

**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

**REPLY FACTUM OF THE RECEIVER
(Re: Unitholder Priority Motion)**

November 9, 2022

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PART I - OVERVIEW

1. This reply factum addresses the following arguments raised by the Unitholders with Potential Priority Claims:¹
 - (a) the Rescission Claimants² have a right of rescission and therefore such claimants are no longer Unitholders, are no longer bound by the applicable constating documents, and the amounts invested by such claimants do not form part of Bridging's estate;
 - (b) the Potential Redemption Claims constitute "enforceable liabilities" that rank in priority to General Unitholder Claims; and
 - (c) the Quebec *Securities Act* applies to the issues on this motion.
2. For the reasons set out below, these arguments should be rejected.

PART II - LAW & ANALYSIS

A. No Priority or Trust for Statutory Rescission Claimants

3. The essence of the argument made by the Rescission Claimants is that Unitholders who elect the statutory remedy of rescission cease to be Unitholders and are therefore no longer bound by the applicable constating documents.³ The Rescission Claimants are trying to

¹ All capitalized terms not expressly defined herein are defined, and have the meanings set forth, in the Agreed Statement of Facts for Unitholder Priority Motion (the "**Agreed Statement of Facts**") located at Tab 2, Schedule "A" of the Receiver's Motion Record dated October 12, 2022 (the "**Motion Record**").

² For the purposes of this factum, "Rescission Claimants" means Unitholders with Potential Statutory Rescission Claims.

³ Factum of Misrepresentation Representative Counsel ("**Rescission Factum**") at para 23, Caselines Master Page: B-1-16.

overcome the unequivocal language in the constating documents that *no Unitholder shall be entitled to any preference, priority or right in any circumstance over any other Unitholder*.⁴ It is further suggested that the amounts invested by the Statutory Rescission Claimants are subject to a trust and do not form part of Bridging's estate.⁵

4. The argument raised by the Rescission Claimants is contrary to the leading case law, which provides that: (i) rescission rights on the basis of misrepresentation cannot be exercised once a company is insolvent or winding-up; and (ii) regardless of whether rescission rights can be exercised, the claims derived from such rights are not afforded any priority.

(i) *Rescission Rights Cannot be Exercised in a Receivership*

5. It is well-established that rescission rights cannot be exercised in respect of an insolvent entity. The leading case law recognizes that, in the context of an insolvency or winding-up, a corporation may not be able to satisfy the claims of all stakeholders, thus changing the entire complexion of a corporation. Rights that a stakeholder may have been entitled to prior to an insolvency can be lost or limited.⁶
6. For example, in *Northwestern Trust Co.*⁷, the Supreme Court of Canada recognized that a claim of rescission for fraud or misrepresentation may be lost in the context of a winding-up due to a change of circumstances, which makes it unjust to exercise such a right:

⁴ See for example: section 3.6 of BIF LP Limited Partnership Agreement, Agreed Statement of Facts, Appendix "E", Caselines Master Page: E3590.

⁵ Rescission Factum at paras 33-34, CaseLines Master Page B-1-20.

⁶ See for example: *Blue Range Resource Corp.* (Re), 2000 ABQB 4 [*Blue Range*] at [para 39](#).

⁷ [McAskill v. Northwestern Trust Co.](#), 1926 CanLII 57 (SCC) [*Northwestern*].

The basis of this is that the winding-up order creates an entirely new situation, by altering the relations, not only between the creditors and the shareholders, but also among the shareholders *inter se*.⁸

7. The Supreme Court's decision in *Northwestern* was followed by Justice Romaine in *Blue Range*, who recognized that:

It is clear that, both in Canada and in the United Kingdom, once a company is insolvent, shareholders are not allowed to rescind their shares on the basis of misrepresentation (emphasis added).⁹

8. It is not open to the Rescission Claimants to exercise statutory rights of rescission to advance an argument that they are no longer Unitholders and no longer bound by the provisions of the constating documents.
9. There is no dispute regarding the *validity* or *enforceability* of the Potential Statutory Rescission Claims. That is assumed for the purposes of this motion. However, the Receivership Proceeding created an entirely new situation in which such rights cannot be *exercised* (whether to circumvent the provisions of the constating documents, to advance trust claims, or otherwise).
10. One of the fundamental purposes of a receivership is to preserve and realize upon the debtor's property for the benefit of all stakeholders. To facilitate this process, the stay of proceedings maintains the *status quo* and prevents all parties from exercising rights in respect of the debtor's property. This is to the benefit of the entire estate. As reflected in the endorsement of Justice Hainey issued in connection with the Appointment Order, the

⁸ *Northwestern* at [419](#).

⁹ *Blue Range* at [para 37](#).

Court determined that, as required under section 129 of the Securities Act, the appointment of the Receiver was in the best interests of investors and will further the due administration of securities law.¹⁰ It would undermine the objective of this proceeding (and the interests of investors generally) if certain groups of stakeholders were permitted to exercise rights (and obtain full recoveries in the process) when all other stakeholders cannot.

11. The Rescission Claimants cannot exercise any rescission rights in the context of this proceeding and therefore remain Unitholders in the Bridging Funds bound by the terms of the constating documents.

(ii) *No Priority Claim for Statutory Rescission*

12. Even if the Rescission Claimants could exercise rights of rescission and ceased to be Unitholders, the claims derived from statutory rights of rescission are not entitled to any priority over the claims of other investors
13. First, the Rescission Claimants have not satisfied the requirements for a trust.
14. Second, contrary to the Rescission Claimants' assertion, the case law supports the conclusion that investors with statutory rescission rights are not entitled to any priority. For example, in *Merit Energy*, in the context of a receivership and a bankruptcy, the Alberta Court of King's Bench held that the statutory rescission claims of investors under the Alberta Securities Act do not rank in priority to the claims of other investors.¹¹ The court recognized that, regardless of how they are framed, rescission claims are fundamentally a

¹⁰ [Appointment Order and Endorsement](#) of Justice Hainey dated April 30, 2021.

¹¹ *National Bank of Canada v. Merit Energy Ltd.*, 2001 ABQB 583 [*Merit Energy*] at [paras 1](#) and [48-55](#).

right to recover an investment and are not materially different from misrepresentation claims for damages¹² (which also provide the innocent shareholder with a right to recover the amount invested and are not “forward looking” as the Rescission Claimants suggest). On that basis, the court refused to grant any priority to the rescission claimants. Leave to appeal was denied.¹³

15. Finally, the *pari passu* principle provides that all stakeholders of the same class must share *pro rata* in any distributions in a liquidation. All Unitholders are innocent victims of the wrongdoing uncovered at Bridging. All Unitholders invested on substantially the same terms. The legal interest of each Unitholder is substantially similar in character and is derived from their beneficial ownership of Units in the Bridging Funds. All Unitholders have rights to the return of capital invested in the Bridging Funds (regardless of the legal doctrine deployed in respect of such rights). Accordingly, the Unitholders must share equally in the proceeds of the Bridging Funds in accordance with the *pari passu* principle.
16. The Ontario Court of Appeal in *Golden Oaks* recently endorsed the principle that victims of fraud should not use legal doctrines (in that case, the doctrine of corporate attribution) to enlarge their recoveries at the expense of other innocent victims.¹⁴ This is consistent with the *pari passu* principle. The Receiver submits that the arguments advanced on this motion should be considered against this backdrop.

¹² *Ibid* at [para 49](#).

¹³ [Delf v. Merit Energy Ltd.](#), 2002 ABCA 5.

¹⁴ *Golden Oaks Enterprises Inc. v. Scott*, 2022 ONCA 509 at paras [46](#), [50](#) and [58](#).

B. No Priority for Redemption Claims

17. The core argument of the Redemption Claimants¹⁵ is that the applicable agreements created an “enforceable liability” pursuant to which Potential Redemption Claimants are required to be paid within 30 days of the applicable Valuation Date¹⁶ (i.e., the last business day of each calendar month as of which the NAV is calculated for the purposes of quantifying and paying out redemptions accepted by Bridging). This argument ignores the fact that the Unfulfilled Redemption Requests were never completed or accepted, and is not supported by the applicable agreements or the leading case law.

(i) *The Unfulfilled Redemption Requests were never Accepted or Binding*

18. The applicable Valuation Date for each Unfulfilled Redemption Request was on or after April 30, 2021.¹⁷ Redemption requests, if accepted by Bridging, were generally not completed until the third or fourth week following the applicable Valuation Date (i.e., once the NAV as of the Valuation Date was calculated and the redemption amount could be quantified).¹⁸

19. The Receiver was appointed before any of the Unfulfilled Redemption Requests were accepted, priced, contracted, and paid out. The Appointment Order and the Temporary Order expressly prohibit the redemption of any Units. Accordingly, the Redemption

¹⁵ For the purposes of this factum, “Redemption Claimants” means Unitholders with Potential Redemption Claims.

¹⁶ Factum of Redemption Representative Counsel (“**Redemption Factum**”) at para 7, Caselines Master Page: B-2-4.

¹⁷ Agreed Statement of Facts at para 68, Caselines Master Page: E2849.

¹⁸ Agreed Statement of Facts at para 35, Caselines Master Page: E2838.

Claimants remain Unitholders in the Bridging Funds and it is not open to the Receiver to “honour” any such redemption requests.

20. Contrary to what the Redemption Claimants suggest, the Unfulfilled Redemption Requests were not “binding” nor were they “required” to be paid in any event.
21. The Trust Agreements provide that “notwithstanding any other provision herein ... the Manager has the sole discretion to accept or reject redemption requests and the Manager intends to accept redemption requests in circumstances where, in the view of the Manager, it would not be prejudicial to the applicable Fund to do so.”¹⁹ There are no circumstances under the applicable constating documents in which the Manager is *required* to accept redemption requests in respect of the Bridging Funds that are structured as trusts.
22. The Limited Partnership Agreement for MMF LP contains an identical provision to those contained in the Trust Agreements.²⁰ The Limited Partnership Agreements for BIF LP and BPDI LP are similar and give the General Partner broad discretion to accept or reject redemption requests, with the General Partner only being *required* to accept redemption requests in circumstances where, in the General Partner’s view, it would not be prejudicial to the partnership to do so.²¹ Such circumstances do not exist here.
23. Bridging is insolvent. It would be prejudicial to BIF LP and BPDI LP (and their stakeholders) to return capital to certain investors while they are insolvent and unable to

¹⁹ See for example: section 6.1 of BIF RSP Trust Agreement, Caselines Master Page: E3884.

²⁰ Section 5.1(j) of MMF LP Limited Partnership Agreement, Caselines Master Page: E3651.

²¹ See for example: section 5.1(g) of BIF LP Limited Partnership Agreement, Caselines Master Page: E3594.

satisfy their obligations to all stakeholders. This restriction on returning capital to investors while insolvent is expressly recognized in section 16(3) of the *Limited Partnerships Act*, which provides that limited partners who receive returns of capital remain liable to the partnership for such amount in the event that the limited partnership is insolvent or dissolved.²²

24. Accordingly, even if the Appointment Order and the Temporary Order were not granted, the Unfulfilled Redemption Requests were not *required* to be accepted or completed.
25. The fact that the Unfulfilled Redemption Requests were never accepted or binding is reflected in Bridging's financial statements. As set out in the Agreed Statement of Facts, only those redemption requests that were *accepted by Bridging and contracted through the issuance of a contract note or an electric settlement file (but not yet paid)* were listed as liabilities in Bridging's financial statements.²³
26. As at April 30, 2021, net contracted but unpaid redemptions are listed as \$0.²⁴ This reflects the reality that no redemption requests were accepted or completed at that time and therefore no corresponding adjustment to the "liabilities" side of the balance sheet was required to account for future cash outflows for completed redemptions.
27. The fact that a cash adjustment for "redemptions payable" appears in Bridging's financial statements is of little relevance to the question of priority in any event. Accounting

²² *Limited Partnerships Act*, R.S.O. 1990, c. L. 16, [s. 16\(3\)](#).

²³ Agreed Statement of Facts at para 57, Caselines Master Page: E2846.

²⁴ *Ibid.*

treatment does not have the effect of creating a priority or altering the legal rights as between issuer and investor. The Supreme Court has cautioned that the treatment of a claim in a company's financial statements should be accorded limited weight in determining its nature and priority.²⁵

(ii) ***Redemptions not a Priority “Liability”***

28. Most importantly, even if the Unfulfilled Redemption Requests could have been accepted (or were accepted in fact), this does not create any priority or differentiate the Potential Redemption Claims from any other Unitholder Claim.
29. This is expressly recognized in the constating documents. For example, section 4.3 of each Limited Partnership Agreement provides as follows:

Section 4.3 – Restricted Right of Withdrawal

No Partner will have any right to withdraw any amount or receive any distribution from the Partnership except as expressly provided for in this Agreement and as permitted by law. Any payment made on the retraction or redemption of Units shall be applied to reduce the Capital Contribution²⁶ of the Limited Partner redeeming its Units (emphasis added).²⁷

30. A request or demand for payment (such as a redemption request), even if accepted or binding, does not have the effect of transforming the legal rights of the parties or creating a priority where none otherwise exists. For example, when an unsecured creditor demands

²⁵ See for example: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, 1992 CanLII 49 at [para 62](#); *All Canadian Investment Corporation (Re)*, 2019 BCSC 1488 [*All Canadian*] at [para 146](#).

²⁶ “Capital Contribution” is defined in the Limited Partnership Agreements to mean, with respect to each Partner, the aggregate amount of cash received by the Partnership from such Partner ... including, in the case of a Limited Partner, in respect of Units subscribed for by such Limited Partner...

²⁷ See for example: section 4.3 of BIF LP Limited Partnership Agreement, Caselines Master Page: E3593.

payment from a debtor, this does not have the effect of elevating the claim of the unsecured creditor to that of a secured or preferred creditor.

31. A claim derived from an Unfulfilled Redemption Request is no different from any other Unitholder Claim. It is fundamentally a claim for the return of capital. There is no legal or equitable basis to grant a priority.
32. This conclusion is supported by the leading case law. For example, in *Central Capital*, Justice Laskin of the Ontario Court of Appeal determined that a shareholder with a “retraction right” (similar to a redemption right) that was exercised prior to the commencement of a CCAA proceeding does not have a priority “liability” claim.²⁸
33. The reasoning of Justice Laskin in *Central Capital* was adopted by the British Columbia Supreme Court in *Dexior* and *All Canadian*, where the court recognized that: (i) the fact that a redemption notice was issued prior to bankruptcy does not change the original intention or the substance of the underlying claim;²⁹ and (ii) the mere presence of a redemption right (regardless of whether it was exercised pre-filing) does not have the effect of creating a priority where none otherwise exists.³⁰

C. Quebec Securities Act does not Apply

34. In addition to adopting the arguments described above, the Quebec Claimants assert that the Quebec Securities Act applies to the priority issue as it relates to the Potential Statutory

²⁸ *Central Capital Corp., Re*, 1996 CarswellOnt 316 at [paras 111-150](#).

²⁹ *Dexior Financial Inc. (Re)*, 2011 BCSC 348 [*Dexior*] at [para 16](#).

³⁰ *All Canadian* at [para 105](#).

Rescission Claims.³¹ This is incorrect. The Quebec Securities Act does not apply in these circumstances and, as set out below, the applicability of the Quebec Securities Act has no impact on the question of priority in any event.

35. As set out in the Agreed Statement of Facts and the Priority Motion Representative Counsel Order, Unitholders resident in Quebec were granted *contractual* rights of rescission that are the same as those provided to purchasers resident in Ontario under the Ontario Securities Act.
36. Unitholders resident in Quebec were granted *contractual* rights of rescission because the rescission rights available under the Quebec Securities Act are limited to investors who purchased pursuant to a prospectus, an offering memorandum *prescribed by regulation*, and any other document authorized by the Quebec securities regulatory authority in lieu of a prospectus. The offering memorandum *prescribed by regulation* contemplated by the Quebec Securities Act must meet specific disclosure and other requirements under the “offering memorandum” prospectus exemption pursuant to National Instrument 45-106 *Prospectus Exemptions*. The Quebec Securities Act does not provide rescission rights to Quebec investors who purchase securities under a *non-prescribed* form of offering memorandum pursuant to other prospectus exemptions under National Instrument 45-106, including the “accredited investor” or “minimum amount investment” exemptions (such as the offering memoranda for the Bridging Funds).³²

³¹ Factum of Quebec Representative Counsel at paras 22-32.

³² [Securities Act \(Quebec\)](#), 1982, c. 48; 2001, c. 38, s. 1 at sections 217 and 221.

37. Accordingly, the submissions of the Quebec Claimants are built upon the incorrect premise that the Quebec Securities Act applies and should be disregarded.
38. Even if the Quebec Securities Act does apply in these circumstances, the analysis with respect to priority does not change. The rights available under the Quebec Securities Act are substantially similar to those provided for under the Ontario Securities Act. There is nothing under the Quebec Securities Act or otherwise at civil law that provides or purports to provide any priority to the Potential Priority Claims.

PART III - RELIEF REQUESTED

39. For all of the foregoing reasons, the Receiver requests that this Honourable Court grant the Priority Motion Order substantially in the form of the draft Order located at Tab 3 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of November, 2022.



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