

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, 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

NOTICE OF APPEAL

THE APPELLANTS, Unitholders located within Quebec at the time of their subscription for a Bridging Fund with Potential Redemption Claims (the “**Quebec Redemption Claimants**”), APPEAL to the COURT OF APPEAL FOR ONTARIO from the order to be rendered by Chief Justice G.B. Morawetz (the “**Proposed Order**” and the “**Motion Judge**”) in support of the endorsement dated April 12, 2023 (the “**Endorsement**”), made at Toronto.

THE APPELLANTS ASK that the relevant section(s) of Proposed Order dealing with the Potential Redemption Claims be set aside and replaced by:

DECLARES that Potential Redemption Claimants, including Quebec Redemption Claimants, with Unfulfilled Redemption Request made at the latest on March 31, 2021, for the funds with a 30-day notice period, and January 31, 2021, for funds with a 90-day notice period, are liabilities of the Bridging Funds.

ORDERS that the Potential Redemption Claims are entitled to priority over General Unitholder Claims with respect to the distribution of proceeds of the Bridging Funds.

1. Capitalized terms used in this notice of appeal (the “**Notice of Appeal**”) and not otherwise defined in the Endorsement have the meaning given to them in the agreed statement of facts attached as schedule A of the Endorsement (the “**Agreed Statement of Facts**” or “**ASF**”).

THE GROUNDS OF APPEAL are as follows:

I. Facts

2. Appellants refer this Honorable Court to the factual overview provided in the Agreed Statement of Facts, and in particular paragraphs 2 to 6 regarding the scope of the Unitholder Priority Motion, paragraphs 7 to 11 and 16 to 30 which set out the background of the Bridging Funds, paragraphs 12 to 15 which describe the appointment of Representative Counsel for the Unitholders and for Potential Priority Claimants, and paragraphs 31 to 58 and 68, which deal specifically with redemption rights. Appellants also rely, as if recited at length, on the notice of appeal dated May 11, 2023, filed on behalf of Redemption Claimants.

3. Appellants wish to emphasize the following facts:

- (a) redemption rights were a fundamental characteristic of the investment vehicle designed and promoted by Bridging Finance Inc. (“**BFI**”) to attract investors and provide them with liquidity absent a secondary market:

There is no market for these Units and no market is expected to develop, therefore, it may be difficult or even impossible for a purchaser to sell their Units other than by way of a redemption of their Units on a Valuation Date.¹

- (b) redemption rights were afforded to all Unitholders but were exercised only by certain and remain unfulfilled for the Redemption Claimants;
- (c) the length of the redemption notice period for the Bridging Funds was extended from 30 days to 90 days as of December 18, 2020, except for the Bridging Income Fund LP (“**BIF**”), Bridging Mid-Market Debt Fund (“**MMF**”) where the validity of the amendment is in dispute;²
- (d) of the ten Bridging Funds, half are structured as limited partnerships³ established pursuant to the *Limited Partnership Act*⁴ and the others as unincorporated investment trust;⁵
- (e) the Receivership Proceedings were initiated by the Ontario Securities Commission pursuant to the *Securities Act*, R.S.O. 1990, c. S.5, exclusively, and at no point has federal insolvency legislation been triggered.⁶

¹ Considerations clearly expressed on the first page of the various Offering Memoranda (“**OM**”); see the Agreed Statement of Facts, Appendix “D”, MMF RSP OM.

² Agreed Statement of Facts, paragraphs 45 to 54.

³ Agreed Statement of Facts, paragraph 13; they are BIF, BIF LP; BPDI; MMF; BRLE.

⁴ *Limited Partnership Act*, RSO 1990, c L.16 [*OLPA*].

⁵ Agreed Statement of Facts, paragraph 13; they are BIF RSP; BIIF; BPDI RSP; FERN; MMF RSP.

⁶ See Endorsement at paragraph 161.

4. Quebec Claimants with Potential Redemption Claims are involved in six of the Bridging Funds, namely BIF, MMF, Bridging Private Debt Institutional Fund (“**BPDI**”), Bridging Income RSP Fund (“**BIF RSP**”), Bridging Mid-Market Debt Fund RSP (“**MMF RSP**”), Bridging Indigenous Impact Fund (“**BIIF**”) as follows (in number and value):

Fund Name and Organizational Structure	Number	Value⁷
BIF – <i>Limited Partnership</i>	56,577	5.63
MMF – <i>Limited Partnership</i>	75,835	7.61
BPDI – <i>Limited Partnership</i>	366	0.04
BIF RSP – <i>Trust</i>	39,973	4.20
MMF RSP – <i>Trust</i>	26,182	2.64
BIIF – <i>Trust</i>	529	0.06
TOTAL⁸	199,462	20.18

II. The Unitholder Priority Motion

5. Quebec Representative Counsel was appointed *inter alia* to represent Quebec Redemption Claimants in the context of the Unitholder Priority Motion to argue in favour of affording priority to certain Unitholders alongside Misrepresentation Representative Counsel (Miller Thomson LLP) and Redemption Representative Counsel (Aird & Berlis LLP) for the purpose of determining the following legal issue:⁹

Whether the holders of valid Potential Redemption Claims¹⁰ and/or Potential Statutory Rescission Claims (collectively referred to as “**Potential Priority**”

⁷ CAD, in millions.

⁸ Agreed Statement of Facts, Appendix “C”.

⁹ Agreed Statement of Facts, paragraphs 3 and 8.

¹⁰ Agreed Statement of Facts, Appendix “A”: “**Potential Redemption Claims**” means the claims of Unitholders in connection with Unfulfilled Redemption Requests. “Unfulfilled Redemption Requests” means the validly exercised

Claims”) are entitled to receive payment from realizations upon Bridging Funds in priority, as debt claims or otherwise, over General Unitholder Claims¹¹ with respect to the distribution of proceeds of the Bridging Funds.

6. The Appellants seek only the appeal of the Motion Judge’s determination that the Potential Redemption Claims are not entitled to priority over General Unitholder Claims with respect to the distribution of proceeds of the Bridging Funds.

A. The Motion Judge’s Findings

7. In the Endorsement, the Motion Judge held that in relation to Potential Statutory Rescission Claims:

- (a) they are entitled to priority over General Unitholder Claims with respect to the distribution of proceeds of the Bridging Funds;¹²
- (b) the proceeds of the Bridging Funds are held subject to a constructive trust in favour of Unitholders with Potential Statutory Rescission Claims;¹³
- (c) that the determination of the validity and quantum of Potential Statutory Rescission Claims (including Potential Quebec Statutory Rescission Claims) shall be determined at a later date and in accordance with a process to be approved by this Court;¹⁴

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.

¹¹ Agreed Statement of Facts, Appendix “A”: “**General Unitholder Claims**” means the claims of Unitholders against the Bridging Funds which are not Potential Statutory Rescission Claims or Potential Redemption Claims.

¹² Endorsement, paragraph 154.

¹³ Endorsement, paragraphs 170 to 179.

¹⁴ Endorsement, paragraphs 3 and 182.

- (d) that the law governing Potential Quebec Statutory Rescission Claims, including the applicable time-limitation and look-back periods, shall be determined at a later date and in accordance with a process to be approved by this Court.¹⁵

8. Regarding the Potential Redemption Claims, the Motion Judge found that:

- (a) the Unitholders who, at the time the Appointment Order was granted,¹⁶ had provided a notice to redeem but their payments had not been issued by Bridging had incomplete redemption request;¹⁷
- (b) the Appointment Order was granted before any of said redemption requests were accepted, priced, contracted or paid out;¹⁸
- (c) in order to achieve priority status, the redemption process must have been fully completed, including the payment, which was not the case.¹⁹

9. In concluding as he did, the Motion Judge took into account the manner in which the Bridging business operations were conducted by the Fund Manager,²⁰ namely evidence of the unilateral behavior of one party's agent subsequent to the execution of the contract between the parties, to contradict unambiguous contractual terms and override contractual rights.

¹⁵ Endorsement, paragraph 182.

¹⁶ Agreed Statement of Facts, Appendix "A": "**Date of Appointment**" means (i) in the case of each Bridging entity other than SMA 2, Bridging SMA 2 GP Inc. and BPD I RSP, April 30, 2021; and (ii) in the case of SMA 2, Bridging SMA 2 GP Inc., and BPD I RSP, May 3, 2021.

¹⁷ Endorsement, paragraphs 135 and 137.

¹⁸ Endorsement, paragraphs 138 and 142.

¹⁹ Endorsement, paragraph 145.

²⁰ Endorsement, paragraphs 143 and 144.

B. Errors made by the Motion Judge

10. The priority issue raised by the Unitholder Priority Motion is confined to priority as amongst Unitholders. Appellants respectfully submit that the gravamen of the Unitholder Priority Motion was whether Potential Redemption Claims amount to a claim for the return of capital invested or whether they amounted to a distinct contractual liability. This determination alone settles if the Potential Redemption Claimants hold a Priority Claim to General Unitholders Claims. Whereas Unitholders could only request a return of their capital upon dissolution, all Unitholders were granted identical redemption rights under the applicable limited partnership or trust agreements. Moreover, the claim for the return of capital is subordinated pursuant to section 24 of the *OLPA*, but the distinct contractual liability owing to Potential Redemption Claimants is not.

11. The distinction that needed to be drawn by the Motion Judge between a claim for the return of capital and a distinct contractual liability upon the occurrence of the Valuation Date as part of the redemption process, is clearly dictated by the *OLPA* and the applicable constating documents:

- (a) section 24 of the *OLPA* stipulates that the liabilities of the limited partnership to creditors shall be paid before return of contributions to limited partners. The liabilities of the limited partnership and the return of capital are distinct, and the repayment of capital contributions is fully subordinated;
- (b) the BIF, MMF and BPDII applicable limited partnership agreements reflects this distinction by providing that limited partners have no right to request a return of

their contribution except upon dissolution²¹ but allows Unitholders to redeem their Units upon appropriate notice;

- (c) the applicable constating documents also dictate that the redemption price of Units being redeemed, until paid, are deemed to be a liability of the partnership. For example, the MMF offering memoranda provides that “the redemption price of the Unit being redeemed, until paid, shall be deemed to be a liability of the Partnership”.²²

12. The BIF RSP, MMF RSP and BIIF applicable trust agreement²³ also distinguishes payment of proceeds of redemption,²⁴ and the return of capital.²⁵ The BIF RSP Trust Agreement provides that a Unitholder shall be entitled to redeem their units, and “require payment”, on a Valuation Date, after which time the redemption price “shall be deemed to be a liability of the Fund...”.²⁶

13. The applicable limited partnership and trust agreements are unambiguous and clearly provide that Units were to be redeemed “on a Valuation Date”, therefore these rights crystallise at 12:01 a.m.,²⁷ notwithstanding that the value of same is calculated “on Valuation Time” which is later at 4:00 p.m. on the same day.

14. As a matter of contractual interpretation, these rights crystallise as liability automatically at 12:01 a.m. on “Valuation Date” and any evidence that redemption requests were only priced,

²¹ Agreed Statement of Facts, Appendix “E”: section 10.1 (f) in both the BIF and MMF and section 10.1(6) in the BRDI applicable limited partnership agreement.

²² Agreed Statement of Facts, Appendix “D”: MMF Offering Memoranda.

²³ MMF RSP and BIIF are both governed by the Amended and Restated Master Trust Agreement of the Bridging Funds (“Master Trust Agreement”), while the BIF RSP is governed by its own trust agreement. See Agreed Statement of Facts, Appendix “E”.

²⁴ Agreed Statement of Facts, Appendix “E”: Master Trust Agreement, sections 4.6, 6.4 (a)(c) and 11.1; BIF RSP Trust Agreement, sections 6.1, 6.3, and 21.2.

²⁵ Agreed Statement of Facts, Appendix “E”: Master Trust Agreement, sections 6.6.

²⁶ Agreed Statement of Facts, Appendix “E”: BIF RSP Trust Agreement, sections 4.3(c) and 6.1.

²⁷ See s. 6(1) of the *Interpretation Act*, RSC 1985, c I-21; s. 9(1) of the *Legislation Act*, 2006, SO 2006, c 21, Sch F, both of which state that where time is not specified, legislation comes into force at the first instant of the day.

contracted or paid out subsequently is irrelevant for the purpose of determining whether Redemption Claimants were claiming a liability to the Bridging Funds or the repayment of their capital contributions.

15. The Appellants respectfully submit that the Motion Judge further made an extricable error of law, to be reviewed on a correctness standard, by relying on the Fund Administrator's internal practice,²⁸ which are inconsistent with the constating documents, to overwhelm the clear wording regarding when a redemption request crystallizes and becomes a liability of the Bridging Funds and override clear contractual rights of the Redemption Claimants.

16. The Appellants respectfully submit that the Motion Judge erred in his contractual interpretation of the applicable constating documents by relying on evidence of the behavior of one party's agent subsequent to the execution of the contract, in the absence of ambiguous terms. Indeed, the Motion Judge held that the manner in which the Bridging business operations were actually conducted demonstrated that the redemption requests were not accepted or completed and therefore had not become liabilities of the Bridging Funds at the time of the Appointment Order.²⁹ The Appellants respectfully submit that the Motion Judge made an extricable error of law by considering evidence of subsequent conduct to the execution of the contract, which is admissible to assist in contractual interpretation only if a court concludes, after considering the contract's written text and its factual matrix, that the contract is ambiguous. The Motion Judge made no such conclusion that the constating documents were ambiguous. Nonetheless, he relied on the internal

²⁸ Endorsement, para 143.

²⁹ Endorsement, para 142-146.

practice of the Fund Administrator's to conclude that the redemption requests were not accepted, priced, contracted or paid out before the Appointment Order and consequently not a liability.³⁰

17. Although unequivocally identified as irrelevant by the Appellants in the Agreed Statement of Facts,³¹ the Motion Judge relied on the fact that the Fund Administrator followed its own internal process when recording and administering redemption requests. While the effective date of a duly requested redemption would be 12:01 a.m. on the applicable Valuation Date, the redemption would not be priced or considered by the Fund Administrator to be "contracted" until the value was calculated for such Valuation Date, which typically occurred approximately 3 to 4 weeks following such Valuation Date.³²

18. This issue is determinative of the outcome of the Endorsement as evidenced by the Motion Judge's statement that "the fatal problem with [the] argument is that the redemption requests of the Redemption Claimants ha[ve] not been completed, [and that] in order to achieve priority status, the redemption process must have been fully completed."³³

19. In concluding that the redemption process must have been "fully completed" in order for Redemption Claims to achieve priority status, the Appellants respectfully submit that the Motion Judge failed to interpret the constating documents of the Bridging Funds as a whole, and instead, incorrectly arrived at the conclusion that a redemption notice only becomes effective once the proceeds are paid as a matter of fact. Such a conclusion is inconsistent with, and renders

³⁰ Endorsement, paras 137-138, 142-144.

³¹ ASF, para 33: "For greater certainty, as it concerns such procedures described herein [the Fund Administrator's internal practices], the Unitholders with Potential Redemption Claims do not accept that such procedures are determinative of when a requested redemption was accepted, became binding or was completed."; see also: Endorsement, para 77.

³² As described: Endorsement, paras 38; see also ASF, paras 33-34.

³³ Endorsement, paras 137 and 145 *in fine*.

meaningless, the language of the constating documents and the offering memoranda of the Bridging Funds which generally provide that a Unitholder shall be entitled to redeem their units on a Valuation Date, after which time the redemption price “*shall be deemed to be a liability of the Fund...*” and therefore distinct from a claim for repayment of a capital contribution. Quebec Potential Redemption Claimants (with Unfulfilled Redemption Request made at the latest on March 31, 2021, for the funds with a 30-day notice period, and January 31, 2021, for funds with a 90-day notice period) can claim a distinct liability, which is not subordinated and thus senior and entitled to priority over General Unitholder Claims with respect to the distribution of proceeds of the Bridging Funds. The Appellants respectfully submit that the Motion Judge was misguided in law in applying incorrect principles in concluding that “in order to achieve priority status, the redemption process must have been fully completed.”³⁴

20. The grounds set out in the Notice of Appeal filed by Redemption Representative Counsel, and such further and other grounds of appeal as the Appellants may advise and the Court of Appeal may permit.

THE BASIS OF THE APPELLATE COURT’S JURISDICTION IS as follows:

21. The Endorsement, and when rendered the Order, appealed are a final order of the Superior Court of Justice that may be appealed as of right to the Court of Appeal;

22. Leave is not required;

23. Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended; and

³⁴ Endorsement, paras 137 and 145 *in fine*.

24. Rule 61.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194.

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

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ONTARIO SECURITIES COMMISSION
Applicant (Respondent in Appeal)

-and- **BRIDGING FINANCE INC. et al.**
Respondents (Appellants)

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PROCEEDING COMMENCED AT TORONTO

NOTICE OF APPEAL

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