COURT OF APPEAL FOR ONTARIO

CITATION: Ontario Securities Commission v. Bridging Finance Inc., 2023 ONCA 769
DATE: 20231117
DOCKET: COA-23-CV-0514, COA-23-CV-0559 & COA-23-CV-0560

van Rensburg, Hourigan and Favreau JJ.A.

BETWEEN

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

Robert Staley and Douglas Fenton, for the appellant, General Unitholders (COA-23-CV-0559), and the respondent, General Unitholders (COA-23-CV-0560 and COA-23-CV-0514)

Gavin H. Finlayson and Matthew G. Smith, for the respondent, Outside Quebec Misrepresentation Claimants (COA-23-CV-0559)

Sylvain Rigaud, Eric Bédard, Émilie St-Pierre and Joshua Bouzaglou, for the respondent, Quebec Misrepresentation Claimants (COA-23-CV-0559), and the appellant, Quebec Redemption Claimants (COA-23-CV-0560)

Robb English and Mark J. van Zandvoort, for the appellant, Outside Quebec Redemption Claimants (COA-23-CV-0514)

John L. Finnigan, Grant B. Moffat and Adam Driedger, for the respondent, PricewaterhouseCoopers Inc. (COA-23-CV-0514 and COA-23-CV-0560)

Heard: October 18, 2023

On appeal from the order of Chief Justice Morawetz of the Superior Court of Justice, dated April 12, 2023, with reasons reported at 2023 ONSC 715.

Hourigan J.A.:

I. OVERVIEW

[1] Bridging Finance Inc. ("Bridging") is a privately held investment management firm, which offered alternative investment options to retail and institutional investors through its investment vehicles (referred to collectively herein as the "Bridging Funds"). Bridging raised capital from investors through the sale of units ("Units"). Depending on the Bridging Fund, the Units were either limited partnership units or trust units. There is an aggregate of approximately 25,900 investors ("Unitholders") across the 13 Bridging Funds.

[2] Serious issues arose regarding the operations of Bridging. On April 30, 2021, the Ontario Securities Commission issued an application requesting an order pursuant to s. 129 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 ("*OSA*") to place the Bridging Funds into receivership. PricewaterhouseCoopers Inc. was appointed by order of the Superior Court on that date (the "Appointment Order") as receiver and manager (the "Receiver"), without security, of all of the assets, undertakings, and properties of most Bridging Funds.

[3] Pursuant to para. 9 of the Appointment Order, Bridging was ordered not to redeem existing Units in any of the Bridging Funds. In addition, also on April 30, 2021, the Ontario Securities Commission issued a temporary order (the "Temporary Order") to cease trading the securities of most of the Bridging Funds. No redemptions have been accepted, completed, or paid since these orders were issued. Other court orders were made, including an order appointing Bennett Jones LLP as counsel for the General Unitholders. For the purpose of this proceeding, the "General Unitholders" are those Unitholders that have not opted out of representation by the Representative Counsel for the General Unitholders, and are neither Statutory Rescission Claimants nor Redemption Claimants, as those terms are defined below.

[4] Following the appointment of the Receiver, certain Unitholders and their advisors informed the Receiver that they may wish to pursue and/or preserve certain rights of rescission or rights of action for damages that arose before the Appointment Order as a result of alleged misrepresentations contained in the offering memoranda. Those potential claimants included Unitholders who intended to bring a claim for rescission under s. 130.1 of the *OSA* (or equivalent securities legislation) or who had statutory rescission rights granted to them in their contracts (the "Statutory Rescission Claims"). These investors (the "Statutory Rescission

Claimants"[1]) assert that they should have a priority claim on the assets of the Bridging Funds.

[5] Certain other Unitholders had provided notice of their intention to redeem Units in the Bridging Funds prior to the Date of Appointment and the Temporary Order and had redemption dates on or before April 30, 2021. However, due to the Temporary Order and the Appointment Order, such redemptions were not completed (the "Redemption Claims"). Those investors (the "Redemption Claimants"[2]) also submit that they should have a priority claim over the assets of the Bridging Funds.

[6] The Receiver brought a motion seeking an order declaring that the Redemption Claims and the Statutory Rescission Claims have no priority over the claims of the General Unitholders (the "General Unitholders' Claims") and an order that all Unitholders shall rank *pari passu* with respect to the distribution of the proceeds of the Bridging Funds. The motion judge ordered that the Statutory Rescission Claims had priority over the General Unitholders' Claims and that the Redemption Claims do not have priority over the General Unitholders' Claims. He further ordered that the Redemption Claims and the General Unitholders' Claims

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[1] "Statutory Rescission Claimants" refers to both the Quebec Misrepresentation Claimants and the Outside Quebec Misrepresentation Claimants.
[2] "Redemption Claimants" refers to both the Quebec Redemption Claimants and the Outside Quebec Redemption Claimants.

shall rank *pari passu* with respect to the distribution of the proceeds of the Bridging Funds.

[7] Appeals were commenced by the Redemption Claimants regarding the denial of their priority claim and by the General Unitholders about the priority granted to the Statutory Rescission Claims. The issues raised by these appeals and my conclusion on each issue may be summarized as follows:

1. **What is the appropriate standard of review?** The standard of review is correctness. The constating documents are contracts of adhesion and there is no relevant factual matrix that forms part of the contractual analysis. Further, the interpretation of the *OSA*, as a statute of general application, must be reviewed on a correctness standard.

2. **Did the motion judge err in finding that the Redemption Claims are not entitled to any priority over the General Unitholders' Claims?** No. The motion judge correctly determined that these claims had not crystallized as at the time of the Appointment Order and that they were still subject to Bridging's discretion to refuse to honour or postpone the redemption requests. That discretion was designed to ensure that Bridging avoided situations where it would be financially prejudicial to payout redemption requests. To properly exercise its discretion and make an informed business judgment about paying out redemptions, Bridging needed to be able to consider the precise quantum of the liability for redemptions in the context of its current financial position. Therefore, until the Redemption Claims were quantified, they were subject to Bridging's discretion. Otherwise, the utility of the discretion clauses would be compromised. Accordingly, the motion

judge made no error in concluding that the Redemption Claims were not entitled to any priority.

3. **Did the motion judge err in finding that the Rescission Claims are entitled to priority over the General Unitholders' Claims?** Yes. While it is unclear from the reasons, it would appear that the motion judge found the priority based on s. 130.1 of the *OSA* or in the nature of the rescission remedy itself. The priority cannot be grounded in the *OSA*, as there is nothing in the language of the statute that suggests that the legislature intended to grant a priority. When legislatures grant priorities, they do so in clear and unambiguous terms. They do not leave open the possibility of a priority by implication, because the whole purpose of statutorily created priorities is to clarify the relative standing of competing claims in a manner that is clear and easily applicable. The nature of the remedy also cannot be the basis for a priority. The motion judge found that the Statutory Rescission Claims stand in priority to the General Unitholders' Claims. However, the General Unitholders' Claims include claims for common law rescission. If the priority for Statutory Rescission Claimants is based on the nature of the remedy, they cannot stand in priority to common law rescission claimants because, regardless of how the right to rescission is established, the nature of the remedy is the same. Therefore, there is no basis to find that the Statutory Rescission Claimants are entitled to a priority.

4. **Should all Unitholders rank *pari passu* with respect to the distribution of proceeds of the Bridging Funds?** Yes. There is no basis to find a priority for either the Redemption Claims or the Statutory Rescission Claims. Therefore, the Unitholders should share *pari passu*. This is consistent with the constating documents of the Bridging Funds, which provided that holders

of Units had the same rights and obligations as all other holders of the same class or series of Units.

II. ANALYSIS

(1) Standard of Review

[8] A central component of the motion judge's analysis was his consideration of the constating documents to determine which claimants, if any, have a priority. The standard of review of a decision interpreting a contract depends on the nature of the contract. In *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, the Supreme Court of Canada held that contractual interpretation is a matter of mixed fact and law because the words of a contract are interpreted in light of its factual matrix.

[9] After *Sattva* was released, questions arose regarding the precise scope of the ruling. For example, many commercial and consumer contracts are standard form documents presented on a take it or leave it basis. These are not situations where the parties sat across a table and hammered out a bargain. There is no relevant factual matrix for such contracts. There were also concerns regarding the precedential value of appellate decisions interpreting standard form contracts. For example, in *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, at para. 40, this court held that it would be unacceptable to have two different interpretations of the same clause in a standard form insurance policy. A correctness standard of review therefore "best ensures that

provincial appellate courts are able to fulfill their responsibility of ensuring consistency in the law": *MacDonald*, at para. 41.

[10] The Supreme Court clarified the scope of *Sattva* in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.,* 2016 SCC 37, [2016] 2 S.C.R. 23. At para. 24, Wagner J. (as he then was), writing for the majority, found an exception to the rule in *Sattva* and outlined three relevant factors to determine the appropriate appellate standard of review of standard form contracts, as follows:

> I would recognize an exception to this Court's holding in *Sattva* that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. In my view, where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[11] I have no difficulty in concluding that the constating documents are standard form agreements, otherwise known as contracts of adhesion. These were take it or leave it contracts and there is no suggestion that the more than 25,000 Unitholders were able to negotiate their agreements with Bridging: see e.g., *Mikelsteins v. Morrison Hershfield Limited*, 2019 ONCA 515, at paras. 11-12. There is also no suggestion that there is a relevant factual matrix that informed the motion judge's contractual analysis.

[12] The remaining *Ledcor* factor is the issue of precedential value. Counsel for the Receiver submits that the correctness standard of review does not apply because there is no precedential value in this case given that Bridging is in receivership and there will be no future claims against it. I accept this submission and agree that there likely will be no future litigation against Bridging requiring the interpretation of the constating documents. In addition, I also appreciate that the Supreme Court in *Ledcor* found that the presence of all three factors resulted in the imposition of the correctness standard of review.

[13] The issue that remains open – and which has been raised in this case – is what happens in a situation with a standard form contract executed by tens of thousands of people where there is no relevant factual matrix, but there is little or no chance of future litigation involving the same contract. Usually, standard form contracts automatically have precedential value because there are other potential litigants who executed the same contract. However, the case at bar is a unique situation because Bridging will not be extant in the future and all claims are being resolved in this proceeding. Does the fact that there is no precedential value mean that the motion judge's analysis must be reviewed on a deferential standard of review? In the circumstances of this case, the answer to that question is no. Given that there are no factual findings and, indeed, scant reference to the facts underlying the creation of the constating documents, there is no basis for this court to defer to the motion judge.

[14] In my view, the absence of one of the *Ledcor* factors should not automatically lead to the imposition of a deferential standard of review. In the case at bar, the motion judge was engaged in a purely legal analysis about contracts that will potentially impact thousands of people. This court is in as good a position as the motion judge to analyze the constating documents and reach a conclusion as to their legal meaning. There is no reason to take a deferential approach. Therefore, I find that the standard of review of the motion judge's contractual analysis is correctness.

[15] The other significant issue in the motion judge's analysis is his interpretation of s. 130.1 of the *OSA*. The interpretation of a statute on appeal is also reviewed on a standard of correctness: see e.g., *Harvey v. Talon International Inc.*, 2017 ONCA 267, 137 O.R. (3d) 184, at para. 32; *Oakville (Town) v. Clublink Corporation ULC*, 2019 ONCA 826, 148 O.R. (3d) 513, at para. 35.

(2) Redemption Claims

[16] It is not disputed that there was no market for the trading or selling of the Units in the Bridging Funds as between investors. Thus, to effectively "cash out", in whole or in part, of an investment in the Bridging Funds, a Unitholder redeemed their Units. In effect, they sold their Units back to Bridging in accordance with the redemption process prescribed by the constating documents. To properly evaluate the priority asserted by the Redemption Claimants, it is first necessary to

understand, in broad strokes, how the redemption process worked. The following is a summary of the process, as outlined in the Agreed Statement of Facts filed by the parties on the motion (the “Agreed Statement of Facts”):

a) a Unitholder submits a notice to redeem some or all of its Units during a particular month. This triggers a 30 or 90 day notice period (the “Redemption Notice Period”);
b) the last day of the month in which the Redemption Notice Period expires is the Valuation Date;
c) redemptions could only be made effective as of the applicable Valuation Date following the receipt of a redemption notice. This was generally defined to be the “Redemption Date” under the applicable constating documents;
d) the constating documents permitted the appointment of a fund administrator (the “Fund Administrator”). The redemption procedures that were generally followed by the Fund Administrator were not described in the constating documents;
e) the Redemption would not be priced or considered by the Fund Administrator to be accepted and “contracted” until the Net Asset Value was calculated for the applicable Valuation Date. This was typically done three to four weeks following the Valuation Date. The Fund Administrator

would record the redemption request as “uncontracted” until this calculation occurred; and

f) the constating documents of the Bridging Funds provide that redemption proceeds must be paid out not later than 30 days following the applicable Valuation Date (60 days if such date was the Bridging Fund’s fiscal year-end).

[17] The constating documents grant Bridging the discretion to accept, reject, or suspend a redemption request. Nothing in those documents places a temporal limit on when the discretion must be exercised. The precise wording of these clauses varies by fund. Below is a list of some of the language used, along with its location within the constating documents:

- Amended and Restated Confidential Offering Memorandum, Bridging Mid-Market Debt RSP Fund (January 1, 2021): “The Manager has the sole discretion to accept or reject redemption requests. The Manager intends to accept redemption requests in circumstances where, in the view of the Manager, it would not be prejudicial to the Fund to do so.”
- Confidential Offering Memorandum, Bridging Fern Alternative Credit Fund (April 1, 2020): “The Manager may suspend the right of Unitholders to require the Fund to redeem Units held by them and the concurrent payment for Units tendered for redemption for any period not exceeding 120 days during which the Manager determines that conditions exist which render

impractical the sale of the assets of the Fund or which impair the ability of the Fund to determine the value of the assets of the Fund. A suspension may apply to all Redemption Notices received prior to the suspension, but as for which payment has not been made, as well as to all Redemption Notices received while the suspension is in effect."

- Second Amended and Restated Trust Agreement Between Bridging Finance Inc. and Odyssey Trust Company (January 1, 2021): "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 Fund to do so."

[18] The motion judge identified that the Redemption Claimants' core argument is that the constating documents created an enforceable liability pursuant to which they are required to be paid within 30 days of the applicable Valuation Date. He concluded that the "fatal problem with this argument is that the redemption requests of these Redemption Claimants had not been completed." The motion judge reasoned that the Unitholders who provided a notice to redeem but whose payments had not been issued by Bridging at the time of the Appointment Order had incomplete redemption requests because they were not priced, contracted, or paid out. In addition, the motion judge found that the redemption was subject to Bridging's overall discretion to refuse or postpone a redemption request.

[19] The Redemption Claimants make two primary submissions on appeal. First, they argue that the motion judge did not take into consideration the clear language of all the redemption provisions, including the language that provides that a redemption request becomes an enforceable liability on the Redemption Date. According to these appellants, the motion judge failed to recognize that they are not seeking a return of capital invested but have distinct contractual claims, which constitute an enforceable liability of the Bridging Funds that are senior to the claims of General Unitholders pursuant to s. 24 of the *Limited Partnerships Act*, R.S.O. 1990, c. L.16.

[20] Second, the Redemption Claimants argue that the motion judge further erred in considering post-contractual internal practices of the Fund Administrator as evidence supporting his derogation from the parties' constating documents. They submit that the motion judge's reliance on whether redemption requests were subsequently priced, contracted, or paid out by the Fund Administrator is irrelevant for the purposes of determining whether the Redemption Claimants have priority over General Unitholders' Claims.

[21] I do not accede to these submissions. Contracts are to be interpreted as a whole, in a manner that gives meaning to all of their terms and avoids an interpretation that would render one or more of the terms ineffective. They are also to be interpreted in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity: *Ventas, Inc. v.*

Sunrise Senior Living Real Estate Investment Trust, 2007 ONCA 205, 85 O.R. (3d) 254, at para. 24.

[22] As noted, the wording of the discretion clauses varies, but, at their essence, they all achieve the same result. They reserve to Bridging the power to prevent or delay redemptions in circumstances where it would be prejudicial to pay out the redemption requests. This is a failsafe provision, which allows Bridging to make a business decision to stop or delay a redemption depending on the financial circumstances of the particular fund. In order for Bridging to make an informed decision about whether to exercise this discretion, it would need to have available certain essential information. This would include the total amount payable for the redemption requests.

[23] This is not a matter concerning the post-contractual internal practices of the Fund Administrator. Rather, the constating documents anticipated that a calculation would have to be completed after the Valuation Date. That amount would be considered in the context of the financial situation of the fund at the time of payment. A business judgment would then be made regarding whether it would be prejudicial to approve the redemptions. It follows that for the discretion provisions to be effective, they must be available up to and until the payment of the Redemption Price. This explains why there is no time limit on the use of the discretion clauses.

[24] Based on the foregoing, it is my view that the trial judge was correct in his analysis of the Redemption Claims. He was right to focus on the fact that the requests had not been valued and were still subject to Bridging's discretion. Therefore, I would dismiss the Redemption Claimants' appeal.

(3) Statutory Rescission Claims

[25] As noted, the motion judge found that the Statutory Rescission Claims are entitled to priority over the General Unitholders' Claims. He also stated that the remedy for the Statutory Rescission Claimants must be meaningful and concluded that it was appropriate to impose a constructive trust.

[26] It is unclear from the reasons how the motion judge arrived at this conclusion. In his analysis, the motion judge made the following statements without referring to any specific authorities. He stated that "the nature of rescission as a remedy creates a *de facto* priority." The motion judge also found that "statutory rescission is a remedy conferred by the *OSA* and its application is non-discretionary." It would appear, therefore, that there are two possible sources for the priority granted by the motion judge to the Statutory Rescission Claims: (a) the wording of s. 130.1 of the *OSA*, and (b) the nature of the rescission remedy. Below, I will consider each source in turn.

(a) Section 130.1 of the *OSA*

[27] The relevant subsections of s. 130.1 of the *OSA* provide:

> **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. 2004, c. 31, Sched. 34, s. 7.
>
> **Defence**
>
> (2) No person or company is liable under subsection (1) if he, she or it proves that the purchaser purchased the securities with knowledge of the misrepresentation. 1999, c. 9, s. 218.
>
> **Limitation in action for damages**
>
> (3) In an action for damages pursuant to subsection (1), the defendant is not liable for all or any portion of the damages that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation relied upon. 1999, c. 9, s. 218.
>
> …
>
> **Limitation re amount recoverable**
>
> (6) In no case shall the amount recoverable under this section exceed the price at which the securities were offered. 1999, c. 9, s. 218.

> **No derogation of rights**
>
> (7) The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the purchaser may have at law. 1999, c. 9, s. 218.[3]

[28] Given the motion judge's comments about s. 130.1 being "non-discretionary," it is essential to consider what the section actually provides. It is clear on the face of s. 130.1 that the legislature has made it easier to assert a claim for either rescission or damages based on a misrepresentation in an offering memorandum by obviating the need to prove reliance. The legislature also took the decision regarding choice of remedy between damages or rescission out of the hands of the court and permitted the plaintiff to make the election. Therefore, the *OSA* confers a non-discretionary right to elect a remedy, but it does not grant a non-discretionary right to a remedy. The right to damages or rescission is not automatic. The court must be satisfied regarding several factors, including that a misrepresentation was made and that the defence in s. 130.1(2) does not apply. Only then will a plaintiff be entitled to a remedy. This remedy is available generally to security holders and is not limited to insolvency situations.

[29] The more significant issue is whether, in enacting this section, the legislature intended to grant a priority to rescission claimants. There is no language in the section that explicitly references granting a priority. This is a curious omission if

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[3] Quebec securities legislation grants an equivalent right of action. See *Securities Act*, C.Q.L.R. c.V-1.1, ss. 217, 221, and 225.0.2.

that was the legislature's intention. A legislature is presumed to use the clearest way of expressing its intention: Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada, 2023), at § 8.02. Accordingly, the ordinary meaning of a legislative provision is deemed to be the meaning intended by the legislature, unless compelling reasons exist to justify a departure from the ordinary meaning: Sullivan, at § 3.01; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. In keeping with this presumption, Canadian courts have consistently held that express and unambiguous statutory language is required to create a statutory priority. The list of examples is numerous, both in the insolvency context and beyond.

[30] Courts have held that the absence of express statutory language is fatal to claims for statutory priority. For example, the Supreme Court has rejected the proposition that the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("*BIA*") or the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("*CCAA*") confer on the Crown a statutory priority in respect of GST claims upon insolvency, concluding that if Parliament had "sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions": *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 51. Similarly, this court has refused to import a municipal super priority into the provisions of the *Residential Tenancies Act*, 2006, S.O. 2006, c. 17, dealing with payment for vital services, holding that there is no basis for any sort of priority

"[w]ithout explicit language from the legislature": *Hamilton (City) v. The Equitable Trust Company*, 2013 ONCA 143, 114 O.R. (3d) 602, at para. 29. In short, courts have rejected statutory priority claims unless the claim is supported by unequivocal statutory language.

[31] Two such examples of clear language are s. 67(3) of the *BIA* and the former s. 18.3(2) of the *CCAA*. Both of these provisions use express language to provide that deemed trusts for source deductions – unlike other deemed trusts – remain effective in insolvency. That is, the ordinary meaning of these provisions indicates that Parliament has legislated a statutory priority "explicitly and elaborately": *Century Services*, at para. 45. Other *BIA* and *CCAA* provisions similarly use explicit language to create a statutory priority. These provisions include *BIA*, s. 14.06(7)(b) and *CCAA*, s. 11.8(8)(b) (super priority of the Crown for environmental remediation costs in respect of the real property of a debtor), as well as *BIA*, s. 136 (general priority distribution scheme for the property of a bankrupt).

[32] The legislative use of express language to create a priority is not limited to insolvency statutes. It is also evidenced in, for example, ss. 221(1) and 222 of the *Business Corporations Act*, R.S.O. 1990, c. B.16; ss. 30-35 of the *Personal Property Security Act*, R.S.O. 1990, c. P.10; and ss. 2- 5 of the *Wages Act*, R.S.O. 1990, c. W.1. In each of these statutory provisions, the language indicating a priority is plain and unambiguous.

[33] The primary difficulty with the submission that s. 130.1 grants a priority is that the legislation does not state that explicitly. I have difficulty accepting that it was the intention of the legislature to grant a priority by implication. The whole point of creating statutory priorities is to alert the world regarding the distribution scheme for a given fund. The idea is to create certainty so that claimants understand where they stand relative to other claimants. A clear priority scheme also makes it easier for courts to adjudicate competing claims. They are not required to examine the equities of the positions of the parties but are only obliged to implement the existing rules. The important public policy objectives of certainty, transparency, and efficiency underlying statutory priorities would be eroded if courts presume an intention of a legislature to create a priority. I decline to do so in this case.

(b) The Nature of the Rescission Remedy

[34] The other suggested basis for a priority is the nature of the remedy of rescission. The argument advanced by the Statutory Rescission Claimants is that rescission is a proprietary remedy, which puts the claimant in a position where the contract is void *ab initio*. This submission may be dealt with by considering the categories of potential rescission claims.

[35] The Statutory Rescission Claims are reserved for those who can assert a claim under s. 130.1 of the *OSA* (and equivalent securities legislation) and residents of British Columbia, Alberta, and Quebec who were granted that statutory remedy under the constating documents. For the purpose of the motion, it was agreed that these claimants would be able to make out their claims and no defences would apply.

[36] The competing claims were the General Unitholders' Claims, which, as mentioned, are the claims that are not Statutory Rescission Claims or Potential Redemption Claims. The Agreed Statement of Facts also references a court order that tolled limitation periods for certain claims. Included in this list are claims for damages or rescission pursuant to, among other things, "any common law or civil law rights."

[37] It is clear, therefore, that the General Unitholders' Claims include common law claims to rescission. In other words, there is a subclass of Unitholders who could potentially assert a successful common law claim for rescission. There can therefore be no basis to award a priority to the Statutory Rescission Claimants over those with common law claims to rescission. Regardless of how the claim for rescission is established, the nature of the remedy is identical. Thus, the motion judge erred in finding that the Statutory Rescission Claimants have a "different relationship to the assets."

[38] In summary, neither the wording of s. 130.1 of the *OSA* nor the nature of the remedy of rescission provides a basis for finding that the Statutory Rescission Claimants have a priority. Accordingly, I would grant the General Unitholders' appeal.

(4) *Pari Passu*

[39] There was a great deal of debate among the parties regarding whether the Bridging Funds are insolvent and, as a consequence, whether the *pari passu* rule should automatically apply. I need not resolve the insolvency issue because I have determined that neither the Statutory Rescission Claimants nor the Redemption Claimants are entitled to a priority. It follows, therefore, that the Unitholders should share *pari passu*. I note that this result is consistent with the constating documents of the Bridging Funds, which provided that holders of Units had the same rights and obligations as all other holders of the same class or series of Units.

III. DISPOSITION

[40] I would dismiss the appeal of the Redemption Claimants and allow the appeal of the General Unitholders. For greater certainty, I would order that the Redemption Claims and the Statutory Rescission Claims have no priority over the General Unitholders' Claims and order that all Unitholders shall rank *pari passu* with respect to the distribution of proceeds of the Bridging Funds. We were advised

by counsel that no party is seeking costs, so I would make no order as to the costs of the appeals.

Released: November 17, 2023 KMvR

I agree. K. van Rensburg J.A.

I agree L. Favreau J.A.