

Court of Appeal File No.

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant

- and -

BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGNG 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

- and -

REPRESENTATIVE COUNSEL FOR THE UNITHOLDERS

(Appellant)

MISREPRESENTATION REPRESENTATIVE COUNSEL

(Respondent on appeal)

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

NOTICE OF APPEAL

THE APPELLANT, Bennett Jones LLP, in its capacity as representative counsel (in such capacity, "**Representative Counsel**") for unitholders (the "**Unitholders**"), except Opt-Out Unitholders (as defined below) in all of the funds managed by Bridging Finance Inc., APPEALS

to the Court of Appeal from the order of Chief Justice Morawetz dated April 12, 2023 made at Toronto, Ontario (the "**Order**").

THE APPELLANT ASKS that (capitalized terms defined below):

1. The Order be set aside in so far as it grants the Potential Statutory Rescission Claims a priority over General Unitholder Claims; and
2. An order be granted that:
 - (a) The Potential Redemption Claims and the Potential Statutory Rescission Claims are not entitled to any priority over General Unitholder Claims with respect to the distribution of proceeds of the Bridging Funds; and
 - (b) The Potential Redemption Claims, the Potential Statutory Rescission Claims and the General Unitholder Claims shall rank *pari passu* with respect to the distribution of proceeds of the Bridging Funds.

THE GROUNDS OF APPEAL are as follows:

Background and the Motion Below

3. This appeal arises in the context of the receivership of Bridging Finance Inc. that, prior to the appointment of the receiver, offered alternative investment options to retail and institutional investors through its investment vehicles (collectively, the "**Bridging Funds**"). Investors participated in the Bridging Funds through the purchase of units, being either limited partnership or trust units depending on the Bridging Fund invested into.

4. Pursuant to Court orders dated April 30, 2021 and May 3, 2021 (the "**Appointment Orders**"), PricewaterhouseCoopers Inc. was appointed as receiver (the "**Receiver**") over the Bridging Funds, upon application by the Ontario Securities Commission under section 129 of the *Securities Act* (Ontario), R.S.O. 1990, c. S. 5.

5. On May 14, 2021, the Court granted an order continuing the Receiver's appointment pursuant to the Appointment Orders until further order of the Court.

6. On October 14, 2021, Bennett Jones LLP was appointed as Representative Counsel for all unitholders in the Bridging Funds (the "**Unitholders**") with the exception of Unitholders who chose to opt-out of representations (the "**Opt-Out Unitholders**").

7. On October 12, 2022, the Receiver brought the underlying motion, which proceeded on an Agreed Statement of Facts between the parties. The issue to be decided on the motion was whether the holders of valid Potential Statutory Rescission Claims and/or Potential Redemption Claims were entitled to any priority over General Unitholder Claims with respect to the distribution of proceeds of the Bridging Funds. These three types of claims were defined as follows:

- (a) "**Potential Statutory Rescission Claims**" means the claim of a Unitholder against the relevant Bridging Fund pursuant to section 130.1(1)2 of the Ontario *Securities Act* and the corresponding securities legislation in other provinces and territories for amounts contributed by way of subscription into the Bridging Funds within the 180 day period (or 120 days, as applicable) prior to the [date of the Receiver's appointment], based on misrepresentations made in the offering memoranda of the applicable Bridging Fund, without regard to whether a Unitholder relied on such

misrepresentation, and includes the corresponding claims of Unitholders in British Columbia and Quebec, or Unitholders in Alberta who purchased Units under an "accredited investor" exemption, who were granted contractual rights of rescission by Bridging that are the same as those provided for under section 130.1(1)2 of the Ontario *Securities Act*;

- (b) **"Potential Redemption Claims"** means the claims of Unitholders in connection with Unfulfilled Redemption Requests;¹ and
- (c) **"General Unitholder Claims"** means the claims of Unitholders against the Bridging Funds which are not Potential Statutory Rescission Claims or Potential Redemption Claims.

8. Pursuant to a Court order dated May 26, 2022, additional representative counsel were appointed to represent the following groups for the purposes of the Motion: (i) Unitholders outside of Quebec with Potential Statutory Rescission Claims; (ii) Unitholders outside of Quebec with Potential Redemption Claims; and (iii) Unitholders in Quebec with Potential Statutory Rescission Claims and Potential Redemption Claims.

9. The Agreed Statement of Facts provided, among other things, that it was to be assumed for purposes of the Motion 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

¹ **"Unfulfilled Redemption Requests"** means the validly exercised requests of Unitholders against the relevant Bridging Fund of their intention to redeem Units in one or more of the Bridging Funds prior to the Date of Appointment, but which were not completed.

Unitholder Claims and any additional claims. In other words, all parties to the motion agreed that the Bridging Funds are insolvent.

10. The impact of a finding of priority on the General Unitholder Claims is significant. As set out in the Agreed Statement of Facts, the total projected realizations for the Bridging Funds were estimated to be between \$701 million to \$861 million, including approximately \$548 million of cash on hand, before costs. This represents a recovery range in the aggregate for all Bridging Funds of 34% to 41%.

11. On the Motion below, the Agreed Statement of Facts stipulated that if a priority was found for Potential Statutory Rescission Claims, it was estimated that the total net recoveries for Unitholders without such claims would be in the range of approximately \$498.6 million to \$658.6 million, representing a recovery range in the aggregate for all Bridging Funds of 26% to 35%.

The Decision under Appeal

12. After a two-day hearing in November 2022, the Motion Judge released his decision on April 12, 2023, and concluded:

- (a) The Potential Redemption Claims are not entitled to any priority over General Unitholder Claims with respect to the distribution of proceeds of the Bridging Funds.
- (b) The Potential Statutory Rescission Claims are entitled to priority over General Unitholder Claims with respect to the distribution of proceeds of the Bridging Funds.

- (c) The Potential Redemption Claimants and the General Unitholder Claims shall rank *pari passu* with respect to the distribution of proceeds of the Bridging Funds.

Errors in the Decision Made

13. The judge in respect of the Motion, Chief Justice Morawetz (the "**Motion Judge**") erred in law by not applying the *pari passu* principle. In particular, and among other things:

- (a) The Agreed Statement of Facts 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, *i.e.* that the Bridging Funds are insolvent. The *pari passu* principle is a governing tenet of insolvency law that must be applied in situations of insolvency. This principle applies in all cases of insolvency as is not limited to insolvencies under federal insolvency statutes. The Motion Judge erred in law by not applying the *pari passu* principle in light of the Agreed Statement of Facts;
- (b) A purported basis for not applying the *pari passu* principle was the Motion Judge's conclusion that subsection 130.1(1) of the Ontario *Securities Act* creates a "*de facto* priority". The Motion Judge erred in law by finding that any priority purportedly created by finding that any priority purportedly created by this provision ousts the fundamental common law *pari passu* principle, or is an exception to its application;

- (c) The Motion Judge erred in law, or committed an error of mixed fact and law, by applying insolvency rules differently in a receivership under the Ontario *Securities Act* than they would be (and have been) applied in any other provincial or federal receivership;
- (d) The Motion Judge created an untenable distinction between an insolvent entity in a receivership under the Ontario *Securities Act*, in which he purported to apply a new set of rules, and insolvent entities in receiverships under other statutes and/or federal insolvency statutes; and
- (e) The failure to apply the *pari passu* rule was also contrary to the governing statutes and agreements, including the *Limited Partnerships Act* (Ontario), R.S.O. 1990, c. L.16, the Offering Memoranda, the Limited Partnership Agreements and the Trust Agreements.

14. The Motion Judge erred in law by interpreting subsection 130.1(1) of the Ontario *Securities Act* as providing a statutory "*de facto* priority". In particular, and among other things, the Motion Judge erred:

- (a) In failing to conduct a proper statutory interpretation analysis in accordance with well-established principles of statutory interpretation;
- (b) In interpreting subsection 130.1(1) of the Ontario *Securities Act* (and equivalent provisions) in a manner that is contrary to the plain language of the provision;

- (c) In failing to compare the language of subsection 130.1(1) of the Ontario *Securities Act* to other statutes put before him in which the legislature expressly provided for a statutory priority;
- (d) By equating a statutory *right* or *remedy* (and the equivalent contractual right granted to certain Unitholders without the statutory right) to a statutory *priority*; and
- (e) By effectively creating a new category of secured creditors in an insolvency through such a "*de facto* priority" without any statutory authority or legal basis to do so.

15. The Motion Judge erred in law, mixed fact and law, and/or in fact by imposing a constructive trust with respect to the Potential Statutory Rescission Claims. In particular, and among other errors:

- (a) The constructive trust was imposed as a remedy based on the Motion Judge's finding that the Potential Statutory Rescission Claims hold a *de facto* priority, which was itself an error in law. The constructive trust therefore cannot stand;
- (b) The imposition of a constructive trust was based on the error that the legal rights of the holders of Potential Statutory Rescission Claims are different than the holders of Potential Redemption Claims and General Unitholder Claims. The constructive trust therefore cannot stand;

- (c) The imposition of a constructive trust was contrary to the governing statutes and agreements, including the Ontario *Limited Partnerships Act*, the Offering Memoranda, the Limited Partnership Agreements and the Trust Agreements;
- (d) The four requirements for imposition of a constructive trust were not satisfied;
- (e) The imposition of a constructive trust in these circumstances is unjust and inequitable; and
- (f) The imposition of a constructive trust in these circumstances fails to appropriately consider the rights and equities of all other affected persons.

16. The Motion Judge erred in law, mixed fact and law, and/or in fact by misinterpreting the contractual and governing documents between the parties, including the Offering Memoranda, Limited Partnership Agreements and Trust Agreements. In particular, and among other things:

- (a) The Motion Judge failed to properly apply the governing principles of contractual interpretation to ascertain the intentions of the parties, including all Unitholders;
- (b) The Order results in a finding contrary to the plain language of the Offering Memoranda, Limited Partnership Agreements and Trust Agreements, and contrary to the intentions of the parties; and

- (c) The interpretation is contrary to the terms of the Ontario *Limited Partnership Act*.

17. The Motion Judge erred in law, mixed fact and law, and/or in fact, by finding that the holders of Potential Statutory Rescission Claims need not take any post-receivership steps to finalize their claims. In coming to this conclusion, the Motion Judge, among other things:

- (a) Failed to give effect to, and properly apply, the principles applicable to insolvency and receivership proceedings;
- (b) Failed to properly interpret subsection 130.1(1) of the Ontario *Securities Act* (and equivalent statutory provisions in other provinces and contractual rights);
- (c) Failed to give effect to, and properly apply the provisions of the Ontario *Limited Partnership Act*;
- (d) Failed to properly interpret the contractual and governing documents between the parties, including the Offering Memoranda, Limited Partnership Agreements and Trust Agreements; and
- (e) Relied on this to justify a statutory priority without any legal basis to do so.

18. Such further and other grounds as counsel may advise.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

19. Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. 43;

20. The Order appealed from is final; and

21. Leave to appeal is not required.

May 11, 2023

Bennett Jones LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, ON M5X 1A4

Robert Staley (LSO#27115J)
Tel No. (416) 777-4857
Email: StaleyR@bennettjones.com

Douglas A. Fenton (#75001I)
Tel No. (416) 777-6084
Email: fentond@bennettjones.com

Bennett Jones LLP, solely in its capacity as
Court-Appointed Representative Counsel

TO THE SERVICE LIST

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Proceeding commenced at Toronto, Ontario

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BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Robert Staley (LSO#27115J)
Tel No. (416) 777-4857
Email: StaleyR@bennettjones.com

Douglas A. Fenton (#750011)
Tel No. (416) 777-6084
Email: fentond@bennettjones.com

Bennett Jones LLP, solely in its capacity as Court-Appointed
Representative Counsel

