

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

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant

- and -

**BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGING
MIDMARKET 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

**REPLY FACTUM OF BENNETT JONES LLP, IN ITS CAPACITY
AS COURT-APPOINTED REPRESENTATIVE COUNSEL
(Unitholder Priority Motion Returnable November 16-17, 2022)**

November 9, 2022

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PART I: OVERVIEW¹

1. Nothing in the facta submitted by the Potential Priority Claimants establishes any legal or equitable basis for a priority over General Unitholders. The fundamental misconception permeating all three facta conflates the *validity* or *enforceability* of a claim with a *priority* for such a claim. It is assumed for purposes of this motion that the holders of Potential Priority Claims have valid claims (although such claims will need to be established on an individual basis pursuant to some form of process depending on the Court's decision herein); the burden on those holders is to demonstrate an associated priority for such claims that would have the effect of essentially elevating that holder to a secured creditor. That burden has not been met.

PART II: ISSUES

2. This Reply Factum addresses the following issues:
- (a) No party has any response to (and each party essentially ignores) the fact that the Agreed Statement of Facts provides that the Bridging Funds are insolvent and therefore the application of the *pari passu* principle is required.
 - (b) The holders of Potential Priority Claims have confused the validity or enforcement of their claims (which is assumed for purposes of this motion) with the issue of whether such a claim would have a *priority*. No basis for a priority has been demonstrated.
 - (c) Contrary to the position of holders of Potential Redemption Claims, a valid contractual claim does not have priority over all other valid claims.

¹ Unless otherwise defined herein, each capitalized term has the meaning given to it in the Factum of Bennett Jones LLP, in its Capacity as Court-Appointed Representative Counsel dated October 21, 2022 [Factum of Representative Counsel dated October 21, 2022] or the Agreed Statement of Facts, Motion Record of the Receiver [Motion Record], Schedule A, p. 44.

- (d) Contrary to the position of holders of Potential Statutory Rescission Claims, a statutory *right* to rescission does not equate to a statutory *priority*.
 - (e) Contrary to the position of holders of Potential Statutory Rescission Claims, there is no trust created as a result of the statutory right to rescission.
 - (f) Contrary to the position of holders of Potential Statutory Rescission Claims, they are still Unitholders subject to the applicable Agreements and legislation. In any event, *pari passu* would govern even if they were not.
 - (g) Contrary to the position of Quebec Representative Counsel, it is the law of Ontario that determines priorities of claims against the Bridging Funds regardless of the province of residence of such claimants.
3. The remainder of the grounds raised by the holders of Potential Priority Claims are also disputed by Representative Counsel.

PART III: LAW AND ANALYSIS

A. The Bridging Funds are insolvent and *pari passu* applies

4. The Agreed Statement of Facts, which is the sole evidentiary record for this motion, provides "that the proceeds of the assets of the Bridging Funds will be less than the aggregate of Potential Statutory Rescission Claims, Potential Redemption Claims, General Unitholder Claims and any additional claims determined in accordance with the Claims and Unitholdings Identification Procedure or otherwise".² This is the definition of "balance sheet" insolvency.

5. None of the holders of Potential Priority Claims have even attempted to argue that this does not equate to insolvency.³ The Agreed Statement of Facts was heavily negotiated and agreed to be

² Agreed Statement of Facts, at para 70, Motion Record, Schedule A, p. 67.

³ The holders of Potential Statutory Rescission Claims argue that the insolvency test does not apply: see para 69 of the Responding Factum of the Misrepresentation Claimants dated November 3, 2022 [Factum of Potential Statutory

the *sole* evidence on this motion. It must govern. It provides that the Court must assume that the Bridging Funds are insolvent; therefore, the application of the *pari passu* principle is paramount.

6. The suggestion that the law of insolvency (including the application of the *pari passu* rule) is engaged only if an insolvency proceeding under a federal statute is extant is wrong as a matter of Ontario law. Notably, no authority is cited for the proposition that *pari passu* does not apply in a provincial receivership such as this one. Instead, the Potential Statutory Rescission Claimants cite the decision of *James Armstrong* for the proposition that the insolvency of the Bridging Funds is no bar to their position.⁴ This demonstrates their confusion between validity of a claim and priority for a claim. In that case, the plaintiff was seeking a declaration of rescission and sought an order striking the defendant's statement of defence. The Court granted the motion, and granted summary judgment after establishing that the plaintiff met the requirements for statutory rescission.⁵ In other words, the Court determined the *validity* of the statutory claim; that validity is assumed for purposes of this motion. In fact, the Court expressly noted that the issue of payment to be made to the plaintiff (as opposed to judgment) was an issue for another day;⁶ that issue, whether a priority payment can be made, is the sole issue before this Court.

Rescission Claimants]. Quebec Representative Counsel simply states that this Court has made no formal finding of insolvency: see para 37 of the Factum of Woods LLP, in its Capacity as Court-Appointed Quebec Counsel dated November 3, 2022 [Factum of Quebec Representative Counsel]. The holders of Potential Redemption Claims similarly state that no such finding has been made by the Court: see para 9 of the Factum of Aird & Berlis LLP, in its Capacity as Redemption Representative Counsel for the Redemption Claimants dated November 3, 2022 [Factum of Potential Redemption Claimants].

⁴ Factum of Potential Statutory Rescission Claimants, *supra* note 3 at para 64.

⁵ *James Armstrong Richardson v Great Gulfcan Energy Inc*, [2011 ONSC 6692](#) at [para 20](#): "Accordingly, the issue for the court on this summary judgment motion is whether the plaintiff has established, on a balance of probabilities, that the Offering Memorandum contained an untrue statement of a material fact...", Reply Book of Authorities of Bennett Jones LLP, in its Capacity as Court-Appointed Representative Counsel dated November 9, 2022 at Tab 1 [BOA].

⁶ *Ibid* at [para 9](#).

7. Quebec Representative Counsel cites the *Urbancorp* decision for the proposition that the *pari passu* rule can be avoided.⁷ In that case, the Court was considering a lease which made it clear that there was no interest in the transfer value and it was instead retained by the landlord.⁸ By contrast, nothing in the applicable documentation or legislation makes clear that certain amounts do not form part of the assets of the Bridging Funds, which is what would be required to move them out of the reach of the *pari passu* principle.

B. The validity or enforcement of claims is distinct from the issue of *priority* of claims

8. The vast majority of the submissions of the holders of Potential Priority Claims attempt to establish the *validity* and *enforceability* of their Claims. However, this entirely misses the issue before this Court, which is one of *priority* with respect to those Claims. The holders of Potential Redemption Claims state that the issue "is whether the Bridging Funds must honour their obligations and liabilities to Redemption Claimants who had submitted redemption requests";⁹ the holders of Potential Statutory Rescission Claims state that the issue is "whether statutory rescission rights should be honoured in an *OSA* receivership";¹⁰ and Quebec Representative Counsel states that the "issues are whether this Court should direct the Receiver to honour Potential Quebec Redemption Claims and Potential Quebec Statutory Rescission Claims".¹¹

9. No one is disputing whether or not the Potential Priority Claims are valid and enforceable, or will be "honoured"; that is *assumed* for purposes of this motion and therefore is not in dispute. It is trite to say that the claim of an unsecured trade creditor is "honoured" in an insolvency

⁷ Factum of Quebec Representative Counsel, *supra* note 3 at para 36.

⁸ *Urbancorp Toronto Management Inc*, [2021 ONSC 5073](#) at [para 65](#), BOA at Tab 2 [*Urbancorp*].

⁹ Factum of Potential Redemption Claimants, *supra* note 3 at para 47.

¹⁰ Factum of Potential Statutory Rescission Claimants, *supra* note 3 at para 18.

¹¹ Factum of Quebec Representative Counsel, *supra* note 3 at para 14.

proceeding in that it is admitted for the purposes of voting and distribution with similarly ranking claims. However, having a valid and enforceable claim does not mean that there is somehow a "*de facto* priority" over *other* valid and enforceable claims. As stated by the Ontario Court: "The right remains *enforceable*. Being *enforceable* is not necessarily the equivalent to being *secured*...or the equivalent of being subject to a trust".¹² The legal basis for a claim or the legal tools used are irrelevant.¹³ What is at issue on this motion is whether a priority attaches to the Potential Priority Claims; characterizing the matter as one of "honouring" claims does not change the actual issue before this Court.

10. In addition to confusing validity with priority, the holders of Potential Statutory Rescission Claims have also confused the issues of allocation and distribution with priority. Their assertions regarding the distribution of units to longer-term investors in the Bridging Funds are irrelevant to the issue of whether a priority exists.¹⁴ In addition, at various points in their factum, arguments are raised with respect to recoupment and quantum of distributions,¹⁵ which are simply not relevant to the issue of whether a *priority* exists prior to any such distribution.

11. It should be noted that, at footnote 10 of their Factum, the holders of Potential Statutory Rescission Claims state that they do not claim a "priority" in the first instance, but rather a *de facto* priority in the spirit of the provisions which excludes property from the estate of a bankrupt, and a priority is claimed in the alternative. With respect, this attempt at re-characterization also does not change the issue at hand – a priority must be demonstrated through some legal or equitable

¹² *Canada (Attorney General) v Confederation Life Insurance Co*, [1995] OJ No 1959 (Ct J (Gen Div)) at para 138 [emphasis in original], BOA at Tab 3 [*Confederation Life Insurance Co*].

¹³ See discussion in *All Canadian Investment Corporation (Re)*, 2019 BCSC 1488 at paras 76-86, BOA at Tab 4 [*All Canadian Investment*].

¹⁴ Factum of Potential Statutory Rescission Claimants, *supra* note 3 at para 51.

¹⁵ Discussed further below at paragraph 22 of this Factum.

means. To have property excluded from the estate of the Bridging Funds, as they suggest, would require a trust, which is a form of priority. No priority – regardless of what it is called – exists.

C. A valid contractual claim does not have priority over all other valid claims

12. The argument for holders of Potential Redemption Claims relies entirely on the premise that they have "distinct legal rights, derived from the valid exercise of a contractual right afforded to all Unitholders, [that] must be enforced".¹⁶ Therefore, in order to succeed on this motion, the holders of Potential Redemption Claims must demonstrate to this Court that "the valid exercise of a contractual right" creates a priority over all other valid claims, including misrepresentation, breach of fiduciary duty, and all other potential claims arising under statute, common law or equity.¹⁷ There simply is no basis for this position.

13. The fact that certain Unitholders sought to exercise redemption rights does not mean that those that have not exercised redemption rights have waived all of their claims against the Bridging Funds (which, while excluded from the requiring proofs of claim to be filed pursuant to the Claims and Unitholdings Identification Procedure, are inevitably very substantial given the circumstances of the Bridging Funds and the record before the Court in these proceedings), nor can the holders of Potential Redemption Claims just pretend that no other Unitholders have claims against the Bridging Funds. Instead, the holders of Potential Redemption Claims must actually demonstrate that their contractual claim has a *priority over* the claims of General Unitholders. They have not done so. In fact, the law is clear that unsatisfied redemption requests do not themselves change the

¹⁶ Factum of Potential Redemption Claimants, *supra* note 3 at para 48.

¹⁷ Claims of Unitholders have expressly been excluded from the Claims and Unitholdings Identification Procedure as "Excluded Claims": Agreed Statement of Facts, at para 70, Motion Record, Schedule A, p. 67.

underlying relationship between debtor and creditor (in this case, between a Unitholder and the applicable Bridging Fund).¹⁸

14. The holders of Potential Redemption Claims cite only *two* cases to support this novel assertion that a contractual claim is the equivalent of a secured priority. First, *Nortel*, in which the issue before the Court was approval of a proposed methodology for allocation of funds.¹⁹ Second, *Urbancorp*, in which the issue was approval of a distribution order of the proceeds from a sale of certain assets.²⁰ The motion before this Court is concerned with the issue of priority, not allocation or distribution. It is also noted that both of these cases are formal insolvency proceedings which the holders of Potential Redemption Claims try to rely upon to make their point, but in the next breath suggest that a paramount principle of insolvency law – *pari passu* – does not apply in these proceedings.

15. The holders of Potential Redemption Claims have not articulated any basis on which a contractual claim can be elevated to the equivalent of a secured claim.

D. A statutory *right of rescission* is not the same as a statutory *priority*

16. The holders of Potential Statutory Rescission Claims (both in Ontario and Quebec) put significant emphasis on the legislative decision behind the right to statutory rescission and how it must be respected (going so far as to submit that this Court cannot override the legislative will of a province). But, again, this confuses the *validity* of a right with a statutory *priority* for that right.

¹⁸ *All Canadian Investment*, *supra* note 13 at [para 122](#), BOA at Tab 4.

¹⁹ *Nortel Networks Corporation (Re)*, [2010 ONSC 5584](#) at [para 1](#), BOA at Tab 5. See also [para 113](#) where the Court also noted a determination of what constitutes a valid claim is needed; in this motion, the validity of claims is being assumed.

²⁰ *Supra* note 8, BOA at Tab 2.

17. No one is suggesting that the statutory right of rescission will not be respected, or that it is not valid or enforceable – in the sense that the quantum of such claims will be taken into account in distributions on a *pro rata* basis. That is assumed for purposes of this motion. Rather, the question is whether that statutory right enjoys a statutory priority. There is no indication in any of the relevant legislation that such a priority exists,²¹ nor can the holders of Potential Statutory Rescission Claims point to *any* such language. As noted in the case law relied upon by the holders of Potential Statutory Rescission Claims, a statutory scheme may oust rights "but only where the legislature expressed its intention to do so with irresistible clearness".²² There is no indication that the provincial *Securities Acts* oust any of the applicable legal principles, including the application of the *pari passu* rule, let alone irresistibly clear language to that effect.

18. If the legislature of any province wished to create a priority, it could very easily have done so when enacting these provisions as it has in other cases.²³ Indeed, clear language to that effect is what is required in order to create a priority.²⁴ But it did not. The purpose of the statutory right of rescission, as indicated by the holders of Potential Statutory Rescission Claims "is to give an additional right to a purchaser".²⁵ That right comes with benefits not available to persons that must proceed at common law or equity (namely, reliance need not be proven). However, a beneficial right is still not the equivalent of a priority.

19. The sole response to this from holders of Potential Statutory Rescission Claims is that "the nature of the remedy is itself the priority".²⁶ But the legislature did not provide for this. The holders

²¹ See para 43 of Factum of Representative Counsel dated October 21, 2022, *supra* note 1.

²² *Urban Mechanical Contracting Ltd v Zurich*, [2022 ONCA 589](#) at [para 44](#), BOA at Tab 6.

²³ E.g. [s 30\(7\)](#) of the *Personal Property Security Act*, [RSO 1990, c P 10](#); [s 227\(4.1\)](#) of the *Income Tax Act*, [RSC 1985, c 1 \(5th Supp\)](#); [s 222\(3\)](#) of the *Excise Tax Act*, [RSC 1985, c E-15](#).

²⁴ See footnote 43 of the Factum of Representative Counsel dated October 21, 2022, *supra* note 1.

²⁵ Factum of Potential Statutory Rescission Claimants, *supra* note 3 at footnote 74.

²⁶ Factum of Potential Statutory Rescission Claimants, *supra* note 3 at para 44.

of Potential Statutory Rescission Claims assert that the applicable legislation is a "complete code";²⁷ so if that "complete code" does not provide for a priority, either by indicating the holder of the right has a priority or by segregating those funds, how can one be imposed?

E. A right to statutory rescission does not create a trust

20. The holders of Potential Statutory Rescission Claims baldly assert that rescission is a "proprietary" remedy requiring the imposition of a constructive trust. However, they have not satisfied the requisite elements for a constructive trust, nor demonstrated how a statutory *right* can create a trust without any language in the statute suggesting one exists.

21. The fourth factor for a constructive trust is that there must be no factors which would render the imposition unjust in all the circumstances of the case.²⁸ As set out in the Factum of Representative Counsel, on this basis constructive trusts have been imposed for *all* investors of defunct funds without regard to the nature of the right they may have, as the misconduct at issue was directed at all investors.²⁹ The same reasoning applies here.

22. In terms of fairness and justness, the holders of Potential Statutory Rescission Claims take the position that since some of them may have received as little as 0.58% or no distributions from the Bridging Funds, it is somehow justified that they should obtain a priority over other Unitholders. In fact, discussion of how much the holders have obtained and their benefit (or lack thereof) from distributions is repeated throughout their Factum.³⁰ However, again, this confuses the issue at hand. The issue before this Court is with respect to the potential priority ranking of

²⁷ Factum of Potential Statutory Rescission Claimants, *supra* note 3 at paras 57-58

²⁸ *Soulos v Korkontzilas*, [1997] 2 SCR 217 at para 45, BOA at Tab 7.

²⁹ Factum of Representative Counsel dated October 21, 2022, *supra* note 1 at paras 57-64.

³⁰ See Factum of Potential Statutory Rescission Claimants, *supra* note 3 at paras 22, 27, 50-51.

Claims; facts regarding recoupment may be considered when determining the allocation and distribution of the funds,³¹ but they cannot justify the creation of a new legal priority.

23. The holders of Potential Statutory Rescission Claims also reference that Bridging operated "not unlike a Ponzi scheme" and "was a glorified Ponzi scheme".³² This assertion is proposed out of whole cloth. Nothing in the (heavily negotiated) Agreed Statement of Facts supports this statement and therefore this proposition should not be considered. However, in any event, reference to this issue again confuses allocation and distribution with a priority. Notably, no Ponzi scheme case was cited where a priority was granted to some defrauded investors over others; rather, it is plain that they would share *pro rata* and issues of recoupment may be considered when determining allocation.³³

24. The fact that rights have become vested and are enforceable – such as the statutory right to rescission – does not mean they become tantamount to a trust.³⁴ There must be some special reason to grant the holders of Potential Statutory Rescission Claims a constructive trust which essentially makes them a secured creditor (which is wholly not established on the Agreed Statement of Facts). Importantly, even if it existed, "the mere 'need to give priority' to a claimant in such a situation is not, by itself, sufficient to trigger the automatic application of the constructive trust mechanism...While priority will almost always be required by the claimant in an insolvency, it must also be just and appropriate in the circumstances to make an order that will have the effect of granting it".³⁵

³¹ See e.g. *Easy Loan Corp v Wiseman*, [2016 ABQB 77](#) at [paras 54-71](#), BOA at Tab 8.

³² Factum of Potential Statutory Rescission Claimants, *supra* note 3 at paras 13 & 51.

³³ Factum of Representative Counsel dated October 21, 2022, *supra* note 1 at paras 65-69.

³⁴ *Confederation Life Insurance Co*, *supra* note 12 at [para 138](#), BOA at Tab 3.

³⁵ *Ibid* at [para 214](#), BOA at Tab 3.

25. Notably, "[a]nother consideration in the analysis of whether a constructive trust is the appropriate remedy is whether the claimant reasonably expected to obtain an actual proprietary interest as opposed to monetary relief".³⁶ Given that none of the documentation or applicable legislation indicates that a proprietary interest would result if a Unitholder has a Potential Statutory Rescission Claim, there is no basis on which to state such a trust would be consistent with their reasonable expectations.³⁷

F. The holders of Potential Statutory Rescission Claims are still Unitholders

26. The holders of Potential Statutory Rescission Claims submit that as a result of their *right* to rescission, they are no longer Unitholders subject to the *pro rata* provisions of the Limited Partnership Agreements, the Limited Partnerships Act and the Trust Agreement (as applicable). As no right of rescission has been effected, there is no basis on which to make this assertion. The holders of Potential Statutory Rescission Claims remain Unitholders and remain subject to the Limited Partnership Agreement, the Limited Partnerships Act, and/or Trust Agreement (as applicable), including with respect to the issue of priority.³⁸

27. Regardless, the application of the *pari passu* principle is part of the common law in Ontario and is not dependent on the applicable Agreements or the Limited Partnerships Act. Therefore, even if the position of the holders of Potential Statutory Rescission Claims is accepted, it is no

³⁶ *Ibid* at [para 220](#), BOA at Tab 3.

³⁷ At paragraph 40 of the Factum of the Potential Statutory Rescission Claimants, *supra* note 3, it is submitted, in the alternative, that General Unitholders who prove fraud and reliance, and thus are entitled to rescission, ought to also have "*de facto*" priority to other General Unitholders. Such a proposition would require an assessment on an individual basis for every Unitholder, demonstrating the difficulty with the position taken.

³⁸ This also applies to holders of Potential Quebec Statutory Rescission Claims which adopt the same argument at para 68 of their factum, *supra* note 3.

answer to the fact that *pari passu* dictates the Unitholders must share *pro rata* and that the Unitholders have failed to point to any legal basis that would override that principle.

G. Quebec law is irrelevant to the issue at hand and does not create a priority

28. The law applicable to the issue of priority is distinct from that applicable to the issue of validity of a claim.³⁹ The two should not be confused. The issue of priority before this Court can only be governed by (i) the *lex fori* – Ontario – and (ii) the law of the Agreements that the Unitholders all agreed to be a part of – Ontario – as those Agreements set out their agreed-upon rights and entitlements vis-à-vis each other.⁴⁰ Quebec law is not relevant to the issue before this Court to determine the priority for distribution of assets of an Ontario limited partnership or trust. Nevertheless, the consideration of Quebec law would not change the outcome.

29. First, with respect to Potential Quebec Redemption Claims, Quebec Representative Counsel indicates that such claims are governed by Ontario law and does not present any legal basis on which such claims would have priority. As such, the submissions above in section "C" also apply to Potential Quebec Redemption Claims.

30. With respect to Potential Quebec Statutory Rescission Claims,⁴¹ Quebec Representative Counsel confuses the enforcement or validity of such claims with whether or not such claims have

³⁹ See *Canada Deposit Insurance Corp v Canadian Commercial Bank*, [1992] AJ No 1076 (QB) at paras 15-18, appeal dismissed, [1993] AJ No 660 (CA), BOA at Tab 9.

⁴⁰ *Ibid*; Janet Walker, *Canadian Conflict of Laws*, 6th ed, (Toronto: LexisNexis Canada, 2005) at §2.02, BOA at Tab 10; see also paras 50-52 of Factum of Representative Counsel dated October 21, 2022, *supra* note 1.

⁴¹ The arguments made with respect to Potential Quebec Statutory Rescission Claims overlap and repeat many of the assertions made by holders of Potential Statutory Rescission Claims in their factum. Therefore, the arguments set out above on these issues also apply, and are adopted, with respect to the Potential Quebec Statutory Rescission Claims. However, it should be noted that **a claim for rescission under the Quebec Securities Act is without prejudice to damages** (*Securities Act*, [COLR c V-11, s 217](#)) which distinguishes it from all other provinces. Therefore, the arguments raised in the Factum of Potential Statutory Rescission Claimants that highlight the fact the sole remedy is rescission, including those raised at paras 21-22, 31-32, and 60, would not be helpful to holders of Potential Quebec Statutory Rescission Claims, and further demonstrates the difficulty in reconciling their claims for priority.

a priority. It threatens that this Court cannot refuse to recognize the Quebec *Securities Act*, citing cases in which claims for misrepresentation under that statute have been certified in Ontario for purposes of settlement.⁴² However, no one is suggesting that the claims of Quebec Unitholders will be disregarded; the issue is whether those claims should be granted a priority. None of the class action cases cited by Quebec Representative Counsel on this point granted a priority to the claims under the Quebec *Securities Act*, so none are supportive of the position taken.

31. Quebec Representative Counsel emphasizes the fact that there is a statutory *right* to rescission and stresses the public order aspect of the legislation and its mandatory application.⁴³ However, no one is disputing those facts; the issue is whether the "public order" legislation grants a priority to that rescission right. No language to that effect is found in the statute,⁴⁴ nor can the elements for a constructive trust be satisfied.⁴⁵

32. Quebec Representative Counsel cites the decision of *Fonds Norbourg Placements équilibrés (Liquidation de)*,⁴⁶ only available in French, as supportive of their relief. As explained in a commentary on the decision, in that case, the liquidator put forward two liquidation methods to be considered by the court: a fund-by-fund distribution method, and a global distribution method.⁴⁷ The comments of the Court cited by Quebec Representative Counsel are in the context of discussing their decision to choose the fund-by-fund distribution method. Issues of distribution

⁴² Factum of Quebec Representative Counsel, *supra* note 3 at para 29.

⁴³ Factum of Quebec Representative Counsel, *supra* note 3 at paras 5, 24-30, 55-59.

⁴⁴ See paras 17-18 of this Factum.

⁴⁵ See paras 20-25 of this Factum.

⁴⁶ *Fonds Norbourg Placements équilibrés (Liquidation de)*, [2006 QCCS 4072](#), cited at footnote 90 of the Factum of Quebec Representative Counsel.

⁴⁷ Isabelle Desharnais, "Financial Fraud in Québec, the Norbourg Case" in Janis Sarra and Barbara Romaine, ed, *Annual Review of Insolvency Law 2014* (Toronto: Carswell, 2015), BOA at Tab 11.

and allocation are not before the Court at this time, and reliance on this decision is misplaced. Even if Quebec law were to apply on this motion, no priority has been demonstrated thereunder.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF NOVEMBER,
2022**

Bennett Jones LLP

Bennett Jones LLP

SCHEDULE "A"
LIST OF AUTHORITIES

Cases Cited

1. *All Canadian Investment Corporation (Re)*, [2019 BCSC 1488](#).
2. *Canada (Attorney General) v Confederation Life Insurance Co*, [\[1995\] OJ No 1959 \(Ct J \(Gen Div\)\)](#).
3. *Canada Deposit Insurance Corp v Canadian Commercial Bank*, [\[1992\] AJ No 1076 \(QB\)](#).
4. *Easy Loan Corp v Wiseman*, [2016 ABQB 77](#).
5. Isabelle Desharnais, "Financial Fraud in Québec, the Norbourg Case" in Janis Sarra and Barbara Romaine, ed, *Annual Review of Insolvency Law 2014* (Toronto: Carswell, 2015)
6. *James Armstrong Richardson v Great Gulfcan Energy Inc*, [2011 ONSC 6692](#).
7. Janet Walker, *Canadian Conflict of Laws*, 6th ed, (Toronto: LexisNexis Canada, 2005).
8. *Nortel Networks Corporation (Re)*, [2010 ONSC 5584](#).
9. *Soulos v Korkontzilas*, [\[1997\] 2 SCR 217](#).
10. *Urban Mechanical Contracting Ltd v Zurich*, [2022 ONCA 589](#).
11. *Urbancorp Toronto Management Inc*, [2021 ONSC 5073](#).

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

Excise Tax Act, RSC 1985, c E-15

Trust for amounts collected

222 (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

Amounts collected before bankruptcy

(1.1) Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the Bankruptcy and Insolvency Act), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

Withdrawal from trust

(2) A person who holds tax or amounts in trust by reason of subsection (1) may withdraw from the aggregate of the moneys so held in trust

(a) the amount of any input tax credit claimed by the person in a return under this Division filed by the person in respect of a reporting period of the person, and

(b) any amount that may be deducted by the person in determining the net tax of the person for a reporting period of the person,

as and when the return under this Division for the reporting period in which the input tax credit is claimed or the deduction is made is filed with the Minister.

Extension of trust

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the Bankruptcy and Insolvency Act), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty,

separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Meaning of security interest

(4) For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

Income Tax Act, RSC, 1985, c 1 (5th Supp)

Withholding taxes

227 (1) No action lies against any person for deducting or withholding any sum of money in compliance or intended compliance with this Act.

Return filed with person withholding

(2) Where a person (in this subsection referred to as the “payer”) is required by regulations made under subsection 153(1) to deduct or withhold from a payment to another person an amount on account of that other person’s tax for the year, that other person shall, from time to time as prescribed, file a return with the payer in prescribed form.

Failure to file return

(3) Every person who fails to file a return as required by subsection (2) is liable to have the deduction or withholding under section 153 on account of the person’s tax made as though the person were a person who is neither married nor in a common-law partnership and is without dependants.

Trust for moneys deducted

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

Extension of trust

(4.1) Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

Meaning of security interest

(4.2) For the purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest.

Application to Crown

(4.3) For greater certainty, subsections (4) to (4.2) apply to Her Majesty in right of Canada or a province where Her Majesty in right of Canada or a province is a secured creditor (within the meaning assigned by subsection 224(1.3)) or holds a security interest (within the meaning assigned by that subsection).

Personal Property Security Act, RSO 1990, c P 10

Priorities

30 (1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:

1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.
2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected otherwise than by registration,
 - i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and
 - ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.
3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.
- 3.1. Where priority is to be determined between perfected security interests in a prescribed class of collateral, priority shall be determined in accordance with the regulations.
4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

Idem

(2) For the purpose of subsection (1), a continuously perfected security interest shall be treated at all times as if perfected by registration, if it was originally so perfected, and it shall be treated at all times as if perfected otherwise than by registration if it was originally perfected otherwise than by registration.

Future advances

(3) Subject to subsection (4), where future advances are made while a security interest is perfected, the security interest has the same priority with respect to each future advance as it has with respect to the first advance.

Exception

(4) A future advance under a perfected security interest is subordinate to the rights of persons mentioned in subclauses 20 (1) (a) (ii) and (iii) if the advance was made after the secured party received written notification of the interest of any such person unless,

(a) the secured party makes the advance for the purpose of paying reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral and its preservation; or

(b) the secured party is bound to make the advance, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from the obligation.

Proceeds

(5) For the purpose of subsection (1), the date for registration or perfection as to collateral is also the date for registration or perfection as to proceeds.

Reperfected security interests

(6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

Same, extended time

(6.1) Despite subsection (6), where a security interest that is perfected by registration becomes unperfected between February 26, 1996 and April 3, 1996, the security interest shall be deemed to have been continuously perfected from the time of first perfection if the security interest is again perfected by registration by April 12, 1996.

Deemed trusts

(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the Employment Standards Act, 2000, the Pension Benefits Act or the Pooled Registered Pension Plans Act, 2015.

Exception

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

Securities Act, CQLR c V-11

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.

IN THE MATTER OF AN APPLICATION UNDER SECTION 129 OF *THE SECURITIES ACT* (Ontario), R.S.O. 1990, c.S.5, AS AMENDED
ONTARIO SECURITIES COMMISSION - and - BRIDGING FINANCE INC., et al.
Applicant Respondents

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

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

Proceeding commenced at Toronto, Ontario

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