



Thornton Grout Finnigan LLP  
RESTRUCTURING + LITIGATION

## ***Pari Passu* Prevails: The Court of Appeal’s Decision in Bridging Finance**

**By Adam Driedger\***

### **Overview**

Thornton Grout Finnigan LLP (“**TGF**”) acts as counsel to PricewaterhouseCoopers Inc. (“**PwC**”), in its capacity as receiver and manager (in such capacity, the “**Receiver**”) of Bridging Finance Inc. (“**BFI**”) and certain related entities and investment funds (collectively, “**Bridging**”). This mandate involves maximizing recoveries for Bridging’s 26,000 unitholders and other stakeholders. One significant obstacle to making a distribution to stakeholders is the question of whether certain groups of unitholders have priority over others.

The priority issue was the subject of the Ontario Court of Appeal’s highly anticipated and precedent-setting decision in what is commonly referred to as the “Unitholder Priority Motion”. The decision was released on November 17, 2023.

The purpose of the Unitholder Priority Motion was to determine whether two distinct groups of unitholders with “Redemption Claims” or “Statutory Rescission Claims” had priority over the general body of unitholders. The decision affected priority and entitlement to over \$421 million in recovered assets. The Receiver and representative counsel for the general body of unitholders took the position that no unitholders should have priority and all unitholders should share *pari passu* in the recoveries.

The Court of Appeal agreed, and held that there is no basis for priority for the Redemption Claims or the Statutory Rescission Claims, with the result that all unitholders rank *pari passu*. The Court of Appeal: (i) overturned the decision of the motion judge that granted priority to the \$202.4 million of Statutory Rescission Claims on the basis of a constructive trust; and (ii) upheld the decision of the motion judge that the \$218.8 million of Redemption Claims were not entitled to any priority.

The Court of Appeal’s decision turned on the language of the applicable constating documents and the governing statute. The Court refused to read a priority into these documents absent clear and unambiguous language and also addressed a novel issue regarding the appellate standard of review for contracts of adhesion. The Court of Appeal’s decision is available [here](#).

### **Background**

BFI is a privately held investment management firm that, prior to the receivership, offered alternative investment options to unitholders through the various Bridging investment funds (the “**Bridging Funds**”). BFI raised capital from unitholders through the Bridging Funds to make high interest private debt loans to third-party borrowers. There are approximately 26,000 unitholders in the Bridging Funds.

On April 30, 2021, the Ontario Securities Commission applied under section 129 of the *Securities Act* to appoint PwC as Receiver of Bridging. The Receiver was appointed by order of the Ontario Superior Court of Justice (Commercial List) dated April 30, 2021 (the “**Appointment Order**”). The Ontario Securities Commission issued a temporary order (the “**Cease Trade Order**”) to cease trading in the securities of most of the Bridging Funds on April 30, 2021.

Following the appointment of the Receiver, two distinct groups of unitholders asserted priority claims over the general body of unitholders (the “**General Unitholders**”).<sup>1</sup>

The first group of unitholders claiming priority are the “**Statutory Rescission Claimants**”. The Statutory Rescission Claimants are unitholders who may have a statutory right of rescission under provincial securities legislation given that they purchased units in the Bridging Funds pursuant to an offering memorandum (that was assumed for the purpose of the Unitholder Priority Motion to contain a misrepresentation) generally within 180 days of the receivership (the “**Statutory Rescission Claims**”). There are approximately \$202.4 million of Statutory Rescission Claims.

The second group of unitholders claiming priority are the “**Redemption Claimants**”. The Redemption Claimants are unitholders who took steps to redeem their units in the Bridging Funds prior to the receivership; however, due to the intervening Appointment Order and Cease Trade Order, such redemptions were never fulfilled or completed (the “**Redemption Claims**”). There are approximately \$218.8 million of Redemption Claims.

A finding of priority for either the Statutory Rescission Claimants or the Redemption Claimants would materially erode recoveries for General Unitholders, who are already facing significant shortfalls.

### **Superior Court Decision**

The Unitholder Priority Motion was heard in November 2022. The Receiver sought an order declaring that the Statutory Rescission Claims and the Redemption Claims have no priority and that all unitholders rank *pari passu*. There is no precedent for this type of priority dispute in the context of a receivership under the *Securities Act*.

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<sup>1</sup> The “General Unitholders” are all unitholders in the Bridging Funds who do not have Statutory Rescission Claims or Redemption Claims. The claims of the General Unitholders may include claims for the return of invested capital, common law claims for damages, and/or common law claims for rescission.

The General Unitholders, the Statutory Rescission Claimants, and the Redemption Claimants were each represented by separate court-appointed representative counsel. The position of each group is summarized below:

- The Receiver and the General Unitholders argued that neither the Statutory Rescission Claims nor the Redemption Claims are entitled to any priority on the basis that the constating documents and the governing legislation do not provide for any priority and instead support a *pari passu* distribution to unitholders. They also argued that, even though federal insolvency legislation had not been engaged, the Bridging Funds are insolvent and therefore the *pari passu* principle should apply.
- The Statutory Rescission Claimants argued that the Statutory Rescission Claims are entitled to priority because the nature of rescission creates a *de facto* priority – the Statutory Rescission Claimants have a distinct proprietary right to the return of their invested capital (less any distributions received) and a constructive trust should be imposed in respect of those amounts.
- The Redemption Claimants argued that the Redemption Claims are entitled to priority because the underlying redemptions had effectively matured prior to the Appointment Orders and the Cease Trade Order and therefore created a crystallized contractual liability that is distinct from the claims of General Unitholders. The Redemption Claimants and the Statutory Rescission Claimants also argued that because federal insolvency legislation had not been engaged, and there had been no judicial finding of insolvency, the *pari passu* principle should not apply.

The motion judge held that the Statutory Rescission Claimants had priority over the General Unitholders and imposed a constructive trust in their favour. He further held that the Redemption Claimants were not entitled to any priority and ranked *pari passu* with the General Unitholders.

### **Court of Appeal Decision**

The motion judge's decision was appealed by each unsuccessful representative counsel group (with the Receiver supporting the appeal brought by representative counsel for the General Unitholders). The appeals were heard on October 18, 2023. The Court of Appeal's decision was released on November 17, 2023. The four key issues raised on the appeals and the conclusion of the Court of Appeal on each issue are discussed below.

*(i) The Appropriate Standard of Review*

A central component of the motion judge’s analysis was his consideration of the constating documents of the Bridging Funds.<sup>2</sup> The Court of Appeal held that the standard of correctness should apply to the review of the motion judge’s interpretation of these documents on the basis that they are standard form contracts with no relevant factual matrix to consider.

Contractual interpretation involves issues of mixed fact and law and, as such, the “palpable and overriding error” standard of review (as opposed to correctness) is the default appellate review standard. However, an exception exists for standard form contracts. The Supreme Court in *Ledcor* held that: (i) where an appeal involves the interpretation of a standard form contract; (ii) the interpretation at issue is of precedential value; and (iii) there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, the interpretation is better characterized as a question of law subject to correctness review.<sup>3</sup>

In this case, only two of the three *Ledcor* factors were satisfied. The constating documents were determined to be standard form contracts with no meaningful factual matrix. However, the interpretation at issue was of no precedential value because there would be no future litigation against or involving the Bridging Funds requiring the interpretation of the constating documents.

Nevertheless, the Court of Appeal held that the absence of one of the *Ledcor* factors should not automatically lead to the imposition of a deferential standard of review. In circumstances in which a motion judge is engaged in purely legal analysis about contracts that will potentially impact thousands of people, there is no reason to take a deferential approach.

*(ii) Redemption Claims*

The Court of Appeal held that the motion judge correctly determined that the Redemption Claims were not distinct crystallized liabilities at the time of the Appointment Order and the Cease Trade Order. The underlying redemptions were never quantified or completed and it was still within BFI’s discretion as fund manager to accept, reject, or suspend the redemption requests. Accordingly, the motion judge correctly concluded that the Redemption Claims were not entitled to any priority.

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<sup>2</sup> The Bridging Funds are structured as limited partnerships or unincorporated “flow through” investment trusts. As such, the constating documents of the Bridging Funds are primarily comprised of limited partnership agreements, trust agreements, subscription agreements, and offering memoranda.

<sup>3</sup> *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para 24.

**(iii) *Statutory Rescission Claims***

The Court of Appeal held that the motion judge erred in finding that the Statutory Rescission Claims were entitled to priority and overturned this aspect of the decision. The Court of Appeal found that neither the applicable provision of the *Securities Act* nor the nature of the rescission remedy itself resulted in any priority.

The priority cannot be grounded in the *Securities Act*, as there is nothing in the language of the statute that suggests that 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 priority by implication.

The nature of the rescission remedy also cannot be the basis for a priority. The motion judge found that the Statutory Rescission Claims stand in priority to the General Unitholder Claims. However, the General Unitholder Claims include common law claims for 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. Accordingly, there is no basis to find that the Statutory Rescission Claimants are entitled to a priority.

**(iv) *Pari Passu***

Given that there was no basis to find a priority for either the Redemption Claims or the Statutory Rescission Claims, the Court of Appeal held that all Unitholders should rank *pari passu* with respect to the distribution of proceeds of the Bridging Funds.

The Court declined to comment on the issue of the insolvency of the Bridging Funds and whether the *pari passu* principle applies in the context of a *Securities Act* receivership because neither the Statutory Rescission Claimants nor the Redemption Claimants had priority in any event.

**Conclusion & Key Takeaways**

It remains to be seen whether the Statutory Rescission Claimants or the Redemption Claimants will seek leave to appeal to the Supreme Court of Canada. However, the Court of Appeal's decision is a positive result for the general body of unitholders and may resolve one of the primary gating issues to moving forward to a distribution to stakeholders.

The key takeaways from the Court of Appeal's decision are twofold. First, courts will be reluctant to read priorities into statutes and agreements absent clear and unambiguous language. To the extent that corporations, investment funds, or stakeholders wish to create priorities (whether in the context of a dissolution or otherwise), such priorities should be clearly and unambiguously set out in the applicable agreements.

Second, all three of the *Ledcor* factors need not be satisfied to engage the correctness standard of review. If the motion judge is engaged in purely legal analysis, the correctness standard will apply.

The Court of Appeal did not comment on the extent to which foundational principles of insolvency law (such as the *pari passu* principle) will apply in receiverships under the *Securities Act* where federal insolvency legislation is not engaged. As such, legal professionals, insolvency practitioners, and market participants will have to await further judicial guidance on this issue. The team at TGF will continue to monitor how the undeveloped body of jurisprudence in the context of *Securities Act* receiverships continues to evolve.

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