Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue queen ouest, Toronto ON M5H 3S8

Citation: Solar Income Fund Inc. (Re), 2021 ONSEC 2
Date: 2021-01-18
File No. 2019-35

IN THE MATTER OF SOLAR INCOME FUND INC., ALLAN GROSSMAN, CHARLES MAZZACATO and KENNETH KADONOFF

REASONS FOR DECISION ON A MOTION (Section 25.0.1(a) of the *Statutory Powers Procedure Act*)

Hearing:	In writing, and by a teleconference held on January 13, 2021	
Decision:	January 18, 2021	
Panel:	Timothy Moseley	Vice-Chair of the Commission
Appearances:	Andrew Faith Ryan Lapensée	For Staff of the Commission
	James W.E. Doris Sean R. Campbell Abhishek Vaidyanathan	For Solar Income Fund Inc. and Allan Grossman
	Andrea L. Burke Chantelle Cseh	For Charles Mazzacato
	Eli Lederman Brian Kolenda Madison Robins	For Kenneth Kadonoff

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REASONS FOR DECISION

I. OVERVIEW

[1] These reasons relate to the admissibility, at a yet-to-be-commenced merits hearing, of the report of a proposed expert witness.

[2] In this proceeding, Staff of the Ontario Securities Commission (**Staff** of the **Commission**) alleges that the respondents raised approximately $57 million from investors in the exempt market through a fund (the **Fund**) that would spend those funds on the acquisition, development and operation of solar energy installations, thereby producing an investment return for the Fund through the sale of solar energy. Staff alleges that the respondents misled and defrauded investors, in that the respondents did not use the funds as promised.

[3] The merits hearing is set to begin on March 1, 2021. In preparation for the hearing, Staff retained a proposed expert witness, who prepared a report (the **Expert's Report**), in which he expressed opinions regarding norms in the solar power industry and regarding the reasonable expectations of investors in that industry.

[4] The respondents object to the Expert's Report forming part of the record in this proceeding. They submit that the opinions contained in the report are outside the scope of the Statement of Allegations or are otherwise inadmissible. They do not wish to incur the expense of responding to the report, if they are correct in their position. They ask that the issue be resolved now.

[5] This issue came before me as a motion by Staff to adduce the Expert's report at the merits hearing, although Staff objects to my resolving this issue before the merits hearing begins, as opposed to during that hearing and before the full hearing panel. I invited submissions from the parties both as to the propriety of resolving the issue at a preliminary stage, and as to the admissibility of the Expert's Report, should I decide that it was appropriate to consider admissibility at this stage of the proceeding.

[6] After reviewing the parties' submissions, I issued an order on January 14 providing that, for reasons to follow, the Expert's Report is inadmissible at the merits hearing. These are my reasons, in which I explain why I concluded that:

a. the expert's opinions regarding solar power industry norms would be admissible, except that the respondents have, since the bringing of this motion, undertaken not to lead or elicit any evidence, or to make any submission, that would make the expert's opinions relevant; and

b. the expert's opinion regarding the reasonable expectations of investors is inadmissible, in that it purports to resolve an issue that is ultimately to be determined by the merits hearing panel, and for which the Commission does not require expert assistance.

II. BACKGROUND

[7] This motion has its roots in my order of August 11, 2020, in this proceeding. That order required that Staff serve every party with the report of its expert witness by October 16, and that if any respondent wished to file a motion regarding Staff's expert evidence, they were to do so by October 30.

[8] Staff delivered the Expert's Report. The respondents then filed a motion objecting to that report, as contemplated by the August 11 order. Following some correspondence with the parties, and a brief teleconference hearing on December 7, I agreed with the respondents' submission that Staff bore the burden of demonstrating the admissibility of the report. By my order of December 11, 2020, resulting from that hearing, the respondents' motion was effectively to be replaced by a motion brought by Staff to adduce the Expert's Report.

[9] I heard the motion in writing. Materials filed on the motion incorrectly refer to the respondents in the proceeding as the moving parties, a confusion no doubt caused by my August 11 order, which as noted above required the respondents to bring any motions regarding Staff's expert evidence by October 30.

[10] That confusion is inconsequential. This motion proceeded in the same way in which the core question would have been addressed during the merits hearing, where Staff would have indicated its intention to call expert evidence, the respondents would have objected, and Staff would have had the burden of demonstrating that the proposed evidence is admissible.

[11] On this motion, Staff filed the affidavit of Kevin Dusseldorp sworn December 18, 2020. That affidavit, which I have marked as Exhibit 1, has the following exhibits:

a. the Expert's Report;

b. the offering memorandum used by the respondents to raise funds from investors (the **Offering Memorandum**);

c. a newsletter sent from the respondent Solar Income Fund Inc. to investors; and

d. the summary of anticipated evidence of the respondent Kenneth Kadonoff (**Kadonoff's Evidence Summary**).

[12] I heard and decided this motion pursuant to s. 25.0.1(a) of the *Statutory Powers Procedure Act*,[1] which empowers the Commission to determine its own procedures and practices, and to make an order with respect to the procedures and practices that apply in a particular proceeding.

III. ANALYSIS

A. Introduction

[13] The core issue is whether part or all of the Expert's Report should be admissible in this proceeding.

[14] A collateral issue raised by this motion is whether the question of admissibility should be decided at this preliminary stage, before the merits hearing begins.

[15] Because both of these issues turn on the general question of how admissibility is determined in a Commission proceeding, I begin my analysis with that question. After addressing that general question, I then consider whether the admissibility question raised by this motion, in this case, should be resolved now, and if so, how it should be resolved.

[1] RSO 1990, c S.22

B. How is admissibility of evidence determined in a Commission proceeding?

[16] An enforcement proceeding before the Commission is initiated by Staff filing its Statement of Allegations. The Statement of Allegations defines the issues in the proceeding.

[17] Unlike defendants in a civil action, who file a statement of defence in response to the statement of claim, respondents in a Commission proceeding are not required to deliver a response to Staff's Statement of Allegations.

[18] Staff does get discovery of a sort in an enforcement proceeding, through one or more of:

a. its investigation prior to the proceeding, which investigation may include the use of compulsory powers;

b. a respondent's obligation, once the proceeding has begun, to disclose to Staff any documents not already in Staff's possession, on which the respondent may rely;

c. a respondent's obligation to provide Staff with a summary of the testimony that the respondent expects to give, if the respondent decides to testify; and

d. a similar obligation on the respondent with respect to any witnesses that the respondent intends to call.

[19] While Staff gets that discovery, nothing disclosed through that discovery alters the scope of the proceeding. The scope is established by the Statement of Allegations. The investigation precedes the delivery of the Statement of Allegations, and a respondent's disclosure obligations are governed by the Statement of Allegations.

[20] Disclosure delivered by a respondent cannot enlarge the scope of a proceeding. If a respondent's witness summary indicates that the respondent will testify about an issue that is not raised by the Statement of Allegations, then Staff would be well within its rights to object during the merits hearing, if the respondent were to begin to give that irrelevant testimony.

[21] Staff submits that relevance may emerge from defences advanced by respondents. In support of that submission, Staff cited a number of court decisions relating to criminal proceedings. I do not find these decisions helpful. The combination of a detailed Statement of Allegations and a respondent's disclosure obligations makes the Commission enforcement proceeding context sufficiently dissimilar from that of criminal proceedings that I am better guided by first principles than by the context-dependent statements in those decisions.

[22] Similarly, I do not find the Commission's decision in *El-Bouji (Re)*,[2] also cited by Staff, to be helpful. That decision related to a motion brought by the respondents in that proceeding to strike evidence filed by Staff on a pending jurisdiction motion. Once again, the context is sufficiently different that it is better to apply first principles than to adopt in this context an approach that was developed for a different purpose.

[2] 2019 ONSEC 19, (2019) 42 OSCB 5065 at para 22

[23] I therefore conclude, as a general rule, that relevance should be determined by the Statement of Allegations. In some cases, though, it will not be sufficient to make that determination based only on the words of the Statement of Allegations itself. A Statement of Allegations may refer, directly or indirectly, to documents or other things, in which case consideration may also have to be given to those documents or other things. Whether it is practical and appropriate to refer to those documents or other things on a motion such as this one will depend on the circumstances of the particular case.

[24] For example, if a Statement of Allegations refers to a formal public document such as an offering memorandum, it may be practical and appropriate, in a given case, to consider that offering memorandum as having been incorporated by reference into the Statement of Allegations.

[25] The practicability and propriety of considering, at a preliminary stage, documents or other things referred to in a Statement of Allegations will diminish as one moves from formal public documents to such things as email threads and oral statements.

[26] I turn now to consider whether, in this case, admissibility of the Expert's Report should be resolved at this preliminary stage, and if so, how.

C. Should admissibility be resolved before the merits hearing begins?

1. Introduction

[27] Staff submits that I should not decide the admissibility issue at this stage of the proceeding. Staff says that I should be governed by the 2010 decision of the Court of Appeal for Ontario in *Harrop v Harrop*,[3] in which the court held that a motion judge should decide the admissibility of expert evidence before trial only in the "rarest of cases".

[28] The court cited four concerns in support of that proposition:

a. the possibility of a multiplicity of proceedings;

b. the need for a full context in which the decision can be made;

c. the risk of the preliminary step being taken for purely tactical reasons; and

d. the risk of different appeal rights depending on whether the decision is made by a motion judge as an interlocutory order or by the trial judge.

[29] The respondents answer by citing a subsequent decision of the Superior Court of Justice, in which that court held that the policy considerations in *Harrop v Harrop* "have to be re-assessed having regard to the rule amendments that have expanded the court's jurisdiction to rule on issues before a trial."[4] Staff distinguishes the later decision, arguing that the proposed expert opinion in that case was so clearly irrelevant that a preliminary determination on admissibility was possible.

[30] I need not resolve the parties' disagreement regarding these two court decisions because, in my view, I should consider the concerns cited by the Court of

[3] 2010 ONCA 390
[4] *Awada v Glaeser*, 2017 ONSC 1094 at para 21

Appeal, whether or not the re-assessment contemplated by the Superior Court would have any impact.

[31] Having said that, only one of the four concerns is relevant in this case. In my analysis below, I address the second of the four concerns (the need for a full context). The first concern does not apply here because, despite the respondents' submission to the contrary, determining the principal issue at this time resolves it for all purposes in the proceeding, and the question may not be re-opened. The third concern does not apply here, because there is neither any suggestion, nor any basis to believe, that the respondents are objecting to the Expert's Report for purely tactical reasons. The fourth does not apply here, because an appeal from a Commission decision may come only after the Commission's final decision in the proceeding, and not after an interlocutory decision.

[32] Finally by way of introduction to the issue of timing, it is common ground that in deciding whether it is appropriate to resolve the principal issue at this stage, I should ask the three questions set out in the Commission's decision in *Mega-C Power Corp (Re)*[5] (***Mega-C***):

a. Can the questions raised in the motion be resolved without regard to contested facts and anticipated evidence at the merits hearing?

b. Is it necessary for a fair hearing that the relief sought on the motion be granted prior to the merits hearing?

c. Will the resolution of the issues make the process materially more efficient or effective?[6]

[33] In *Mega-C*, the Commission said that if the answer to any of the three questions is yes, it makes sense to hear the motion before the merits hearing, absent strong reasons to the contrary. If, however, the answer to all three questions is no, the Commission should be reluctant to hear the motion before the merits hearing.[7]

[34] I note that in *Mega-C*, the Commission prefaced the three questions with:

> In our view, in exercising its discretion as 'master of its procedure', the Commission ought to have due regard for all of the circumstances described above, as well as concern for not unduly 'judicializing' its processes. While fairness and the procedural rights of the Respondents and affected persons must be ensured… administrative proceedings are intended to be less formal and more procedurally flexible than those of the courts.[8]

[35] In my view, that is a useful caution when considering Staff's reliance in this case on decisions (such as *Harrop v Harrop*) that deal with court proceedings.

[36] I turn now to address each of the three questions posed in *Mega-C*.

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[5] 2007 ONSEC 4, (2010) 33 OSCB 8245
[6] *Mega-C* at para 34
[7] *Mega-C* at paras 35-36
[8] *Mega-C* at para 34

2. Can the questions raised in the motion be resolved without regard to contested facts and the anticipated evidence at the merits hearing?

[37] Staff says that the principal issue in this motion cannot be resolved without regard to the anticipated evidence at the merits hearing, for two reasons.

[38] First, Staff's proposed expert reviewed 163 documents before preparing the Expert's Report. Those documents have not yet been put into evidence, and no witness has testified about them.

[39] I reject this submission. A party cannot make otherwise inadmissible expert evidence admissible simply by providing documents (some of which may be irrelevant to the proceeding) to its proposed expert.

[40] While documents provided to a proposed expert will not dictate relevance, documents referred to in the Statement of Allegations may well do so. Something that is not apparent from the Statement of Allegations itself may become apparent upon review of a document referred to in the Statement of Allegations.

[41] This complicates the determination of relevance, depending on the document referred to in the Statement of Allegations. Where there is no controversy about the authenticity or content of the document, such as would likely be the case with an offering memorandum, reference to that document at this preliminary stage is unlikely to be problematic. However, any controversy about the authenticity of a document, or about which document(s) the Statement of Allegations refers to, might require a "no" answer to this first question.

[42] Similarly, any reference to facts that for their proof might depend exclusively on oral evidence (and not documents) might be more indicative of a "no" answer.

[43] Staff cites as its second reason for answering "no" to this question its expectation that the respondents will raise defences that the Expert's Report is intended to rebut. Staff submits that the Commission should not exclude the Expert's Report when the Commission is not privy to the full scope of material issues, including the respondents' defences.

[44] That submission, though, does not answer the question asked. The question is whether it is necessary to know the evidence, not whether it is necessary to know the defences. As I have explained above, any evidence to be admitted at the merits hearing, and any defences asserted by the respondents, must be relevant to the allegations.

[45] In other words, the Commission is, at this time, privy to the full scope of material issues in this matter. That scope is defined by the Statement of Allegations. Any evidence called at the merits hearing must fall within that scope. No evidence called at the merits hearing can change the scope.

[46] Accordingly, the answer to the first of the three questions is "yes" – the questions raised in this motion can be resolved without regard to contested facts and the anticipated evidence at the merits hearing. This conclusion fully responds to the second of the four concerns in *Harrop v Harrop*.

[47] As the Commission held in *Mega-C*, if the answer to any of the three questions is "yes", it makes sense to hear the motion before the merits hearing, absent

strong reasons to the contrary. While it may therefore be unnecessary to consider the second and third questions, I will do so anyway, for the sake of completeness and to respond to the parties' submissions.

3. Is it necessary for a fair hearing that the relief sought on the motion be granted prior to the merits hearing?

[48] The second question asks whether it is "necessary" that the relief sought here be granted prior to the merits hearing. In this case, it is not necessary, and no party has suggested that it is.

4. Will the resolution of the issues make the process more efficient or effective?

[49] Staff submits that resolving the admissibility issue now commits the Commission to an inefficient and duplicative process. I disagree.

[50] A resolution at this time is more efficient. If the respondents are correct in saying that some or all of Staff's proposed expert testimony is inadmissible, it is better to determine that now, before the respondents feel the need to retain their own expert to respond to the Expert's Report. Determining the issue now may avoid unnecessary cost to all parties. Further, determining the issue now gives all parties, including Staff, greater certainty about how the merits hearing will proceed, thereby avoiding the risk of a mid-hearing adjournment request occasioned by a ruling against Staff at that time.

[51] A resolution now does not result in a duplicative process. The Commission's decision in *Pro-Financial Asset Management Inc. (Re)*[9] (***PFAM***), on which Staff relies to suggest that it does, is clearly distinguishable. In that case, an individual respondent facing various allegations of misconduct in an enforcement proceeding brought a motion, prior to the merits hearing, relating to his then pending application for registration under the *Securities Act*[10] (the **Act**). In dismissing the motion, the Commission observed that the evidence that would be necessary on the motion would almost entirely replicate the evidence to be called at the merits hearing.

[52] The motion in *PFAM* raised issues that overlapped with those that would be addressed at the merits hearing. However, unlike Staff's motion in this case, the *PFAM* motion had nothing to do with how the merits hearing would proceed. A decision now about the admissibility of part or all of the Expert's Report will resolve that issue conclusively, absent a change to the scope of this proceeding occasioned by an amendment to the Statement of Allegations or by some other permissible means.

[53] The answer to the third question is "yes".

5. Conclusion as to when the admissibility issue should be determined.

[54] Two of the three questions set out in *Mega-C* are answered "yes" in this case. That leads to the conclusion that the admissibility issue should be determined

[9] 2015 ONSEC 32, (2015) 38 OSCB 8057 at paras 47-48
[10] RSO 1990, c S.5

now, unless there are strong reasons to the contrary. No such reasons have been advanced. I therefore turn to consider the Expert's Report.

D. Is part or all of the Expert's Report admissible?

[55] Opinion evidence is generally inadmissible. For the Expert's Report to be admitted, Staff must establish that:

a. the Expert's Report is relevant;

b. the proposed expert is qualified to give the opinion evidence; and

c. the expert's intended evidence is necessary, in that it is outside the Commission's experience and knowledge.[11]

[56] I will address each of these requirements in turn.

1. Is the Expert's Report relevant?

[57] Staff submits, and I agree, that when considering relevance, it is useful to distinguish between "logical relevance", which is a threshold criterion of admissibility, and "legal relevance". To be legally relevant, evidence must first be logically relevant, and then (particularly in the context of criminal cases with juries) it must be sufficiently probative.

[58] For the purposes of this motion, I consider whether the Expert's Report is logically relevant. I will begin by reviewing the pertinent facts alleged in the Statement of Allegations. I will then identify the alleged misconduct, which in this case includes alleged contraventions of two provisions of the Act. Staff also alleges "conduct contrary to the public interest", in addition to referring to the two specific provisions of the Act. For reasons I explain below, I disregard this allegation for the purposes of this motion.

[59] Finally, I will review the content of the Expert's Report, consider its admissibility (using the alleged contraventions as a guide), and consider whether any part of the Expert's Report could be made relevant by anything not specifically set out in the Statement of Allegations (*e.g.*, a respondent's summary of anticipated evidence, served on Staff by the respondent as required).

(a) Facts alleged

[60] The Statement of Allegations contains detailed factual allegations. The following three allegations are sufficient to define the context for this motion:

a. that the Offering Memorandum represented to investors that the proceeds of the relevant offering "would be used to invest in subsidiaries to acquire, develop, and operate solar energy power installations";[12]

b. that the proceeds were used, however, "for purposes other than those represented to investors" in the Offering Memorandum;[13] and

c. that the Offering Memorandum stated that the business and purpose of the Fund was "to invest in Subsidiaries [a term defined in the Offering Memorandum] which will in turn invest in the acquisition, development,

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[11] *Paramount (Re)*, 2020 ONSEC 12, (2020) 43 OSCB 4475 at para 5, citing *R v Mohan*, [1994] 2 SCR 9 at paras 17, 26

[12] Statement of Allegations at para 6

[13] Statement of Allegations at para 7

financing and operation of solar energy powered installations… and other ancillary or incidental business activities…".[14]

[61] I note at this point that the above allegations are largely objectively determinable. They do not involve more subjective concepts such as "reasonable" or "low-risk".

(b) Misconduct alleged

[62] Staff alleges contraventions of two provisions of the Act, and alleges "conduct contrary to the public interest".

i. Subsection 44(2) of the Act – false or misleading statements

[63] The first alleged contravention is of s. 44(2) of the Act, which prohibits the making of any statement that "a reasonable investor would consider relevant in deciding whether to enter into or maintain a trading… relationship" with the person or company who makes the statement, if the statement "is untrue or omits information necessary to prevent the statement from being false or misleading in the circumstances in which it is made".

[64] I note, but disregard for the purposes of this motion, the respondents' assertion that s. 44(2) of the Act does not apply in this case because the respondents did not enter into a trading relationship with any investors. That is an issue to be determined at the merits hearing. For present purposes, the allegation as made determines relevance.

[65] Staff submits that the Expert's Report relates to the question of whether a reasonable investor would consider certain loans to be relevant when deciding whether to enter into or maintain a trading relationship with the respondents. Staff submits that the Commission must have the benefit of the Expert's Report in order to "understand what a reasonable solar industry investor would consider relevant when investing in" the Fund.[15]

[66] In its submissions, Staff refers not only to statements made in the Offering Memorandum (which is explicitly referred to in the Statement of Allegations), but also to the newsletter (referred to in paragraph [11] above) sent to investors by the corporate respondent, which says that certain subject loans were on "commercially reasonable terms". Staff submits that the words "commercially reasonable" make the Expert's Report relevant. However, as the respondents correctly point out, the statements that the Statement of Allegations cites in support of the alleged contravention of s. 44(2) of the Act do not include the newsletter.

[67] Staff also submits, based on Kadonoff's Evidence Summary, that the respondents have given notice that they may assert a defence of having obtained legal advice. If that defence is available for an alleged breach of s. 44(2) of the Act (which is not conceded by Staff), Staff submits that the Expert's Report is relevant to determining whether the advice was reasonable and credible under the circumstances. The respondents did not address that

[14] Statement of Allegations at para 17
[15] Staff's written submissions at para 50

argument in their submissions. As will be evident from my reasons below, it is unnecessary for me to resolve this specific issue. I decline to do so.

ii. Clause 126.1(1)(b) of the Act – fraud

[68] The second alleged contravention is of s. 126.1(1)(b) of the Act, which prohibits any act, practice or course of conduct relating to securities, where the person or company engaging in the act, practice or course of conduct knows or reasonably ought to know that doing so would perpetrate a fraud.

[69] Staff alleges that the respondents contravened this provision by using the raised funds in a way that was contrary to the purpose and the objectives of the Fund as set out in the Offering Memorandum. In particular, Staff alleges that the respondents caused the Fund to transfer money to a second fund to pay distributions to investors in that second fund, and in other ways, all contrary to statements made in the Offering Memorandum. Staff alleges that by doing so, the respondents exposed investors to risks not disclosed to them, and in some cases caused actual losses to investors.

iii. Conduct contrary to the public interest

[70] As noted above, the Statement of Allegations also includes an allegation that the respondents engaged in conduct "contrary to the public interest". The only relevant portions of the Statement of Allegations are paragraphs 11 and 64, which I reproduce in their entirety:

> 11. In addition, the Respondents acted contrary to the public interest.
>
> […]
>
> 64. All of the Respondents have also acted contrary to the public interest.

[71] These bald allegations, without any particulars, are a classic example of an all-too-common practice by Staff. Unfortunately, that practice has been tacitly condoned by this tribunal in too many of its decisions.

[72] It is tempting to let this point pass by yet again, for efficiency's sake. However, on this motion, Staff has expressly relied on its allegations of "conduct contrary to the public interest" in support of its position that the Expert's Report is relevant. I will therefore deal with the point now.

[73] The phrase "contrary to the public interest" is found nowhere in the Act.

[74] It is a trope that finds its roots in the opening words of s. 127 of the Act ("The Commission may make… orders if in its opinion it is in the public interest to make the… orders") and that evokes the few instances in which the Commission has found it to be in the public interest to issue an order under s. 127, even without having found a contravention of Ontario securities law.

[75] Those decisions, which include *Canadian Tire Corporation, Limited (Re)*[16] and its progeny, need not be reviewed here. It is sufficient for present purposes to say that in cases where the Commission has decided that it is in the public interest to make an order under s. 127 even absent a contravention of Ontario securities law, the Commission took pains to explain why such an exception was appropriate in the circumstances.

[16] (1987) 10 OSCB 857

[76] The Statement of Allegations in this case offers no assistance as to why an order under s. 127 might be justified against the respondents even if no contraventions of Ontario securities law are found at the merits hearing. These allegations are nothing but clutter in the Statement of Allegations, and I disregard them for the purposes of this motion.

(c) Comparison of the allegations to the Expert's Report

[77] With the two specific alleged contraventions of the Act in mind, I turn to the four questions that were asked of Staff's proposed expert. I deal with them in two groups: (i) the first three questions, which invoke prevailing solar power industry norms, and (ii) the fourth question, which addresses the reasonable expectations of investors in the solar energy industry.

i. Questions that invoke solar power industry norms

[78] The first three questions asked of Staff's proposed expert may be paraphrased as follows:

a. Did the terms of a specified debenture (by which the Fund made a loan) and a specified acquisition (by which the Fund purchased shares of a related entity) meet or depart from prevailing solar power industry norms, and specifically, did the transactions involve commercially reasonable levels of risk?

b. Did loans by the Fund to a related fund meet or depart from prevailing solar power industry norms, and specifically, did they involve commercially reasonable levels of risk?

c. Did certain other specified loans from the Fund meet or depart from prevailing solar power industry norms, and specifically, did they involve commercially reasonable levels of risk?

[79] Staff submits that the Expert's Report will assist Staff in "rebutting any inference in the Respondents' evidence or argument that these transactions were commercially typical or reasonable."[17]

[80] The respondents submit, and I agree, that there is nothing in the Statement of Allegations that explicitly invokes solar power industry norms, or that connects to the question of how typical or reasonable the impugned transactions were. The allegations say that the funds were deployed to destinations different from those promised to investors. There is no allegation that the funds were deployed in violation of subjective criteria, *e.g.*, level of risk, or commercial reasonableness. The alleged contraventions are about the entities to which the funds flowed, not why the funds flowed to those entities.

[81] As discussed above, however, it is appropriate on a motion at this stage to go beyond the Statement of Allegations itself and consider documents that are referred to, directly or indirectly, in the Statement of Allegations. In its submissions, Staff cites both the Offering Memorandum and the newsletter, but as I have explained above, there is nothing in the Statement of Allegations that would bring the newsletter within the scope of this proceeding.

[17] Staff's written submissions at para 49

[82] As for the Offering Memorandum (which is included in the material filed on this motion), section 1.3, titled "Reallocation", says (in full): "We intend to spend the available funds as stated. We will reallocate funds only for sound business reasons."

[83] Staff submits, and I agree, that the words "sound business reasons" in the Offering Memorandum might enable a respondent to argue at the merits hearing that all of the impugned transactions met that standard. In light of this possibility, Staff had good reason to retain an expert to provide opinions about the soundness of the transactions.

[84] Because of those words in the Offering Memorandum, I would have ruled that the three opinions that invoke solar power industry norms were admissible at the merits hearing. However, the respondents' written submissions on this motion prompted a different decision.

[85] In their submissions, the respondents state that they "have no intention to lead or elicit evidence that would render [the] first three opinions relevant". In other words, the respondents waived their right to lead or elicit evidence designed to support a submission that they reallocated funds for sound business reasons.

[86] That waiver might have resolved the question of the admissibility of the first three opinions, except that I was uncertain about the precise extent of the respondents' commitment. I could imagine the respondents choosing not to lead or elicit evidence that would make the opinions relevant, but still making a submission at the merits hearing that might make the opinions relevant. If they were to do so, even inadvertently, it would be unfair to Staff for me to exclude the Expert's Report at this stage.

[87] After reviewing the parties' written submissions, I decided that if the respondents wished to extend their commitment beyond evidence to include submissions (*i.e.*, to waive their right to argue, based on whatever evidence was properly admitted at the merits hearing, that any reallocation of funds was done for sound business reasons), the first three opinions in the Expert's Report would be inadmissible on that basis. If the respondents were not willing to extend their commitment, the opinions would be admissible.

[88] Because of my uncertainty, I convened a teleconference hearing, in which I explained my decision and identified the uncertainty. Soon after that teleconference hearing, the respondents confirmed in writing that they will make no submission at the merits hearing that would make the three opinions relevant.

[89] That commitment fully resolves the question. The three opinions, which would have otherwise been relevant, have been made irrelevant by the respondents' waiver. Staff therefore need not, and may not, adduce the three opinions at the merits hearing.

ii. Question regarding the reasonable expectations of investors in the solar energy industry

[90] The fourth question asked of Staff's proposed expert may be paraphrased as follows: Could the loans made by the Fund have been reasonably understood by a solar energy investor to be investments in the acquisition, development,

financing and operation of solar energy powered installations as described in the Offering Memorandum?

[91] The respondents do not dispute that the expert's answer to that question is relevant.

(d) Conclusion as to relevance

[92] For the foregoing reasons, all four of the opinions given by the expert would be relevant, but for the respondents' waiver with respect to the first three.

2. Is this witness qualified to give opinion evidence re issues that are properly before the tribunal?

[93] I turn now to the second of the three questions regarding admissibility. That is, is Staff's proposed expert qualified to give the opinions contained in the Expert's Report?

[94] While this question is moot in light of my decision, I did consider it, especially given my uncertainty about the extent of the respondents' commitment about relevance.

[95] The respondents neither admitted nor acknowledged the proposed expert's qualifications, but they did not dispute those qualifications or argue that the proposed expert was unqualified. Based on the background and qualifications of the proposed expert, as set out in the Expert's Report, I had no difficulty concluding that he would be qualified to give the opinions contained in the report.

3. Necessity

[96] The last of the three questions regarding admissibility asks whether the tribunal requires the assistance of the expert to determine the issues addressed by the expert's proposed evidence.

[97] I need not consider this question with respect to the first three opinions in the Expert's Report, for the reasons set out above. I must consider it only with respect to the fourth opinion, which answers the question referred to in paragraph [90] above; namely, "Could the loans made by the Fund have been reasonably understood by a solar energy investor to be investments in the acquisition, development, financing and operation of solar energy powered installations as described in the Offering Memorandum?"

[98] Staff submits that this opinion is necessary so that the Commission can understand how the word "financing" is typically understood by participants in the solar energy market.

[99] I disagree. How a reasonable investor would read the word "financing" in an offering memorandum, and how a reasonable investor would assess whether certain transactions conformed to that language, are questions that are squarely within the expertise of the Commission. I reject Staff's suggestion, unsupported by any authority, that the Commission should admit expert industry-specific opinion evidence when considering the perspective of a reasonable investor.

[100] The fourth opinion is, therefore, inadmissible at the merits hearing.

IV. CONCLUSION

[101] The first three opinions in the Expert's Report would have been admissible at the merits hearing, absent the respondents' commitment not to lead or elicit evidence, or to make any submission, that would make those opinions relevant.

[102] The fourth opinion in the Expert's Report is relevant, but is not needed, and is therefore inadmissible.

[103] As a result, the Expert's Report is inadmissible at the merits hearing.

Dated at Toronto this 18th day of January, 2021.

"*Timothy Moseley*"
Timothy Moseley