstanding as a part of the class into which it has been redesignated.⁶⁴

[our emphasis]

51. Consistent with the foregoing, Vested Redemption Rights were recorded as specific liabilities owed by the Bridging Funds in their unaudited internal financial statements, distinct from the Unitholders' contributions.⁶⁵
52. Section 24 OLPA subordinates the repayment of limited partners' contributions to the payment of liabilities of the partnership. Again, by exercising their redemption rights Unitholder were not seeking the repayment of their contributions, but rather payment of the applicable Class Net Asset Value per Unit as defined and calculated in accordance with the applicable constating documents, and once the Valuation Date occurs these redemption rights become vested and become distinct and enforceable liabilities no longer subordinated pursuant to section 24 OLPA.⁶⁶
53. Although there are no statutes that govern investment trusts, as they are creatures of contract and therefore governed solely by the contract in which the investment trust is created, the trust agreements also include that upon termination of the trust, liabilities of the relevant fund are paid prior to the return of Unitholder contribution.⁶⁷
54. The Receiver should be directed to honor Potential Redemption Claims who hold Vested Redemption Rights, meaning a redemption request that has crystalized the Valuation Date, but prior to the Appointment Order issued at approximately 16:00 on April 30, 2021.

⁶⁴ MR, ASF, Appendix "D", p 207.

⁶⁵ MR, ASF, para 57. See also: MR, ASF, Appendix "P", p 1471.

⁶⁶ See for example s. 10.1(f) BIF LP, MR, ASF, p 824.

⁶⁷ See for example s. 21.2 BIF RSP, MR, ASF, Appendix "E" p 1068.

D. THE RECEIVER SHOULD BE DIRECTED TO HONOUR POTENTIAL QUEBEC STATUTORY RESCISSION CLAIMS

55. Section 217 QSA grants Quebec investors the right to have their subscription of securities on the primary market rescinded in case of misrepresentations contained in an offering memorandum (the “QSA Rescission Right”) (for ease of reference, the relevant sections of the QSA are displayed alongside the near equivalent section 130.1 OSA):⁶⁸

QSA

217. A person who has subscribed for or acquired securities in a distribution effected with a prospectus containing a misrepresentation may apply to have the contract rescinded or the price revised, without prejudice to his claim for damages.

The defendant may defeat the application only if it is proved that the plaintiff knew, at the time of the transaction, of the alleged misrepresentation.

221. Rights of action established under sections 217 to 219 may also be exercised if a misrepresentation is contained in

- (1) the information incorporated by reference in the simplified prospectus;
- (2) the offering memorandum prescribed by regulation;
- (3) any other document authorized by the Authority for use in lieu of a prospectus.

225.0.2. The plaintiff is not required to prove that the plaintiff relied on the document containing a misrepresentation when the plaintiff subscribed for, acquired or disposed of a security.

OSA

130.1 (1) Where an offering memorandum contains a misrepresentation, a purchaser who purchases a security offered by the offering memorandum during the period of distribution has, without regard to whether the purchaser relied on the misrepresentation, the following rights:

1. The purchaser has a right of action for damages against the issuer and a selling security holder on whose behalf the distribution is made.
2. If the purchaser purchased the security from a person or company referred to in paragraph 1, the purchaser may elect to exercise a right of rescission against the person or company. If the purchaser exercises this right, the purchaser ceases to have a right of action for damages against the person or company.

[our emphasis]

⁶⁸ In *Goldman, Sachs & Co. v Catucci*, 2017 QCCA 1890, paras 29-34 (Tab 17), the Quebec Court of Appeal expressed the view that the rights of action established under s. 217 QSA are available to the subscriber of a security further to an offering memorandum, whether prescribed by regulation or provided voluntarily.

56. In addition to the QSA Rescission Right, the QSA provides other distinct rights and remedies including the right of rescission of subscribers or acquirers of security without the required prospectus,⁶⁹ the right to demand the revision of the price for securities subscribed or acquired in the same circumstances⁷⁰ or in case of misrepresentations made on the primary market,⁷¹ and the right to demand damages for misrepresentations for securities acquired on the secondary market.⁷²
57. The QSA Rescission Rights were introduced with the enactment of the QSA and were explicitly modelled on the OSA; they greatly eased the burden incumbent on an investor victim of misrepresentations, always with a view to protecting the investor.⁷³ Indeed, such an investor seeking rescission had to meet a heavy burden under the Civil Code; that is, proving that 1) he subscribed to securities from an issuer; (2) the subscription was made pursuant to a prospectus or an offering memorandum; (3) the prospectus or offering memorandum contained misrepresentations made by the issuer or to his knowledge; (4) the misrepresentation was willingly made by the issuer; (5) but for this misrepresentation, the claimant would not have bought the securities, or would have bought them at a different price.⁷⁴ Pursuant to s. 217 QSA, the investors who subscribed to securities issued pursuant to a prospectus or an offering memorandum only needs to prove that those contained misrepresentations. S. 225.0.2 QSA saves the investor from having to prove reliance, as is the case under s. 130.1(1) OSA.⁷⁵

⁶⁹ S. [214](#) QSA.

⁷⁰ S. [214](#) QSA.

⁷¹ S. [217](#) QSA.

⁷² Ss. [225.2](#), [225.4](#) QSA.

⁷³ “Projet de loi no 85 – Loi sur les valeurs mobilières”, Quebec, National Assembly, Commission permanente des institutions financières et coopératives, 32-3, (15 December 1982), p 11, 14 (Jacques Parizeau) (**Tab 31**); Stéphane Rousseau, “Qualité et intégrité de l’information sur les marchés financiers : quel rôle pour les sanctions civiles au Canada?” in Paul-Henry Antonmattei, ed, *Études à la mémoire de Philippe Neau-Leduc : Le juriste dans la Cité* (Paris; LGDJ, 2018), p 918. (**Tab 23**)

⁷⁴ *Allaire v Girard & Associés*, [2005 QCCA 713](#), paras [57](#) and [63](#) (**Tab 18**); Pierre-Gabriel Jobin & Nathalie Vézina, *Les obligations*, 7th ed., 2013, Cowansville, Yvon Blais Editions, para 232. (**Tab 28**)

⁷⁵ The QSA was, in fact, explicitly influenced by the OSA: Quebec, National Assembly, Commission permanente des institutions financières et coopératives, 32-3, (15 December 1982), pp 12-12 and 40 (Jacques Parizeau).

58. It is assumed that Potential Quebec Statutory Rescission Claimants are entitled to obtain the rescission of the Units to which they subscribed, and the restitution of the price paid.⁷⁶ Once the threshold conditions are met (and which are assumed at this stage), the Court has no discretion to deny this remedy or to force the aggrieved Quebec investors to accept damages instead.

59. Indeed, the Quebec legislature intended that the Court could not refuse and indeed would be obligated to rescind the subscription of securities once the burden of proof was met by the claimant:

[TRANSLATED] **M. Parizeau:** Mr. President, I think that, in terms of protection for the investor, we must give him this right. It is only a right. "May apply to have the contract rescinded or the price revised". That doesn't mean he's going to get it, but he can ask for it. I'm talking about price revision; it doesn't mean that there will be price revision. He can ask for rescission, he can ask for a revision and the revision can be denied.

M. French: Could the rescission be refused?

M. Parizeau: No, no, no. Not the rescission. He can ask for the rescission, it is a right he has.⁷⁷

[our emphasis]

60. As under the OSA,⁷⁸ the choice of remedy lies entirely upon the claimant, leaving no discretion to the Court in this regard.⁷⁹ The Court should therefore decide this motion under the assumption that the Potential Quebec Statutory Claimants are entitled to the rescission of their subscription of Units.

61. The practical consequence of rescission is to restore the parties to their previous state (*restituo in integrum*) by restituting their respective prestation (*status quo ante*)⁸⁰. This conclusion follows from

⁷⁶ MR, ASF, para 5.

⁷⁷ "Projet de loi no 85 – Loi sur les valeurs mobilières", Quebec, National Assembly, Commission permanente des institutions financières et coopératives, 32-3, (15 December 1982), pp 10-11 (Jacques Parizeau). (**Tab 31**)

⁷⁸ Section [130.1\(1\)\(2\)](#) OSA.

⁷⁹ Marielle Girard, "Régimes de responsabilité civile : divulgation sur les marchés primaire et secondaire", in JurisClasseur Québec, coll. "Droit des affaires", *Valeurs mobilières*, fasc. 13, Montreal, LexisNexis Canada, no 8, updated February 2022 (**Tab 29**); Guy Paquette and al., "Les recours civils en vertu des lois sur les valeurs mobilières du Canada", *Développements récents sur les valeurs mobilières* (2002), S.F.P.B.Q, Cowansville, Yvon Blais Editions, p 12. (**Tab 30**)

⁸⁰ Pierre-Gabriel Jobin & Nathalie Vézina, *Les obligations*, 7th ed., 2013, Cowansville, Yvon Blais Editions, paras 398-400 and 920. (**Tab 28**)

the application of article 1422 CCQ.⁸¹ The Civil Code is explicit in explaining that the restitution of prestations consists in “return[ing] to another person the property received”, for instance “under a juridical act which is subsequently annulled with retroactive effect [...]”,⁸² and to do so “in kind”, unless “this is impossible or cannot be done without serious inconvenience”.⁸³ This result is in line with the consequences of rescission under Ontario law,⁸⁴ and is as automatic. As the Superior Court of Québec put it, addressing the treatment of a recourse to rescind a contract based on vitiated consent:

[TRANSLATED] [179] The Court, seized of an application for annulment on the basis of error-vitiated consent cannot chose the sanction. Once the error is established, it must sanction and can only annul the contract.⁸⁵

62. Concretely, this means that the Bridging Funds regain ownership of the Units and are restored to their state prior to subscription. Bridging Funds, however, are left holding property belonging to Potential Quebec Statutory Rescission Claimants, so that the latter are not restored to their previous state. In order for Potential Quebec Statutory Rescission Claimants to be restored to their previous state, the Bridging Funds must return the money they received for the subscription of the Units subject to the exercise of QSA Rescission Rights and to which they have no more right. This should take place before the funds from other Units are paid out in the context of the Receivership.

63. Indeed, through specific provisions of the QSA, the Quebec legislature has sought to place Quebec investors in an advantageous position by granting a high degree of protection, especially in cases of misrepresentation. Considering the immediate application of the QSA, the Court should give effect to this legislative intent and distribute the funds belonging to such investors before others. The position advocated by the Receiver and Representative Counsel under the guise of fairness would frustrate the clear, overriding, and imperative protection afforded to Quebec investors by depriving them of the

⁸¹ Art. [1422](#) CCQ “A contract that is null is deemed never to have existed. In such a case, each party is bound to restore to the other the prestations he has received.”

⁸² Art. [1699](#) CCQ.

⁸³ Art. [1700](#) CCQ.

⁸⁴ *Guarantee Co. of North America v Gordon Capital Corp.*, [1999] 3 RCS 423, paras [39-40](#). (Tab 19)

⁸⁵ *Collin v Société immobilière du Massif de Charlevoix inc.*, 2016 QCCS 346, paras [170-180](#). (Tab 20)

benefit of the QSA Rescission Right and forcing them to accept instead a damage claim, the Receiver appointed on the basis of the OSA has neither authority nor discretion to do, absent invoking paramountcy and the application of overriding federal legislation in support of its appointment. An indefinite stay of such a recourse for rescission would amount to the same.

64. Contrary to what Representative Counsel submits,⁸⁶ there would be nothing inequitable or unfair in the Potential Statutory Rescission Claims taking precedence over the claims of General Unitholders. All Unitholders were entitled at one point in time to exercise statutory rescission rights. Indeed, the offering memoranda informed subscribers of their rescission rights, for instance:

Securities laws in certain jurisdictions of Canada provide purchasers, in addition to any other rights they may have at law, with rights of action for damages or rescission if an offering memorandum, such as this Offering Memorandum, or any amendment to it and, in certain cases, advertising and sales literature used in connection therewith, contains a misrepresentation. However, these rights must be exercised by the purchaser within the time limits prescribed by the applicable securities laws. Each purchaser should refer to the provisions of the applicable securities laws for a complete text of these rights and/or consult with a legal advisor.⁸⁷

[our emphasis]

65. It is not unfair or arbitrary to limit in time the exercise of such rights and certainly it is not incumbent on this Court to hold that the time-period set out by the legislatures of different Provinces are arbitrary.
66. The statutory rescission right provided by the applicable provincial legislation is awarded to every Unitholders who subscribed to Units within a 180-day period, in most Canadian jurisdiction. The different and distinct legal rights of Potential Quebec Statutory Rescission Claimants are not based on the applicable limited partnership or trust agreements but result from a policy decision of the Quebec legislator aimed at protecting the Quebec investing public which must be applied irrespectively of the rights of the General Unitholders whose statutory rescission rights have lapsed.

⁸⁶ Factum of Representative Counsel, paras 3, 50 and 74; See also Factum of the Receiver, para 10.

⁸⁷ MR, ASF, Appendix “D”, pp 153, 224, 300, 384, 457, 556, 627, 700, 770.

67. All Unitholders benefited from the Statutory Rescission Rights during the temporal window provided by the applicable provincial legislation and the attempt by Representative Counsel⁸⁸ to present the standard 180-day period applicable in most Canadian jurisdictions as arbitrary is not a valid reason to overlook the distinct and different rights granted by statute to Potential Quebec Statutory Rescission Claimants or to impose the same treatment to all Unitholders irrespective of their Potential Statutory Rescission Claims.
68. For the purpose of this Motion, this Court must assume that the Potential Quebec Rescission Claimants are entitled to exercise their QSA Rescission Right and to recover their contributions as restitution of their property, rather than being forced to exercise a claim in damages against Bridging Funds or be treated like the General Unitholders. Considering the rescission of the subscription of Units by Potential Quebec Statutory Rescission Claimants, these cannot be considered to be bound by the terms of the limited partnership or trust agreements, or of the OLPA. The distribution itself regarding Potential Quebec Statutory Rescission Claimants should therefore be subject to the same principles as the distribution respecting other Potential Statutory Rescission Claimants, taking place under receivership pursuant to the OSA.⁸⁹
69. For this Court to disregard the entitlement of Potential Quebec Rescission Claimants in the context of the distribution would be inequitable and amount to replacing an injustice by another, as Justice Robert Mongeon of the Superior Court of Quebec refused to do when asked to rule on the distribution of funds put under the provisional administration of the Quebec securities regulator pursuant to the QSA in *Fonds Norbourg Placements équilibrés (Liquidation de)*.⁹⁰ In short, some investors in a number of Norbourg funds were destined to receive less from the distribution than investors in other Norbourg funds on account of the varying extent of the misrepresentations tarnishing the different funds to be

⁸⁸ Factum of Representative Counsel, paras 3, 50 and 74.

⁸⁹ Quebec Representative Counsel refers to and relies on the Misrepresentation Representative Counsel factum.

⁹⁰ [*Norbourg Placements équilibrés \(Liquidation de\)*](#), 2006 QCCS 4072 [*Norbourg*], paras [1-2](#). (**Tab 21**)

liquidated. Justice Mongeon was being asked to authorize a distribution that would ensure that all investors received something rather than directing that each amount invested be returned to their investors. He denied that request in the following terms:

[TRANSLATED] [211] Regarding the risk for the Court to ratify arbitrariness, we must be mindful not to correct an inequity by provoking another. It is perhaps tempting or sympathetic at first sight to elaborate a scenario where all clients-investors receive something rather than only returning the assets remaining in the Funds to their owners. Absent convincing and unavoidable reasons, the Court cannot dispossess clients-investors from what they are entitled to. That would be committing one last injustice to correct all others.⁹¹

[our emphasis]

70. Simply put Potential Quebec Rescission Claimants are entitled to recover their investment principal (less distributions received) as the return of their property resulting from the exercise of the rescission remedy. That property no longer forms of the estate of the Bridging Funds to be distributed amongst its creditors, granting the Potential Quebec Rescission Claimants a *de facto* or functional priority that this Court should direct the Receiver to respect in the distribution.

PART V – RELIEF REQUESTED

c) This Court should:

- (a) declare that Potential Redemption Claims with a Valuation Date on or before April 30, 2021, should be treated as Priority Claims;
- (b) declare that Unitholders with Potential Statutory Rescission Rights, including a right of rescission pursuant to section 217 of the Quebec *Securities Act*, should be treated as Priority Claimants with a Priority Claim;
- (c) direct the Receiver to pay all Priority Claims, including in favour of Unitholders residing in Quebec, in full before payment of the Claims of Unitholders without such a Priority Claim.

⁹¹ *Norboung Placements équilibrés (Liquidation de)*, 2006 QCCS 4072 [*Norboung*], para 211. (Tab 21)

71. This Court should also direct the Receiver to engage and negotiate with Quebec Representative Counsel, Misrepresentation Representative Counsel and Redemption Representative Counsel to design an efficient process to be implemented diligently to allow individual Unitholders to prove that they hold valid Priority Claims.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of November 2022.

Woods s.e.n.c.r.l./LLP

Woods LLP
Quebec Representative Counsel

SCHEDULE “A”

LIST OF AUTHORITIES

CASE NAME

- TAB 1 [*Huang c Yan*](#), 2021 QCCA 1473;
- TAB 2 [*Doré v Verdun \(City\)*](#), [1997] 2 RCS 862;
- TAB 3 [*Infotique Tyra Inc v Québec \(Commission des valeurs mobilières\)*](#), 1994 CanLII 5940 (QC CA);
- TAB 4 [*Pacific Coast Coin Exchange v Ontario Securities Commission*](#), [1978] 2 RCS 112;
- TAB 5 [*Brosseau v Alberta Securities Commission*](#), [1989] 1 SCR 301;
- TAB 6 [*Savard v 2329-1297 Québec Inc.*](#), 2005 QCCA 705;
- TAB 7 [*Langford Sharp v Autorité des marchés financiers*](#), 2021 QCCA 1364;
- TAB 8 [*R v Thomas Equipment Ltd.*](#), [1979] 2 SCR 529;
- TAB 9 [*243930 Alberta Ltd v. Wickham*](#), [1990] O.J. No. 1781 (ON CA);
- TAB 10 [*Cappelli v Nobilis Health Corp.*](#), 2019 ONSC 4521;
- TAB 11 [*CC&L Dedicated Enterprise Fund \(Trustee of\) v Fisherman*](#), 26 BLR (3d) 281;
- TAB 12 [*CC&L Dedicated Enterprise Fund \(Trustee of\) v Fisherman*](#), [2001] OJ No 4622 (QL);
- TAB 13 [*Garcia Transport Ltée v Royal Trust Co.*](#), [1992] 2 SCR 499;
- TAB 14 [*Association des courtiers et agents immobiliers du Québec v Proprio Direct Inc.*](#), 2008 CSC 32;
- TAB 15 [*Isidore Gagnon Ltée v Tremblay*](#), [2006] 1 SCR 27;
- TAB 16 [*Urbancorp Toronto Management Inc.*](#), 2021 ONSC 5073; leave to appeal refused: [*Urbancorp Toronto Management Inc. \(Re\)*](#), 2022 ONCA 181;
- TAB 17 [*Goldman, Sachs & Co. v Catucci*](#), 2017 QCCA 1890;
- TAB 18 [*Allaire v Girard & Associés*](#), 2005 QCCA 713;
- TAB 19 [*Guarantee Co. of North America v Gordon Capital Corp.*](#), [1999] 3 RCS 423;
- TAB 20 [*Collin v Société immobilière du Massif de Charlevoix inc.*](#), 2016 QCCS 346;
- TAB 21 [*Norbourg Placements équilibrés \(Liquidation de\)*](#), 2006 QCCS 4072;

DOCTRINE

- TAB 22 Stéphane Rousseau, *L’encadrement du secteur des valeurs mobilières par les provinces*, 2012, Montreal, Themis Editions;

- TAB 23** Stéphane Rousseau, “Qualité et intégrité de l’information sur les marchés financiers : quel rôle pour les sanctions civiles au Canada?” in Paul-Henry Antonmattei, ed, *Études à la mémoire de Philippe Neau-Leduc : Le juriste dans la Cité* (Paris; LGDJ, 2018);
- TAB 24** Gérald Goldstein, “Lois de police québécoises”, in JurisClasseur Québec, coll. “Droit civil”, *Droit international privé*, fasc. 6, Montreal, LexisNexis Canada;
- TAB 25** Claude Emmanuelli, *Droit international privé québécois*, 3rd ed., 2011, Montreal, Wilson & Lafleur;
- TAB 26** Gérald Goldstein, “Situation de la règle de conflit au sein du droit international privé”, in JurisClasseur Québec, coll. “Droit civil”, *Droit international privé*, fasc. 2, Montreal, LexisNexis Canada;
- TAB 27** Janet Walker, *Conflict of Laws*, 2020 reissue, LexisNexis;
- TAB 28** Pierre-Gabriel Jobin & Nathalie Vézina, *Les obligations*, 7th ed., 2013, Cowansville, Yvon Blais Editions;
- TAB 29** Marielle Girard, “Régimes de responsabilité civile : divulgation sur les marchés primaire et secondaire”, in JurisClasseur Québec, coll. “Droit des affaires”, *Valeurs mobilières*, fasc. 13, Montreal, LexisNexis Canada;
- TAB 30** Guy Paquette and al., “Les recours civils en vertu des lois sur les valeurs mobilières du Canada”, *Développements récents sur les valeurs mobilières* (2002), S.F.P.B.Q, Cowansville, Yvon Blais Editions;

DEBATES

- TAB 31** “Projet de loi no 85 – Loi sur les valeurs mobilières”, Quebec, National Assembly, Commission permanente des institutions financières et coopératives, 32-3, (15 December 1982).

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Quebec Securities Act, CQLR c V-1.1

214. Every person who has subscribed for or acquired securities in a distribution of securities effected without the prospectus required under Title II may apply to have the transaction rescinded or the price revised, at his option, without prejudice to his claim for damages.

The plaintiff may claim damages from the issuer or the holder, as the case may be, whose securities were distributed without a prospectus from the promoter of the venture, from their officers or directors, or from the dealer responsible for the distribution.

However, if the plaintiff did not receive the prospectus he was entitled to receive, he has no claim in damages except against the dealer or the person prescribed who is required to send the prospectus to him pursuant to section 29.

For the purposes of this section, a reference to a prospectus includes a document, prescribed by regulation, standing in lieu of a prospectus.

217. A person who has subscribed for or acquired securities in a distribution effected with a prospectus containing a misrepresentation may apply to have the contract rescinded or the price revised, without prejudice to his claim for damages.

The defendant may defeat the application only if it is proved that the plaintiff knew, at the time of the transaction, of the alleged misrepresentation.

221. Rights of action established under sections 217 to 219 may also be exercised if a misrepresentation is contained in

- (1) the information incorporated by reference in the simplified prospectus;
- (2) the offering memorandum prescribed by regulation;
- (3) any other document authorized by the Authority for use in lieu of a prospectus.

225.0.2. The plaintiff is not required to prove that the plaintiff relied on the document containing a misrepresentation when the plaintiff subscribed for, acquired or disposed of a security.

225.2. This division applies to any person who acquires or disposes of a security of a reporting issuer or of any issuer closely connected to Québec whose securities are publicly traded.

However, this division does not apply to a person that subscribes for or acquires a security during the period of a distribution of securities made with a prospectus or, unless otherwise provided by regulation, under a prospectus exemption granted by this Act, a regulation made under this Act or a decision of the Authority; nor does it apply to a person that acquires or disposes of a security in connection with or pursuant to a take-

over bid or issuer bid, unless otherwise provided by regulation, or to a person that makes any other transaction determined by regulation.

225.4. No action for damages may be brought under this division without the prior authorization of the court.

The request for authorization must state the facts giving rise to the action. It must be filed together with the projected statement of claim and be served by bailiff to the parties concerned, with a notice of at least 10 days of the date of presentation.

The court grants authorization if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff.

The request for authorization and, if applicable, the application for authorization to institute a class action required under article 574 of the Code of Civil Procedure (chapter C-25.01) must be made to the court concomitantly.

234. Any action for rescission or for revision of the price under this title is prescribed by the lapse of three years from the date of the transaction.

236.1. Any action under this Title or any action under the ordinary rules of law in respect of facts related to the distribution of a security or to a take-over bid or issuer bid may be brought before the court of the plaintiff's residence.

In matters pertaining to the distribution of a security, the laws of Québec are applicable where the subscriber or purchaser resides in Québec, regardless of the place of the contract.

Any contrary stipulation as to the jurisdiction of the courts or the applicable legislation is without effect.

Limited Partnerships Act, R.S.O. 1990, c. L.16

Return of limited partner's contribution

15 (1) A limited partner has the right to demand and receive the return of the limited partner's contribution,

- (a) upon the dissolution of the limited partnership;
- (b) when the time specified in the partnership agreement for the return of the contribution occurs;
- (c) after the limited partner has given six months notice in writing to all other partners, if no time is specified in the partnership agreement for the return of the contribution or for the dissolution of the limited partnership; or
- (d) when all the partners consent to the return of the contribution.

Idem

(2) Despite subsection (1), a limited partner is not entitled to receive any part of the limited partner's contribution out of the limited partnership assets or from a general partner until,

- (a) all liabilities of the limited partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains sufficient limited partnership assets to pay them; and
- (b) the partnership agreement is terminated or so amended, if necessary, to set forth the withdrawal or reduction of the contribution.

Idem

(3) A limited partner has, irrespective of the nature of the limited partner's contribution, only the right to demand and receive money in return therefor, unless,

- (a) the partnership agreement provides otherwise; or
- (b) all the partners consent to some other manner of returning the contribution.

Dissolution

(4) A limited partner is entitled to have the limited partnership dissolved and its affairs wound up where,

- (a) the limited partner is entitled to the return of the limited partner's contribution but, upon demand, the contribution is not returned to the limited partner; or
- (b) the other liabilities of the limited partnership have not been paid or the limited partnership assets are insufficient for their payment as required by clause (2) (a) and the limited partner seeking dissolution would otherwise be entitled to the return of the limited partner's contribution.

Settling accounts on dissolution

24 In settling accounts after the dissolution of a limited partnership, the liabilities of the limited partnership to creditors, except to limited partners on account of their contributions and to general partners, shall be paid first, and then, unless the partnership agreement or a subsequent agreement provides otherwise, shall be paid in the following order:

1. To limited partners in respect of their share of the profits and other compensation by way of income on account of their contributions.
2. To limited partners in respect of their contributions.
3. To general partners other than for capital and profits.
4. To general partners in respect of profits.
5. To general partners in respect of capital.

Civil Code of Quebec, CQLR c CCQ-1991

PRELIMINARY PROVISION

The Civil Code of Québec, in harmony with the Charter of the French language (chapter C-11), the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

9. In the exercise of civil rights, derogations may be made from those rules of this Code which supplement intention, but not from those of public order.

1422. A contract that is null is deemed never to have existed.

In such a case, each party is bound to restore to the other the prestations he has received.

1699. Restitution of prestations takes place where a person is bound by law to return to another person the property he has received, either without right or in error, or under a juridical act which is subsequently annulled with retroactive effect or whose obligations become impossible to perform by reason of superior force.

The court may, exceptionally, refuse restitution where it would have the effect of according an undue advantage to one party, whether the debtor or the creditor, unless it considers it sufficient, in that case, to modify the scope or modalities of the restitution instead.

1700. Restitution of prestations is made in kind, but, if this is impossible or cannot be done without serious inconvenience, it may be made by equivalence.

Equivalence is assessed as at the time when the debtor received what he is liable to restore.

2647. The legal causes of preference are prior claims and hypothecs.

2650. A prior claim is a claim to which the law attaches the right for a creditor to be preferred over the other creditors, even the hypothecary creditors, according to the origin of his claim.

The priority of a claim is indivisible.

2651. The following are the prior claims and, notwithstanding any agreement to the contrary, they are in all cases collocated in the order here set out:

- (1) legal costs and all expenses incurred in the common interest;
- (2) the claim of a seller who has not been paid the price of a movable sold to a natural person who does not operate an enterprise;
- (3) the claims of persons having the right to retain movable property, provided that the right subsists;
- (4) claims of the State for amounts due under fiscal laws;
- (5) claims of municipalities, school service centres and school boards for property taxes on taxable immovables as well as claims of municipalities, specially provided for by laws applicable to them, for taxes other than property taxes on immovables and movables for which the taxes are due.

2657. Prior claims rank, according to their order among themselves, and without regard to their date, before movable or immovable hypothecs.

Prior claims of the same rank concur in proportion to the amount of each claim.

3111. A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or whose designation may be inferred with certainty from the terms of the act.

Where a juridical act contains no foreign element, it remains nevertheless subject to the mandatory provisions of the law of the State which would apply in the absence of a designation.

The law may be expressly designated as applicable to the whole or to only part of a juridical act.

3114. In the absence of a designation by the parties, the sale of a corporeal movable is governed by the law of the State where the seller had his residence or, if the sale is concluded in the ordinary course of business of an enterprise, his establishment, at the time the contract was concluded. However, the sale is governed by the law of the State in which the buyer had his residence or his establishment at the time the contract was concluded in any of the following cases:

- (1) negotiations have taken place and the contract has been concluded in that State;
- (2) the contract provides expressly that delivery shall be performed in that State;
- (3) the contract is concluded on terms determined mainly by the buyer, in response to a call for tenders.

In the absence of a designation by the parties, the sale of immovable property is governed by the law of the State where it is situated.

Interpretation Act, RSC 1985, c I-21

6 (1) Where an enactment is expressed to come into force on a particular day, it shall be construed as coming into force on the expiration of the previous day, and where an enactment is expressed to expire, lapse or otherwise cease to have effect on a particular day, it shall be construed as ceasing to have effect on the commencement of the following day.

Legislation Act, 2006, SO 2006, c 21, Sch F

Time of commencement and repeal Commencement

9 (1) Unless otherwise provided, an Act comes into force at the first instant of the day on which it comes into force.

Securities Act, R.S.O. 1990, c. S.5

Liability for misrepresentation in offering memorandum

130.1 (1) Where an offering memorandum contains a misrepresentation, a purchaser who purchases a security offered by the offering memorandum during the period of distribution has, without regard to whether the purchaser relied on the misrepresentation, the following rights:

1. The purchaser has a right of action for damages against the issuer and a selling security holder on whose behalf the distribution is made.

2. If the purchaser purchased the security from a person or company referred to in paragraph 1, the purchaser may elect to exercise a right of rescission against the person or company. If the purchaser exercises this right, the purchaser ceases to have a right of action for damages against the person or company.

Limitation periods

138 Unless otherwise provided in this Act, no action shall be commenced to enforce a right created by this Part more than,

- (a) in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action; or
- (b) in the case of any action, other than an action for rescission, the earlier of,
 - (i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or
 - (ii) three years after the date of the transaction that gave rise to the cause of action.

ONTARIO SECURITIES COMMISSION
Applicant

-and- BRIDGING FINANCE INC., et al.

Respondents

Court File No. CV-21-00661458-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF QUEBEC REPRESENTATIVE COUNSEL

Woods LLP
2000 McGill College Avenue,
Suite 1700
Montreal, QC H3A 3H3

Sylvain Rigaud
Email: srigaud@woods.qc.ca

Eric Bedard
Email: ebedard@woods.qc.ca

Émilie St-Pierre
Email: estpierre@woods.qc.ca

Simon-Alexandre Poitras
Email: sapoitras@woods.qc.ca

Tel: 514-982-4545 / Fax: 514-284-2046
Quebec Representative Counsel