

**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*

**RESPONDING FACTUM OF THE MISREPRESENTATION CLAIMANTS
(*Re: Unitholder Priority Motion returnable November 16 & 17, 2022*)**

November 3, 2022

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RESPONDING FACTUM OF THE MISREPRESENTATION CLAIMANTS
(Re: Unitholder Priority Motion returnable November 16 & 17, 2022)

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RESPONDING FACTUM OF THE MISREPRESENTATION CLAIMANTS
(Re: Unitholder Priority Motion returnable November 16 & 17, 2022)

PART I - INTRODUCTION

1. This Factum is filed on behalf of Misrepresentation Claimants, being unitholders of the Bridging Funds¹ located outside of Quebec who have Statutory Rescission Claims.

2. More than 26,000 unitholders invested their money in Bridging relying on representations made by Bridging and its principals. All of these unitholders are innocent victims of the wrongdoing uncovered at Bridging. It is substantially certain that there will be insufficient funds available to provide all unitholders with full recovery. In the face of this injustice, there is a strong and understandable impulse to treat unitholders “equally” by distributing the available funds on a *pro rata* basis. Equality is not always synonymous with fairness however.

3. While all unitholders are similarly situated in many respects, unitholders who invested within 180 days of the appointment of the Receiver: (i) did not share in potentially years of returns on their invested funds like other unitholders; and (ii) have a statutory right of rescission (or a contractual equivalent) of which all unitholders had notice.

4. The nature of rescission as a remedy creates a *de facto* priority.² Misrepresentation Claimants may annul their contracts, are not bound by their terms, and have a proprietary right to

¹ The main purpose of a definition is to achieve clarity without needless repetition. For this reason it is “unnecessary” to define ordinary words that are used consistent with what is assumed to be the Court’s general familiarity with the subject matter. That being said, “**Bridging Funds**”: BIF, MMF, BPDI, SMA 1, & SMA 2 (limited partnerships established pursuant to the *Limited Partnerships Act* (Ontario), R.S.O. 1990, c. L.16), and BIIF, FERN, BIF RSP, MMF RSP, & BPDI RSP (unincorporated investment trusts organized pursuant to Ontario law); see Agreed Statement of Facts, Thirteenth Report of the Receiver dated October 12, 2022, at Schedule “A”, in Motion Record of the Receiver dated October 12, 2022 (“MR”), at Tab “2A” (“ASOF”), at paras. 7, 16, & Appendix “E”, p. 46, 48-49, 788-1255.

² Note, the term “priority” is used for convenience given how the issues have been framed for this Honourable Court. However, the Misrepresentation Claimants do not claim a “priority” in the first instance, *per se*, but rather a

a return of their funds. Since the contract is annulled, its terms do not govern distributions. Since Misrepresentation Claimants who elect to rescind are no longer unitholders, the provisions of Ontario's *Limited Partnerships Act*³ do not apply.

5. At first blush it may seem arbitrary that unitholders who invested within 180 days of the receivership, as opposed to 181 days before, have substantially different rights. However, (i) the limitation represents a legislative policy choice connected to the objective of providing these investors with a proprietary right of rescission, close to the point of a misrepresentation, to encourage issuers to exercise greater care in preparing offering documents; and (ii) in law there are always “bright-line” rules; this is no different than any other limitation period.

6. Recognizing the distinct, statutory rescission remedy available to Misrepresentation Claimants does not offend the *pari passu* principle or principles of equity. The *pari passu* principle provides that creditors of the same class should receive the same fractional amount as other creditors *in accordance with their entitlements*. The *pari passu* principle does not alter, amend or negate the different rights that creditors may have. Equity is similarly not unbounded. Equity does not allow the Court to override the proprietary statutory remedy of rescission. Neither principle should be used to enforce subjective notions of fairness by ignoring substantive *statutory rights*.

7. In a receivership under the *Securities Act*,⁴ this Court should recognize and give effect to the statutory rights of unitholders under securities legislation.

de facto priority in the spirit of the provisions which exclude certain property from the estate of a bankrupt, separating these assets from any *pro rata* distribution scheme. A priority is claimed in the alternative.

³ R.S.O. 1990, c. L.16.

⁴ *Securities Act*, R.S.O. 1990, c. S.5, (the “*OSA*”), s. 130.1(1), Schedule “B” (“**Sched. B**”).

PART II - RELEVANT FACTS

8. The facts, assumptions, and defined terms in respect of this motion are set out in the Agreed Statement of Facts. This Factum summarizes those facts pertinent to Misrepresentation Claimants.

A. Potential Statutory Rescission Claims

9. Misrepresentation Claimants have statutory remedies, or a contractual equivalent. Their rights are to a specific remedy chosen by the Legislature: rescission. Rescission is a proprietary remedy on these facts that allows Misrepresentation Claimants to cancel the investment contract and have their contributed capital returned net of benefits received.

10. For instance, pursuant to the Ontario *Securities Act*,⁵ where an offering memorandum contains a misrepresentation, a purchaser has (a) certain rights to pursue damages; **or** (b) a right of rescission.⁶ This right to choose a remedy exists regardless of whether a purchaser relied on the misrepresentation.

11. Those unitholders who otherwise may not have access to these statutory rescission rights⁷ were granted contractual rights under the offering memoranda of the Bridging Funds, which rights are equivalent to the rights conferred by the *OSA*.⁸ These Misrepresentation Claimants are thus identically situated to those Misrepresentation Claimants with purely statutory rights.⁹

⁵ *OSA*, s. 130.1(1), Sched. B, and other securities legislation: see Sched. B, and ASOF, Appendix “Q”, p. 1541.

⁶ Together, “**Statutory Misrepresentation Rights**”; ASOF, at para. 59, p. 63; *OSA*, s. 130.1(1), Sched. B.

⁷ By operation of securities regulations and exemptions — i.e., unitholders in British Columbia and Quebec, and unitholders in Alberta who purchased units under an “accredited investor” exemption; ASOF, at para. 61, p. 64.

⁸ ASOF, at para. 61, p. 64.

⁹ Among other things, their rights also have their source in statute (the *OSA*). They are subject to the same 180-day statutory limitation period, the same presumption of reliance, the same statutory requirements, the same right to elect for a remedy of rescission, and are also beneficiaries of the Legislature’s policy objectives underpinning the statutory rescission right, as discussed further below.

12. It is assumed for purposes of this motion that Misrepresentation Claimants will be able to prove their statutory rescission claims, and that no defences will apply.¹⁰ These claims are subject to a tight statutory limitation period.¹¹ The pool of unitholders with statutory rescission remedies is generally limited to those unitholders who contributed during the 180 days between November 1, 2020 and April 30, 2021.¹² After that, the claim is statute-barred.¹³ Misrepresentation Claimants have investments of approximately \$202.4 million.¹⁴

B. Distributions

13. Once a unitholder subscribed in the Bridging Funds, they became entitled to distributions. Unitholders could elect to receive distributions in cash on written notice to Bridging; otherwise, distributions were automatically reinvested in additional units.¹⁵ Unitholder contributions were not segregated, such that distributions could be funded from new unitholder capital, opening the door for Bridging to operate not unlike a Ponzi scheme.

¹⁰ Without regard to which substantive law may ultimately apply to the claims: ASOF, at para. 5, p. 45.

¹¹ Which limitation prevails over other limitation periods: see provincial limitations legislation excerpts at Sched. B.

¹² The 180 day period and November 1, 2020 start date apply to all unitholders (see provincial securities legislation excerpts at Sched. B.; see also ASOF, Appendix “R”, p. 1543-1544), with the exception of those located in: (i) Yukon, for which the start date is Sept. 29, 2019 due to a Covid-19 limitations suspension; (ii) Nova Scotia, for which the limitation is 120 days; and (iii) Quebec, for which the limitation is 3 years (see applicable provincial securities legislation excerpts at Sched. B; see also ASOF, at Appendix “R”, p. 1543-1544).

¹³ ASOF, at para. 63, p. 64.

¹⁴ ASOF, at para. 65, p. 65; while this is \$202.4 million out of potential recoveries between \$701 and \$880 million, it is assumed for present purposes that the proceeds of the assets of the Bridging Funds will be less than the aggregate of the claims against the Bridging Funds: ASOF, at paras. 70-74, p. 67-69.

¹⁵ ASOF, at para. 27, p. 52-53; in the latter case, the distributions increased the unitholder’s payout upon redemption, or alternatively increased the unitholder’s present claim against the estate.

14. Distributions were made to unitholders on either a monthly or semi-annual basis, depending on the fund.¹⁶ Distributions were made based on the net income of the applicable Bridging Fund, beginning in late 2013.¹⁷ There have been no distributions since April 30, 2021.¹⁸

15. Table 1.0, below, summarizes the historical frequency of distributions, and the annual and cumulative return received by unitholders that invested for the life of four Bridging Funds:

Table 1.0: Sample of Bridging ROI (Distributions)¹⁹

Fund	Inception	Distributions	Annual Returns²⁰	Cumulative Return²¹
BIF	Nov. 21, 2013	Monthly	7.71 to 10.10%	82.50%
MMF	Nov. 1, 2017	Monthly	8.19 to 9.15%	32.23%
BIIF	Apr. 2, 2019	Semi-Annual	9.78%	19.44%
FERN	Jun. 1, 2019	Monthly	6.94%	9.43%

16. As many of the Bridging Funds were operating for several years, there is a significant differential between (a) the average distributions made to unitholders who invested during the relevant 180-day period, and (b) the average distributions made during the life of the fund. The latter figure is greater. Misrepresentation Claimants received between 0 and 6 distributions.²²

¹⁶ ASOF, at para. 27, p. 52-53.

¹⁷ ASOF, at para. 28, p. 53.

¹⁸ ASOF, at para. 30, p. 53.

¹⁹ See ASOF, Appendix “S”, p. 1546-1560.

²⁰ Bridging’s reported annual returns for the fund’s full years only — i.e., excluding partial years (year of inception, final) with anomalous returns.

²¹ Bridging’s reported cumulative return for the fund between inception and March 31, 2021 (one month prior to the Appointment Date).

²² Based on the funds’ distribution schedules, and the time period applicable to Misrepresentation Claimants.

17. If this Honourable Court finds that Potential Statutory Rescission Claims have a *de facto* priority, it is estimated and assumed that funds will remain available for distribution to General Unitholders. It is assumed for purposes of this motion that the estate will be reduced by approximately one quarter.²³

PART III - ISSUES

18. The issue is whether Potential Priority Claims²⁴ are entitled to any priority over General Unitholder Claims with respect to the distribution of proceeds of the Bridging Funds.²⁵ That is, whether statutory rescission rights should be honoured in an *OSA* receivership.

PART IV - LAW AND SUBMISSIONS

19. For purposes of this motion it is assumed that Misrepresentation Claimants will be able to prove their statutory misrepresentation claims,²⁶ that no defences apply, and that they have elected for rescission as a remedy, foregoing damages.

20. It is respectfully submitted that the Potential Statutory Rescission Claims are entitled to a priority over General Unitholder Claims for the following reasons.

21. **First**, the nature of rescission as a remedy creates *de facto* priority:

²³ See the Receiver's estimated high/low-end recovery scenarios: ASOF, at paras. 72-74, p. 68-69.

²⁴ Potential Statutory Rescission Claims and Potential Redemption Claims.

²⁵ ASOF, at para. 2, p. 6; it is expressly *not* the purpose of the motion to determine which unitholders have particular claims, the validity of any claims, the quantum of any claims, or whether Potential Statutory Rescission Claims and/or Potential Redemption Claims are entitled to priority *inter se*: ASOF, at para. 3, p. 6-7.

²⁶ I.e., the offering memoranda contained untrue statements of material facts, as of the date they were issued, that would reasonably be expected to have a material effect on the value of the securities: *James Armstrong Richardson v. Great Gulfcan Energy Inc.*, 2011 ONSC 6692 (Ont. Sup. Ct. [C.L.]) per Wilton-Siegel J., at paras. 18-20 [*“James Armstrong”*] Misrepresentation Claimants' Book of Authorities (“MC-BOA”) Tab 1).

- (a) Rescission in this instance is a statutory proprietary remedy for a wrong done creating a resulting trust on these facts, and requiring the imposition of a constructive trust over the Misrepresentation Claimants' monies in the hands of Bridging. The Misrepresentation Claimants' *rights*, in this regard, are fundamentally different to those General Unitholders who may advance common law *claims* for rescission and other potential relief;
- (b) The introduction of the *pari passu* principle or a solvency requirement inappropriately conflates rescission in *OSA* s.130.1(1)2 with damages in *OSA* s.130.1(1)1. Rescission and damages are mutually exclusive;
- (c) Statutory rescission is a remedy conferred by the Legislature. Its application is non-discretionary. It reflects a public policy decision by the Legislature to grant Misrepresentation Claimants a powerful remedy codified in statute and distinct from the remedy at common law. This Court should give it effect; and
- (d) There are no bars to rescission on these facts.

22. **Second**, given their proprietary remedy, it is unfair for Misrepresentation Claimants to share *pro rata* in the Bridging Funds, where: (a) they are relatively new investors who have minimally benefited from distributions; (b) they will forego the benefits they *did* receive and further damages claims; and (c) General Unitholders had express notice of the rescission rights.

23. **Third**, the Moving Parties' arguments do not foreclose a *de facto* priority for Misrepresentation Claimants: (a) the absence of case law recognizing a priority is no bar. There is no jurisprudence to the opposite effect; (b) the *OSA* is not silent as to priority. The nature of the

remedy chosen by the legislature creates the priority, and section 130.1 of the *OSA* is a complete code governing the rights for security holders; and (c) the contractual and statutory provisions which stipulate equal treatment for unitholders do not bind Misrepresentation Claimants, as once they elect to rescind they cease to be unitholders subject to these provisions.

24. **Fourth**, the alleged insolvency of the Bridging Funds is no bar. Rescission rights can be enforced against insolvent entities. This is an *OSA* receivership, not a *BIA* proceeding. There is no paramountcy issue. Provincial statutory rights should not be overridden and must be respected.

A. Nature of Rescission Creates the *De Facto* Priority

(i) Nature of Rescission: A Return to the Original Position

25. The Misrepresentation Claimants cannot be held to their “bargain”; it was induced by material misrepresentations from Bridging.²⁷ Their consent to the terms of the various agreements was vitiated, and may be revoked.²⁸ Their agreements are *voidable* at their election.²⁹

26. Once the statutory rescission remedy is exercised, the contracts are considered *void ab initio*.³⁰ Rescission unwinds the transaction, returns any benefits conferred to each party, and returns the parties to the same positions they were in before they entered into the contract.³¹ Here, this means a return of investment principal, minus any benefit obtained *via* the rescinded contract.

²⁷ Contrary to the Factum of the Receiver dated October 21, 2022 (“**Receiver’s Factum**”) at para. 7.

²⁸ *Bank of Montreal v. i Trade Finance Inc.* 2011 SCC 26 (SCC) at paras. 45-50, MC-BOA Tab 2.

²⁹ *Bank of Montreal v. i Trade Finance Inc.* 2011 SCC 26 (SCC) at para. 45, MC-BOA Tab 2, citing Fridman.

³⁰ *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589 (Ont. C.A.) at paras. 35-39, MC-BOA Tab 3; *Grant v. Saks* 2010 ONSC 2759 (Ont. Sup. Ct.) at paras. 9 & 12, MC-BOA Tab 4.

³¹ *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589 (Ont. C.A.) at paras. 35-39, MC-BOA Tab 3; see also *Grant v. Saks* 2010 ONSC 2759 (Ont. Sup. Ct.) at para. 12, MC-BOA Tab 4.

27. The benefits conferred to the Misrepresentation Claimants were: (a) their units, along with the attached rights and terms; and (b) any distributions received,³² the return of which can be accomplished by way of adjustments,³³ or a set-off.³⁴

28. Misrepresentation Claimants who elect for the remedy of rescission *cease to be unitholders*.³⁵ They are no longer bound by the contractual and statutory provisions which otherwise limit unitholders to *pro rata* distribution.³⁶ They cease to be similarly situated with General Unitholders. Their rights, obligations, and circumstances are distinct and different.³⁷

29. Misrepresentation Claimants become *former unitholders* with an absolute statutory *right* to the return of their investment principal, less any distributions received, regardless of whether they each relied on the misrepresentation (making individualized inquiries unnecessary).³⁸ There is no mechanism or discretion to substitute a different right or remedy once they elect to rescind.

30. On the other hand, General Unitholders remain unitholders, have contractual and common law *claims* arising from and constrained by the contracts and the applicable legislation.³⁹ Their

³² ASOF, at paras. 27-28, p. 52-53.

³³ See, e.g., *846-6718 Canada Inc v 1779042 Interior Ltd*, 2018 ONSC 1563 (Ont. Sup. Ct.) at para. 338, MC-BOA Tab 5, citing Fridman.

³⁴ I.e., a set-off of the Misrepresentation Claimants' rescission rights *vis-a-vis* the estate, against the Bridging Funds' entitlement to recoup the distributions paid to Misrepresentation Claimants. For this Honourable Court's word on the availability of legal and equitable set-off, see, e.g., *Johanns v. Fulford* 2021 ONSC 8513 (Ont. Sup. Ct. [C.L.]) per Vermette J., at paras. 20-23, MC-BOA Tab 6, citing, *inter alia*, *Holt v. Telford*, [1987] 2 SCR 193 (SCC) at para. 25, MC-BOA Tab 7; see also *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), s. 111, Sched. B., and *BIA*, s. 97(3), Sched. B.

³⁵ Contrary to the Receiver's Factum, at para. 48.

³⁶ See, e.g., *James Armstrong*, *supra*, per Wilton-Siegel J, at paras. 12-14, 43, MC-BOA Tab 1, in which the defendant asserted defences based on the terms of the relevant subscription agreement. The statement of defence was struck, and those terms were no defence. The agreement had been invalidated by operation of the statutory right of rescission.

³⁷ Contrary to Receiver's Factum, at paras. 10-11; General Unitholder Factum, at paras. 37-39, 54.

³⁸ Contrary to the General Unitholder Factum, at para. 46.

³⁹ E.g., the *Limited Partnerships Act* (Ontario), R.S.O. 1990, c. L.16.

common law rescission claims are contingent in several respects. They must first prove misrepresentation. This necessitates proving reliance,⁴⁰ which requires individualized inquiries. They must also prove fraud,⁴¹ and/or they must further establish on equitable grounds that rescission is appropriate and “practically just”,⁴² because unlike statutory rescission claimants they do not have a legislatively-pre-determined entitlement to rescission, over other potential remedies.

31. Rescission and damages are distinct remedial concepts. A return to pre-investment conditions *is not* the same as an entitlement to damages. Damages are forward-looking and compensatory in nature. They try to put the claimant in the same position in which they would have been had the misrepresentation never occurred or had the contract been performed.⁴³ Rescission is retroactive, foreclosing any right to the benefits conferred under the contract,⁴⁴ or any amounts in excess of the initial investment.⁴⁵ This distinction is appropriate: (a) the *OSA* expressly provides that a rescinding purchaser “ceases to have a right of action for damages ... ”;⁴⁶ and (b) due to the “important restitutionary implications” of rescission, it is understood and appropriate that rescission “may have the effect of putting the innocent party in a better position than would an award of damages.”⁴⁷

⁴⁰ A question of fact to be inferred from all the circumstances of the case and evidence at trial: *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589 (Ont. C.A.) at paras. 37, 39, MC-BOA Tab 3.

⁴¹ Non-fraudulent misrepresentations do not void agreements at common law: *1261468 Ontario Ltd. v. Huigenbos* [2008] 171 A.C.W.S. (3d) 962 (Ont. Sup. Ct.) at para. 63, MC-BOA Tab 8.

⁴² *846-6718 Canada Inc v 1779042 Interior Ltd.*, 2018 ONSC 1563 (Ont. Sup. Ct.) at para 330, MC-BOA Tab 5.

⁴³ See, e.g., *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (SCC) at paras. 15-17, MC-BOA Tab 9;

Agribrands Purina Canada Inc. v. Kasamekas, 2011 ONCA 460 (Ont. C.A.) at para. 45, MC-BOA Tab 10.

⁴⁴ *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589 (Ont. C.A.) at paras. 35-39, MC-BOA Tab 3; see also *Grant v. Saks* 2010 ONSC 2759 (Ont. Sup. Ct.) at para. 12, MC-BOA Tab 4.

⁴⁵ *OSA*, s. 130.1(6): “In no case shall the amount recoverable under this section exceed the price at which the securities were offered”, Sched. B.

⁴⁶ *OSA*, s. 130.1(1)2: “If the purchaser exercises a right of rescission, “the purchaser ceases to have a right of action for damages against the person or company”, Sched. B.

⁴⁷ *Fitzpatrick v. Estevan Credit Union* 2003 SKQB 453 (Sask. Q.B.) at para. 51, MC-BOA Tab 11.

32. The scheme of *pari passu* distribution contemplated by the Moving Parties treats the Misrepresentation Claimants' remedy of rescission as though it was a damages claim. It is not. An order for *pari passu* distribution of the fund as it exists today, post-transaction, performance, and misfeasance, is simply an award of damages. That is not what the statutory scheme entitles Misrepresentation Claimants to, as disclosed in the offering memoranda. Such an order fails to give *any effect* to the Misrepresentation Claimants' election for rescission under ss. 130.1(1)2 of the *OSA*, rather than damages under ss. 130.1(1)1.

(ii) Nature of Rescission: A Proprietary Remedy

33. Even in an insolvency, property held for others by way of a trust does not form part of the estate.⁴⁸ This property does not belong to the bankrupt, but rather, to the beneficial owner.⁴⁹ This results in a *de facto* priority at distribution; trust claims are paid ahead of all other claims even though the statute does not expressly provide for such a priority position.

34. The Misrepresentation Claimants' statutory rescission rights are similarly situated. Upon electing to rescind their subscriptions, the Misrepresentation Claimants have a proprietary interest in their investment principal as a consequence of: (a) the proprietary nature of the rescission remedy; and (b) the constructive and/or resulting trusts which arise by operation of law.

35. ***A right of rescission is a proprietary remedy*** on these facts. Rescission may be either proprietary or personal in nature. Where the setting aside of the transaction involves the re-vesting

⁴⁸ *BIA*, s. 67(1)(a), Sched. B.

⁴⁹ *Sharby v. N.R.S. Elgin Realty Ltd. Estate (Bkcy.)*, [1991] 3 OR (3d) 129 (Ont. Gen Div.) at paras. 42-50, MC-BOA Tab 12; citing *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 SCR 24 (SCC), per McLachlin J., at para. 38 (p. 31), MC-BOA Tab 13.

of property *in either party*, the relief granted is proprietary in nature.⁵⁰ That is the case here. Upon rescission, the Misrepresentation Claimants' units will re-vest in Bridging, notwithstanding that they are intangible property.⁵¹ The opposite is also true; unitholder contributions were vested in the trustee⁵² and/or the general partner and must re-vest in the Misrepresentation Claimants.

36. *A constructive trust* arises by operation of law where — on account of fraud, breach of fiduciary duty, or unjust enrichment — it would be against good conscience to allow the legal owner to retain the beneficial interest, such that equity converts the owner into a trustee.⁵³ The four *Soulos* conditions set out in the General Unitholders' Factum must generally be satisfied.⁵⁴

37. *A resulting trust* arises by operation of law to recognize beneficial entitlements — that is, “to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it”, such that the property results (reverts) to the true owner.⁵⁵ A resulting trust arises upon, *inter alia*, the failure of an express trust.⁵⁶

⁵⁰ Peter D Maddaugh & John D McCamus, *The Law of Restitution*, Looseleaf Edition (United States: Thomson Reuters, 2022) at § 5:18, MC-BOA, Tab 45.

⁵¹ For instance, the limited partnership agreements expressly provide that units which are returned to the partnership (on account of, e.g., a default in payment of a unitholder), “vest” in the partnership: see ss. 3.5(a) of the Second Amended and Restated Limited Partnership Agreement for the Bridging Income Fund LP, dated January 1, 2021, ASOF Appendix “E”, p. 807, which is representative of the other LP agreements.

⁵² “An express trust is created when the requirements of certainty of intention, subject, and objects of the transfer have been established *and the trust property has been vested in the trustee*”: see, e.g., *Suen v. Suen*, 2013 BCCA 313 (BCCA) at para. 45, MC-BOA Tab 14.

⁵³ *Soulos v Korkontzilas*, [1997] 2 SCR 217 (SCC) at paras. 29, 42 & 45, MC-BOA Tab 15.

⁵⁴ General Unitholder Factum, para. 56; *Soulos v Korkontzilas*, [1997] 2 SCR 217 (SCC) at para. 45, MC-BOA Tab 15: paraphrasing: “(1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands; (2) There must be a nexus or link between the assets in the hands of the defendants and a breach of its equitable obligation to the plaintiff; (3) The plaintiff must show a legitimate reason for seeking any proprietary remedy; and (4) There must be no factors that would render imposition of a constructive trust unjust in all of the circumstances.”

⁵⁵ *Kerr v. Baranow* 2011 SCC 10 (SCC) at para. 16, MC-BOA Tab 16, which ruled-out the application of the “common intention” resulting trust in domestic cases, but otherwise left resulting trust intact: see paras. 24 & 29.

⁵⁶ See, e.g., *Dunnison Estate v. Dunnison* 2017 SKCA 40 (Sask. C.A.) at para. 19, MC-BOA Tab 17; *Rankin v. Rankin* 2022 SKCA 32 (Sask. C.A.) at para. 123, MC-BOA Tab 18.

38. The relevant trust agreements unsurprisingly provide that legal title to the Bridging Funds' property is held in trust for the unitholders, which have the beneficial interest.⁵⁷ This express trust fails once it is rescinded, having been vitiated by misrepresentation.⁵⁸ Similarly, under the limited partnership agreements, the general partner holds legal title to the partnership assets, but the beneficial interest lies with the limited partners (i.e., unitholders).⁵⁹ This is substantively, a trust relationship, which fails upon rescission of the Misrepresentation Claimants' agreement.

39. In both cases, a resulting trust arises by operation of law to return the property to the Misrepresentation Claimants upon failure of the express trust. Similarly, a constructive trust arises, as set out in the General Unitholders' Factum. Resort to the proprietary remedy of constructive trust is warranted due to the Misrepresentation Claimants' existing dual-proprietary entitlements (to rescission, and their beneficial interest in their funds). It is equitable that a constructive trust applies to vindicate the Misrepresentation Claimants' rights, even if it may decrease General Unitholder recoveries. As noted, Misrepresentation Claimants are not similarly situated with General Unitholders; they have an additional statutory remedy available to them that others do not.

40. In the alternative, if there is no distinction between the proprietary entitlements of Misrepresentation Claimants and the proven constructive trust claims of General Unitholders, then Misrepresentation Claimants and those General Unitholders *who prove fraud and reliance*, and

⁵⁷ See, e.g., ss. 2.4-2.5 & 2.8 of the Amended and Restated Master Trust Agreement of the Bridging Funds dated November 1, 2018, ASOF Appendix "E", p. 965-966, which is representative of the other trust agreement.

⁵⁸ Even absent a statutory right to rescind, where participation in a trust agreement is induced by misrepresentation, the agreement may be declared *void ab initio*: see *Mongillo v. Mongillo* [1999] 103 O.T.C. 252 (Ont. Sup. Ct.) at paras. 51-57, 66, MC-BOA Tab 19, aff'd [2003] 172 OAC 49 (Ont. C.A.).

⁵⁹ See, e.g., ss. 6.7 & 20.1 of the Second Amended and Restated Limited Partnership Agreement for the Bridging Income Fund LP, dated January 1, 2021, ASOF Appendix "E", p. 816 & 840, which is representative of the other LP agreements.

thus are entitled to rescission, ought to share *pro rata* in distributions from the Bridging Funds (in *de facto* priority to General Unitholders without proven common law rescission claims).

(iii) *There is no Residual Discretion to Refuse to Enforce Statutory Rescission Rights*

41. It is respectfully submitted that this Court does not have residual discretion to refuse to enforce statutory rescission rights. There is no judicial discretion embedded in section 130.1(1)2 of the *OSA*. Once the factual statutory criteria are met,⁶⁰ reliance is presumed, and the entitlement to rescind crystallizes. Discretion under the section belongs to the purchaser, who “may elect to exercise a right of rescission”.⁶¹ That is, they may elect to exercise a right to a remedy, because “[r]escission is a remedy, not a cause of action.”⁶²

42. If a lawsuit is necessary to enforce the right, this is an action for declaratory relief,⁶³ to vindicate the purchaser’s specific, existing statutory right to a remedy. This is in contrast to: (a) the “right of action for damages” provided in *OSA* s. 130.1(1)1, which contemplates an action to determine and quantify the entitlement to damages; and (b) the General Unitholders’ claims for rescission *as just one of the potential remedies* for their causes of action in fraud or other torts. For these claims, there is no pre-existing right to rescission, but rather a claim — based on loss and harm — for rescission as one of several potential remedies.⁶⁴

⁶⁰ I.e., “that that the offering memorandum contained an untrue statement of a material fact as of the date it was issued that would reasonably be expected to have a material effect on the value of the [units]”: *James Armstrong, supra*, per Wilton-Siegel J, at para. 20, MC-BOA Tab 1.

⁶¹ *OSA*, s. 130.1(1)2, Sched. B. As opposed to hypothetical language such as, e.g., “may bring an application to the Court to seek the remedy of rescission”.

⁶² Contrary to the General Unitholder Factum, at para. 43; see, e.g., *846-6718 Canada Inc v 1779042 Interior Ltd*, 2018 ONSC 1563 (Ont. Sup. Ct.) at para 330, MC-BOA Tab 5, citing Fridman.

⁶³ As in *James Armstrong, supra*, per Wilton-Siegel J, at paras. 2 & 41, MC-BOA Tab 1.

⁶⁴ E.g., consequential and expectation damages, restitution, special damages, punitive damages, imposition of a constructive trust, *etc.*

43. Moreover, it is trite that the exercise of judicial discretion is always bounded by the context in which it operates. Even in proceedings involving the broadest possible judicial discretion, the Supreme Court of Canada has recognized that the Court must be satisfied that the exercise of its discretionary power is appropriate *vis-à-vis* the objectives of the governing statute, and any restrictions set out therein.⁶⁵ Similarly, the Court may only exercise its inherent jurisdiction to, *inter alia*, “do justice between the parties” where it can do so “without contravening any statutory provision.”⁶⁶ A discretionary decision disregarding the right of rescission conferred by section 130.1(1)2 of the *OSA* would contravene express statutory language, and the *OSA*’s purpose to, *inter alia*, protect investors from unfair, improper, or fraudulent practices.⁶⁷

44. The Moving Parties suggest that the absence of an express grant of priority in section 130.1 of the *OSA*, indicates an intention by the Legislature to limit the right of rescission.⁶⁸ On the contrary, the nature of the remedy is itself the priority. The Legislature has expressed a public policy interest in providing purchasers with a powerful statutory remedy which would otherwise be unavailable at common law. The legislative trend has ever been towards expanding the availability of the right,⁶⁹ thereby affording greater protections and discouraging misconduct.

45. For example, a statutory remedy *of damages* for misrepresentation in a prospectus was introduced in Ontario in 1891.⁷⁰ There was no statutory right *of rescission* until 1966 for

⁶⁵ *Canada v. Canada North Group Inc.*, 2021 SCC 30 (SCC) at para 21, MC-BOA Tab 20.

⁶⁶ *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 (SCC) at paras. 20-23, MC-BOA Tab 21.

⁶⁷ *OSA*, s. 1.1(a), Sched. B.

⁶⁸ Receiver’s Factum, at para. 57; General Unitholder Factum, at para. 43.

⁶⁹ Both in respect of misrepresentations in prospectuses, and later, offering memoranda. There has always been an interplay between the regulation of these offering documents (see *The Securities Act, 1978, O Reg 478/79*, s 20(2), Sched. B), and each serve the same underlying legislative purposes.

⁷⁰ *Directors Liability Act* (UK), 1890, 53 & 54 Vict, c 64, s. 3(1), Sched. B.; *Directors’ Liability Act* (Ontario), SO 1891, c 34, s. 4(1), Sched. B; see Mark R Gillen, *Securities Regulation in Canada*, 4th ed (Toronto: Thomson Reuters, 2019) at 150, MC-BOA Tab 46.

prospectuses,⁷¹ and 1999 for offering memoranda.⁷² In the interim, a rescission remedy was only available at common law, with proof of reliance. In 1966, the Legislature accepted a committee's proposal⁷³ of a statutory right of rescission, in order to *create a new right*, and presume reliance:

The purpose of this change is to give an additional right to a purchaser which does not exist now exist at law. Basically at law a purchaser has a right of rescission if he relied on an untrue statement. The present section permits him the right of rescission if the untrue statement is in a prospectus, even though the purchaser may not have read it. It is felt that this is a significant additional right and hence it will make persons filing prospectuses exercise greater care in preparing prospectuses and will avoid the necessity of the purchaser establishing that he relied on the untrue statement. This right is in addition to any other right a purchaser may have under the existing law.⁷⁴ [Emphasis added.]

46. To meet these policy objectives, the statutory remedy of rescission must have teeth. It would be incongruous with the rationale underpinning the remedy if it is to be deemed ineffective in circumstances where the issuer's misrepresentations are particularly severe and threaten solvency.

(iv) No Bars To Rescission Apply on These Facts

47. Common law rescission may be barred where it would "operate to the prejudice of a third and innocent party, who was not implicated in the original contract";⁷⁵ that is, where rescission

⁷¹ *The Securities Act* (Ontario), 1966, SO 1966, c 142, s. 64, Sched. B.

⁷² *An Act to implement the 1999 Budget and to make other amendments to various Acts in order to foster an environment for jobs, growth and prosperity in Ontario*, SO 1999, c 9, s. 218, Sched. B; though 1978 regulations required the issuer to grant contractual rights of rescission: see *The Securities Act*, 1978, O Reg 478/79, s 20(2), Sched. B.

⁷³ Kimber, J.R., *Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, March 1965) ["**Kimber Report**"] at p. 47-48, MC-BOA Tab 47, frequently referred to in Hansard: *The Securities Act*, 1966, 4th Sess, 27th Leg, Ontario, 1966 (assented to 8 July 1966): see, e.g., Ontario, Legislative Assembly, "Official Report – Daily Edition, Fourth Session of the Twenty-Seventh Legislature", Legislature of Ontario Debates (Hansard), (16 Mar 1966) at 1571 [First Reading]; (29 Mar 1966) at 2001 [Second Reading]; (5 July 1966) at 5605 [Third Reading].

⁷⁴ *Kimber Report*, *supra*, *Supplementary Notes to Explanatory Notes* (Toronto: Queen's Printer, March 1965) at p. 5-6, MC-BOA, Tab 48.

⁷⁵ *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589 (Ont. C.A.) at para. 54, MC-BOA Tab 3, citing Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at pp. 762-63, MC-BOA, Tab 49.

would defeat rights which third parties have acquired, in reliance on the fraudulent contract to be rescinded, without notice of the rescission entitlement.⁷⁶ This common law bar aims at *subsequent* innocent creditors, parties, and *bona fide* purchasers.⁷⁷ It is not an absolute bar.⁷⁸ It also has no application here, particularly in the statutory context.

48. General Unitholders by definition purchased their units *before* the Misrepresentation Claimants, and had express, actual notice of the statutory rescission rights. They are also not third parties to the agreements being rescinded. Further, rescission is not barred simply because it may prejudice third parties by shrinking the pool of assets available; even shareholdings may be rescinded before winding up, even if the company is then insolvent.⁷⁹

49. Common law rescission may also be barred where *restitutio in integrum* is impossible.⁸⁰ The bar usually arises where the relevant property has been purchased by an innocent third party for value without notice.⁸¹ It does not matter that funds transferred are longer made up of the same notes or coins, or that Bridging mixed the funds with other contributions.⁸² *Resitutio in integrum*

⁷⁶ *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589 (Ont. C.A.) at para. 55, MC-BOA Tab 3; John McGhee & Steven Elliott, *Snell's Equity*, 34th ed (London, England: Thomson Reuters, 2020) at 460, MC-BOA, Tab 50.

⁷⁷ *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589 (Ont. C.A.) at paras. 55-56, MC-BOA Tab 3.

⁷⁸ *Ibid*, at paras. 81-83.

⁷⁹ *Re London and Leeds Bank; ex p Carling* (1887) 56 LT (NS) 115 (UK Chan. Div.), per Sterling J., at p. 116-118, MC-BOA, Tab 22; although a shareholder who wishes to rescind a purchase induced by fraud must repudiate the transaction *before insolvency proceedings have commenced* and the rights of creditors have thereby intervened: see, e.g., *Oakes v Turquand*, (1867) LR 2 HL 325 (HL), MC-BOA Tab 23; *Re National Stadium Ltd*, [1924] OJ No 9 (Ont. Sup. Ct.) at para. 9, MC-BOA Tab 24; *Blue Range Resource Corp. (Re)*, 2000 ABQB 4 (Alt. Q.B.), at paras. 37-39, MC-BOA Tab 25; *Nelson Financial Group Ltd.*, 2010 ONSC 6229 (Ont. Sup. Ct. [C.L.]), at para. 26, MC-BOA Tab 26.

⁸⁰ John McGhee & Steven Elliott, *Snell's Equity*, 34th ed. (London, England: Thomson Reuters, 2020) at 458, MC-BOA, Tab 50.

⁸¹ *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589 (Ont. C.A.) at para. 59, MC-BOA Tab 3.

⁸² *BMP Global Distribution Inc v Bank of Nova Scotia*, 2009 SCC 15 (SCC) at para. 85, MC-BOA Tab 27.

is not strictly interpreted to require a precise restitution *in specie*.⁸³ Here, *restitutio in integrum* is possible. The Misrepresentation Claimants can return their units. The assets of the Bridging Funds are sufficient to satisfy the statutory rescission rights of the Misrepresentation Claimants. Even if they were not, deterioration resulting from the misconduct of Bridging would not preclude statutory rescission.⁸⁴

B. Fairness to Unitholders

50. It is respectfully submitted that it is unfair to disregard the Misrepresentation Claimants' statutory rescission rights, when they: (a) have not benefited from distributions, to the same extent as other unitholders, or at all; (b) will return what benefits they received; and (c) will limit their claims to their principal.

51. In many respects Bridging was a glorified Ponzi scheme. Early subscribers in the BIF fund may have already recouped up to 82.50% of their investment by way of distributions — or have increased their claim to this extent — whereas a late-subscribing Misrepresentation Claimant may have recouped as little as 0.58%, or nothing.⁸⁵

52. Notably, General Unitholders themselves had the benefit of the same statutory rescission rights. General Unitholders had notice of the rescission rights they shared with Misrepresentation

⁸³ Peter D Maddaugh & John D McCamus, *The Law of Restitution*, Looseleaf Edition (United States: Thomson Reuters, 2022) at § 5:18, MC-BOA, Tab 45.

⁸⁴ *Carter v. Golland* [1937] O.R. 881 (Ont. C.A.) at para. 10, MC-BOA, Tab 28.

⁸⁵ See ASOF, Appendix "S", p. 1546-1560.

Claimants. The statutory rescission rights were disclosed and explained at great length in the offering memoranda.⁸⁶

53. In the alternative, if the statutory rescission rights of Misrepresentation Claimants are to be overridden on the grounds of fairness to other unitholders, then similar fairness considerations should operate in favour of the Misrepresentation Claimants. In this regard, each unitholder's claims in respect of their investment principal should be reduced to reflect the quantum of distributions received by that unitholder, since subscription into the applicable Bridging Fund. This common-sense approach has been adopted by this Honourable Court previously.⁸⁷

C. Moving Parties' Arguments No Bar to *De Facto* Priority

(i) *Dearth of Jurisprudence No Bar*

54. The Moving Parties correctly note there appear to be no reported authorities that provide for priority payment based on, *inter alia*, a misrepresentation in the offering documents.⁸⁸ The absence of case law recognizing a priority is no bar where there is no jurisprudence to the opposite effect.⁸⁹ Recognizing the proprietary nature of rescission claims is not plucking a "new priority" from thin-air, but rather mechanically giving effect to the remedy pursuant to its principles.

⁸⁶ See, e.g., ASOF, Appendix "D", Offering Memorandum for the Bridging Mid-Market Debt RSP Fund, p. 153-168, which is representative of the offering memoranda.

⁸⁷ E.g., in November 2020, the late Honourable Justice Hainey approved a plan of distribution to syndicated mortgage investors, in which the investors' individual claims to the fund were reduced to the extent principal had been repaid or interest had been paid to them. See Endorsement and Order of Justice Hainey dated November 23, 2020 in *Hi-Rise Capital Ltd. and Adelaide Street Lofts Inc. (Re)*, MC-BOA, Tab 43; Sixth Report of Representative Counsel dated June 11, 2020 ([online](#)), with the method of calculation explained in Representative Counsel's Update on Investor Claim Notices & Accrued Interest Calculations dated February 17, 2021 ([online](#)).

⁸⁸ Receiver's Factum, at para. 56; General Unitholder Factum, at para. 65.

⁸⁹ In the spirit of the jurisprudence allowing reasonable, novel claims to proceed: see, e.g., *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (SCC) at para. 21, MC-BOA Tab 29; and *Spasic Estate v. Imperial Tobacco Ltd.*, [2000] 188 D.L.R. (4th) 577 (Ont. Sup. Ct.) at para. 22, MC-BOA Tab 30.

(ii) *The Remedy in the OSA’s Complete Code Creates the Priority*

55. Fundamentally, the *OSA* is not “silent” on priority for rescission rights.⁹⁰ The nature of the remedy *is* the priority. It reflects the Legislature’s original intention to provide a powerful remedy not available at common law.

56. A decision giving effect to the remedy expressed in section 130.1 of the *OSA* is an appropriately incremental development of the law.⁹¹ Disregarding the remedy, or reading-in a solvency requirement, would represent “major revisions of the law [that] are best left to the legislature ... which should assume the major responsibility for law reform.”⁹²

57. Section 130.1 is a complete code governing the rights for specific security holders in the event of misrepresentation in an offering memorandum. The Honourable Justice Strathy, as he then was, found that section 130.1’s sibling provisions dealing with misrepresentations in prospectuses⁹³ and in circulars,⁹⁴ are complete codes governing those misrepresentation claims.⁹⁵ There is no principled basis to distinguish s. 130.1 from its sibling provisions.

58. A “complete code” is legislation that offers “an exhaustive account of the law in an area; it occupies the field in that area, displacing existing common law rules and cutting off further common law evolution”; it affords “effective redress” and contains “an adequate enforcement

⁹⁰ Receiver’s Factum, at para. 57; General Unitholder Factum, at paras. 42-43.

⁹¹ I.e., a “small extension of existing rules to meet the exigencies of a new case” in which “the consequences of the change are readily assessable”: *Watkins v. Olafson*, [1989] 2 SCR 750 (SCC), per McLachlin J, as she then was, at para. 19 (p. 760-761), MC-BOA Tab 31.

⁹² As, among other things, “the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make”: *Ibid* at para. 18.

⁹³ *OSA*, s. 130, Sched. B.

⁹⁴ *OSA*, s. 131, Sched. B.

⁹⁵ See *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1764 (Ont. Sup. Ct.) per Strathy J., at paras. 4-9, MC-BOA Tab 32 (re: *OSA*, s. 130, Sched. B.); and *Allen v. Aspen Group Resources Corporation*, 2012 ONSC 3498 (Ont. Sup. Ct.) per Strathy J., at paras. 94-96, MC-BOA Tab 33 (re: *OSA*, s. 131, Sched. B.).

regime for the rights it grants”, as “where there is a right, *there ought to be a remedy*”.⁹⁶ Ignoring or supplementing a complete code risks doing “violence to the comprehensive statutory scheme provided by the Legislature.”⁹⁷

59. The Moving Parties effectively suggest an impermissible re-writing of the Legislature’s comprehensive scheme governing rescission rights, as the section purporting to grant *the right* of rescission would fundamentally and ultimately deny the unitholder *the remedy* of rescission.

60. Such an interpretation offends the accepted approach to statutory interpretation summarized in *Rizzo & Rizzo Shoes Ltd. (Re)*.⁹⁸ As noted above, the Moving Parties’ interpretation treats the right to rescission under subsection 130.1(1)2 as the same as the right to sue for damages under subsection 130.1(1)1, which fails to give effect to the express intention of the Legislature to confer a right of rescission *which excludes* any right to damages.⁹⁹

61. Further, review of the entire scheme of the *OSA* illustrates that this is not a case where the Legislature failed to turn its mind to the possibility of liquidation of securities firms, the appointment of receivers, and the protection of the best interests of creditors, all of which are expressly contemplated in section 129 of the *OSA*.¹⁰⁰ Had the Legislature intended to limit the right of rescission in cases where the liquidated estate cannot satisfy other creditors, it could have

⁹⁶ *Tucci v. Peoples Trust Company*, 2017 BCSC 1525 (B.C. Sup. Ct.), at paras. 64-68, MC-BOA Tab 34.

⁹⁷ *Frame v. Smith*, [1987] 2 SCR 99 (SCC) at para. 83, MC-BOA Tab 35.

⁹⁸ “[T]he words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (SCC) at para. 21, MC-BOA Tab 36.

⁹⁹ *OSA*, s. 130.1(1)2, Sched. B.

¹⁰⁰ *OSA*, s. 129, Sched. B.

done so. It did not. Instead, it imposed other limitations on the right: a tight limitation period.¹⁰¹

The balance chosen by the Legislature should not be ignored.

(iii) “Equal Treatment” Provisions in the Agreements and Partnerships Legislation No Bar

62. The Moving Parties argue that the text of the offering memoranda,¹⁰² limited partnership agreements,¹⁰³ and trust agreements¹⁰⁴ governing the Bridging Funds provide that units are to be treated equally and *pro rata*, including in respect of distributions, and on dissolution.¹⁰⁵

63. The parties cannot contract-out of the applicable securities legislation.¹⁰⁶ The agreements cannot be read as supplanting the Misrepresentation Claimants’ statutory right to rescind the agreements. Rescission voids the agreement as between them and Bridging. They cease to be unitholders bound by the terms of the applicable subscription, trust, or limited partnership agreements. The same logic applies to the statutory scheme applicable to the dissolution of a limited partnership in Ontario. On rescission, the Misrepresentation Claimants cease to be limited partners bound by the limited partnership agreement or governed by the *LPA*.

D. The Potential Insolvency of the Bridging Funds is No Bar

64. This Honourable Court has previously recognized and enforced statutory rescission rights in circumstances where the defendant was admittedly insolvent.¹⁰⁷ In *James Armstrong*, the

¹⁰¹ *OSA*, s. 138, Sched. B.

¹⁰² See, e.g., Offering Memorandum for Bridging Income Fund LP, ASOF, at Appendix “D”, at p. 674.

¹⁰³ See, e.g., Bridging Income Fund LP Limited Partnership Agreement dated January 1, 2021, s. 3.6 & 10.01, ASOF, at Appendix “E”, at p. 807 & 824, which provision is representative of the other relevant agreements.

¹⁰⁴ See, e.g., Amended and Restated Master Trust Agreement of the Bridging Funds, s. 3.1 & 11.3, ASOF, Appendix “E”, MR at p. 967 & 988.

¹⁰⁵ Receiver’s Factum at paras. 41-50; General Unitholder Factum at paras. 24-28.

¹⁰⁶ See, e.g., *R. v Stevenson*, 2017 ABCA 420 (Alt. C.A.) at para. 10, MC-BOA Tab 37; and *Ontario Securities Commission v. Buckingham Securities Corporation*, [2002] OJ No 4036 (Ont. Sup. Ct. [C.L.]), per Ground J., at paras. 29-30, MC-BOA Tab 38.

¹⁰⁷ *James Armstrong*, *supra*, per Wilton-Siegel J, at paras. 2, 39-41, MC-BOA Tab 1.

defendant argued that the rescission claim could not be enforced because payment in satisfaction of the rescission right would prejudice creditors and other purchasers claiming rescission.¹⁰⁸ In dismissing these arguments as unmeritorious — and finding that the plaintiff was entitled to (a) a declaration that the subscription agreement had been rescinded; and (b) the return of his investment¹⁰⁹ — Justice Wilton-Siegel correctly concluded that the defendant had to make payment, and if it could not, it must file for bankruptcy.¹¹⁰

65. *In a bankruptcy* under the *BIA*,¹¹¹ there is a presumption of *pari passu* distribution. All proven unsecured claims are paid rateably.¹¹² There are exceptions. Proprietary (trust) claims are given a *de facto* priority by the *BIA*.¹¹³ As discussed above, even in an insolvency scenario, this exception to *pari passu* distribution operates in favour of the Misrepresentation Claimants.

66. Additionally, as explained above, rescission provides Misrepresentation Claimants with distinct and different rights as compared to General Unitholders. This impacts creditor classification, which does influence *pari passu* distribution.

67. *Pari passu* involves distribution *amongst classes of creditors* rateably.¹¹⁴ That is, *pro rata* distribution among similarly situated creditors. It does not prohibit recognizing a proprietary interest of one group of creditors, which rights are distinct and different than ordinary unitholders.

¹⁰⁸ And offend other statutes, such as the *Assignments and Preferences Act* RSO 1990, c A.33 (the “*APA*”); *James Armstrong, supra*, per Wilton-Siegel J, at paras. 4-6, MC-BOA Tab 1.

¹⁰⁹ *James Armstrong, supra*, per Wilton-Siegel J, at para. 41, MC-BOA Tab 1.

¹¹⁰ *James Armstrong, supra*, per Wilton-Siegel J, at paras. 9-11, MC-BOA Tab 1.

¹¹¹ *Bankruptcy and Insolvency Act, RSC 1985, c B-3* (“*BIA*”), s. 141, Sched. B.

¹¹² *BIA*, s. 141, Sched. B.

¹¹³ *BIA*, s. 67(1)(a), Sched. B.; *Sharby v. N.R.S. Elgin Realty Ltd. Estate (Bkcy.)*, [1991] 3 OR (3d) 129 (Ont. Gen Div.) at paras. 42-50, MC-BOA Tab 12; citing *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 SCR 24 (SCC) at para. 38 (p. 31), MC-BOA Tab 13.

¹¹⁴ *Nortel Networks Corp, Re*, 2015 ONCA 681 (Ont. C.A.) at para. 23, MC-BOA Tab 39.

That is why the *BIA*'s codification of the *pari passu* principle is "subject to [the *BIA*]",¹¹⁵ which serves to exclude the *BIA* priority claims,¹¹⁶ and proprietary (trust) claims.¹¹⁷

68. The Misrepresentation Claimants are in a separate class. As the Moving Parties indicate, "creditors should be classified *in accordance with their contract rights*, that is, according to their respective interests in the debtor company."¹¹⁸ The Misrepresentation Claimants' legal interests are not the same as other unitholders.¹¹⁹ Upon rescission, they do not hold units. They are not governed by the same agreements. They did not freely agree to have their rights determined by the agreements, as their consent to these terms is assumed to have been vitiated.

69. The Moving Parties in their factum effectively ask this Court to infer that the Bridging Funds are "balance sheet" insolvent under *BIA* test (c).¹²⁰ The within proceeding is not an insolvency proceeding under the *BIA*. The Receiver was not appointed pursuant to the *BIA*. There is no principled reason why the *BIA* insolvency tests should apply in a receivership under the *OSA*. There is no principled basis for the Receiver to disregard the terms of its own "home statute". There is similarly no basis for the Receiver or this Honourable Court to disregard the other securities legislation affording statutory rights to Misrepresentation Claimants located outside of Ontario, absent invoking paramountcy and applying overriding federal legislation.

¹¹⁵ *BIA*, s. 141, Sched. B.

¹¹⁶ *BIA*, s. 136, Sched. B.

¹¹⁷ *BIA*, s. 67(1)(a), Sched. B.

¹¹⁸ Emphasis added; *Stelco Inc, Re*, [2005] 78 OR (3d) 241 (Ont. C.A.), per Blair J.A., at paras 21-23 & 34, MC-BOA Tab 40.

¹¹⁹ To the extent it pertains, even their economic interests are distinct and different from General Unitholders.

¹²⁰ *BIA*, "Insolvent Person", s. 2(1)(c), Sched. B.; General Unitholder Factum, paras. 19 & 32; citing *Stelco Inc, Re*, [2004] OJ No 1257 (Ont. Sup. Ct. [C.L.]) per Farley J., at para. 41, MC-BOA Tab 41.

Fundamentally, the scheme for distribution and priorities under the *BIA* does not govern; it is only the suggestion of a shadow on the horizon.¹²¹

PART V - ORDER REQUESTED

70. The Misrepresentation Claimants respectfully request that the Receiver's motion be dismissed, and request an order declaring that the Potential Statutory Rescission Claims (a) are entitled to a priority over General Unitholder Claims, *inter se*, with respect to the distribution of proceeds of the Bridging Funds; and (b) shall not rank *pari passu* with General Unitholder Claims.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of November, 2022.



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¹²¹ *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 (SCC) at para. 51, MC-BOA Tab 42.

**SCHEDULE “A”
LIST OF AUTHORITIES**

Case Law

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2. *Bank of Montreal v. i Trade Finance Inc.* 2011 SCC 26 (SCC) per Deschamps J.
3. *Urban Mechanical Contracting Ltd. v. Zurich*, 2022 ONCA 589 (Ont. C.A.), per Thorburn J.A.
4. *Grant v. Saks* 2010 ONSC 2759 (Ont. Sup. Ct.), per Healey J.
5. *846-6718 Canada Inc v 1779042 Interior Ltd*, 2018 ONSC 1563 (Ont. Sup. Ct.), per Kane J.
6. *Johanns v. Fulford* 2021 ONSC 8513 (Ont. Sup. Ct. [C.L.]) per Vermette J.
7. *Holt v. Telford*, [1987] 2 SCR 193 (SCC), per Wilson J.
8. *1261468 Ontario Ltd. v. Huigenbos* [2008] 171 A.C.W.S. (3d) 962 (Ont. Sup. Ct.), per Matheson J.
9. *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (SCC), per Arbour J.
10. *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 (Ont. C.A.), per Goudge J.A.
11. *Fitzpatrick v. Estevan Credit Union* 2003 SKQB 453 (Sask. Q.B.) per Dawson J.
12. *Sharby v. N.R.S. Elgin Realty Ltd. Estate (Bkcy.)*, [1991] 3 OR (3d) 129 (Ont. Gen Div.) per Killeen J.
13. *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 SCR 24 (SCC), per McLachlin J.
14. *Suen v. Suen*, 2013 BCCA 313 (BCCA) per Smith J.
15. *Soulos v Korkontzilas*,[1997] 2 SCR 217 (SCC) per McLachlin J.
16. *Kerr v. Baranow* 2011 SCC 10 (SCC) per Cromwell J.
17. *Dunnison Estate v. Dunnison* 2017 SKCA 40 (Sask. C.A.), *per curiam*.
18. *Rankin v. Rankin* 2022 SKCA 32 (Sask. C.A.) per Ottenbreit J.A.

19. *Mongillo v. Mongillo* [1999] 103 O.T.C. 252 (Ont. Sup. Ct.) per Shaughnessy J., aff'd [2003] 172 OAC 49 (Ont. C.A.), *per curiam*.
20. *Canada v. Canada North Group Inc.* 2021 SCC 30 (SCC), per Côté J.
21. *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (SCC), per Karakatsanis J.
22. *Re London and Leeds Bank; ex p Carling* (1887) 56 LT (NS) 115 (UK Chan. Div.), per Sterling J.
23. *Oakes v Turquand*, (1867) LR 2 HL 325 (HL)
24. *Re National Stadium Ltd.*, [1924] OJ No 9 (Ont. Sup. Ct.) per Orde J.
25. *Blue Range Resource Corp. (Re)*, 2000 ABQB 4 (Alt. Q.B.) per B.E. Romaine J.
26. *Nelson Financial Group Ltd.*, 2010 ONSC 6229 (Ont. Sup. Ct. [C.L.]) per Pepall J.
27. *BMP Global Distribution Inc v Bank of Nova Scotia*, 2009 SCC 15 (SCC) per Deschamps J.
28. *Carter v. Golland* [1937] O.R. 881 (Ont. C.A.) per Middleton J.A.
29. *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (SCC) per McLachlin C.J.
30. *Spasic Estate v. Imperial Tobacco Ltd.*, [2000] 188 D.L.R. (4th) 577 (Ont. Sup. Ct.), per Borins J.A.
31. *Watkins v. Olafson*, [1989] 2 SCR 750 (SCC), per McLachlin J.
32. *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1764 (Ont. Sup. Ct.) per Strathy J.
33. *Allen v. Aspen Group Resources Corporation*, 2012 ONSC 3498 (Ont. Sup. Ct.) per Strathy J.
34. *Tucci v. Peoples Trust Company*, 2017 BCSC 1525 (B.C. Sup. Ct.) per Masuhara J.
35. *Frame v. Smith*, [1987] 2 SCR 99 (SCC), per La Forest J.
36. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (SCC), per Iacobucci J.
37. *R. v Stevenson*, 2017 ABCA 420 (Alt. C.A.), *per curiam*.
38. *Ontario Securities Commission v. Buckingham Securities Corporation*, [2002] OJ No 4036 (Ont. Sup. Ct. [C.L.]), per Ground J.
39. *Nortel Networks Corp, Re*, 2015 ONCA 681 (Ont. C.A.), per Rouleau J.A.

40. *Stelco Inc, Re*, [2005] 78 OR (3d) 241 (Ont. C.A.), per Blair J.A.
41. *Stelco Inc, Re*, [2004] OJ No 1257 (Ont. Sup. Ct. [C.L.]) per Farley J.
42. *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 (SCC), per Deschamps J.

Unreported Authorities

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48. Kimber, J.R., *Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, March 1965), *Supplementary Notes to Explanatory Notes*, at p. 5-6.
49. G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at pp. 762-63.
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**SCHEDULE “B”
RELEVANT STATUTES**

1. ***Securities Act (Ontario), RSO 1990, c S5***

Purposes of Act

1.1 The purposes of this Act are,

- (a) to provide protection to investors from unfair, improper or fraudulent practices;
- (b) to foster fair, efficient and competitive capital markets and confidence in capital markets;
- (b.1) to foster capital formation; and
- (c) to contribute to the stability of the financial system and the reduction of systemic risk. 1994, c. 33, s. 2; 2017, c. 34, Sched. 37, s. 2; 2021, c. 8, Sched. 9, s. 40 (7).

...

Appointment of receiver, etc.

129 (1) The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company. 1994, c. 11, s. 375; 2006, c. 19, Sched. C, s. 1 (1).

Grounds

- (2) No order shall be made under subsection (1) unless the court is satisfied that,
- (a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company; or
 - (b) it is appropriate for the due administration of Ontario securities law. 1994, c. 11, s. 375.

...

Powers of receiver, etc.

(5) A receiver, receiver and manager, trustee or liquidator of the property of a person or company appointed under this section shall be the receiver, receiver and manager, trustee or liquidator of all or any part of the property belonging to the person or company or held by the person or company on behalf of or in trust for any other person or company, and, if so directed by the court, the receiver, receiver and manager, trustee or liquidator has the authority to wind up or manage the business and affairs of the person or company and has all powers necessary or incidental to that authority. 1994, c. 11, s. 375.

Directors' powers cease

(6) If an order is made appointing a receiver, receiver and manager, trustee or liquidator of the property of a person or company under this section, the powers of the directors of the company that the receiver, receiver and manager, trustee or liquidator is authorized to exercise may not be exercised by the directors until the receiver, receiver and manager, trustee or liquidator is discharged by the court. 1994, c. 11, s. 375.

Fees and expenses

(7) The fees charged and expenses incurred by a receiver, receiver and manager, trustee or liquidator appointed under this section in relation to the exercise of powers pursuant to the appointment shall be in the discretion of the court. 1994, c. 11, s. 375.

...

Liability for misrepresentation in PROSPECTUS [*Emphasis added.*]

130 (1) Where a prospectus, together with any amendment to the prospectus, contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution or during distribution to the public has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against,

- (a) the issuer or a selling security holder on whose behalf the distribution is made;
- (b) each underwriter of the securities who is required to sign the certificate required by section 59;
- (c) every director of the issuer at the time the prospectus or the amendment to the prospectus was filed;
- (d) every person or company whose consent to disclosure of information in the prospectus has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by them; and
- (e) every person or company who signed the prospectus or the amendment to the prospectus other than the persons or companies included in clauses (a) to (d),

or, where the purchaser purchased the security from a person or company referred to in clause (a) or (b) or from another underwriter of the securities, the purchaser may elect to exercise a right of rescission against such person, company or underwriter, in which case the purchaser shall have no right of action for damages against such person, company or underwriter. R.S.O. 1990, c. S.5, s. 130 (1); 2004, c. 31, Sched. 34, s. 6; 2006, c. 33, Sched. Z.5, s. 13.

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. R.S.O. 1990, c. S.5, s. 130 (2).

...

Limitation re amount recoverable

(9) In no case shall the amount recoverable under this section exceed the price at which the securities were offered to the public. R.S.O. 1990, c. S.5, s. 130 (9).

No derogation of rights

(10) 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. R.S.O. 1990, c. S.5, s. 130 (10).

...

Liability for misrepresentation in OFFERING MEMORANDUM [*Emphasis added.*]

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 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.

...

Liability for misrepresentation in CIRCULAR [Emphasis added.]

131 (1) Where a take-over bid circular sent to the security holders of an offeree issuer as required by the regulations related to Part XX, or any notice of change or variation in respect of the circular, contains a misrepresentation, a security holder may, without regard to whether the security holder relied on the misrepresentation, elect to exercise a right of action for rescission or damages against the offeror or a right of action for damages against,

- (a) every person who at the time the circular or notice, as the case may be, was signed was a director of the offeror;
- (b) every person or company whose consent in respect of the circular or notice, as the case may be, has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by the person or company; and
- (c) each person who signed a certificate in the circular or notice, as the case may be, other than the persons included in clause (a). R.S.O. 1990, c. S.5, s. 131 (1); 2004, c. 31, Sched. 34, s. 8 (1); 2015, c. 38, Sched. 18, s. 7 (1).

Same

(2) Where a directors' circular or a director's or officer's circular delivered to the security holders of an offeree issuer as required by the regulations related to Part XX, or any notice of change or variation in respect of the circular, contains a misrepresentation, a security holder has, without regard to whether the security holder relied on the misrepresentation, a right of action for damages against every director or officer who signed the circular or notice that contained the misrepresentation. 2004, c. 31, Sched. 34, s. 8 (2); 2007, c. 7, Sched. 38, s. 9 (1); 2015, c. 38, Sched. 18, s. 7 (2).

...

Defence

(4) No person or company is liable under subsection (1), (2) or (3) if the person or company proves that the security holder had knowledge of the misrepresentation. R.S.O. 1990, c. S.5, s. 131 (4).

...

No derogation of rights

(11) The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the security holders of the offeree issuer may have at law. R.S.O. 1990, c. S.5, s. 131 (11).

...

Limitation periods

138 Unless otherwise provided in this Act, no action shall be commenced to enforce a right created by this Part more than,

- (a) in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action; or
- (b) in the case of any action, other than an action for rescission, the earlier of,
 - (i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or
 - (ii) three years after the date of the transaction that gave rise to the cause of action.

2. ***Securities Act (British Columbia) R.S.B.C. 1996, c. 418***

Liability for misrepresentation in prescribed disclosure document

132.1 (1) If a prescribed disclosure document contains a misrepresentation, a purchaser who purchases a security offered by the disclosure document

- (a) is deemed to have relied on the misrepresentation if it was a misrepresentation at the time of purchase, and
- (b) has a right of action for damages against
 - (i) the issuer,
 - (ii) every director of the issuer at the date of the disclosure document,
 - (ii.1) every person whose consent to the disclosure of information in the disclosure document was filed, and
 - (iii) every person who signed the disclosure document.

(2) The purchaser may elect to exercise a right of rescission against the issuer, in which case the purchaser has no right of action for damages against the issuer.

...

(3) A person is not liable under subsection (1) if the person proves that the purchaser had knowledge of the misrepresentation.

...

(10) The amount recoverable by a plaintiff under this section must not exceed the price at which the securities were offered under the disclosure document.

(11) The right of action for rescission or damages conferred by this section is in addition to and not in derogation from any other right the purchaser may have.

...

Limitation period

140 Unless otherwise provided in this Act or in the regulations, an action to enforce a civil remedy created by this Part or by the regulations must not be commenced

- (a) in the case of an action for rescission, more than 180 days after the date of the transaction that gave rise to the cause of action, or
- (b) in the case of an action other than for rescission, more than the earlier of
 - (i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or
 - (ii) 3 years after the date of the transaction that gave rise to the cause of action.

3. ***Securities Act (Alberta) R.S.A. 2000, c. S-4***

Civil liability — offering memorandum or other prescribed offering documents

204 (1) If a person or company purchases securities offered by an offering memorandum or other prescribed offering document that contains a misrepresentation, the purchaser has, without regard to whether the purchaser relied on the misrepresentation, a right of action

- (a) for damages against
 - (i) the issuer or selling security holder on whose behalf the distribution is made,
 - (ii) every director of the issuer at the date of the document, and
 - (iii) every person or company who signed the document,

and

- (b) for rescission against the issuer or selling security holder on whose behalf the distribution is made.

(2) Notwithstanding subsection (1)(b), if the purchaser elects to exercise a right of rescission against the issuer, the purchaser has no right of action for damages against a person or company referred to in subsection (1)(a).

...

(4) The amount recoverable under this section shall not exceed the price at which the securities were offered under the offering memorandum or other prescribed offering document.

...

(9) The right of action for rescission or damages conferred by this section is in addition to and does not derogate from any other right that the purchaser may have at law.

...

Limitation period

211 Unless otherwise provided in this Act, no action may be commenced to enforce a right created by this Part,

- (a) in the case of an action for rescission, more than 180 days from the day on which the transaction that gave rise to the cause of action was completed, or
- (b) in the case of any other action, later than the earlier of
 - (i) 180 days from the day that the plaintiff first had knowledge of the facts giving rise to the cause of action, and
 - (ii) 3 years from the day on which the transaction, contravention or alleged contravention, as the case may be, that gave rise to the cause of action was completed or committed, as the case may be.

4. ***The Securities Act (Saskatchewan) 1988 S.S. 1988-89, c. S-42.2***

Misrepresentation in offering memorandum

138 (1) Where an offering memorandum, together with any amendment to the offering memorandum, sent or delivered to a purchaser contains a misrepresentation, a purchaser who purchases a security covered by the offering memorandum or an amendment to the offering memorandum has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against:

- (a) the issuer or a selling security holder on whose behalf the distribution is made;
 - (b) every promoter and director of the issuer or the selling security holder, as the case may be, at the time the offering memorandum or the amendment to the offering memorandum was sent or delivered;
 - (c) every person or company whose consent has been filed respecting the offering, but only with respect to reports, opinions or statements that have been made by them;
 - (d) every person who or company that, in addition to the persons or companies mentioned in clauses (a) to (c), signed the offering memorandum or the amendment to the offering memorandum; and
 - (e) every person who or company that sells securities on behalf of the issuer or selling security holder under the offering memorandum or amendment to the offering memorandum.
- (2) Where a purchaser described in subsection (1) purchased the security from a person or company mentioned in clause (1)(a), the purchaser may elect to exercise a right of rescission against that person or company and, when the purchaser so elects, the purchaser shall have no right of action for damages against that person or company.

...

(11) In no case shall the amount recoverable pursuant to this section exceed the price at which the securities were offered to the public.

(12) The right of action for rescission or damages conferred by this section is in addition to and does not derogate from any other right the purchaser may have at law.

...

Limitation periods

147 Notwithstanding The Limitations Act but subject to any other provisions in this Act, no action shall be commenced to enforce a right created by this Part or the regulations more than:

- (a) in the case of an action for rescission or cancellation, 180 days after the date of the transaction that gave rise to the cause of action; or
- (b) in the case of any action, other than an action for rescission or cancellation, the earlier of:
 - (i) one year after the plaintiff first had knowledge of the facts giving rise to the cause of action; and
 - (ii) six years after the date of the transaction that gave rise to the cause of the action.

5. ***The Securities Act (Manitoba), CCSM c S50***

Statutory rights — offering memorandum

141.1 (1) When an offering memorandum contains a misrepresentation, a purchaser who purchases a security offered by the offering memorandum is deemed to have relied on the representation if it was a misrepresentation at the time of purchase and has

- (a) a right of action for damages against
 - (i) the issuer,
 - (ii) every director of the issuer at the date of the offering memorandum, and
 - (iii) every person or company who signed the offering memorandum; and
- (b) a right of rescission against the issuer.

...

(2) If the purchaser chooses to exercise a right of rescission against the issuer, the purchaser has no right of action for damages against a person or company referred to in clause (1)(a).

...

(5) The amount recoverable under this section shall not exceed the price at which the securities were offered under the offering memorandum.

...

(9) The rights of action for rescission or damages conferred by this section are in addition to and do not derogate from any other right that the purchaser may have at law.

...

Limitation period re other rights of action

141.4 (2) Unless otherwise provided in this Act, no action may be commenced to enforce a right created by section 141.1, 141.1.1 or 141.2,

(a) in the case of an action for rescission, more than 180 days after the day of the transaction that gave rise to the cause of action; or

(b) in any other case, more than

(i) 180 days after the day that the plaintiff first had knowledge of the facts giving rise to the cause of action, or

(ii) two years after the day of the transaction that gave rise to the cause of action,

whichever occurs earlier.

6. ***Securities Act (Quebec), CQLR c V-1.1***

217. A person who has subscribed for or acquired securities in a distribution effected with a prospectus containing a misrepresentation may apply to have the contract rescinded or the price revised, without prejudice to his claim for damages.

The defendant may defeat the application only if it is proved that the plaintiff knew, at the time of the transaction, of the alleged misrepresentation.

218. The plaintiff may claim damages from the issuer or the holder, as the case may be, whose securities were distributed, from its officers or directors, the dealer under contract to the issuer or holder whose securities were distributed and any person who is required to sign an attestation in the prospectus, in accordance with the conditions prescribed by regulation.

...

221. Rights of action established under sections 217 to 219 may also be exercised if a misrepresentation is contained in

(1) the information incorporated by reference in the simplified prospectus;

(2) the offering memorandum prescribed by regulation;

(3) any other document authorized by the Authority for use in lieu of a prospectus.

...

225.0.2. The plaintiff is not required to prove that the plaintiff relied on the document containing a misrepresentation when the plaintiff subscribed for, acquired or disposed of a security.

...

234. Any action for rescission or for revision of the price under this title is prescribed by the lapse of three years from the date of the transaction.

7. ***Securities Act (New Brunswick) S.N.B. 2004, c. S-5.5***

Liability for misrepresentation when securities offered for sale in reliance on an exemption

150 (1) Where, in connection with a distribution of securities, securities are offered for sale in reliance on an exemption from section 71 that is provided for under the regulations and that is prescribed by regulation for the purposes of this section or in reliance on an exemption from section 71 provided for in an order made by the Commission under section 80, and where an offering memorandum provided to the purchaser of the securities contains a misrepresentation, a purchaser who purchases the securities shall be deemed to have relied on the misrepresentation if it was a misrepresentation at the time of purchase, and

(a) the purchaser has a right of action for damages against

(i) the issuer,

(ii) the selling security holder on whose behalf the distribution is made,

(iii) every person who was a director of the issuer at the date of the offering memorandum,

(iv) every person who signed the offering memorandum, or

(b) if the purchaser purchased the securities from a person referred to in subparagraph (a)(i) or (ii), the purchaser may elect to exercise a right of rescission against the person referred to in that subparagraph, in which case the purchaser shall have no right of action for damages against the person.

...

(6) In no case shall the amount recoverable under this section exceed the price at which the securities were offered.

(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.

...

Limitation periods

161 Unless otherwise provided in this Part, no action shall be commenced to enforce a right created by this Part more than,

- (a) in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action, or
- (b) in the case of any action, other than an action for rescission, the earlier of
 - (i) one year after the plaintiff first had knowledge of the facts giving rise to the cause of action, and
 - (ii) 6 years after the date of the transaction that gave rise to the cause of the action.

8. ***Securities Act (Nova Scotia) R.S.N.S. 1989, c. 418***

Misrepresentation in offering memorandum

138 (1) Where

- (a) an offering memorandum sent or delivered to a purchaser, together with any amendment to the offering memorandum; or
- (b) advertising or sales literature as defined by subsec-tion (2) of Section 56,

contains a misrepresentation, a purchaser who purchases a security referred to in it is deemed to have relied on that misrepresentation, if it was a misrepresentation at the time of purchase, and

...

- (c) has a right of action for damages against (i) the seller, (ii) every director of the seller at the date of the offering memorandum, and (iii) every person who signed the offering memorandum; or

- (d) may elect to exercise a right of rescission against the seller, in which case the purchaser has no right of action for damages against any person or company under clause (c).

...

(9) The amount recoverable by a plaintiff under this Section may not exceed the price at which the securities were offered under the offering memo-randum or amendment to the offering memorandum.

(10) The right of action for rescission or damages conferred by this Section is in addition to and not in derogation from any other right the purchaser may have.

...

Limitation period

146 (1) Unless otherwise provided in this Act, no action shall be commenced to enforce a right created more than

- (a) in the case of an action for rescission, one hundred and eighty days after the date of the transaction that gave rise to the cause of action; or
- (b) in the case of any action, other than an action for rescission, the earlier of,
 - (i) one hundred and eighty days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or
 - (ii) three years after the date of the transaction that gave rise to the cause of action.

(2) Notwithstanding subsection (1), no action shall be commenced to enforce the right created under Section 138 more than one hundred and twenty days after the date on which payment was made for the securities or after the date on which the initial payment for the securities was made where payments subsequent to the initial payment are made pursuant to a contractual commitment assumed prior to, or concurrently with, the initial payment.

9. ***Securities Act (Prince Edward Island) S.P.E.I. 2007, c. 17***

112. Right of action for damages for misrepresentation in offering memorandum

(1) If 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, a right of action for damages against

- (a) the issuer;
- (b) the selling security holder on whose behalf the distribution is made;
- (c) every director of the issuer at the date of the offering memorandum; and
- (d) every person who signed the offering memorandum. Right of action for rescission

(2) If an offering memorandum contains a misrepresentation, a purchaser who purchases a security offered by the offering memorandum during the period of distribution has a right of action for rescission against the issuer or the selling security holder on whose behalf the distribution is made.

(3) If the purchaser elects to exercise a right of action for rescission, the purchaser shall have no right of action for damages against a person referred to in clauses (1)(a) to (d).

...

(13) The amount recoverable by a plaintiff under this section must not exceed the price at which the securities purchased by the plaintiff were offered.

(14) 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.

10. ***Securities Act (Newfoundland & Labrador) R.S.N.L. 1990, c. S-13***

Civil liability - misrepresentation in offering memorandum

130.1 (1) Where an offering memorandum contains a misrepresentation when a person or company purchases a security offered by the offering memorandum, the purchaser has, without regard to whether the purchaser relied on the misrepresentation, a right of action

(a) for damages against

(i) the issuer,

(ii) every director of the issuer at the date of the offering memorandum, and

(iii) every person or company who signed the offering memorandum; and

(b) for rescission against the issuer.

(2) Notwithstanding paragraph (1)(b), where the purchaser elects to exercise a right of rescission against the issuer, the purchaser has no right of action for damages against a person or company referred to in paragraph (1)(a).

...

(4) The amount recoverable under this section shall not exceed the price at which the securities were offered under the offering memorandum.

...

(9) The right of action for rescission or damages conferred by this section is in addition to and does not derogate from any other right that the purchaser may have at law.

...

Limitation periods

138. Unless otherwise provided in this Act, an action shall not be started to enforce a right created by this Part more than

(a) in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action; or

(b) in the case of an action, other than an action for rescission, the earlier of

(i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or

(ii) 3 years after the date of the transaction that gave rise to the cause of action.

11. ***Securities Act (Yukon) S.Y. 2007, c. 16***

Right of action misrepresentation memorandum for damages for misrepresentation in offering memorandum

112 (1) If 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, a right of action for damages against purchaser who

- (a) the issuer;
- (b) the selling security holder on whose behalf the distribution is made;
- (c) every director of the issuer at the date of the offering memorandum; and
- (d) every person who signed the offering memorandum.

(2) If an offering memorandum contains a misrepresentation, a purchaser who purchases a security offered by the offering memorandum during the period of distribution has a right of action for rescission against the issuer or the selling security holder on whose behalf the distribution is made.

(3) If the purchaser elects to exercise a right of action for rescission, the purchaser shall have no right of action for damages against a person referred to in paragraphs (1)(a) to (d).

...

(13) The amount recoverable by a plaintiff under this section must not exceed the price at which the securities purchased by the plaintiff were offered.

(14) 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.

...

Limitation periods

121 No action may be commenced to enforce a right created by this Part more than:

- (a) in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action; or
- (b) in the case of any action other than an action for rescission,
 - (i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or
 - (ii) three years after the date of the transaction that gave rise to the cause of action,

whichever period expires first. S.Y. 2007, c.16, s.121

12. ***Securities Act (Nunavut) S.Nu. 2008, c. 12***

Right of action for damages for misrepresentation in offering memorandum

112. (1) If 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, a right of action for damages against

- (a) the issuer;
- (b) the selling security holder on whose behalf the distribution is made;
- (c) every director of the issuer at the date of the offering memorandum; and
- (d) every person who signed the offering memorandum.

...

(2) If an offering memorandum contains a misrepresentation, a purchaser who purchases a security offered by the offering memorandum during the period of distribution has a right of action for rescission against the issuer or the selling security holder on whose behalf the distribution is made.

(3) If the purchaser elects to exercise a right of action for rescission, the purchaser shall have no right of action for damages against a person referred to in paragraphs (1)(a) to (d).

...

(13) The amount recoverable by a plaintiff under this section must not exceed the price at which the securities purchased by the plaintiff were offered.

(14) 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.

...

Limitation period

121. No action may be commenced to enforce a right created by this Part more than,

- (a) in the case of an action for rescission, 180 days after the date of the transaction giving rise to the cause of action; or
- (b) in the case of any action other than an action for rescission,
 - (i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or
 - (ii) three years after the date of the transaction giving rise to the cause of action, whichever period expires first.

13. ***Securities Act (Northwest Territories) S.N.W.T. 2008, c. 10***

Right of action for damages for misrepresentation in offering memorandum

112. (1) If an offering memorandum contains 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, a right of action for damages against

- (a) the issuer;
- (b) the selling security holder on whose behalf the distribution is made;
- (c) every director of the issuer at the date of the offering memorandum; and
- (d) every person who signed the offering memorandum.

(2) If an offering memorandum contains a for rescission misrepresentation, a purchaser who purchases a security offered by the offering memorandum during the period of distribution has a right of action for rescission against the issuer or the selling security holder on whose behalf the distribution is made.

(3) If the purchaser elects to exercise a right of action for rescission, the purchaser shall have no right of action for damages against a person referred to in paragraphs (1)(a) to (d).

...

(13) The amount recoverable by a plaintiff under this section must not exceed the price at which the securities purchased by the plaintiff were offered.

(14) 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.

...

Limitation Periods

121. No action may be commenced to enforce a right created by this Part more than,

- (a) in the case of an action for rescission, 180 days after the date of the transaction giving rise to the cause of action; or
- (b) in the case of any action other than an action for rescission,
 - (i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or
 - (ii) three years after the date of the transaction giving rise to the cause of action, whichever period expires first.

14. ***Limitations Act (Alberta)* R.S.A. 2000, c. L-12**

Application

2(4) This Act does not apply where a claimant seeks

- (a) a remedial order based on adverse possession of real property owned by the Crown, or
- (b) a remedial order the granting of which is subject to a limitation provision in any other enactment of the Province.

15. ***Limitation Act (British Columbia)* S.B.C. 2012, c. 13**

Exempted Claims

3(2) This Act does not apply to a claim or court proceeding for which a limitation period has been established under another enactment, except to the extent provided for in the other enactment.

16. ***The Limitations Act (Manitoba)* S.M. 2021, c. 44**

Relationship to other Acts

4(1) This Act does not apply to a claim

- (a) that is subject to a limitation provision in another Act, except in the circumstance mentioned in section 13 and subsection 14(1) (suspension of limitation periods); or
- (b) if another enactment states that no limitation period applies to the claim.

17. ***Limitation of Actions Act (New Brunswick)*, SNB 2009, c L-8.5**

Conflict

4(1) If there is a conflict between this Act and any other public Act of New Brunswick, that other Act prevails.

18. ***Limitations Act, (Newfoundland & Labrador)* SNL 1995 c L-16 1**

Limitation period 6 years

6. (1) Following the expiration of 6 years after the date on which the right to do so arose, a person shall not bring an action

...

- (f) to enforce an obligation arising from a statute;

...

19. ***Limitation of Actions Act (Northwest Territories), RSNWT 1988, c L-8***

Limitation Periods Exception

(2) Nothing in subsection (1) extends to any action where the time for bringing the action is specially limited by an Act.

20. ***Limitation of Actions Act (Nova Scotia) S.N.S. 2014, c. 35***

Conflict with other enactments

6 Where there is a conflict between this Act and any other enactment, the other enactment prevails. 2014, c. 35, s. 6. SEPTEMBER 1, 2015

21. ***Limitation of Actions Act, (Nunavut) RSNWT (Nu) 1988, c L-8***

Limitation Periods Exception

(2) Nothing in subsection (1) extends to any action where the time for bringing the action is specially limited by an Act.

22. ***Limitations Act (Ontario), 2002, S.O. 2002, c. 24, Sch B***

Other Acts, etc.

19 (1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,

(a) the provision establishing it is listed in the Schedule to this Act; or

(b) the provision establishing it,

(i) is in existence on January 1, 2004, and

(ii) incorporates by reference a provision listed in the Schedule to this Act. 2002, c. 24, Sched. B, s. 19 (1); 2008, c. 19, Sched. L, s. 3.

23. ***Statute of Limitations (Prince Edward Island) RSPEI 1988, c S-7***

Limitations Periods – Application of Section

2 (2) Nothing in this section extends to any action where the time for section bringing the action is by statute specially limited. R.S.P.E.I. 1974, Cap. S-7, s.2; 1994, c.5, s.13 {eff.} July 14/94.

24. ***The Limitations Act (Saskatchewan)* S.S. 2004, c. L-16.1**

Application of Act

3 (4) This Act does not apply to a claim that is subject to a limitation provision in another Act or a regulation if that Act or regulation states that the limitation provision applies notwithstanding this Act.

25. ***Limitation of Actions Act (Yukon)*, RSY 2002, c 139**

Periods of Limitations

2(3) The following actions are not governed by any limitation period and may be brought at any time

- (a) a cause of action based on misconduct of a sexual nature, including without limitation, sexual assault,
 - (i) when the misconduct occurred while the person was a minor, and
 - (ii) whether or not the person's right to bring the action was at any time governed by a limitation period;
- (b) a cause of action based on sexual assault, whether or not the person's right to bring the action was at any time governed by a limitation period.

26. ***Limited Partnerships Act (Ontario)*, R.S.O. 1990, c. L.16**

Limited partners' rights as between themselves

14 (1) Subject to subsection (2), limited partners, in relation to one another, share in the limited partnership assets, (a) for the return of contributions; and (b) for profits and other compensation by way of income on account of their contributions, in proportion to the respective amounts of money and other property actually contributed by the limited partners to the limited partnership (emphasis added).

Priority Agreement

(2) Where there are several limited partners, the partners may agree that one or more of the limited partners is to have priority over other limited partners, (a) as to the return of contributions; (b) as to profits or other compensation by way of income; or (c) as to any other matter, but the terms of this agreement shall be set out in the partnership agreement (emphasis added).

Idem

(3) Where the partnership agreement does not contain an agreement referred to in subsection (2), the shares of the limited partners in the partnership assets shall be determined in accordance with subsection (1).

...

Settling accounts on dissolution

24 In settling accounts after the dissolution of a limited partnership, the liabilities of the limited partnership to creditors, except to limited partners on account of their contributions and to general partners, shall be paid first, and then, unless the partnership agreement or a subsequent agreement provides otherwise, shall be paid in the following order:

1. To limited partners in respect of their share of the profits and other compensation by way of income on account of their contributions.
2. To limited partners in respect of their contributions.
3. To general partners other than for capital and profits.
4. To general partners in respect of profits.
5. To general partners in respect of capital. R.S.O. 1990, c. L.16, s. 24.

27. ***Bankruptcy and Insolvency Act, RSC 1985, c B-3***

Interpretation

Definitions

2 In this Act, ...

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

- (a) a dividend or similar payment,
- (b) a return of capital,
- (c) a redemption or retraction obligation,
- (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
- (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); ...

equity interest means

- (a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and
- (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; ...

...

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; ...

...

Priority of claims

60 (1) No proposal shall be approved by the court that does not provide for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of a debtor and for the payment of all proper fees and expenses of the trustee on and incidental to the proceedings arising out of the proposal or in the bankruptcy.

...

Payment — equity claims

(1.7) No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

...

67 (1) Property of bankrupt

The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person, ...

...

Partnership Property

Application to limited partnerships

85 (1) This Act applies to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general partners of a limited partnership becoming bankrupt, the property of the limited partnership vests in the trustee.

Actions by trustee and bankrupt's partner

(2) If a member of a partnership becomes bankrupt, the court may authorize the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner, and any release by the partner of the debt or demand to which the action relates is void or, in the Province of Quebec, null.

Notice to partner

(3) Notice of the application for authority to commence an action under subsection (2) shall be given to the bankrupt's partner, who may show cause against it, and on his application the court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and, if he does not claim any benefit therefrom, he shall be indemnified against costs in respect thereof as the court directs.

...

97(3) Law of set-off or compensation

The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

...

Scheme of Distribution

Priority of claims

136 (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

- (a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;
- (b) the costs of administration, in the following order,
 - (i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),
 - (ii) the expenses and fees of the trustee, and
 - (iii) legal costs;
- (c) the levy payable under section 147;
- (d) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid;
 - (d.01) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.3 and 81.4 and the amount actually received by the secured creditor;
 - (d.02) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.5 and 81.6 and the amount actually received by the secured creditor;

(d.1) claims in respect of debts or liabilities referred to in paragraph 178(1)(b) or (c), if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;

(e) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding the bankruptcy, that do not constitute a secured claim against the real property or immovables of the bankrupt, but not exceeding the value of the interest or, in the Province of Quebec, the value of the right of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;

(f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

(g) the fees and costs referred to in subsection 70(2) but only to the extent of the realization from the property exigible thereunder;

(h) in the case of a bankrupt who became bankrupt before the prescribed date, all indebtedness of the bankrupt under any Act respecting workers' compensation, under any Act respecting unemployment insurance or under any provision of the Income Tax Act creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;

(i) claims resulting from injuries to employees of the bankrupt in respect of which the provisions of any Act respecting workers' compensation do not apply, but only to the extent of moneys received from persons guaranteeing the bankrupt against damages resulting from those injuries; and

(j) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (a) to (i), in right of Canada or any province, rateably notwithstanding any statutory preference to the contrary.

Payment as funds available

(2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, payment in accordance with subsection (1) shall be made as soon as funds are available for the purpose.

Balance of claim

(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him.

...

Postponement of equity claims

140.1 A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.

Claims generally payable rateably

141 Subject to this Act, all claims proved in a bankruptcy shall be paid rateably.

28. ***Courts of Justice Act* R.S.O. 1990, c. C.43**

Set off

111 (1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.

Same

(2) Mutual debts may be set off against each other even if they are of a different nature.

Judgment for defendant

(3) Where, on a defence of set off, a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant is entitled to judgment for the balance. R.S.O. 1990, c. C.43, s. 111.

29. ***Directors Liability Act (UK), 1890, 53 & 54 Vict, c 64***

3 (1.) Where, after the passing of this Act, a prospectus or Liability for notice invites persons to subscribe or apply for shares, debenture stock, annuities on lives, or other securities of a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who, having authorised such naming of him, is named in the prospectus or notice as a director of the company or as having agreed to become a director of the company either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus or notice, shall be liable to pay to all persons so subscribing or applying on the faith of such prospectus or notice, compensation for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, ...

30. ***Directors' Liability Act (Ontario), SO 1891, c 34***

4 (1) Where, after the passing of this Act, a prospectus or Liability for notice invites persons to subscribe or apply for shares, debenture stock, annuities on lives, or other securities of a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who, having authorised such naming of him, is named in the prospectus or notice as a director of the company or as having agreed to become a director of the company either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus or notice, shall be liable to pay to all persons so subscribing or applying on the faith of such prospectus or notice, compensation for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, ...

31. ***The Securities Act (Ontario), 1966, SO 1966, c 142***

64 (1) A person or company that is a party to a contract rescind as purchaser resulting from the offer of a security in the course of primary distribution to the public to which section 35 or 56 is applicable has a right to rescind the contract while still the owner of the security if the prospectus and any amended prospectus then filed with the Commission in compliance with section 55 received by the purchaser, as of the date of receipt, contains an untrue statement of a material fact or omits to state a material fact necessary in order to make any statement contained therein not misleading in the light of the circumstances in which it was made.

32. ***An Act to implement the 1999 Budget and to make other amendments to various Acts in order to foster an environment for jobs, growth and prosperity in Ontario, SO 1999, c 9***

218. The Act is amended by adding the following section:

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 shall be deemed to have relied on the misrepresentation if it was a misrepresentation at the time of purchase, and,

(a) the purchaser has a right of action for damages against the issuer and a selling security holder on whose behalf the distribution is made; or

(b) where the purchaser purchased the security from a person or company referred to in clause (a), the purchaser may elect to exercise a right of rescission against the person or company, in which case the purchaser shall have no right of action for damages against such person or company.

33. ***The Securities Act, 1978, O Reg 478/79***

- 20** (2) Notwithstanding the exemptions in clauses d and p of subsection 1 of section 71, sections 52 and 61 apply to a trade in which an offering memorandum is used unless,
- (a) each investor in the distribution is given a contractual right of action for rescission or damages, at his election, exercisable on notice given not more than ninety days subsequent to the date of investment which right shall correspond to the extent reasonably feasible to the rights provided by section 126 of the Act as to a prospectus and may specify defenses equivalent to those available under that section where the offering memorandum,
- (i) contains an untrue statement of a material fact or
 - (ii) omits to state a material fact necessary in order to make any, statement contained therein not misleading in the light of the circumstances in which it was made;
- (b) the offering memorandum describes the right of action referred to in clause a and how that right is to be provided; ...

**SCHEDULE “C”
SERVICE LIST**

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Applicant

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**RESPONDING FACTUM OF THE
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(Re: Unitholder Priority Motion returnable
November 16 & 17, 2022)**

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