The Ontario Securities Commission

OSC Bulletin

January 19, 2023

Volume 46, Issue 3

(2023), 46 OSCB

The Ontario Securities Commission carries out the powers, duties and functions given to it pursuant to the *Securities Commission Act, 2021* (S.O. 2021, c. 8, Sched. 9).

The Ontario Securities Commission exercises its regulatory oversight function through the administration and enforcement of Ontario's *Securities Act* (R.S.O. 1990, c. S.5) and *Commodity Futures Act* (R.S.O. 1990, c. C.20), and administration of certain provisions of the *Business Corporations Act* (R.S.O. 1990, c. B.16).

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Published under the authority of the Commission by:
Thomson Reuters
One Corporate Plaza
2075 Kennedy Road
Toronto, Ontario
M1T 3V4
416-609-3800 or 1-800-387-5164

43062562

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ISSN 0226-9325
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A. Capital Markets Tribunal

A.2
Other Notices

A.2.1 Trevor Rosborough et al.

FOR IMMEDIATE RELEASE
January 12, 2023

TREVOR ROSBOROUGH,
TAYLOR CARR, AND
DMITRI GRAHAM,
File No. 2020-33

TORONTO – The Tribunal issued its Reasons and Decision and an Order in the above noted matter.

A copy of the Reasons and Decision and the Order dated January 10, 2023 are available at capitalmarketstribunal.ca.

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A.2.2 Solar Income Fund Inc. et al.

FOR IMMEDIATE RELEASE
January 12, 2023

SOLAR INCOME FUND INC.,
ALLAN GROSSMAN,
CHARLES MAZZACATO, AND
KENNETH KADONOFF,
File No. 2019-35

TORONTO – The Tribunal issued its Reasons and Decision and an Order in the above noted matter.

A copy of the Reasons and Decision and the Order dated January 11, 2023 are available at capitalmarketstribunal.ca.

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A.2.3 Mark Odorico

FOR IMMEDIATE RELEASE
January 12, 2023

MARK ODORICO,
File No. 2022-18

TORONTO – The Tribunal issued an Order in the above named matter.

A copy of the Order dated January 12, 2023 is available at capitalmarketstribunal.ca.

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A.2.4 Mark Edward Valentine

FOR IMMEDIATE RELEASE
January 16, 2023

MARK EDWARD VALENTINE,
File No. 2022-7

TORONTO – Take notice that the merits hearing in the above named matter scheduled to be heard on September 26 and 28, 2023 will not proceed as scheduled.

The hearing on the merits shall commence on September 29, 2023 at 10:00 a.m. and continue on October 2, 3, 4, 5, 10, 11, 12, 13, 17, 18, 19, 20, 23 and 24, 2023 at 10:00 a.m. on each day.

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A.2.5 Mughal Asset Management Corporation et al.

FOR IMMEDIATE RELEASE
January 17, 2023

MUGHAL ASSET MANAGEMENT CORPORATION,
LENDLE CORPORATION AND
USMAN ASIF,
File No. 2022-15

TORONTO – The Tribunal issued an Order in the above named matter.

A copy of the Order dated January 17, 2023 is available at capitalmarketstribunal.ca.

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A.3
Orders

A.3.1 Trevor Rosborough et al. – ss. 127(1), 127.1

**IN THE MATTER OF
TREVOR ROSBOROUGH,
TAYLOR CARR AND
DMITRI GRAHAM**

File No. 2020-33

Adjudicators: Timothy Moseley (chair of the panel)
Cathy Singer
James Douglas

January 10, 2023

**ORDER
(Subsection 127(1) and section 127.1 of
the *Securities Act,* RSO 1990, c S.5)**

WHEREAS on October 7, 2022, the Capital Markets Tribunal held a hearing by videoconference to consider the sanctions and costs that the Tribunal should impose on Taylor Carr and Dmitri Graham as a result of the findings in the Reasons and Decision on the merits, issued on May 25, 2022;

ON READING the materials filed by the parties, and on hearing the submissions of the representatives for Staff of the Ontario Securities Commission and for Carr, no one appearing on behalf of Graham;

IT IS ORDERED THAT:

1. pursuant to paragraph 9 of subsection 127(1) of the Act:
    a. Carr shall pay an administrative penalty of $15,000; and
    b. Graham shall pay an administrative penalty of $40,000;
2. pursuant to paragraph 10 of subsection 127(1) of the Act, Carr shall disgorge to the Commission the amount of $1,215.03;
3. pursuant to paragraphs 2 and 2.1 of subsection 127(1) of the Act, Carr and Graham shall be prohibited from trading in any securities or derivatives, and from acquiring any securities,
    a. Carr for a period of three years; and
    b. Graham for a period of five years;
4. pursuant to paragraphs 7, 8, 8.1 and 8.2 of subsection 127(1) the Act, Carr and Graham shall be required to resign any positions they hold as directors or officers of any issuers or registrants, and shall be prohibited from becoming or acting as directors or officers of any issuer or registrant,
    a. Carr for a period of three years; and
    b. Graham for a period of five years;
5. pursuant to paragraph 8.5 of subsection 127(1) of the Act, Carr and Graham shall be prohibited from becoming or acting as registrants or promoters,
    a. Carr for a period of three years; and
    b. Graham for a period of five years; and

6. pursuant to section 127.1 of the Act:

   a. Carr shall pay to the Commission $5,000 for the costs of the investigation and proceeding; and

   b. Graham shall pay to the Commission $15,000 for the costs of the investigation and proceeding.

“Timothy Moseley”

“Cathy Singer”

“James Douglas”

A.3.2 Solar Income Fund Inc. et al. – ss. 127(1), 127.1

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

File No. 2019-35

Adjudicators: Timothy Moseley (chair of the panel)
William J. Furlong
Dale R. Ponder

January 11, 2023

ORDER
(Subsection 127(1) and section 127.1 of the *Securities Act,* RSO 1990, c S.5)

WHEREAS on September 13, 2022, the Capital Markets Tribunal held a hearing by videoconference, to consider the sanctions and costs that the Tribunal should impose on Solar Income Fund Inc. (**SIF Inc.**), Allan Grossman, Charles Mazzacato and Kenneth Kadonoff as a result of the findings in the Reasons and Decision on the merits, issued March 28, 2022;

ON READING the materials filed by the parties, and on hearing the submissions of the representatives for Staff of the Ontario Securities Commission and for SIF Inc., Allan Grossman, Charles Mazzacato and Kenneth Kadonoff;

IT IS ORDERED THAT:

1. pursuant to paragraphs 2 and 2.1 of s. 127(1) of the *Securities Act* (the **Act**):

   a. SIF Inc. shall cease trading in any securities or derivatives, or acquiring any securities, permanently;

   b. each of Grossman and Kadonoff is permanently prohibited from trading in any securities or derivatives, or acquiring any securities, except that after he has fully paid the amounts in paragraphs 5, 6, and 7 below, he may trade securities or derivatives, and acquire securities in a Registered Retirement Savings Plan, Registered Retirement Income Fund, Registered Education Savings Plan, Registered Disability Savings Plan or Tax-Free Savings Account (as those terms are defined in the *Income Tax Act,* RSC, 1985, c 1 (5th Supp)) of which only he, his spouse or his children are the sole or joint legal and beneficial owners, through a registered dealer in Canada to whom he has given both a copy of this order and a certificate from the Commission confirming that he has paid the required amounts; and

   c. Mazzacato is permanently prohibited from trading in any securities or derivatives, or acquiring any securities, except that he may trade securities or derivatives, and acquire securities in a Registered Retirement Savings Plan, Registered Retirement Income Fund, Registered Education Savings Plan, Registered Disability Savings Plan or Tax-Free Savings Account (as those terms are defined in the *Income Tax Act*), of which only he, his spouse or his children are the sole or joint legal and beneficial owners, through a registered dealer in Canada to whom he has given a copy of this order;

2. pursuant to paragraph 3 of s. 127(1) of the Act, any exemptions contained in Ontario securities law shall not apply to any of the respondents, permanently;

3. pursuant to paragraphs 7, 8, 8.1 and 8.2 of s. 127(1) of the Act, Grossman, Mazzacato and Kadonoff shall resign any positions that they hold as directors or officers of any issuer or registrant, and are prohibited permanently from becoming or acting as directors or officers of any issuer or registrant, except that:

   a. Mazzacato may continue as a director and officer of 2740753 Ontario Ltd.;

   b. in respect of Kadonoff's role as director and officer of Mika Holdings Limited and 2741797 Ontario Inc., and as the nominee trustee for Mika Holdings Trust, the requirement to resign, and the prohibition, take effect on February 10, 2023, being thirty days after the date of this order; and

   c. Kadonoff may, after he has fully paid the amounts in paragraphs 5, 6 and 7 below, continue as a director and officer of Mika Holdings Limited and 2741797 Ontario Inc., and as the nominee trustee for Mika Holdings Trust;

4. pursuant to paragraph 8.5 of s. 127(1) of the Act, the respondents are prohibited from becoming or acting as a registrant or as a promoter;

5. pursuant to paragraph 9 of s. 127(1) of the Act:

   a. SIF Inc. shall pay to the Commission an administrative penalty of $175,000;

   b. Grossman shall pay to the Commission an administrative penalty of $175,000;

   c. Kadonoff shall pay to the Commission an administrative penalty of $125,000;

   d. Mazzacato shall pay to the Commission an administrative penalty of $1,000: and

6. pursuant to paragraph 10 of s. 127(1) of the Act:

   a. SIF Inc. and Grossman are jointly and severally liable to disgorge to the Commission $234,864.04; and

   b. Kadonoff is, jointly and severally with SIF Inc. and Grossman, liable to disgorge to the Commission $51,361.34, which amount forms part of the $234,864.04 referred to in subparagraph 6a. above; and

7. pursuant to s. 127.1 of the Act:

   a. SIF Inc. shall pay costs to the Commission in the amount of $37,500.00, for which amount Grossman and Kadonoff shall be jointly and severally liable; and

   b. each of Grossman and Kadonoff shall pay costs to the Commission in the amount of $37,500.00.

“Timothy Moseley”

“William J. Furlong”

“Dale R. Ponder”

A.3.3 Mark Odorico – s. 2(2) of the TARA, rule 22(4) of the CMT Rules of Procedure and Forms

IN THE MATTER OF
MARK ODORICO

File No. 2022-18

Adjudicators: Andrea Burke (chair of the panel)
Sandra Blake
Dale R. Ponder

January 12, 2023

ORDER
(Subsection 2(2) of
the *Tribunal Adjudicative Records Act, 2019*,
SO 2019, c 7, Sch 60 and
Rule 22(4) of
the *Capital Markets Tribunal Rules of Procedure and Forms*)

WHEREAS on January 11, 2023, the Capital Markets Tribunal held a hearing by videoconference, in relation to the Application brought by Mark Odorico to review the decisions of the Investment Industry Regulatory Organization of Canada (**IIROC**) dated April 7, 2022 and August 15, 2022;

AND WHEREAS Odorico and Staff of the New Self-Regulatory Organization of Canada (formerly IIROC) (**New SRO**) made requests for confidentiality of certain documents contained in the supplementary record of the original proceeding (**Supplementary Record**), Odorico made requests for confidentiality of certain other documents contained in the Supplementary Record, and Odorico made an additional request to vary a deadline contained in the Tribunal's order dated October 7, 2022 (**October 7 Order**);

ON HEARING the submissions of Odorico and the representatives of Staff of the New SRO and Staff of the Ontario Securities Commission, and on reading the Supplementary Record and the tabs contained therein;

IT IS ORDERED THAT:

1. paragraph 2(h) of the October 7 Order is varied as follows:
   a. by 4:30 p.m. on January 18, 2023, Odorico shall:
      i. give notice of any intention to rely on documents or things not included in the record of the original proceeding or Supplementary Record;
      ii. disclose any documents or things not included in the record of the original proceeding or Supplementary Record on which he intends to rely;
      iii. serve and file a witness list, if any, and serve a summary of each witness' anticipated evidence; and
      iv. indicate any intention to call an expert witness;
2. pursuant to subsection 2(2) of the *Tribunal Adjudicative Records Act, 2019* and Rule 22(4) of the *Capital Markets Tribunal Rules of Procedure and Forms*, tabs 2, 3, 4, 5, 6, 7 and 8 of the Supplementary Record are marked as confidential, and only the redacted version of the Supplementary Record shall be available to the public; and
3. a further attendance in this proceeding is scheduled for January 20, 2023, at 1:00 p.m., by videoconference, or on such other date and time as may be agreed to by the parties and set by the Governance & Tribunal Secretariat.

"Andrea Burke"

"Sandra Blake"

"Dale R. Ponder"

A.3.4 Mughal Asset Management Corporation et al.

**IN THE MATTER OF
MUGHAL ASSET MANAGEMENT CORPORATION,
LENDLE CORPORATION AND
USMAN ASIF**

File No. 2022-15

Adjudicators: Andrea Burke (chair of the panel)
Geoffrey D. Creighton
William J. Furlong

January 17, 2023

ORDER

WHEREAS on January 16, 2023, the Capital Markets Tribunal held a hearing by videoconference to schedule certain steps in this proceeding;

ON HEARING the submissions of the representative for Staff of the Ontario Securities Commission and of Usman Asif, appearing on his own behalf and on behalf of Mughal Asset Management Corporation and Lendle Corporation;

IT IS ORDERED THAT:

1. by 4:30 p.m. on March 17, 2023:

   a. each party shall serve the other party with a hearing brief containing copies of the documents, and identifying the other things, that the party intends to produce or enter as evidence at the merits hearing; and

   b. Staff shall serve any affidavit evidence for the merits hearing on the respondents;

2. each party shall provide to the Registrar a completed copy of the *E-hearing Checklist for Videoconference Hearings* by 4:30 p.m. on March 23, 2023;

3. a further attendance in this matter is scheduled for March 28, 2023 at 10:00 a.m., by videoconference, or on such other date and time as may be agreed to by the parties and set by the Governance & Tribunal Secretariat;

4. by 4:30 p.m. on April 17, 2023:

   a. each party shall provide to the Registrar the electronic documents that the party intends to rely on or enter into evidence at the merits hearing, along with an index file containing hyperlinks to the documents in the hearing brief, in accordance with the *Protocol for E-hearings*; and

   b. Staff shall file any affidavit evidence for the merits hearing; and

5. the merits hearing shall take place by videoconference and commence on April 24, 2023 at 10:00 a.m., and continue on April 25, 26 and 27, and May 1, 2, 4 and 5, 2023 at 10:00 a.m. on each day, or on such other dates and times as may be agreed to by the parties and set by the Governance & Tribunal Secretariat.

”Andrea Burke”

“Geoffrey D. Creighton”

“William J. Furlong”

A.4
Reasons and Decisions

A.4.1 Trevor Rosborough et al. – ss. 127(1), 127.1

Citation: *Rosborough (Re)*, 2023 ONCMT 2
Date: 2023-01-10
File No. 2020-33

IN THE MATTER OF
TREVOR ROSBOROUGH,
TAYLOR CARR AND
DMITRI GRAHAM

REASONS AND DECISION
(Subsection 127(1) and section 127.1 of
the *Securities Act*, RSO 1990, c S.5)

Adjudicators:	Timothy Moseley (chair of the panel) Cathy Singer James Douglas	
Hearing:	By videoconference, October 7, 2022	
Appearances:	Alvin Qian	For Staff of the Ontario Securities Commission
	Isaac Paonessa	For Taylor Carr
	No one appearing for Dmitri Graham	

REASONS AND DECISION

1. OVERVIEW

[1] This case relates to trading in securities of WeedMD Inc, an Ontario reporting issuer. Staff of the Ontario Securities Commission alleged that the three respondents engaged in insider trading in WeedMD shares while in possession of material non-public information relating to a planned expansion. Staff also alleged that one of the respondents, Dmitri Graham, made three misleading statements in his examination during Staff's investigation.

[2] Rosborough previously reached a settlement with Staff[1] in which he admitted to having been tipped and to having traded while in possession of material non-public information. These reasons relate to Staff's request for sanctions and costs orders against Graham and against Taylor Carr, following a finding by the merits panel that they contravened Ontario securities law.[2]

[3] The merits panel found the following with respect to Carr and Graham:

a. while an employee of WeedMD, Carr tipped Rosborough about a planned expansion of WeedMD before that information had been generally disclosed, contrary to s. 76(2) of the *Securities Act*[3] (the ***Act***);

b. between November 14 and 22, 2017, with knowledge of the undisclosed planned expansion, Carr entered into numerous transactions in WeedMD shares, contrary to s. 76(1) of the *Act*, making a profit of $1,215.03; and

c. in his examination during Staff's investigation in April 2020, Graham made one misleading statement to Staff, about whether he had assisted Rosborough with work-related activities at a time when Rosborough was not registered, contrary to s. 122(1)(a) of the *Act*.

---

1 *Rosborough (Re)*, 2021 ONSEC 20
2 *Rosborough (Re)*, 2022 ONCMT 11
3 RSO 1990, c S.5

[4] The merits panel dismissed the other allegations against Graham, including the allegation that he engaged in insider trading contrary to s. 76(1) of the *Act*.

[5] For the reasons set out below, we conclude that it would be in the public interest to make the following orders regarding sanctions and costs:

a. Carr and Graham shall pay administrative penalties of $15,000 and $40,000 respectively;

b. Carr shall disgorge to the Commission the amount of $1,215.03;

c. Carr and Graham shall be prohibited from trading in any securities or derivatives, and from acquiring any securities, and shall be prohibited from being directors or officers of an issuer and acting as registrants or promoters, for periods of three and five years respectively; and

d. Carr and Graham shall pay costs of the investigation and proceeding, in the amounts of $5,000 and $15,000 respectively.

2. GRAHAM'S PARTICIPATION SINCE THE MERITS DECISION

[6] Graham did not fully participate in the sanctions and costs hearing. We have proceeded in his absence, and we set out here the factual background to our decision to do so.

[7] In the merits decision, the Tribunal required that the parties contact the Registrar by June 17, 2022, to arrange an attendance for the purpose of scheduling the sanctions and costs hearing, and to arrange a schedule for the exchange of materials in advance of that hearing. On June 17, Staff wrote to the Registrar (with a copy to Graham and to Carr's counsel) offering dates for that attendance, all of which were acceptable to all parties.

[8] The attendance took place on July 7 with all parties present. The Tribunal ordered[4] that the sanctions and costs hearing proceed on October 7. Staff was to file any evidence and submissions by July 22, Carr and Graham were to file responding materials by August 12, and Staff was to file any reply materials by August 19.

[9] Staff filed its material on July 22 as required. On that same day, the Registrar wrote to all parties reminding them that the hearing would take place on October 7, and advising of the composition of the panel.

[10] On August 11, Graham sent to the Registrar, with copies to the other parties:

a. copies of income tax summary pages for 2016 and 2017, and one T4 slip for each of 2018, 2019 and 2020;

b. a September 10, 2021, letter to Graham from a law firm, seeking recovery of funds on behalf of the firm's client; and

c. a February 23, 2022, letter from the Mutual Fund Dealers Association of Canada (**MFDA**) to Graham, summarizing sanctions imposed by a hearing panel on February 16, 2022.

[11] Graham provided no written submissions, nor an affidavit, nor any explanation regarding the documents he had filed.

[12] On October 5, two days before the hearing, the Registrar wrote to the parties to advise that the Tribunal had moved the start time of the hearing from 10:00 a.m. to 10:30 a.m. on October 7. All participants in the hearing, including Graham, would have received automated emails the day prior to, and an hour prior to, the start time of the hearing, providing a link to join the videoconference.

[13] The hearing began at 10:30 a.m. on October 7 as scheduled, but Graham did not appear. At our direction, the Registrar tried to contact Graham by email. Those efforts were unsuccessful. We continued the hearing in Graham's absence.

[14] On October 10, Graham wrote to the Registrar. He apologized for his absence, advising that he thought the date was "after the long weekend", which would have been October 11 or later. He said that he had been "under the weather for the last week and a half" and had not been "thinking about much else besides getting [his] strength back." He simply asked that this be brought to the panel's attention. He made no request about next steps.

[15] On October 12, at our direction, the Registrar wrote to Graham, asking him to advise whether he was asking us to permit him to make submissions orally (by videoconference) or in writing. Graham did not respond. On October 27, at our direction, the Registrar wrote to Graham, advising that he was required to respond by November 4, failing which, we would make our decision without hearing from him. Graham has not responded.

[4] (2022) 45 OSCB 6708

[16] We have given Graham every opportunity to participate in this hearing and he has chosen not to, beyond filing the documents referred to above. Without any testimony or submissions regarding the income tax documents and the collection letter, we must disregard them. We ruled during the hearing that we would not introduce the documents into evidence, and we therefore did not mark them as an exhibit during the hearing, given Graham's absence, but we do so now simply so that they form part of the adjudicative record. However, we place no weight on them. The letter from the MFDA formed part of an affidavit filed by Staff on this hearing, so we do not have the same issue with that document, and in fact we rely on it below.

[17] We turn now to our analysis of the appropriate sanctions and costs against each of Carr and Graham.

3. ANALYSIS

3.1 Introduction

[18] The Tribunal may impose sanctions under s.127(1) of the *Act* where it finds it to be in the public interest to do so. The Tribunal must exercise that jurisdiction in a manner consistent with the purposes of the *Act*, which include protecting investors from unfair, improper and fraudulent practices, and fostering fair and efficient capital markets and confidence in the capital markets.[5]

[19] Sanctions are protective and are intended to prevent future harm to investors and to the capital markets.[6]

[20] Sanctions must be proportionate to the respondent's conduct in the circumstances of the case.[7] Fashioning the appropriate sanctions is a highly contextual exercise that is dependent on the facts and findings in the particular case. We refer below to decisions of the Tribunal in other cases, which are helpful but of limited precedential value when determining the appropriate length of a market ban or the amount of an administrative penalty.[8]

[21] In this case Staff seeks the following sanctions:

a. restrictions on participation in the capital markets (*e.g.*, prohibitions against trading, or holding director or officer positions) for three years in respect of Carr and for five years in respect of Graham;

b. an administrative penalty of $26,125 against Carr and $75,000 against Graham; and

c. disgorgement of $1,215.03 against Carr.

[22] Carr does not contest the three-year market prohibitions or disgorgement order being sought against him. He does submit, however, that Staff's requested administrative penalty is excessive. He proposes an administrative penalty of $3,645 (being three times the profit that Carr earned from his illegal insider trading).

[23] As for costs of the investigation and proceeding, Staff submits that Carr should be required to pay $5,000, and Graham should be required to pay $30,000. Once again, Carr submits that Staff's request is excessive. Carr proposes that he pay costs of $2,590.

[24] We begin by reviewing the relevant factors, and how they apply to each of Carr and Graham. We then address each of the requested sanctions in turn.

3.2 Factors relevant to sanctions and costs

[25] In previous decisions, the Tribunal has identified a non-exhaustive list of factors to be considered in determining an appropriate sanctions and costs order, which include:

a. the respondents' level of activity in the marketplace, or in other words, the "size" of the contravention;

b. the seriousness of the misconduct;

c. the size of the profit made or loss avoided from the misconduct;

d. whether the misconduct was isolated or recurrent;

e. the respondents' experience in the marketplace;

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5 *Act*, s. 1.1

6 *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at paras 42-43

7 *Bradon Technologies Ltd. (Re),* 2016 ONSEC 19 at para 28; and at para 47, citing *Cartaway Resources Corp (Re)*, 2004 SCC 26 at para 60

8 *Quadrexx Hedge Capital Management Ltd (Re),* 2018 ONSEC 3 (***Quadrexx***) at para 20

f. any mitigating factors; and

g. the likely effect that any sanction would have on the respondent ("specific deterrence") as well as on others ("general deterrence").[9]

[26] Applying these factors to the misconduct in this case, and first considering Carr, we conclude that his misconduct was serious. The prohibition against insider trading is a significant component of investor protection and of the fostering of fair and efficient capital markets and confidence in them.[10] The Tribunal has previously described insider trading as "a cancer that erodes public confidence in the capital markets".[11]

[27] We agree with Staff's submission that the seriousness of Carr's insider trading is aggravated by the fact that even though he was aware of his employer's policy that he was required to pre-clear any trades in shares of WeedMD, he did not do so. We do not accept Carr's submission that this is a matter entirely between employer and employee, and that we should therefore disregard it. In this respect, publicly traded corporations are gatekeepers in the capital markets. A failure to adhere to an internal policy that seeks to protect against insider trading is a relevant consideration for us.

[28] Carr has never been registered with the Commission in any capacity. He has no experience in securities. He submits that he made an error by acceding to Rosborough's repeated requests for information, although in his admissions he does not give an explanation for why, in addition to yielding to Rosborough's requests, he traded for his own account as well.

[29] Carr's misconduct was isolated, and he earned a profit of $1,215.03 as a result of it. This is a very small amount in the context of other cases that come before this Tribunal, a fact that does not relieve Carr of responsibility for the contravention but that, along with the isolated nature of the misconduct, moves this case toward the lower end of the scale of seriousness.

[30] As a mitigating factor, Staff acknowledges Carr's meaningful efforts to resolve potential allegations against him before this proceeding commenced, and his admissions of facts and contraventions of Ontario securities law. His doing so not only saved time and resources, it also demonstrates remorse on his part. We consider this to be a significant mitigating factor in Carr's favour.

[31] As for Graham, his misconduct was also serious. As the Ontario Court of Appeal has held, it "is difficult to imagine anything that could be more important to protecting the integrity of capital markets than ensuring that those involved in those markets, whether as direct participants or as advisers, provide full and accurate information to the OSC."[12]

[32] Graham's misstatement to investigators about whether he had assisted a non-registrant with work-related activities hindered the Commission's ability to administer and enforce the *Act* in a timely and efficient way, something the Commission is mandated to do by s. 2.1 of the *Act*. The seriousness of this misconduct is aggravated by the fact that Graham had affirmed, prior to making the misstatement, that he would tell the truth.

[33] Graham's misconduct is also made significantly more serious by the fact that he had been a registrant for almost four years at the time of his misstatement. Registrants are expected to be aware of their duties,[13] including the obligation to be truthful with their regulators.

[34] We have no evidence of any remorse on Graham's behalf, or any other mitigating factors.

[35] We turn now to consider the specific sanctions that Staff requests, beginning with restrictions on participation in the capital markets.

3.3 Restrictions on participation in the capital markets

[36] Staff submits that Carr ought to be prohibited from participating in Ontario's capital markets for a period of three years. Carr does not contest the market prohibitions requested by Staff. We agree that such an order would be proportionate to his misconduct as described above, and that it would protect investors and help to restore confidence in the capital markets.

[37] Staff asks that we prohibit Graham from participating in Ontario's capital markets for a period of five years. As we noted above, we have no submissions from Graham about appropriate sanctions.

[38] A five-year prohibition against Graham, for one misstatement to Staff, might seem disproportionate compared to the three-year prohibition against Carr, for tipping and insider trading. However, in our view that disparity is justified by Carr's

9 *Belteco Holdings Inc (Re)*, (1998) 21 OSCB 7743 at 7746

10 *Finkelstein v Ontario Securities Commission*, 2018 ONCA 61, citing *Woods (Re)*, (1995) 18 OSCB 4625

11 *MCJC Holdings Inc (Re)*, (2002) 25 OSCB 1135

12 *Wilder v Ontario Securities Commission*, 2001 CanLII 24072 (ON CA) at para 22

13 *North American Financial Group Inc (Re)*, 2014 ONSEC 28 at para 29

significant co-operation, as detailed above, and by the fact that Graham had been a registrant for almost four years at the time of his misconduct. Further, we consider the need for specific and general deterrence to be significantly greater for Graham, given his unexplained failure or refusal to participate fully in this proceeding, and given the findings by the MFDA that he engaged in various serious acts of misconduct, including attempting to mislead the MFDA.

[39] We agree with Staff that a five-year restriction on Graham's participation in the capital markets would be appropriate.

3.4 Financial Sanctions

3.4.1 Introduction

[40] We now address Staff's request for financial sanctions. Staff seeks:

a. an administrative penalty of $26,125 against Carr and of $75,000 against Graham; and

b. disgorgement of $1,215.03 against Carr.

3.4.2 Administrative penalties

3.4.2.a Carr

[41] Carr submits that the administrative penalty requested by Staff is excessive and that an amount of $3,645, being three times the profit he earned on his illegal insider trading, would be appropriate. Carr submits that if we impose too high an administrative penalty, that may discourage individuals in the future from cooperating with Staff as Carr has done.

[42] Staff refers us to several precedent cases:

a. In the settlement that Rosborough entered into in this proceeding,[14] Rosborough admitted to engaging in insider trading of WeedMD shares with knowledge of the material non-public information that Carr provided. That trading yielded a profit of $492.32. Rosborough had been a registrant for eleven years and he had previously been sanctioned by the MFDA for using pre-signed forms. He was given credit for his co-operation in reaching the settlement and for his future co-operation as a witness in the balance of this proceeding. The Tribunal approved the agreed-upon administrative penalty of $35,000 against him.

b. In *Agueci (Re)*,[15] the Tribunal imposed administrative penalties totaling $350,000 against Agueci, who was an employee of a registrant and who had tipped others by passing along material confidential information relating to five of her employer's reporting issuer clients. The total of $350,000 included $25,000 for each of nine instances of tipping, as well as penalties relating to misleading Staff and improperly disclosing information that was protected by s. 16 of the *Act*.

c. In a settlement in *Anderson (Re)*,[16] the Tribunal approved the agreed-upon administrative penalty of $18,770, which was equal to the profit earned by the respondent on her illegal insider trading in shares of two issuers. The Tribunal also ordered her to disgorge the same amount.

d. In settlements by the two respondents in *Talawdekar (Re)*,[17] the Tribunal approved administrative penalties against one respondent of $23,000 for illegal insider trading and $55,326.40 for tipping. The latter amount was a substantial portion of the profit made by the tippee, the other respondent, whose settlement was approved taking into account his voluntary payment of $35,000.

[43] Staff also notes that Carr currently lives outside Ontario. Staff submits that as a result, the restrictions on participation in the capital markets will have less of a deterrent effect on Carr, and any administrative penalty should be higher than it would otherwise be, to compensate for that.

[44] We cannot accept that submission. We have no evidence about how long Carr intends to live outside the province and, in any event, it is entirely possible for non-residents to participate in Ontario's capital markets, both through trading and through positions with Ontario-based issuers. We were given no authority for the proposition that an administrative penalty should be increased for the suggested reason. We do not rule out the possibility in another case, but we are not persuaded that we should adopt that approach here.

[45] In view of the isolated nature of Carr's misconduct, the small profit he made, and his substantial efforts to expedite this proceeding, we determine that it would be in the public interest to impose an administrative penalty of $15,000.

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14 *Rosborough (Re)*, 2021 ONSEC 20
15 2015 ONSEC 19
16 (2015), 38 OSCB 4539
17 (2015), 38 OSCB 3356 and (2015), 38 OSCB 4092

3.4.2.b Graham

[46] We have no submissions from Graham regarding Staff's proposed $75,000 administrative penalty. We must still satisfy ourselves that any penalty we impose is proportionate to Graham's misconduct (*i.e.*, one misstatement to Staff during the investigation) and that the penalty would be in the public interest.

[47] Staff submits that the sanctions requested for Graham fall within the range of appropriate sanctions for contravention of s.122(1)(a) of the *Act* and are in the public interest. We agree with Staff's submission that significant sanctions are necessary to deter Graham and to signal to others in similar positions that making misleading statements to the Commission or those acting under its authority will not be tolerated and will carry significant consequences.

[48] Staff cites the following cases to assist in determining the appropriate administrative penalty:

a. *Cheng (Re)*,[18] in which the Tribunal approved a settlement involving the respondent Tremblay, who falsely denied knowing about the respondent Cheng tipping a third person. Tremblay was not only a registrant, he was the chair of the board, and Ultimate Designated Person, of a registered fund manager and asset management firm. The Tribunal approved the agreed-upon administrative penalty of $125,000.

b. In *Norshield Asset Management (Canada) Ltd*,[19] the Tribunal imposed an administrative penalty of $125,000 against each of two individual respondents who had misled Staff in the course of a compliance review, in an effort to conceal violations of Ontario securities law.

c. In the *Agueci* case referred to at paragraph [42](b) above, the Tribunal imposed an administrative penalty of $100,000 against Agueci for misleading Staff, as part of the overall total of $350,000. The Tribunal also imposed an administrative penalty of $250,000 against Wing, another respondent, who was a senior and long-time registrant whose misleading of Staff was wide-ranging and done at a time when Wing was both Chief Compliance Officer and Ultimate Designated Person at his firm.

[49] Staff's proposed administrative penalty of $75,000 for Graham is, in our view, excessive for the isolated finding of misconduct against him. Taking into account all of the factors referred to in paragraph [38] above, we determine that it would be in the public interest to impose an administrative penalty of $40,000.

3.4.3 Disgorgement

[50] Staff's last requested financial sanction is a disgorgement order against Carr in the amount of $1,215.03, being the profit that Carr earned from the illegal insider trading. Such an order is authorized by paragraph 10 of s. 127(1) of the *Act*, which refers to "any amounts obtained as a result of the non-compliance". In this case, it is clear that $1,215.03 is such an amount.

[51] Carr does not oppose Staff's request, and we consider it to be in the public interest to make that order.

3.5 Costs

[52] Finally, we address Staff's request that Carr and Graham pay a portion of the costs incurred by the Commission in this proceeding and in the investigation of this matter. Section 127.1 of the *Act* authorizes the Tribunal to order a respondent to pay the costs of an investigation and hearing if the respondent has been found to have contravened Ontario securities law.

[53] Reimbursement of the Commission's costs by a respondent who contravenes Ontario securities law is reasonable in view of the fact that the Commission's budget, including its enforcement budget, is paid by fees charged to registrants, issuers and others. A costs order is discretionary and is designed to reduce the burden on market participants to pay for investigations and enforcement proceedings.[20]

[54] Staff provided evidence to establish that it incurred costs of $198,995.95. Staff analyzed the costs incurred and separated the investigation and proceeding into several phases, depending on the extent to which each of the three respondents was involved.

[55] Staff submits that $54,328.84 of the costs are attributable to Carr. It applies a discount of approximately 91% and requests that Carr pay costs of $5,000. Carr submits that a costs order of $2,590 would be appropriate and questions Staff's methodology. Carr questions the number of days of the relevant phase, arguing that the first phase should end on a date in September 2020 (earlier than Staff's date) on which we are told a confidential settlement conference was held.

[18] 2018 ONSEC 43

[19] 2010 ONSEC 16

[20] *Quadrexx* at para 118; *Pro-Financial Asset Management Inc (Re)*, 2018 ONSEC 18 at para 111

Assuming one did, clearly no settlement resulted from it, and as Staff points out, Carr continued to be an active respondent following that date.

[56] Accordingly, we cannot accept the further reduction that Carr proposes. Further, we agree with Staff's submission that the 91% reduction Staff has applied is already a large discount. Such a discount is warranted given Carr's co-operation in significantly narrowing the issues in this proceeding, but we think the discount that has been applied is appropriate. We therefore find Staff's request for $5,000 to be reasonable and we will make that order for costs as against Carr.

[57] As for Graham, Staff submits that the sum of $93,723.94 is attributable to him. Staff applied a 68% discount to reflect the fact that the merits panel dismissed some of the allegations against Graham, and to narrow the time claimed to the lead investigator and litigation counsel during the investigation and litigation phases. Staff therefore requests that Graham pay costs of $30,000.

[58] In our view, a costs order of $15,000 as against Graham would be appropriate. The merits panel dismissed almost the entire case against Graham, including the insider trading allegations, which by their nature would account for greater costs of investigation and hearing preparation. The amount of $15,000 better aligns with the merits panel's sole finding against Graham.

4. CONCLUSION

[59] For the above reasons, we will issue an order as follows:

a. pursuant to paragraph 9 of s. 127(1) of the *Act*:

   i. Carr shall pay an administrative penalty of $15,000; and

   ii. Graham shall pay an administrative penalty of $40,000;

b. pursuant to paragraph 10 of s. 127(1) of the *Act*, Carr shall disgorge to the Commission the amount of $1,215.03;

c. pursuant to paragraphs 2 and 2.1 of s. 127(1) of the *Act*, Carr and Graham shall be prohibited from trading in any securities or derivatives, and from acquiring any securities,

   i. Carr for a period of three years; and

   ii. Graham for a period of five years;

d. pursuant to paragraphs 7, 8, 8.1 and 8.2 of s. 127(1) of the *Act*, Carr and Graham shall be required to resign any positions they hold as directors or officers of any issuers or registrants, and shall be prohibited from becoming or acting as directors or officers of any issuer or registrant,

   i. Carr for a period of three years; and

   ii. Graham for a period of five years;

e. pursuant to paragraph 8.5 of s. 127(1) of the *Act*, Carr and Graham shall be prohibited from becoming or acting as registrants or promoters,

   i. Carr for a period of three years; and

   ii. Graham for a period of five years; and

f. pursuant to s. 127.1 of the *Act*:

   i. Carr shall pay to the Commission $5,000 for the costs of the investigation and proceeding; and

   ii. Graham shall pay to the Commission $15,000 for the costs of the investigation and proceeding.

Dated at Toronto this 10th day of January, 2023

"Timothy Moseley"

"Cathy Singer"

"James Douglas"

A.4.2 Solar Income Fund Inc. et al. – ss. 127(1), 127.1

Citation: *Solar Income Fund Inc. (Re)*, 2023 ONCMT 3
Date: 2023-01-11
File No. 2019-35

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

REASONS AND DECISION
(Subsection 127(1) and section 127.1 of
the *Securities Act*, RSO 1990, c S.5)

Adjudicators:	Timothy Moseley (chair of the panel) William J. Furlong Dale R. Ponder	
Hearing:	By videoconference, September 13, 2022; final written submissions received October 31, 2022	
Appearances:	Andrew Faith Ryan Lapensée	For Staff of the Ontario Securities Commission
	James W.E. Doris Sean R. Campbell	For Solar Income Fund Inc. and Allan Grossman
	Chantelle Cseh Alisa McMaster	For Charles Mazzacato
	Brian Kolenda Eli Lederman Madison Robins	For Kenneth Kadonoff

REASONS AND DECISION

1. OVERVIEW

[1] In a decision on the merits dated March 28, 2022 (the **Merits Decision**),[1] this Tribunal found that:

a. the respondent Solar Income Fund Inc. (**SIF Inc.**) was a small private company set up to develop and manage solar photovoltaic power generation installations;

b. each of the respondents Allan Grossman, Charles Mazzacato and Kenneth Kadonoff was a principal of SIF Inc. for part or all of the relevant time;

c. the respondents established various funds, which paid SIF Inc. to provide consulting, development and management services;

d. one such fund was SIF Solar Energy Income & Growth Fund (**SIF #1**), which raised money from the public by way of an offering memorandum;

e. contrary to the allegations made by Staff of the Ontario Securities Commission, the respondents did not contravene s. 44(2) of the *Securities Act*[2] (the **Act**) by making prohibited representations relevant to a trading or advising relationship;

[1] 2022 ONSEC 2
[2] RSO 1990, c S.5

f. however, the respondents did engage in fraudulent conduct relating to securities, and thereby contravened s. 126.1(1)(b) of the Act, by causing SIF #1 to divert $234,864.04 for two purposes unauthorized by the offering memorandum:

   i. to pay distributions to investors in Solar Income and Growth Fund #2 (**SIF #2**), another fund managed by SIF Inc.; and

   ii. to pay fees to SIF #2's exempt market dealers;

g. Grossman and Mazzacato shared responsibility with SIF Inc. for the full amount of $234,864.04 that was diverted; and

h. of that $234,864.04, Kadonoff shared responsibility for $51,721.34 (a figure we correct to $51,361.34 at paragraph [104] below).

[2] Staff asks that we impose sanctions against the respondents under s. 127(1) of the Act, and that we order the respondents to pay a portion of the Commission's costs of the investigation and this proceeding, under s. 127.1 of the Act.

[3] For the reasons we set out below, we conclude that it would be in the public interest to order that:

a. SIF Inc. and Grossman be jointly and severally liable to disgorge to the Commission $234,864.04, and that Kadonoff have joint and several liability for $51,361.34 of that amount;

b. SIF Inc., Grossman, Kadonoff and Mazzacato pay administrative penalties of $175,000, $175,000, $125,000 and $1,000, respectively;

c. SIF Inc., Grossman and Kadonoff each pay $37,500 of the Commission's costs connected with the investigation and this proceeding, and that Grossman and Kadonoff be jointly and severally liable for SIF Inc.'s portion;

d. the respondents cease trading in or acquiring any securities or derivatives permanently, except that the individual respondents may, upon satisfaction of their financial obligations resulting from our order, conduct limited personal trading as specified below;

e. the individual respondents resign as directors and officers of any issuer or registrant, and be prohibited permanently from acting in any such capacity, except that:

   i. Kadonoff (upon satisfaction of his financial obligations resulting from our order) and Mazzacato may hold director and officer positions for the private issuers specified below; and

   ii. the effective date of this prohibition for Kadonoff, in respect of the private issuers specified below, is deferred for thirty days, to February 10, 2023;

f. any exemptions contained in Ontario securities law do not apply to any of the respondents, permanently; and

g. the respondents be prohibited permanently from becoming or acting as a registrant or as a promoter.

[4] We begin our analysis by reviewing the legal framework for sanctions and how the facts of this case lead us to the sanctions that we have decided would be appropriate. We then consider Staff's request for costs.

2. ANALYSIS – SANCTIONS

2.1 Introduction

[5] The Tribunal may impose sanctions under s. 127(1) of the Act where it finds that it would be in the public interest to do so. The Tribunal must exercise this jurisdiction in a manner consistent with the Act's purposes, which include the protection of investors from unfair, improper or fraudulent practices, and the fostering of fair and efficient capital markets.[3]

[6] The sanctions listed in s. 127(1) of the Act are protective and preventative, and are intended to be exercised to prevent future harm to Ontario's capital markets.[4]

[3] *Securities Act*, s. 1.1
[4] *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at paras 42-43

[7] Sanctions must be proportionate to the respondent's conduct in the circumstances of the case.[5] Fashioning the appropriate sanctions is a highly contextual exercise that is dependent on the facts and findings in the particular case. We refer below to decisions of the Tribunal in other cases, which are helpful but of limited precedential value when determining the appropriate length of a market ban or the amount of an administrative penalty.[6]

[8] We break our sanctions analysis down into four sections:

a. a confirmation of the scope of conduct on which we should rely in determining appropriate sanctions;

b. a consideration of factors applicable to sanctions generally;

c. analysis of Staff's request for restrictions on participation in the capital markets (including prohibitions against trading, and against acting as directors and officers); and

d. analysis of Staff's request for financial sanctions, being disgorgement orders and administrative penalties.

2.2 Scope of conduct that can be relied upon

[9] We begin by addressing the scope of conduct that we can appropriately consider on this hearing.

[10] Staff submits that when we determine the appropriate sanctions, we must consider not just the specific fraud as found by the merits panel (*i.e.*, in the amount of $234,864.04), but we must also consider the context of broader conduct involving millions of dollars of loans made from SIF #1 to SIF #2. When pressed, Staff asserted that it was not seeking a sanction in respect of those additional transactions; rather, it submits that we should not consider the fraud in isolation from the other evidence. Staff notes the merits panel's conclusion in paragraph 163 of the merits decision that the offering memorandum did not permit lending. Staff suggests that in light of this broad conclusion, it is proper for us to look beyond the loans that made up the fraud and to look also at other loans that SIF #1 made.

[11] We decline that invitation. At the merits hearing, including in Staff's closing submissions in that hearing, Staff explicitly limited its fraud allegations to two impugned purposes – the payment of distributions to SIF #2 investors, and the payment of dealer fees. As a result, the merits panel's finding that the offering memorandum did not permit lending was entirely in the context of those specific transactions. The merits panel made no finding about the propriety of any other transaction.

[12] Having deliberately compartmentalized its case at the merits stage, Staff cannot now seek to reframe its case. It would be unfair to the respondents for us to take any other transactions into account when considering appropriate sanctions.

2.3 Factors relevant to sanctions

2.3.1 Introduction

[13] We turn now to review the factors applicable to the determination of appropriate sanctions. In previous decisions, the Tribunal has identified a non-exhaustive list of factors, which include:

a. the respondents' level of activity in the marketplace, or in other words, the "size" of the contravention;

b. the seriousness of the misconduct;

c. the profit made or loss avoided from the misconduct;

d. whether the misconduct was isolated or recurrent;

e. the respondents' experience in the marketplace;

f. any mitigating factors; and

g. the likely effect that any sanction would have on the respondent ("specific deterrence") as well as on others ("general deterrence").[7]

[14] The Tribunal has also previously discussed the extent to which a respondent's inability to pay is relevant when determining appropriate financial sanctions. We return to this factor below in our analysis of the financial sanctions requested in this case. We first address in turn each of the above seven factors applicable to sanctions generally.

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5 *Bradon Technologies Ltd. (Re),* 2016 ONSEC 19 at para 28; and at para 47, citing *Cartaway Resources Corp (Re)*, 2004 SCC 26 at para 60

6 *Quadrexx Hedge Capital Management Ltd. (Re),* 2018 ONSEC 3 (***Quadrexx***) at para 20

7 *Belteco Holdings Inc (Re)*, (1998) 21 OSCB 7743 at 7746

2.3.2 The respondents' level of activity in the marketplace, or, the size of the contravention

[15] The first of the seven factors listed above is often referred to as "the respondents' level of activity in the marketplace". More precisely, it is a collection of characteristics about the activity that made up the contravention. Such characteristics typically include one or more of: the dollar amount, the number of investors affected, the number of individual breaches, and the duration of the misconduct.[8]

[16] The amount of the fraud in this case, $234,864.04, could of course be significant for a particular investor if that were the loss suffered by the investor. However, it is not significant compared to the amounts at issue in the authorities cited to us.

[17] It is also a small portion of the approximately $60 million that SIF #1 raised from investors. In that regard, we reject Staff's position that if we cannot consider allegedly improper transactions outside the scope of the merits decision (as we have found above), equally we cannot consider the overall size of the fund when assessing materiality of the fraud. There is no logical connection between the two concepts. As we have discussed, fairness dictates that the sanctions be based only on that conduct found to have been improper (*i.e.*, in the amount of $234,864.04), and not on a significantly larger amount, in the millions of dollars, that Staff submitted was contrary to the offering memorandum. The limitation on the scope of misconduct does not preclude our reference to the overall context (*i.e.*, $60 million raised) when assessing the respondents' misconduct. Having said that, we do not attach significant weight to the overall size of the fund, since that number does not relate directly to the respondents' contravention.

[18] In terms of duration and number of individual transactions, again the fraud in this case was at the lower end of the spectrum. The transactions fell within a relatively short time (approximately 10 months), and although there were 22 transactions, almost all of them were monthly repetitions of the same kind of transaction (*i.e.*, a distribution to unitholders) as opposed to fully independent transactions.

2.3.3 Seriousness of the misconduct

2.3.3a Introduction

[19] In considering the seriousness of the respondents' misconduct, we focus on three characteristics that are particularly relevant in this case:

a. the nature of the contravention, *i.e.*, fraud;

b. the fact that the contravention was not part of a larger fraudulent scheme; and

c. the respondents' mental state at the time of the contravention.

2.3.3.b The nature of the contravention

[20] Fraud is one of the most egregious violations of securities laws. It can cause direct harm to investors, and it undermines confidence in the capital markets.[9]

[21] The respondents acknowledge the seriousness of a finding of fraud. Initially, the respondents characterized their fraud as "highly technical in nature", although in closing submissions they retreated from that description, one we would not have accepted in any event. Despite that softening of the submission, we think it important to address the point.

[22] We agree with Staff that if anything, it was the respondents' defence of their use of funds that was highly technical. As the merits panel concluded, the language in the offering memorandum overwhelmingly supported the conclusion that the offering memorandum did not authorize the lending that SIF #1 did for the two impugned purposes. The respondents offered a technical defence, by focusing on one instance of the word "financing". There should be no suggestion that the respondents were caught by a technicality. Their fraud was serious.

2.3.3.c The contravention was not part of a larger fraudulent scheme

[23] The second characteristic we consider in assessing the seriousness of the misconduct is whether it was part of a larger fraudulent scheme.

[24] Here, it was not. The respondents are correct to distinguish this case, with its legitimate underlying business, from other cases in which the entire schemes perpetrated by respondents were fraudulent.

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8 *North American Financial Group Inc (Re)*, 2014 ONSEC 28 (***North American Financial***) at para 40

9 *Money Gate Mortgage Investment Corporation (Re)*, 2021 ONSEC 10 (***Money Gate***) at para 14

2.3.3.d The respondents' mental state at the time of the contravention

[25] The final characteristic we consider in assessing the seriousness of the misconduct is the respondents' mental state at the relevant time.

[26] Grossman admitted that he authorized the use of SIF #1 funds to pay SIF #2's dealer fees and distributions, and that he did so to maintain the confidence of SIF #2's investors and exempt market dealers. Grossman's misconduct was deliberate.

[27] That by itself would heighten the seriousness of the misconduct. However, Grossman explained that he believed at the time that this was an authorized use of the funds. There is no evidence to the contrary, and we accept his assertion as to his belief. However, we give Grossman little credit for that, since his belief was a product of what the merits panel found to be his reckless conduct. For an individual with Grossman's position in the business, his professional qualifications, and his lengthy experience, including in the capital markets, such recklessness undermines the mitigating effect of an honest belief.

[28] Mazzacato and Kadonoff are similarly situated. They were both directing minds and they knew the purposes of the transfers. Mazzacato largely deferred to others about the propriety of those transfers, and like Kadonoff he attempted to distance himself from the responsibilities that were part of his role as a senior officer. As the merits panel found, both Mazzacato and Kadonoff were at least reckless with respect to the fraud.

[29] Accordingly, we cannot give the respondents credit for the fact that, as they put it, they repeatedly sought and obtained legal advice. They did not seek legal advice about the issue that led to the fraud contravention, *i.e.*, whether the offering memorandum permitted the impugned transactions.

2.3.3.e Conclusion about the seriousness of the fraud

[30] Staff suggests that we should take an additional factor into account when assessing the seriousness of the fraud. Staff submits that it should be an aggravating factor that the respondents would have continued their fraudulent conduct had SIF Inc. not been removed as manager in late 2017. We decline Staff's invitation to reach that conclusion, because it would be excessively speculative.

[31] We therefore find that the respondents' misconduct was serious in nature, as are all frauds. On the other hand, their misconduct arose in the context of a legitimate business, it was not part of a larger scheme, and the respondents did not deliberately set out to commit a fraud. We describe the fraud in this case as somewhat or moderately serious, when compared to other frauds that come before the Tribunal.

2.3.4 Did the respondents benefit (*e.g.*, make a profit or avoid a loss) from the fraud?

[32] The third of the seven factors listed above asks whether the respondents made a profit, or avoided a loss, as a result of their misconduct. We conclude that they did benefit, although indirectly.

[33] The respondents submit that their fraud did not involve investor funds being appropriated for personal use. This is true in a direct sense, and Staff did not attempt to demonstrate that the respondents directly made a profit, or directly avoided a loss, from the misconduct.

[34] However, as Staff submits, SIF Inc.'s primary reason for existence was to earn management and development fees for its services to various entities, including SIF #1 and SIF #2. As Grossman admitted, he authorized the use of SIF #1 funds to pay SIF #2's dealer fees and distributions, in order to maintain the confidence of SIF #2's investors and exempt market dealers. SIF Inc. thus benefited directly from the fraud.

[35] As for the individual respondents, each of them owned, directly or indirectly (and, in the case of Mazzacato, jointly with his then partner), approximately one third of SIF Inc., and would therefore benefit personally if SIF Inc. and the funds it managed performed better. We do not adopt the respondents' contention that because Staff did not attempt to prove a flow of funds to the individual respondents, we are precluded from finding that the individual respondents benefited indirectly from the fraud. It is a natural and logical consequence of the respondents' ownership that they would benefit, absent evidence to the contrary, of which there was none.

[36] With respect to Kadonoff in particular, we cannot accept his submission that he was no longer involved from the beginning of September 2015 and therefore that we should put little if any weight on the idea of a personal benefit to him. It is true that Kadonoff resigned as an officer and director of SIF Inc. at that time, but he continued to work as a consultant to the company until February 2016, and he continued to hold his shares in SIF Inc. beyond that time. He had a continuing interest in the overall financial health of the group of companies and funds.

2.3.5 Was the fraud isolated or recurring?

[37] The fourth of the seven factors asks whether the misconduct was an isolated instance or a recurring series of events.

[38] Staff emphasizes the recurring nature of the fraud. SIF Inc. effected 22 impugned transfers of funds from July 2015 to April 2016, representing ten monthly pairs of transactions paying distributions to investors, and two transactions paying exempt market dealer fees. The time period over which the transfers took place is neutral, in our view. It is neither as limited as the respondents describe nor as extensive as this Tribunal sees in other instances.

[39] Kadonoff correctly notes that his involvement in the matters giving rise to the fraud was limited to two monthly pairs of the transfers, occurring in August and September of 2015.

2.3.6 The individual respondents' experience in the marketplace

[40] The fifth of the seven factors refers to the respondents' experience in the marketplace.

[41] All three individual respondents are experienced businesspeople. However, each individual's experience varies in the extent to which it relates to the issues present in this case.

[42] Grossman has more than 50 years' experience as a Chartered Professional Accountant. He had previously founded a firm that was registered with the Commission (then known as a limited market dealer, now an exempt market dealer) and that sold real estate. His relevant experience is at the high end of the range, when compared to other respondents in other cases.

[43] Mazzacato is a sophisticated businessperson who had run his own business, had held senior roles in various businesses, and had considerable experience in the solar industry. However, he had no experience in the exempt market before joining SIF Inc. We describe his relevant experience as moderate.

[44] Kadonoff is a lawyer who had practiced corporate law, among other things, but who had no experience with respect to public issuers of securities. We describe his relevant experience as moderate.

[45] Individuals like the respondents, who have considerable experience in senior positions, should know better and must be more responsible. In viewing the appropriateness of sanctions in this case through an investor protection lens, we must ensure that the sanctions make clear that there are serious consequences for this kind of misconduct.

2.3.7 Mitigating Factors

[46] We turn now to identify any mitigating factors.

[47] The respondents emphasize, and Staff agrees, that the respondents co-operated fully throughout the investigation of this matter.

[48] The individual respondents also submit that none of them has previously been involved in any proceedings before this Tribunal, nor does any of them have any other record of misconduct in connection with Ontario's capital markets. For us, this acts both in their favour and against them. Individuals with lengthy and senior business experience should know better and should act more responsibly. However, a long period without any misconduct related to the capital markets does suggest that the misconduct here was an aberration. On balance, we consider this to be a mitigating factor, although not a significant one.

[49] The individual respondents also note that none of them is currently working in any role in Ontario's capital markets, and that none of them intends to work in such a role in the future. We are not persuaded that we should see this as a mitigating factor. People change their mind all the time, and it is important that the sanctions reflect the conduct, not respondents' stated and non-binding intentions.

[50] As for the respondents' asking for and obtaining legal advice, we repeat what we set out above. We agree with Staff that it is not a mitigating factor that the respondents relied on legal advice that did not address the central issue in the fraud contravention. We do not, however, accept Staff's submission that the respondents deliberately and intentionally chose not to seek advice about the conduct that has been found to have been fraudulent. The evidence does not support that submission.

[51] We have no basis to conclude that the respondents are remorseful. Staff submits to the contrary, that the respondents did not recognize the seriousness of their conduct, as is reflected in the merits panel's finding that each respondent attempted to limit his own responsibility. We repeat the general rule that respondents are entitled to assert defences in response to Staff's allegations, and that their choice to do so must not be seen as an aggravating factor when the Tribunal

determines appropriate sanctions. However, we agree with Staff that no mitigation credit is due to the respondents in this case.

[52] Similarly, we cannot give effect to Kadonoff's submission that we should treat as a mitigating factor the fact that he raised concerns about the impugned payments. As the merits panel found, he first raised a concern on September 1, 2015, that he was not comfortable having SIF #2 borrow funds from SIF #1 for the identified purposes, because SIF #2 did not have cash to pay distributions. However, soon after communicating that concern, and even after he had resigned (but still retained signing authority), Kadonoff signed a cheque to facilitate the August distributions, a transaction that the merits panel found to be fraudulent. That action precludes any mitigation credit, because his signing of the cheque rendered meaningless the fact that he had previously expressed a concern.

[53] Similarly, concerns that Kadonoff raised in October 2015, well after he had already signed the cheque, cannot operate in his favour, given that it had been within his power either to block the fraudulent transaction in the first place, or at least not to be complicit in it.

[54] Finally, Kadonoff is correct in his submission that there is no evidence that the respondents actively misled investors once those investors had supplied funds. However, we cannot give significant weight to the distinction between misleading investors after the investment on the one hand, and departing from the promised use of funds on the other. Investors are entitled to make their investment decision based on disclosure that exists at the time of investment, and they are entitled to assume that their funds will be used in a manner consistent with that disclosure. It would not be consistent with our mandate of investor protection and confidence in the capital markets to hold that silence about an unauthorized diversion is a mitigating factor, compared to active deceit about that same diversion.

2.3.8 Specific and general deterrence

[55] We address now the last item in our list of relevant factors, *i.e.*, specific and general deterrence.

[56] As we concluded above, recklessness has no place in the conduct of a senior officer and/or director who is engaged in the public solicitation and deployment of investors' funds. The sanctions we impose must specifically deter all the respondents from engaging in similar conduct.

[57] There is also a need to deter each of the individual respondents from asserting, while they are an officer, that the responsibility for discharging some of the obligations of the office belong to others and not to themselves. As the merits panel found, that is an inappropriate approach to governance for a public issuer. It undermines investor protection and the integrity of the capital markets.

[58] We note again the respondents' stated intention not to take on similar roles in the capital markets, but that current intention cannot be determinative. It is important that our order ensure sufficient protection to the market.

[59] The respondents submit that specific deterrence has already been achieved. They say that this proceeding has brought shame and embarrassment to them. That may be so, but shame and embarrassment are natural and common consequences of misconduct that is identified and that becomes the subject of an enforcement proceeding. The prospect of shame and embarrassment is not a sufficient deterrent, and in most cases, including this one, sanctions are needed to provide effective protection to the capital markets.

[60] The sanctions we order must also deter others. Many individuals are in positions similar to those that were occupied by the individual respondents, with control over how investors' funds are used. It is often tempting for such individuals to use investor funds not for the specific purposes that were promised to the investors, but for broader purposes in an effort to prop up a business that is facing difficulties. Absent the required notice to and consent from investors, individuals in positions of responsibility do not have the discretion to choose other uses for the funds. The sanctions in this case must make that clear.

[61] Having said that, the respondents correctly submit that the important objective of general deterrence does not justify sanctions that are punitive rather than protective.[10] We are mindful of this principle as we formulate sanctions that are proportionate and in the public interest.

[62] Specifically, the respondents argue that since they accept that a general market ban is appropriate given the merits panel's findings, and since the respondents have no intention of working in the capital markets again, there would be no additional value in an administrative penalty, which would be unnecessary to achieve specific deterrence and would therefore be punitive. We cannot accept that argument, which would effectively eliminate general deterrence as a relevant factor, even where the sanction would not be punitive.

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[10] *Quadrexx* at para 58

2.3.9 Conclusion about factors to be considered

[63] We have reviewed the factors to be considered on sanctions (other than ability to pay, discussed below) and concluded that:

a. the size of the fraud in this case was at the lower end of the spectrum;

b. however, fraud is one of the most serious contraventions of Ontario securities law, and this fraud was perpetrated by experienced businesspeople who ought to have been more attentive to whether the way in which they used investor funds conformed to the promises made to those investors;

c. the fraud in this case was not part of a larger scheme, but rather was an element of an otherwise legitimate business;

d. the fraud was not designed to, and did not, provide any direct benefit to the individual respondents, although they did benefit indirectly;

e. the fraud was recurring, although of a small amount, particularly in the case of Kadonoff;

f. the respondents co-operated fully with the investigation;

g. all respondents are experienced businesspeople, although with varying experience in the capital markets;

h. none has previously been involved in any proceedings before this Tribunal, nor does any of them have any other record of misconduct in connection with Ontario's capital markets; and

i. the respondents are all in their late 60s or 70s, do not currently have a role in the capital markets, and state that they have no intention of taking on any such role.

[64] We now apply these conclusions to the specific sanctions that Staff seeks, beginning with restrictions on participation in the capital markets.

2.4 Restrictions on participation in the capital markets

[65] Staff seeks permanent market restrictions against SIF Inc., including with respect to trading and acquiring securities, and becoming or acting as a registrant or promoter. Staff also asks that SIF Inc. be denied the benefit of any exemptions contained in Ontario securities law. SIF Inc. does not oppose Staff's request. We consider the requested sanctions to be appropriate, and we make the necessary order, which we set out in detail in our conclusion below.

[66] As against the individual respondents, Staff seeks similar sanctions, as well as prohibitions on their becoming or acting as directors or officers of any issuer or registrant. The individual respondents accept that a permanent and general ban is appropriate given the merits panel's findings, but they seek two limitations ("carve-outs") on that general ban. First, they wish to be able to conduct limited trading in personal accounts. Second, they wish to be able to remain as directors and/or officers of personal or family-owned corporations. Because Staff asks us to make satisfaction of financial obligations (*i.e.*, administrative penalty, disgorgement, costs) a condition to the effectiveness of any carve-outs we order, we will return to the request for carve-outs after our analysis about appropriate sanctions.

2.5 Financial Sanctions

2.5.1 Introduction

[67] Staff seeks an administrative penalty of $500,000 against each of SIF Inc., Grossman and Mazzacato, and of $400,000 against Kadonoff. In addition, Staff seeks, from each respondent, disgorgement of the amount for which that respondent is responsible as set out above, *i.e.*, $234,864.04 in respect of SIF Inc., Grossman and Mazzacato, and $51,721.34 (the merits panel's figure, which we correct below) in respect of Kadonoff.

[68] We begin our analysis of Staff's requested sanctions by reviewing the one sanctioning factor that we mentioned above but have not yet addressed, *i.e.*, ability to pay. We conclude that Mazzacato has satisfactorily demonstrated his inability to pay financial sanctions. The nature and extent of that inability are such that it should factor significantly into our decision about the appropriate sanctions. We draw no similar conclusion about any of the other respondents.

[69] With those conclusions in mind, we then consider appropriate disgorgement orders and administrative penalties. We determine that it would be in the public interest to order:

a. disgorgement from SIF Inc. and Grossman to the full extent of the fraud (*i.e.*, $234,864.04), and from Kadonoff to the extent of his time-limited involvement in the fraud (*i.e.*, $51,361.34); and

b. an administrative penalty of $175,000 for each of SIF Inc. and Grossman, $125,000 for Kadonoff, and $1,000 for Mazzacato.

2.5.2 Ability to pay financial sanctions

2.5.2.a Introduction

[70] Ability to pay is a relevant factor to be considered in determining financial sanctions, although it is generally not the predominant or determining factor.[11]

[71] The respondents submit that they have no, or limited, ability to pay the financial sanctions that Staff seeks. The individual respondents assert that they are not employed or that they have limited employment, and that they do not have the necessary financial resources to pay Staff's requested sanctions.

[72] The respondents point to previous decisions of the Tribunal in which they say the Tribunal imposed small administrative penalties, or none at all, for similar reasons:

a. *Sino-Forest Corporation (Re)*,[12] in which the Tribunal imposed only a nominal administrative penalty on one respondent due specifically to that respondent's life-threatening medical issues and very limited financial means, and due to the fact that the respondent would not likely work again in his life.

b. *Gold-Quest International (Re)*,[13] in which the Tribunal ordered certain sanctions against the respondent Gale based on an agreed statement of facts she entered into with Staff. The Tribunal noted that general deterrence is an essential consideration, but chose not to impose financial sanctions against Gale, because: (i) she was neither the designer nor the initiator of the impugned investment products; (ii) she did not know that the subject scheme was fraudulent, and genuinely believed in the investment opportunity; (iii) she was remorseful; (iv) she avoided the need for a hearing on the merits; (v) she was 71 years old; and (vi) she had no assets to her name, lived on government pension, and had debts totalling more than $220,000. The Tribunal concluded that adding financial sanctions would not achieve any meaningful general deterrence.

c. *Clayton Smith (Re)*,[14] in which the Tribunal approved a settlement agreement that included a $250,000 administrative penalty. The Tribunal held that a greater penalty would otherwise be called for, but a receiver had already been appointed over all the relevant assets, and those assets were being recovered to the extent possible for the benefit of harmed investors.

[73] We now review the circumstances with respect to each respondent separately.

2.5.2.b SIF Inc.

[74] We have no evidence about SIF Inc.'s ability to pay. We were advised by counsel at the hearing that all its business was transferred in 2017, and that it has not been carrying on active business since then.

[75] Even if it has no assets or income, we would not consider those as mitigating factors in this case. We are mindful of the fact that in some cases, this Tribunal has taken into account the Commission's likely inability to recover financial sanctions ordered. In our view, in the circumstances of this case, the need for general deterrence and the possibility that SIF Inc. might currently have, might generate or might acquire assets in the future, all combine to overcome any concern about an inability to collect at this time.[15]

2.5.2.c Grossman and Kadonoff

[76] In the case of Grossman and Kadonoff, they simply assert in submissions that they are unable to pay. Those assertions are not sufficiently supported to warrant any reduction in financial sanctions.

[77] Grossman provided no evidence about his income or assets.

[78] Kadonoff did provide an affidavit in which he states that he is retired and has no "active" source of income, apart from some casual work as a business coach and mediator. He gives no information about his assets, about the amount of income he receives from his casual work, or about income that he might derive from his assets.

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[11] *Rezwealth Financial Services Inc. (Re)*, 2014 ONSEC 18 at para 69
[12] 2018 ONSEC 37 at paras 165-166
[13] 2014 ONSEC 29
[14] 2018 ONSEC 33 (***Smith***)
[15] *Gold-Quest International (Re)*, 2010 ONSEC 30 at paras 98-99

[79] Without sufficient evidence, we cannot give effect to their submissions on this point.

2.5.2.d Mazzacato

[80] In contrast, Mazzacato filed a comprehensive affidavit, the contents of which were unchallenged by Staff. At Mazzacato's request, we ordered[16] that certain portions of his affidavit be kept confidential, under s. 2(2) of the *Tribunal Adjudicative Records Act, 2019*[17] and Rule 22(4) of the Capital Markets Tribunal *Rules of Procedure and Forms*. We made that order for reasons to follow, and we now give our reasons here.

[81] The portions we ordered be kept confidential contain intimate financial and personal matters relating to the identity and circumstances of a dependent of Mazzacato's. In the course of explaining our reasons for decision on sanctions and costs, we do not need to disclose those details. The details support the broad description of the circumstances that is in the unredacted version of the affidavit, and that we have set out below. That broad description is sufficient to explain our decision.

[82] In this case, the legitimate interests of Mazzacato and of his dependent in preserving the confidentiality of that information outweigh the desirability of adhering to the important principle that adjudicative records be available to the public.

[83] In the public portion of his affidavit, Mazzacato states that:

a. he is 69 years old;

b. he currently works on contract as a consultant, and has been unemployed for significant periods of time since he left SIF Inc.;

c. he is the sole caretaker for, and provides significant financial support to, a dependent who lives with him and who has severe addiction and mental health challenges;

d. all of his income is used to provide for basic, reasonable costs of living for himself, his ex-wife, and his dependent;

e. he has made withdrawals from his RRSP to pay for reasonable living expenses for him and his dependent; and

f. he lives largely paycheque to paycheque.

[84] Staff agrees that the circumstances that Mazzacato describes are compelling. In our view, these circumstances, the detail that Mazzacato provides, and the fact that none of Mazzacato's evidence was challenged, combine to support a conclusion that Mazzacato's is an exceptional case that justifies making his inability to pay financial sanctions a significant factor for our consideration.

[85] It is well established that an inability to pay is generally not a determinative factor. The burden remains very high for a respondent to demonstrate circumstances that are sufficient to relieve the respondent, partially or wholly, of what would otherwise be their financial sanctions. Mazzacato met that burden.

2.5.3 Disgorgement

2.5.3.a Introduction

[86] We now turn to our analysis of Staff's request that we order disgorgement of:

a. $51,721.34, jointly and severally, against all respondents including Kadonoff; and

b. $183,142.70 (being $234,864.04, the total amount of the fraud, less the $51,721.34 for which the merits panel held that all four respondents share responsibility), jointly and severally, against all respondents except Kadonoff.

[87] The respondents submit that no disgorgement order would be appropriate, since there was no finding by the merits panel that any of the respondents personally profited, or even obtained a benefit, from the fraudulent conduct.

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[16] *Solar Income Fund Inc (Re)*, (2022) 45 OSCB 8005

[17] SO 2019, c 7, Sch 60

2.5.3.b Analysis

2.5.3.b.i Legal framework

[88] Paragraph 10 of s. 127(1) of the Act authorizes the Tribunal to order that a respondent who has not complied with Ontario securities law disgorge to the Commission "any amounts obtained as a result of the non-compliance".

[89] As the Divisional Court has held, because the purpose of a disgorgement order is to restore confidence in the capital markets, the focus should be not on "whether the fraudsters pocketed the money for themselves", but rather on the fact that the money was improperly diverted at all.[18] A disgorgement order ensures that respondents do not benefit in any way from their contraventions of Ontario securities law, and it deters them and others from similar misconduct.[19]

[90] The Tribunal has stated that when considering whether a disgorgement order is appropriate, and if so in what amount, the following non-exhaustive list of factors applies:

a. whether an amount was obtained by a respondent as a result of the non-compliance with Ontario securities law;

b. the seriousness of the misconduct and whether that misconduct caused serious harm, whether directly to original investors or otherwise;

c. whether the amount obtained as a result of the non-compliance is reasonably ascertainable;

d. whether those who suffered losses are likely to be able to obtain redress; and

e. the deterrent effect of a disgorgement order on the respondents and on other market participants.[20]

[91] We will address each of these in turn.

2.5.3.b.ii Did the respondents obtain an amount as a result of the non-compliance with Ontario securities law?

[92] This Tribunal has consistently held that the word "obtained" in s. 127(1)10 of the Act should be given its plain meaning, and that it is not confined to profit. Staff is correct in rejecting the respondents' submission to the contrary.[21]

[93] For there to be a disgorgement order against a particular respondent, there is no requirement to show that the amounts obtained as a result of the non-compliance flowed directly to that respondent. Even though a central purpose of disgorgement orders is to deprive wrongdoers of ill-gotten gains,[22] a respondent wrongdoer who benefits only indirectly rather than directly cannot raise the indirect nature of the benefit as a shield to a disgorgement order.

[94] Further, even though a particular individual respondent does not obtain funds directly, if that individual respondent is a directing mind of a corporate (or similar) respondent that does, then the individual respondent who is a directing mind of the corporate respondent should be jointly and severally liable for a disgorgement order made against the corporate respondent.[23] In this case, the three individual respondents were directing minds of SIF Inc. and should be jointly responsible for any disgorgement order made against SIF Inc., except to a more limited extent for Kadonoff, because of his limited (in time and amount) role in SIF Inc.'s fraud.

[95] The respondents also submit that they did not personally benefit from the amounts improperly transferred from SIF #1 to SIF #2, because all those amounts were used to pay exempt market dealer fees and investor distributions, and the risk to the investors was extremely limited. The respondents point to two previous decisions:

a. In *Peter Sabourin (Re)*,[24] no disgorgement order was made against Irwin, an individual respondent. The Tribunal found that Irwin had a primarily administrative role and acted at the direction of Sabourin. Irwin had neither sold the investment schemes at issue, nor received any commissions. The panel said it was not prepared to conclude that Irwin had obtained any amounts as a result of his contraventions of the Act, being trading in securities without being registered, and distributing securities without a prospectus. The panel emphasized, however, that

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[18] *North American Financial Group Inc v Ontario Securities Commission*, 2018 ONSC 136 at para 218

[19] *Al-Tar Energy Corp. (Re)*, 2011 ONSEC 1 at para 71

[20] *Pro-Financial Asset Management Inc (Re)*, 2018 ONSEC 18 (***PFAM***) at para 56

[21] *North American Financial* at paras 31, 65

[22] *Limelight Entertainment (Re)*, 2008 ONSEC 28 at para 47

[23] *PFAM* at para 60

[24] 2010 ONSEC 10 (***Sabourin***)

"we should not be taken to have concluded that a person paid a salary can never be held to have obtained, for purposes of subsection 127(1)10 of the Act, such amounts as a result of their non-compliance with the Act."[25]

b. In *M P Global Financial Ltd (Re)*,[26] the panel confirmed that ordinarily, all funds obtained as a result of non-compliance with Ontario securities law should be disgorged. However, because the case did not involve an allegation of fraud, the panel chose to reduce the amount ordered to be disgorged to $2.2 million, being the amount obtained by the respondents and used for their personal benefit.

[96] Neither of these decisions supports our limiting any disgorgement order to the amount that was diverted for the respondents' personal benefit. Indeed, such a conclusion would be contrary to judicial and Tribunal authority, as discussed above. As the Divisional Court has held, the "issue of whether disgorgement orders should be limited to the amount that the fraudsters obtained personally, either directly or indirectly, has been litigated and lost."[27]

[97] Further, the fact that in this case approximately 95% of the diverted amount was moved from one fund (SIF #1) to another (SIF #2) should not prompt a reduction in the amount of disgorgement we order. SIF Inc. obtained that amount at the expense of the SIF #1 unitholders, whose fund was deprived of money it rightfully should have had. The fact that the respondents chose to have SIF Inc. use the money to help SIF #2, as opposed to using the money for direct personal benefit, does not change that fact.[28]

[98] The respondents' choice for SIF Inc. to use the money in that way makes the contravention less egregious, but their choice is of no assistance to SIF #1 unitholders. From the perspective of investor protection and confidence in the capital markets, our disgorgement order must make it clear that individuals in situations like that of the respondents in this case must be meticulous in ensuring that investor funds are used as promised and as the reasonable investor would expect.

[99] Accordingly, we conclude that the manner in which the funds were used does not warrant a reduction in the amount of any disgorgement order.

2.5.3.b.iii Seriousness of the misconduct and whether the misconduct caused serious harm

[100] We explained above, beginning at paragraph [19], why we view the misconduct in this case as moderately serious. As we have stated, fraud is one of the most serious contraventions of Ontario securities law, and it was perpetrated by experienced businesspeople. However, the fraud in this case was not part of a larger scheme; rather, it was an element of an otherwise legitimate business, and it was of moderate magnitude.

[101] As for whether the misconduct caused serious harm, the respondents correctly submit that Staff did not attempt to show direct harm to investors. However, diverting investor funds to uses other than those promised exposes those investors to risks they did not bargain for. That in itself is harmful.

[102] A disgorgement order can be appropriate even where there is no provable or direct loss to investors. The Divisional Court, in *Pushka v Ontario Securities Commission*, cited the Supreme Court of Canada speaking about disgorgement orders in general, holding that if provable direct loss were required, "this would encourage [fiduciaries] to in effect gamble with other people's money, knowing that if they are discovered they will be no worse off than when they started."[29]

2.5.3.b.iv Is the amount obtained as a result of the non-compliance reasonably ascertainable?

[103] In this case, the parties agreed that there is no uncertainty about the amount that is the subject of the fraud. The merits panel found that the total amount is $234,864.04.

[104] The merits panel concluded that the portion of that for which Kadonoff shares responsibility with the other respondents is $51,721.34. However, in the course of our deliberation following the receipt of all submissions, we noted a typographical error in the merits decision that resulted in a slight overstatement of that total. In paragraph 308 of the merits decision, the panel correctly refers to monthly payments of $25,680.67. The panel concluded that Kadonoff shared responsibility for two such payments. However, in calculating the total in paragraph 309 of the merits decision, the panel transposed two digits and used the incorrect figure of $25,860.67 instead of the correct figure of $25,680.67. Accordingly, the extent of Kadonoff's liability should be $51,361.34, not $51,721.34.

[105] Subject to that correction, the amounts involved are reasonably ascertainable and are precise.

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25 *Sabourin* at para 73

26 2012 ONSEC 35

27 *North American Financial Group Inc v Ontario Securities Commission*, 2018 ONSC 136 at para 217

28 *North American Financial* at para 59

29 2016 ONSC 3041 at para 251, quoting *Hodgkinson v Simms*, 1994 CanLII 70 at para 93

2.5.3.b.v Are those who suffered losses likely to be able to obtain redress?

[106] We noted above that there was no evidence of direct losses by investors. Accordingly, this factor is neutral in our analysis of the appropriate disgorgement order.

2.5.3.b.vi Deterrent effect on the respondents and others

[107] As we have discussed in the context of the foregoing factors, it is essential both for the protection of investors and for the promotion of confidence in the capital markets that those entrusted with investor funds faithfully and diligently carry out the obligations that arise in connection with that trust.

2.5.3.c Conclusion about disgorgement

[108] Applying the above factors and analysis, we conclude that is in the public interest to order disgorgement of $234,864.04, jointly and severally by SIF Inc. and Grossman, with Kadonoff sharing joint and several liability for $51,361.34 of that amount.

[109] In view of Mazzacato's exceptional circumstances, we exercise our discretion not to order disgorgement from him.

2.5.4 Administrative penalties

2.5.4.a Introduction

[110] We will now review Staff's request for administrative penalties. Staff seeks $500,000 against each of SIF Inc., Grossman and Mazzacato, and $400,000 against Kadonoff. The respondents propose that any administrative penalty should not exceed $100,000 for Grossman and $20,000 for Kadonoff, and that Mazzacato should not be subject to an administrative penalty, but if one is ordered, it should not exceed $100,000.

[111] We begin by reviewing administrative penalties imposed in the cases that Staff cited to us. We then analyze what administrative penalties would be appropriate in this case. For reasons we explain below, we find that the circumstances before us are not as serious as those present in the precedents. We conclude that it is in the public interest to order an administrative penalty of $175,000 against each of SIF Inc. and Grossman, a penalty of $125,000 against Kadonoff, and a penalty of $1,000 against Mazzacato (in view of his inability to pay).

2.5.4.b Review of administrative penalties imposed in other cases

[112] Determining the amount of an administrative penalty is not a science. The parties provided us with precedent decisions to guide us in determining appropriate sanctions, but those precedents reflect a wide range of sanctions that vary according to the circumstances, The sanctions imposed in other cases, and the reasons for those sanctions, largely serve to suggest a possible range of penalties and a principled approach to determining appropriate penalties in this case.

[113] As the respondents correctly point out, the merits panel found that they contravened only one provision of Ontario securities law, *i.e.*, fraud, in the amount of $234,864.04. When we review any previous Tribunal decision to assist in determining appropriate sanctions in this case, we must keep in mind whether the previous decision involved contraventions of multiple provisions.

[114] Staff cited a number of previous decisions for our assistance in determining appropriate sanctions. For the sake of completeness, and to explain our conclusion that this case falls at the low end of the spectrum, we have summarized all of them here, and we have identified the important differences between the precedent and the present case.

[115] In *Natural Bee Works Apiaries Inc (Re)*,[30] the respondents committed fraud by misusing $267,203 of investor funds. Some of those funds were used for personal purposes; other funds were used in a manner inconsistent with what had been disclosed to investors. The Tribunal imposed a $500,000 administrative penalty (the amount that Staff seeks here against three of the respondents) against Landucci, the individual respondent who was the architect of the fraudulent scheme, and a $150,000 penalty against another individual who played a lesser role. The amount of the fraud was similar to this case, but the case featured a number of significant characteristics that distinguish it from this case:

a. the investors lost their funds;

b. the merits panel found "extravagant deceit" in the respondents' misrepresentations that the corporate respondent was a very substantial enterprise, with a multi-million dollar line of credit, preparing to list on NASDAQ;

[30] 2019 ONSEC 31 (***Natural Bee Works***)

c. the individual respondents used some of the investor funds for their personal benefit;

d. Landucci not only committed fraud but also violated the prospectus requirement in the Act; and

e. there were no mitigating factors.

[116] In *Sandy Winick (Re)*,[31] Winick raised $450,000 from 32 investors through three fraudulent schemes. The Tribunal imposed a $750,000 administrative penalty against Winick. The following significant characteristics distinguish that case from this one:

a. there were no legitimate businesses involved in any of the three schemes;

b. Winick engaged in an ongoing course of deceitful and fraudulent conduct designed to personally enrich himself at the expense of innocent investors;

c. in addition to the fraud, Winick breached the registration and prospectus requirements in the Act; and

d. Winick did not appear at the hearing.

[117] *Rezwealth Financial Services Inc*[32] involved a Ponzi scheme orchestrated by the respondent Blackett. Through the scheme, the respondents raised approximately $5.9 million from 101 investors. The Tribunal imposed a $500,000 administrative penalty on Blackett. In that case:

a. Blackett created the fraudulent scheme and operated it over a long period of time;

b. investors lost substantial funds;

c. Blackett not only committed fraud but violated the registration and prospectus requirements in the Act;

d. Blackett obtained a net amount of almost $1.5 million from investors, more than $1 million of which he used for personal purposes; and

e. Blackett did not participate in the proceeding.

[118] The respondents in *Quadrexx Hedge Capital Management Ltd*[33] committed three frauds. The Tribunal imposed an administrative penalty of $600,000 against each individual respondent. The following significant characteristics distinguish that case from this one:

a. the individual respondents committed three separate frauds, by:

i. manipulating a valuation process relating to shares they held, resulting in a benefit to them of more than $800,000;

ii. paying distributions totaling approximately $259,000 to prior investors with funds raised from new investors, contrary to the offering memorandum; and

iii. misappropriating approximately $185,000 of raised funds, for working capital;

b. investors directly lost substantial funds as a result of the second and third frauds, in addition to any loss caused by the first;

c. the respondents also committed the following contraventions of Ontario securities law:

i. they failed to report a working capital deficiency as required;

ii. they failed to deal fairly, honestly and good faith with clients; and

iii. they breached their obligations as Ultimate Designated Person and Chief Compliance Officer;

d. the respondents' conduct in the first fraud was particularly egregious and was motivated only by their personal profit, and the second fraud also featured aggravating factors; and

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[31] 2013 ONSEC 51

[32] 2014 ONSEC 18

[33] 2018 ONSEC 3

e. the amount of the administrative penalty was reduced to reflect the significant deterrent effect of a $2.3 million disgorgement order.

[119] In *Money Gate Mortgage Investment Corporation Ltd*,[34] the individual respondents, father and son, perpetrated fraud on investors by diverting approximately $1.5 million contrary to representations in the offering memoranda. The Tribunal imposed an administrative penalty of $750,000 on the father and $600,000 on the son. In that case:

a. the misconduct occurred over more than three years, involving approximately $11 million raised from more than 150 investors;

b. in addition to committing fraud, the respondents also violated the registration and prospectus requirements of the Act;

c. more than $1 million was diverted to the father for his benefit;

d. a further $435,000 was diverted to various entities owned or controlled by the father, the son, or individuals associated with them;

e. there were no mitigating factors with respect to the father; and

f. the Tribunal ordered disgorgement of more than $8.7 million.

[120] The respondents in *Maple Leaf Investment Fund Corp*[35] perpetrated a fraud on 80 investors, raising approximately $4.5 million over 19 months. The Tribunal imposed an administrative penalty of $450,000 on the principal individual respondent. That case featured the following significant characteristics that distinguish it from this case:

a. the panel found that the respondent's behaviour was egregious, including because he knowingly perpetrated the fraud by providing false and incomplete information to investors;

b. the respondent was at the centre of the fraud, and was primarily responsible for the marketing and sales of the securities, as well as communication with investors;

c. the respondent preyed on vulnerable investors; and

d. the respondent not only committed fraud but also breached the registration and prospectus requirements in the Act, and made prohibited representations about future listing on a stock exchange.

[121] The respondents in *Richvale Resource Corp*[36] raised more than $750,000 from 27 investors in a fraudulent scheme that included misrepresentations about the use of investor funds, as well as the compensation and the business experience of the company's directors and officers. The Tribunal imposed an administrative penalty of $300,000 against the individual respondent who was the directing mind of the scheme. That case is distinct from this one in that:

a. investors were told that their funds would be used primarily in connection with exploration, when in fact most funds were paid to the company's directors;

b. the respondent not only committed fraud, but violated the registration and prospectus requirements of the Act, and made prohibited representations about future listing on a stock exchange;

c. the respondent personally benefited from some of the funds; and

d. the respondent did not appear at the hearing.

[122] In *North American Financial Group Inc*,[37] the Tribunal imposed an administrative penalty of $600,000 on each of the two individual respondents, in respect of a financing scheme in which approximately $4 million was raised from investors. The respondents committed fraud in that they did not advise the investors that their funds would be used to pay interest, dividends or principal to other investors. The following significant characteristics distinguish that case from this one:

a. the individual respondents not only committed fraud, they:

i. violated the registration requirement in the Act;

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[34] 2021 ONSEC 10

[35] 2012 ONSEC 8

[36] 2012 ONSEC 40

[37] 2014 ONSEC 28

ii. failed to deal with clients fairly, honestly and in good faith; and

iii. violated suitability requirements;

b. no mitigating factors were cited;

c. the individual respondents prepared the misleading marketing materials;

d. the respondents' actions caused significant harm to investors;

e. the respondents moved their assets out of the reach of investors; and

f. the respondents were former registrants and were therefore subject to a higher standard.

[123] In *Portfolio Capital Inc*,[38] the Tribunal imposed an administrative penalty of $500,000 on the primary individual respondent, who was an active participant in a fraudulent scheme through which more than $1.5 million was raised from over 200 investors. That case featured a number of significant characteristics that distinguish it from this case:

a. the respondent had over 25 years of experience in the capital markets, and created an elaborate web of deceit through various update letters to shareholders;

b. the respondent not only committed fraud, but violated the registration and prospectus requirements in the Act, as well as the prohibition against making statements relating to future listing on a stock exchange;

c. only one investor was repaid, and the others lost their money; and

d. there were no mitigating factors.

[124] The respondents in *Lyndz Pharmaceuticals Inc*[39] engaged in two fraudulent schemes, through which they raised approximately $2.1 million from more than 70 investors. The Tribunal imposed administrative penalties of $600,000 and $500,000 respectively against the two individual respondents, McKenzie and Eatch. As with many of the cases cited above, this one resulted in administrative penalties similar to what Staff seeks here, but in circumstances that were markedly different from this case. In that case:

a. McKenzie and Eatch misused $700,000 and $655,000 respectively for their personal expenses;

b. investors were told that their funds were to be used to bring affordable pharmaceuticals to the third world as a humanitarian project, when in fact there was no legitimate underlying business;

c. the fraud took place over five years and in multiple jurisdictions, and included providing misleading documents to investors;

d. the respondents not only committed fraud, they violated the registration and prospectus requirements in the Act; and

e. McKenzie did not appear at the hearing, and the Tribunal found that Eatch did not recognize the seriousness of his misconduct.

[125] In *2196768 Ontario Ltd (Rare Investments)*,[40] the Tribunal imposed an administrative penalty of $250,000 against the principal of a fraudulent scheme. The respondents solicited approximately $1.3 million from 16 investors, purportedly to engage in trading of foreign currencies. The respondents did not inform investors about trading losses or that their investments would be used to make payments and loans to third parties. That case is distinct from this case in that:

a. the individual respondent was a registrant, and therefore held to a higher standard;

b. the respondent's conduct was egregious, and caused significant harm to investors by way of financial loss of their entire investment;

c. the respondent not only committed fraud, but violated the registration and prospectus requirements in the Act; and

[38] 2015 ONSEC 27

[39] 2012 ONSEC 25 (***Lyndz***)

[40] 2015 ONSEC 9

d. there were no mitigating factors.

[126] We agree with the respondents' submission in this case that the circumstances before us are less serious than all of the precedents cited to us. This case does not feature breaches of multiple provisions of Ontario securities law; rather, it was an isolated series of unauthorized diversions of funds from one fund to another, in the context of a legitimate underlying business. The respondents were reckless but not deliberately deceitful. There was no direct personal benefit to the respondents, and no investor loss approaching that found in the precedent cases. Finally, the respondents co-operated fully with Staff throughout the investigation of this matter, a factor that deserves significant weight.

2.5.4.c Analysis and conclusion

[127] In determining what an appropriate administrative penalty would be, we must take a global view of all the sanctions we impose on each respondent individually, taking into account the disgorgement we order and the fact that subject to limited exceptions, the respondents will be prohibited from participating in the capital markets. We must consider both specific and general deterrence, and the extent to which those objectives are achieved by the other sanctions we impose.[41]

[128] Staff submits that even though Kadonoff shared responsibility for only one-fifth of the total amount of the fraud, we should apply no corresponding discount to any administrative penalty compared to the other individual respondents. Staff says that Kadonoff's responsibility was limited only because he ended his time as a directing mind of SIF Inc. partway through the material period. Staff suggests that Kadonoff is as culpable as the other individual respondents because he participated in the fraud while a director of SIF Inc., and he knew of the diversion of funds. Staff says that Kadonoff's lesser involvement warrants an administrative penalty of $400,000, compared to $500,000 for Grossman and Mazzacato.

[129] We find that the fraud in this case warrants an administrative penalty of $175,000 for SIF Inc., an amount that is proportionate to the size of the fraud, that reflects the various factors set out in paragraph [127] above, and that falls slightly below the lower end of the overall range seen in the precedents we have summarized above.

[130] It is appropriate to impose the same penalty of $175,000 for Grossman. He had more than 50 years' experience as a Chartered Professional Accountant and had capital markets experience, including as a founder of a limited market dealer firm. He was a founder of SIF Inc., he became a director of the company in November 2013, and he held various senior officer roles throughout the relevant time. He was the only person who was a director and/or officer of SIF Inc. for the entire period of March 2013 to December 2016. He played a primary role among the three individual respondents, as is evident from various of the merits panel's findings. By his own admission, he directed that the unauthorized transfers be made for the impugned purposes. His level of responsibility should correspond to that of SIF Inc.

[131] An administrative penalty of $125,000 is in order for Kadonoff. He played a less central role than Grossman, and his involvement was time-limited. While we apply a reduction to Kadonoff's administrative penalty in view of the time-limited nature of his involvement, that reduction is not mathematically proportional in the way that we reduced the amount we ordered him to disgorge. Unlike our disgorgement order, the administrative penalty reflects the nature of the misconduct itself. It also reflects the fact that Kadonoff was a lawyer. While he had no specific training or previous experience in matters related to the capital markets, he was a corporate lawyer who was well situated to be alert to the fundamental question that should have been asked of SIF Inc.'s external lawyers, *i.e.*, whether the offering memorandum authorized the transfer of funds for the impugned purposes.

[132] As for Mazzacato, we would impose an administrative penalty of $100,000, if it were not for his inability to pay. While he was involved in the fraud for a longer time period than was Kadonoff, Mazzacato had no accounting, capital markets, or legal expertise. Experience in any of those areas would expose him to a greater penalty in the circumstances of this case, as was the case with Grossman and Kadonoff. Instead, Mazzacato's experience and focus were more operational. While that does not relieve him of responsibility, in our view he is less culpable than his fellow individual respondents.

[133] Taking Mazzacato's inability to pay into account, we substitute a nominal administrative penalty of $1,000. That penalty reflects our denunciation of his misconduct but avoids having a punitive effect.

2.6 Carve-outs

2.6.1 Introduction

[134] Having determined the appropriate financial sanctions, we return to the market bans discussed above. We now address the question of whether there should be any carve-outs from those bans, as the respondents request.

[41] *Quadrexx* at para 58

[135] Staff submits that any bans we impose should be total, and that we should not allow for any carve-outs. Alternatively, submits Staff, if we decide to grant carve-outs, those carve-outs should become effective only once all financial sanctions and costs have been paid by the respondents.

[136] We received two different draft orders to effect the requested carve-outs, one draft from Staff (without prejudice to its main submission that we should not order any carve-outs) and one draft from the respondents. In our analysis below, we identify each of the meaningful differences between the two versions and we indicate how we resolve those differences.

[137] In submitting that no carve-outs should apply at all, Staff contends that the respondents have demonstrated from extensive activities related to SIF Inc. that they are not capable of fulfilling basic obligations that come with raising funds from the public. We disagree. That proposed conclusion about the respondents' abilities, stated as broadly as it is, does not follow from the merits panel's findings. Even if we were to accept that conclusion, the requested carve-outs would not be inconsistent with it. The carve-outs the respondents seek have no connection with raising public funds, and nothing in the merits panel's findings raises any concern that would lead us to conclude that the proposed carve-outs would pose a danger to the capital markets.

[138] As for deferring the effective date of the carve-outs until the particular respondent has satisfied his any financial sanctions and costs that we order, the parties' draft orders reflected their different positions on this question, but neither Staff nor the respondents made detailed submissions about the appropriateness of such a condition. As the Tribunal has previously held, though, where a trading ban is imposed, but an ability to trade in personal accounts is allowed only after the satisfaction of financial sanctions and costs orders, that term provides an incentive to the respondent to make those payments.[42]

[139] We adopt that reasoning for this case, except as it relates to Mazzacato. Given his impecuniosity, the incentive to pay any financial order does not operate. Accordingly, we do not attach a deferral to the carve-outs we order in respect of Mazzacato.

[140] We now examine each of the two requested carve-outs.

2.6.2 Carve-out to permit limited personal trading

[141] Staff submits that we should treat the respondents in this case similarly to those in *Lyndz Pharmaceuticals Inc. (Re)*, in which the Tribunal commented that the respondents could not be trusted to participate in the capital markets in any way.[43] We disagree.

[142] The merits panel in this case found that the respondents sought to avoid their responsibility as members of senior management of an entity that raises funds from the public. The merits panel concluded that neither Mazzacato nor Kadonoff appeared to appreciate the obligations that come with such positions. We have no indication that anything has changed in that regard, and so for protection of the capital markets we must impose sanctions that specifically deter the individual respondents from engaging in similar conduct.

[143] In contrast, in *Lyndz*, the Tribunal found that investors were told that their funds were to be used to bring affordable pharmaceuticals to the third world as a humanitarian project, when in fact there was no legitimate underlying business. The respondents in that case knowingly perpetrated a $2.1 million fraud that took place over five years and in multiple jurisdictions, that included providing misleading documents to investors, and that involved the diversion of funds for personal purposes.[44] None of those important facts aligns with the circumstances in this case.

[144] Despite the seriousness of the respondents' misconduct in this case, we do not accept that the respondents cannot be trusted to participate in the capital markets in any way. That is a description that should be used to describe only the most culpable of wrongdoers that come before the Tribunal. Using that description too indiscriminately risks depriving it of meaning.

[145] The carve-out that the individual respondents seek would enable them to conduct trading in registered accounts of which they, their spouse or children are the owners.

[146] Other than the potential deferral until satisfaction of financial sanctions and costs, the two draft orders that we received have no meaningful differences between them on this point. There are inconsequential differences in wording about ownership of the exempted accounts, but both Staff's draft and the respondents' draft contemplate registered accounts owned by the individual respondent, his spouse or his children.

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42 *Simba (Re)*, 2018 ONSEC 56 at para 22; *Money Gate* at para 38; *Morgan Dragon Development Corp (Re)*, 2014 ONSEC 26 at para 39

43 *Lyndz* at para 80

44 *Lyndz* at paras 61, 62, 80

[147] We will therefore include in our order the requested carve-out. In the case of Grossman and Kadonoff, that carve-out is subject to satisfaction of financial obligations to the Commission.

2.6.3 Carve-out to permit a respondent to be an officer or director

[148] We turn to the individual respondents' request that despite the market bans, they be permitted to continue as directors and officers of certain specified private entities.

[149] We acknowledge Staff's observation that it is unaware of any Tribunal case in which fraud was found against an individual who then benefited from a carve-out permitting the individual to act as an officer or director of an issuer. On the other hand, we are unaware of any authority that engages in a discussion of the propriety of that kind of carve-out in such a situation. It is often the case that the nature of the fraud suggests strongly that no carve-out should be made available, and the respondent does not contest the point. Here, the conduct does not mandate the denial of a carve-out, and the respondents have pushed strongly for the limited carve-outs, partially to avoid problematic consequences for their family members. In this exceptional case, and despite the finding of fraud, we are prepared in principle to grant the requested carve-out, subject to there being satisfactory information from each respondent.

[150] Mazzacato asks for a carve-out for his personal corporation 2740753 Ontario Ltd., of which he testifies that he is the sole director, officer and shareholder. He uses the corporation to deposit fees received for consulting work. The corporation retains a negligible amount of earnings and cash. Staff did not challenge Mazzacato's evidence regarding this corporation.

[151] Kadonoff lists two corporations in respect of which he wants exemptions:

a. Mika Holdings Limited, in which the two shareholders are Kadonoff's ex-wife and his current wife, with Kadonoff as the sole director; and

b. 2741797 Ontario Inc., of which Kadonoff is the sole officer, director and shareholder, and which is the corporate trustee for Mika Holdings Trust.

[152] We received no information about Mika Holdings Trust, other than that 2741797 Ontario Inc. is the corporate trustee. We know nothing about its activities or holdings.

[153] Kadonoff does state in his affidavit filed on this hearing that neither Mika Holdings Limited nor 2741797 Ontario Inc. solicits outside business or conducts any business on behalf of anyone other than Kadonoff's immediate family. Kadonoff asserts that no one else is willing and able to act as a director of the two companies specified above, and that his family would be greatly prejudiced if he were required to resign as an officer and director of those companies. He does not specify the nature of that prejudice, but Staff did not challenge Kadonoff's evidence on the point.

[154] As Staff observes, Grossman's request is limited to identifying the corporation (J9 Investments Ltd.) in the proposed draft order but is unsupported by evidence that would offer any comfort about the scope of the carve-out as it applies to him. The respondents' joint submissions refer variously to "family-owned corporations", "family companies" and "family holding companies". In our view, Grossman's request is insufficiently specific and insufficiently supported. We cannot accede to his request over Staff's objection.

[155] We will therefore include in our order carve-outs for:

a. Mazzacato as requested, without any deferral pending payment of his financial obligations under our order; and

b. Kadonoff as requested, but only on satisfaction of his financial obligations under our order.

[156] Given our conclusion about Kadonoff, and his assertion of prejudice that would result from his no longer being a director or officer, we are ordering that the market bans against him, in respect of the two private issuers he identified, be effective thirty days after the date of our order, to give Kadonoff time to either make payment or necessary arrangements regarding the governance of those entities.

2.7 Reprimand

[157] Staff also seeks a reprimand against each of the respondents, under s. 127(1)6 of the Act. We decline to make that order.

[158] Authority to issue a reprimand was granted in 1994 to make available a sanction to be used where other sanctions would be too severe.[45] Staff now routinely asks for a reprimand, and its persistence in doing so continues to risk making the reprimand a token sanction, which undermines the effect of reprimands generally.[46]

[159] We conclude that it is neither necessary nor in the public interest to issue a reprimand where the reasons for decision inherently denounce the misconduct (as is the case here), and other sanctions are imposed.

3. ANALYSIS – COSTS

3.1 Introduction

[160] We turn now to Staff's request that the respondents pay a portion of the costs incurred by the Commission in this proceeding and in the investigation of this matter. Section 127.1 of the Act authorizes the Tribunal to order a respondent to pay the costs of an investigation and of the proceeding that follows it, if the respondent has been found to have contravened Ontario securities law.

[161] Reimbursement of the Commission's costs by a respondent who contravenes Ontario securities law is reasonable, because the Commission's budget, including its enforcement budget, is paid by fees charged to registrants, issuers and others. A costs order is discretionary and is designed to reduce the burden on market participants to pay for investigations and enforcement proceedings.[47]

[162] Staff seeks costs of $367,246.60 to be apportioned equally among the respondents (*i.e.*, $91,811.65 each), with the three individual respondents being jointly and severally responsible for SIF Inc.'s portion of the costs. The respondents submit that the costs claimed are excessive, and that they should not be required to pay any costs, in particular because they were successful on most of the issues in the proceeding.

[163] For reasons we explain below, we conclude that it would be appropriate to order that:

a. $37,500.00 be paid by SIF Inc., for which amount Grossman and Kadonoff shall be jointly and severally liable; and

b. $37,500.00 for each of Grossman and Kadonoff.

3.2 Analysis

[164] Staff has provided an affidavit regarding costs and disbursements, which shows Staff's costs of the investigation, pre-hearing activities and merits hearing. The affidavit lists members of Staff (including outside counsel) who participated in each phase, the hourly rates approved by the Tribunal for their positions, and the time spent by them. The costs incurred, including disbursements for which receipts were included, totalled $1,973,250.45. Members of Staff spent more than 7,700 hours, a figure that does not include time spent by outside counsel.

[165] Staff has reduced these costs by $1,606,003.85, primarily by:

a. reducing outside counsel's hourly rate to the rate normally applied for Staff counsel;

b. excluding time spent by all members of Staff other than the principal investigator (for the investigation stage) and the principal investigator and one Staff litigator (for the litigation phase);

c. excluding some of the time spent by Staff's litigator regarding an expert witness, whose testimony was ruled inadmissible before the merits hearing began;[48] and

d. by applying a further 50% deduction to reflect Staff's partial success.

[166] Although a respondent found to have contravened Ontario securities law should expect to pay costs, a large costs award can reasonably be viewed as punitive. The potential for such an award may adversely affect a respondent's willingness, and ability, to pursue a full defence. Further, as is the case with an administrative penalty, determining the amount of a costs award is not a science. The Tribunal should apply a balanced approach that takes into account various factors.

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[45] *Smith* at para 26

[46] *Money Gate* at para 39

[47] *Quadrexx* at para 118; *PFAM* at para 111

[48] *Solar Income Fund Inc (Re)*, 2021 ONSEC 2

[167] In this case, we begin with Staff's starting number of almost $2 million. We do not question the factual basis behind that total, but even before applying a reduction to reflect Staff's mixed success, we consider that number to be at the high end of what we would expect for a case of this nature.

[168] For us, though, the most influential factor is Staff's degree of success in establishing its allegations.[49] Staff can never be certain about which allegations it will succeed in proving, and it should not be held to an unreasonable standard. However, from the point of view of the respondents, they should not be held responsible for investigation and hearing costs related to allegations that are not proven. Not only are the Commission's costs in that regard unconnected to any misconduct that has been established against the respondents, but the respondents can reasonably be expected to have incurred significant unrecoverable costs of their own in defending against those allegations.

[169] In this case, the merits panel upheld Staff's relatively narrow fraud allegations but dismissed other allegations that the respondents had contravened s. 44(2) of the Act, which prohibits false or misleading representations relevant to a trading or advising relationship. The finding of a fraud in the amount of $234,864.04 related to transactions for two discrete purposes, *i.e.*, distributions to SIF #2 unitholders, and exempt market dealer fees. In contrast, the s. 44(2) allegations were wide-ranging, they consumed a significantly greater portion of the Statement of Allegations and of the affidavit evidence of Staff's investigator witness, they involved numerous loans by SIF #1 to related entities, and they were associated with approximately $20 million that SIF #1 raised from investors.[50] It is impossible to put a precise number on the degree of Staff's success, but we can safely say that Staff proved only a small part of its case.

[170] Further, and aside from the s. 44(2) point, we agree with the respondents' submission that on occasion throughout the proceeding, Staff adopted an approach that was overly broad, *i.e.*, by going beyond the scope of the Statement of Allegations during the merits hearing, and by going beyond the findings of the merits panel during the sanctions and costs hearing. This approach persisted during the examination of witnesses in the merits hearing, it appeared in Staff's closing submissions (as itemized by the respondents in theirs), and it reappeared in Staff's submissions at the sanctions and costs stage. Such an approach imposes an unnecessary burden on respondents, who even though they take the position that the matters are beyond the appropriate scope, reasonably feel compelled to defend against them.

[171] That feature of this proceeding is counterbalanced somewhat by the respondents' unsuccessful assertion of the defence of reasonable reliance on legal advice. The respondents are perfectly entitled to raise such a defence. The fact is, though, that the testimony and submissions associated with that defence consumed a significant portion of the merits hearing. It is appropriate to take that fact into account in determining costs.

[172] Overall, the balance between these two features weighs more heavily against Staff when it comes to assessing the extent to which the parties' conduct contributed to Staff's costs. We are also mindful that the costs implications of the unsuccessful assertion of a s. 44(2) violation reach back into the investigation stage.

[173] In this regard, we do not accept Staff's reply submission that the difference between what Staff alleged and what Staff proved is simply a question of degree, as might have been the case if the difference had simply been about the dollar amount of the fraud. This was not a case with only one core allegation of misconduct, with only small increments of resources required on both sides to define the extent of that misconduct. Staff's wide-ranging s. 44(2) allegations were different in character from the tightly-focused fraud allegations, and the s. 44(2) allegations consumed significantly more resources, as we have explained.

[174] In addition, the respondents correctly submit that as the merits panel found, Staff attempted to have s. 44(2) apply in circumstances where it had not been applied before (*i.e.*, against a non-registrant who was not engaged in conduct that required registration).[51] We have some sympathy for the respondents' submission that they should not bear the burden of that.

[175] The last factor we consider with respect to all respondents is the seriousness of the fraud contravention. We differ with what Staff's submission appears to imply about the weight we should attach to this factor. This Tribunal has indeed identified the seriousness of the misconduct as a relevant factor,[52] and serious misconduct such as the fraud in this case warrants a regulatory response.[53] However, when it comes to determining the appropriate amount of costs to be awarded, then the primary relevance of the seriousness of the allegations is as an indirect driver of complexity, which itself is a driver of the length of, and resources required in, investigations and proceedings.

[176] Finally, with respect to Kadonoff specifically, he submits that he should be responsible for no more than 20% of any costs award, given the time-limited nature of his involvement. We do not accept that submission. There is no linear relationship

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49 *Quadrexx* at para 120

50 Merits Decision at para 6

51 Merits Decision at para 56

52 *YBM Magnex International Inc (Re)*, (2003) 26 OSCB 5285 at para 608

53 *Natural Bee Works* at para 94

between what Staff's costs would be and the number of months for which any particular respondent was involved. To put it another way, once the fraud formed part of the investigation and proceeding, adding some months to the regular schedule of payments would have only an immaterial incremental effect on the costs.

3.3 Conclusion about costs

[177] Considering the length of the hearing, the complexity of the issues, Staff's degree of success in establishing its allegations, the time spent by Staff, the financial sanctions imposed on the respondents, and our finding with respect to Mazzacato's impecuniosity, we have determined that the overall costs number for which the respondents should be liable is $150,000. That amount differs from Staff's claim primarily because of our greater discount to reflect Staff's limited success.

[178] Subject to our findings about Mazzacato's inability to pay, we accept Staff's request to apportion the costs equally among the respondents, with the individual respondents being jointly and severally liable for SIF Inc.'s portion. We will relieve Mazzacato of any obligation to pay costs, but we will not apply a corresponding increase to the amount to be borne by his fellow respondents. Accordingly, we will order that the respondents be liable for costs as follows:

a. $37,500.00 to be paid by SIF Inc., for which amount Grossman and Kadonoff shall be jointly and severally liable; and

b. $37,500.00 for each of Grossman and Kadonoff.

CONCLUSION

[179] The sanctions we have specified above are proportionate to the misconduct in this case, and are appropriate when viewed globally in the context of each respondent. The combination of sanctions for a particular respondent:

a. ensures that none of them profited, directly or indirectly, from their misconduct;

b. takes account of the mitigating factors, including in particular the respondents' co-operation with Staff throughout the investigation

c. differentiates based on degree of culpability;

d. effects both general and specific deterrence, thereby protecting investors and promoting confidence in the capital markets; and

e. in Mazzacato's case, reflects his inability to pay significant financial sanctions or costs.

[180] For the reasons set out above, we shall issue an order that provides as follows:

a. pursuant to paragraphs 2 and 2.1 of s. 127(1) of the Act:

i. SIF Inc. shall cease trading in any securities or derivatives, or acquiring any securities, permanently;

ii. each of Grossman and Kadonoff is permanently prohibited from trading in any securities or derivatives, or acquiring any securities, except that after he has fully paid the amounts in subparagraphs (e), (f) and (g) below, he may trade securities or derivatives, and acquire securities in a Registered Retirement Savings Plan, Registered Retirement Income Fund, Registered Education Savings Plan, Registered Disability Savings Plan or Tax-Free Savings Account (as those terms are defined in the *Income Tax Act*[54]) of which only he, his spouse or his children are the sole or joint legal and beneficial owners, through a registered dealer in Canada to whom he has given both a copy of our order and a certificate from the Commission confirming that he has paid the required amounts; and

iii. Mazzacato is permanently prohibited from trading in any securities or derivatives, or acquiring any securities, except that he may trade securities or derivatives, and acquire securities in a Registered Retirement Savings Plan, Registered Retirement Income Fund, Registered Education Savings Plan, Registered Disability Savings Plan or Tax-Free Savings Account (as those terms are defined in the *Income Tax Act*), of which only he, his spouse or his children are the sole or joint legal and beneficial owners, through a registered dealer in Canada to whom he has given a copy of our order;

b. pursuant to paragraph 3 of s. 127(1) of the Act, any exemptions contained in Ontario securities law shall not apply to any of the respondents, permanently;

[54] RSC, 1985, c 1 (5th Supp)

c. pursuant to paragraphs 7, 8, 8.1 and 8.2 of s. 127(1) of the Act, Grossman, Mazzacato and Kadonoff shall resign any positions that they hold as directors or officers of any issuer or registrant, and are prohibited permanently from becoming or acting as directors or officers of any issuer or registrant, except that:

    i. Mazzacato may continue as a director and officer of 2740753 Ontario Ltd.;

    ii. in respect of Kadonoff's role as director and officer of Mika Holdings Limited and 2741797 Ontario Inc., and as the nominee trustee for Mika Holdings Trust, the requirement to resign, and the prohibition, take effect on February 10, 2023, being thirty days after the date of our order; and

    iii. Kadonoff may, after he has fully paid the amounts in paragraphs (e), (f) and (g) below, continue as a director and officer of Mika Holdings Limited and 2741797 Ontario Inc., and as the nominee trustee for Mika Holdings Trust;

d. pursuant to paragraph 8.5 of s. 127(1) of the Act, the respondents are prohibited from becoming or acting as a registrant or as a promoter;

e. pursuant to paragraph 9 of s. 127(1) of the Act:

    i. SIF Inc. shall pay to the Commission an administrative penalty of $175,000;

    ii. Grossman shall pay to the Commission an administrative penalty of $175,000;

    iii. Kadonoff shall pay to the Commission an administrative penalty of $125,000;

    iv. Mazzacato shall pay to the Commission an administrative penalty of $1,000: and

f. pursuant to paragraph 10 of s. 127(1) of the Act:

    i. SIF Inc. and Grossman are jointly and severally liable to disgorge to the Commission $234,864.04; and

    ii. Kadonoff is, jointly and severally with SIF Inc. and Grossman, liable to disgorge to the Commission $51,361.34, which amount forms part of the $234,864.04 referred to in subparagraph (f)(i) above; and

g. pursuant to s. 127.1 of the Act:

    i. SIF Inc. shall pay costs to the Commission in the amount of $37,500.00, for which amount Grossman and Kadonoff shall be jointly and severally liable; and

    ii. each of Grossman and Kadonoff shall pay costs to the Commission in the amount of $37,500.00.

Dated at Toronto this 11th day of January, 2023

“Timothy Moseley”

“William J. Furlong”

“Dale R. Ponder”

B. Ontario Securities Commission

B.2
Orders

B.2.1 TAAL Distributed Information Technologies Inc.

Headnote

National Policy 11-206 Process for Cease to be a Reporting Issuer Applications – The issuer ceased to be a reporting issuer under securities legislation.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., s. 1(10)(a)(ii).

January 12, 2023

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR CEASE TO BE
A REPORTING ISSUER APPLICATIONS

AND

IN THE MATTER OF
TAAL DISTRIBUTED INFORMATION
TECHNOLOGIES INC.
(the Filer)

ORDER

Background

The principal regulator in the Jurisdiction has received an application from the Filer for an order under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) that the Filer has ceased to be a reporting issuer in all jurisdictions of Canada in which it is a reporting issuer (the **Order Sought**).

Under the Process for Cease to be a Reporting Issuer Applications (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application, and

(b) the Filer has provided notice that subsection 4C.5(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this order, unless otherwise defined.

Representations

This order is based on the following facts represented by the Filer:

1. the Filer is not an OTC reporting issuer under Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets*;

2. the outstanding securities of the Filer, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 securityholders in each of the jurisdictions of Canada and fewer than 51 securityholders in total worldwide;

3. no securities of the Filer, including debt securities, are traded in Canada or another country on a marketplace as defined in National Instrument 21-101 *Marketplace Operation* or any other facility for bringing together buyers and sellers of securities where trading data is publicly reported;

4. the Filer is applying for an order that the Filer has ceased to be a reporting issuer in all of the jurisdictions of Canada in which it is a reporting issuer; and

5. the Filer is not in default of securities legislation in any jurisdiction.

Order

The principal regulator is satisfied that the order meets the test set out in the Legislation for the principal regulator to make the order.

The decision of the principal regulator under the Legislation is that the Order Sought is granted.

"Marie-France Bourret"
Manager, Corporate Finance
Ontario Securities Commission

OSC File #: 2022/0591

B.2.2 PenderFund Capital Management Ltd. and Pender Emerging Markets Impact Fund

Headnote

National Policy 11-206 Process for Cease to be a Reporting Issuer Applications – The issuer ceased to be a reporting issuer under securities legislation.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., s. 1(10)(a)(ii).

January 13, 2023

**IN THE MATTER OF
THE SECURITIES LEGISLATION OF
BRITISH COLUMBIA AND
ONTARIO
(the Jurisdictions)**

AND

**IN THE MATTER OF
THE PROCESS FOR CEASE TO BE
A REPORTING ISSUER APPLICATIONS**

AND

**IN THE MATTER OF
PENDERFUND CAPITAL MANAGEMENT LTD.
(the Filer)**

AND

**PENDER EMERGING MARKETS IMPACT FUND
(the Fund)**

ORDER

Background

¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (Decision Maker) has received an application from the Filer, on behalf of the Fund, for an order under the securities legislation of the Jurisdictions (the Legislation) that the Fund has ceased to be a reporting issuer in all jurisdictions of Canada in which the Fund is a reporting issuer (the Order Sought).

Under the Process for Cease to be a Reporting Issuer Applications (for a dual application):

(a) the British Columbia Securities Commission is the principal regulator for this application,

(b) the Filer has provided notice that subsection 4C.5(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Newfoundland, Prince Edward Island, Nunavut, Yukon and Northwest Territories, and

(c) this order is the order of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

¶ 2 Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this order, unless otherwise defined.

Representations

¶ 3 This order is based on the following facts represented by the Filer:

1. the Fund is not an OTC reporting issuer under Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets*;

2. the outstanding securities of the Fund, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 securityholders in each of the jurisdictions of Canada and fewer than 51 securityholders in total worldwide;

3. no securities of the Fund, including debt securities, are traded in Canada or another country on a marketplace as defined in National Instrument 21-101 *Marketplace Operation* or any other facility for bringing together buyers and sellers of securities where trading data is publicly reported;

4. the Filer is applying for an order that the Fund has ceased to be a reporting issuer in all of the jurisdictions of Canada in which it is a reporting issuer; and

5. the Fund is not in default of securities legislation in any jurisdiction.

Order

¶ 4 Each of the Decision Makers is satisfied that the order meets the test set out in the Legislation for the Decision Maker to make the order.

The decision of the Decision Makers under the Legislation is that the Order Sought is granted.

"Noreen Bent"
Chief, Corporate Finance Legal Services
British Columbia Securities Commission

B.2.3 Empire Life Investments Inc. et al.

Headnote

National Policy 11-206 Process for Cease to be a Reporting Issuer Applications – Application for the Funds to cease to be reporting issuers under applicable securities law - relief granted.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., s. 1(10)(a)(ii).

January 4, 2023

**IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)**

AND

**IN THE MATTER OF
THE PROCESS FOR CEASE TO BE
A REPORTING ISSUER APPLICATIONS**

AND

**IN THE MATTER OF
EMPIRE LIFE INVESTMENTS INC.
(the Filer)**

AND

**EMPIRE LIFE EMBLEM DIVERSIFIED
INCOME PORTFOLIO
EMPIRE LIFE EMBLEM CONSERVATIVE PORTFOLIO
EMPIRE LIFE EMBLEM BALANCED PORTFOLIO
EMPIRE LIFE EMBLEM MODERATE
GROWTH PORTFOLIO
EMPIRE LIFE EMBLEM GROWTH PORTFOLIO
EMPIRE LIFE EMBLEM AGGRESSIVE
GROWTH PORTFOLIO
EMPIRE LIFE MONTHLY INCOME MUTUAL FUND
(each, a Fund, and collectively, the Funds)**

ORDER

Background

The principal regulator in the Jurisdiction has received an application from the Filer, on behalf of the Funds, for an order under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) that each of the Funds has ceased to be a reporting issuer in all jurisdictions of Canada in which each Fund is a reporting issuer (the **Order Sought**).

Under the Process for Cease to be a Reporting Issuer Applications (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application, and

(b) the Filer has provided notice that subsection 4C.5(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon and Nunavut.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this order, unless otherwise defined.

Representations

This order is based on the following facts represented by the Filer:

1. none of the Funds are an OTC reporting issuer under Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets;*

2. the outstanding securities of each Fund, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 securityholders in each of the jurisdictions of Canada and fewer than 51 securityholders in total worldwide;

3. no securities of the Funds, including debt securities, are traded in Canada or another country on a marketplace as defined in National Instrument 21-101 *Marketplace Operation* or any other facility for bringing together buyers and sellers of securities where trading data is publicly reported;

4. the Filer is applying for an order that each Fund has ceased to be a reporting issuer in all of the jurisdictions of Canada in which each Fund is a reporting issuer; and

5. the Funds are not in default of securities legislation in any jurisdiction.

Order

The principal regulator is satisfied that the order meets the test set out in the Legislation for the principal regulator to make the order.

The decision of the principal regulator under the Legislation is that the Order Sought is granted.

"Darren McKall"
Manager, Investment Funds and Structured Products Branch
Ontario Securities Commission

Application File #: 2022/0557

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B.3
Reasons and Decisions

B.3.1 Invesco Canada Ltd. and Invesco Balanced-Risk Allocation Pool

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Relief granted from sections 15.3(2), 15.3(4)(c), 15.6(1)(a)(i), 15.6(1)(d), 15.8(2)(a.1) and 15.8(3)(a.1) and 15.1.1 of National Instrument 81-102 Investment Funds to permit a prospectus qualified alternative mutual fund that has not distributed securities under a simplified prospectus in a jurisdiction for 12 consecutive months to include in its sales communications past performance data relating to a period when the fund's securities were previously distributed to investors on a prospectus-exempt basis and to use this past performance data to calculate its investment risk level in accordance with Appendix F Investment Risk Classification Methodology – Alternative mutual fund is managed substantially similarly after it became a reporting issuer as it was during the period prior to becoming a reporting issuer and has similar fee and expense structure;

Relief granted from section 2.1 of National Instrument 81-101 Mutual Fund Prospectus Disclosure for the purposes of the relief requested from Item 10(b) of Part B of Form 81-101F1 Contents of Simplified Prospectus to permit the alternative mutual fund to use the past performance data for a period when its securities were offered on a prospectus-exempt basis to calculate its investment risk rating in its simplified prospectus, and Item 5 of Part I of Form 81-101F3 Contents of Fund Facts Document to permit the alternative mutual fund to include in its fund facts document past performance data for a period when the fund was offered on a prospectus-exempt basis;

Relief granted from section 4.4 of National Instrument 81-106 Investment Fund Continuous Disclosure for the purposes of the relief requested from Items 3.1(7), 4.1(1), 4.1(2), 4.2(1), 4.3(1) and 4.3(2) of Part B of Form 81-106F1, and Items 3(1) and 4 of Part C of Form 81-106F1 Contents of Annual and Interim Management Report of Fund Performance, to permit the alternative mutual to include in its annual and interim management reports of fund performance the past performance and financial data relating to a period when the fund was previously offered on a prospectus-exempt basis.

Applicable Legislative Provisions

National Instrument 81-102 Investment Funds, ss. 15.3(2), 15.3(4)(c), 15.6(1)(a)(i), 15.6(1)(d), 15.8(2)(a.1), 15.8(3)(a.1), 15.1.1 and 19.1.
National Instrument 81-101 Mutual Fund Prospectus Disclosure, ss. 2.1 and 6.1.
Form 81-101F1 Contents of Simplified Prospectus, Item 10(b) of Part B.
Form 81-101F3 Contents of Fund Facts Document, Item 5 of Part I.
National Instrument 81-106 Investment Fund Continuous Disclosure, ss. 4.4 and 17.1.
Form 81-106F1 Contents of Annual and Interim Management Report of Fund Performance, Items 3.1(7), 4.1(1), 4.1(2), 4.2(1), 4.3(1) and 4.3(2) of Part B, and Items 3(1) and 4 of Part C.

January 17, 2023

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF APPLICATIONS
IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
INVESCO CANADA LTD.
(the Filer)

AND

INVESCO BALANCED-RISK ALLOCATION POOL
(the Pool)

DECISION

Background

The principal regulator in the Jurisdiction has received an application (the **Application**) from the Filer on behalf of the Pool for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) exempting the Series F and I units (collectively, the **Units**) of the Pool from:

(a) sections 15.3(2), 15.3(4)(c), 15.6(1)(a)(i), 15.6(1)(d), 15.8(2)(a.1) and 15.8(3)(a.1) of National Instrument 81-102 *Investment Funds* (**NI 81-102**) to permit the Pool to include its past performance data in sales communications notwithstanding that the past performance data will relate to a period prior to the Pool offering its Units under a simplified prospectus;

(b) section 15.1.1(a) of NI 81-102 and Items 2 and 4 of Appendix F *Investment Risk Classification Methodology to NI 81-102* (**Appendix F**) to permit the Pool to include its past performance data in determining its investment risk level in accordance with Appendix F;

(c) section 15.1.1(b) of NI 81-102 and Item 4(2)(a) and Instruction (1) of Item 4 of Form 81-101F3 *Contents of Fund Facts Document* (**Form 81-101F3**) to permit the Pool to disclose its investment risk level as determined by including its past performance data in accordance with Appendix F;

(d) Item 10(b) of Part B of Form 81-101F1 *Contents of Simplified Prospectus* (**Form 81-101F1**) to permit the Pool to use its past performance data to calculate its investment risk rating in its simplified prospectus;

(e) section 2.1 of National Instrument 81-101 *Mutual Fund Prospectus Disclosure* (**NI 81-101**) for the purposes of the relief requested herein from Form 81-101F1 and Form 81-101F3;

(f) Items 5(2), 5(3) and 5(4) and Instructions (1) and (5) of Part I of Form 81-101F3 in respect of the requirement to comply with sections 15.3(2), 15.3(4)(c), 15.6(1)(a)(i), 15.6(1)(d), 15.8(2)(a.1) and 15.8(3)(a.1) of NI 81-102 to permit the Pool to include in its fund facts the past performance data of the Pool notwithstanding that such performance data relates to a period prior to the Pool offering its Units under a simplified prospectus and the Pool has not distributed its Units under a simplified prospectus for 12 consecutive months;

(g) section 4.4 of National Instrument 81-106 *Investment Fund Continuous* Disclosure (**NI 81-106**) for the purposes of relief requested herein from Form 81- 106F1 *Contents of Annual and Interim Management Report of Fund Performance* (**Form 81-106F1**); and

(h) Items 3.1(7), 4.1(1) in respect of the requirement to comply with subsections 15.3(2) and 15.3(4)(c) of NI 81-102, 4.1(2), 4.2(1), 4.3(1) and 4.3(2) of Part B of Form 81-106F1 and Items 3(1) and 4 of Part C of Form 81-106F1 to permit the Pool to include in its annual and interim management reports of fund performance (**MRFP**) the past performance data and financial highlights of the Pool notwithstanding that such performance data and financial highlights relate to a period prior to the Pool offering its Units under a simplified prospectus.

(collectively, the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this Application, and

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in each of the other provinces and territories of Canada (together with the Jurisdiction, the **Canadian Jurisdictions**).

Interpretation

Terms defined in National Instrument 14-101 *Definitions*, MI 11-102, NI 81-101, NI 81-102 and NI 81-106 have the same meanings if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

1. The Pool is an open-ended mutual fund trust established on November 7, 2012, under the laws of the Province of Ontario. The Pool is governed by an amended and restated declaration of trust dated as of November 4, 2022, as same may be amended and/or restated from time to time.

2. The Filer is the investment fund manager, trustee, and portfolio manager of the Pool. The head office of the Filer is located in Toronto, Ontario.

3. The Filer is registered as an investment fund manager in Ontario, Québec, and Newfoundland and Labrador and as a portfolio manager in every province of Canada. The Filer is also registered in other related categories.

4. Since the Pool's commencement of operations on November 7, 2012 through November 4, 2022, the units of the Pool were distributed to investors on a prospectus-exempt basis in accordance with National Instrument 45-106 *Prospectus Exemptions* in each of the Canadian Jurisdictions other than Ontario and in accordance with the *Securities Act* in Ontario.

5. The Pool consists of two series of Units:

   (a) Series F Units of the Pool which were offered for sale effective June 20, 2017 (the **Series F Effective Date**); and

   (b) Series I Units of the Pool which were offered for sale effective November 16, 2012 (the **Series I Effective Date**, together with the Series F Effective Date, the **Effective Dates**).

6. The Pool commenced distributing Units of the Pool pursuant to a simplified prospectus and, to that end, filed a simplified prospectus and fund facts documents dated November 4, 2022 (the **"Disclosure Documents"**). Upon the issuance of the final receipt for the Disclosure Documents, the Pool became a reporting issuer in each of the Canadian Jurisdictions and became subject to the requirements of NI 81-102 that relate to alternative mutual funds and the requirements of NI 81-106 that apply to investment funds that are reporting issuers.

7. The Pool adopted a new investment objective upon becoming a reporting issuer. The Pool's investment objective, as stated in the Disclosure Documents, is to seek to provide total return with low to moderate correlation to traditional financial market indices by investing, directly or indirectly, in a diversified portfolio of equity securities, fixed income securities and commodities located anywhere in the world. The Pool may invest more than 10% of its NAV, directly or indirectly, in commodities. The Pool may also use leverage through the use of derivatives, which shall not exceed a certain percentage (currently 250%) of the Pool's NAV or as otherwise permitted under applicable securities legislation.

   In order to achieve its investment objective, the Pool's equity exposure is achieved through investments in derivatives that track equity indices comprised of securities of companies anywhere in the world. The Pool's fixed income exposure is achieved through derivatives that offer exposure to the debt or credit of issuers in developed and/or emerging markets that are rated investment grade or are unrated but are, in the portfolio management team's opinion, equivalent to investment grade, including U.S. and foreign government debt securities having intermediate (5-10 years) and long (10 plus years) term maturity. The Pool's commodity exposure is achieved through investment in commodity futures and swaps, commodity related exchange-traded funds and exchange-traded notes and commodity-linked notes. The Pool uses leverage through the use of derivative contracts.

8. The Pool is managed substantially similarly after it became a reporting issuer as it was during the period prior to becoming a reporting issuer. Specifically,

   (a) While the investment objective of the Pool, as stated in the Disclosure Documents, is changed from the Pool's investment objective in the period prior to becoming a reporting issuer, this change was made to clarify and restate the Pool's investment objective in accordance with applicable prospectus disclosure requirements and did not impact the implementation of the Pool's strategy and accordingly did not change the manner in which the Pool is managed;

   (b) There were no changes to the fee and expense structure associated with Series I Units that were distributed prior to the Pool becoming a reporting issuer. For Series F Units, prior to the Pool becoming a reporting issuer, the Pool paid all operating expenses and the Filer, in its discretion, absorbed or waived expenses such that the operating expenses portion of the management expense ratio (**MER**) of Series F Units was maintained at 0.15% of that series' average daily NAV per year (excluding HST). Since the Pool has become a reporting issuer, the Filer has agreed to cap the operating expenses portion of the MER of the Series F Units at 0.25% of that series' average daily NAV per year (excluding HST);

(c) The day-to-day administration of the Pool did not change, other than to comply with the additional regulatory requirements associated with being a reporting issuer (as modified by exemptive relief obtained on behalf of, among others, the Pool), none of which impact the portfolio management of the Pool, and to provide additional features that are available to investors of mutual funds managed by the Filer, as described in the Disclosure Documents.

9. Since its inception, as a "mutual fund in Ontario", the Pool has complied with the applicable obligation to prepare and send audited annual and unaudited interim financial statements to all holders of its securities in accordance with NI 81-106.

10. Prior to becoming a reporting issuer, the Pool was not required to comply with the investment restrictions and practices contained in NI 81-102 that relate to alternative mutual funds (the **Alternative Fund Rules**). Except as noted below, the Pool's investments from inception to the date it became a reporting issuer, have, however, substantially complied with the Alternative Fund Rules. The sole instances in which the Pool was not in compliance with the Alternative Fund Rules were the result of (1) an investment in a non-Canadian ETF, the underlying investments of which would have been permitted by the Alternative Fund Rules, and (2) investments in foreign government bonds in excess of prescribed concentration limits that have an immaterial contribution to the Pool's performance during the relevant period.

11. Since becoming a reporting issuer, the Pool has (except as set out in any exemptive relief received by, among others, the Pool) complied and will comply with the Alternative Fund Rules.

12. Each of the Filer and the Pool are not in default of securities legislation in any of the Canadian Jurisdictions.

13. In sales communications pertaining to the Pool, the Filer proposes to present the Pool's performance data for:

(a) series F Units of the Pool for the time period commencing as of the Series F Effective Date; and

(b) series I Units of the Pool for the time period commencing as of the Series I Effective Date.

Without the Exemption Sought, the sales communications pertaining to the Pool cannot include performance data of the Pool that relates to a period prior to the Pool becoming a reporting issuer, and the Pool cannot provide performance data in its sales communications until it has distributed securities under a simplified prospectus for at least 12 consecutive months.

14. As a reporting issuer, the Pool is required under NI 81-101 to prepare and file a simplified prospectus and fund facts documents.

15. The Filer proposes to use the Pool's past performance data for the time period commencing November 16, 2012 to determine its investment risk level and to disclose that investment risk level in the simplified prospectus and the fund facts documents for each Series of Units. Without the Exemption Sought, the Filer, in determining and disclosing the Pool's investment risk level in the simplified prospectus and the fund facts documents for each Series of Units, cannot use performance data of the Pool that relates to a period prior to the Pool becoming a reporting issuer.

16. The Filer proposes to include in the fund facts documents past performance data for the time period commencing the Series F Effective Date in the case of Series F Units of the Pool and the Series I Effective Date in the case of Series I Units of the Pool in the charts required by Items 5(2), 5(3), and 5(4) of Part I of Form 81-101F3 under the sub-headings "Year-by-year returns", "Best and worst 3-month returns", and "Average return", respectively, related to periods prior to the Pool becoming a reporting issuer. Without the Exemption Sought, the fund facts documents of the Pool cannot include performance data of the Pool that relates to a period prior to the Pool becoming a reporting issuer.

17. As a reporting issuer, the Pool is required under NI 81-106 to prepare and send MRFPs to all holders of its securities on an annual and interim basis. Without the Exemption Sought, the MRFPs of the Pool cannot include financial highlights and performance data of the Pool that relates to a period prior to the Pool becoming a reporting issuer.

18. The performance data and other financial data of the Pool for the time period commencing as of the Effective Dates and before it became a reporting issuer is significant and meaningful information for existing and prospective investors of Units of the Pool.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that:

(a) any sales communication, fund facts documents and MRFP that contains performance data of the Units of the Pool relating to a period of time prior to when the Pool was a reporting issuer discloses:

(i) that the Pool was not a reporting issuer during such period;

(ii) the expenses of the Pool would have been higher during such period had the Pool been subject to the additional regulatory requirements applicable to a reporting issuer;

(iii) the Filer obtained exemptive relief on behalf of the Pool to permit the disclosure of performance data of the Units relating to a period prior to when the Pool was a reporting issuer; and

(iv) with respect to any MRFP, the financial statements of the Pool for such period are available to investors upon request; and

(b) the Filer makes the financial statements of the Pool since the Effective Dates available to investors upon request.

"Darren McKall"
Manager, Investment Funds and Structured Products Branch
Ontario Securities Commission

Application File #: 2022/0510
SEDAR File #: 3454679

B.3.2 TD Asset Management Inc. and Its Affiliates

Headnote

National Policy 11-203 Process for Exemptive Relief in Multiple Jurisdictions – relief granted to permit investment funds subject to NI 81-102 to invest in securities of related underlying investment funds not subject to NI 81-102 and that are not reporting issuers, subject to conditions.

Applicable Legislative Provisions

National Instrument 81-102 Investment Funds, ss. 2.5(2)(a) and (c), and 19.1.

January 13, 2023

**IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)**

AND

**IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF APPLICATIONS
IN MULTIPLE JURISDICTIONS**

AND

**IN THE MATTER OF
TD ASSET MANAGEMENT INC. (TDAM)
AND
ITS AFFILIATES
(the Filer)**

DECISION

Background

The principal regulator in the Jurisdiction has received an application (the **Application**) from the Filer for a decision under the securities legislation of the Jurisdiction (the **Legislation**) granting an exemption to each existing and future mutual fund managed by the Filer that is a reporting issuer to which National Instrument 81-102 *Investment Funds* (**NI 81-102**) and National Instrument 81-107 *Independent Review Committee for Investment Funds* (**NI 81-107**) apply (the **Top Funds**) from sections 2.5(2)(a) and (c) of NI 81-102 to permit each Top Fund to invest, within the restrictions concerning illiquid assets applicable to mutual funds in section 2.4 of NI 81-102, in securities of the following (the **Exemption Sought**):

(a) TD *Emerald* Private Debt Pooled Fund Trust and TD Greystone Mortgage Fund (the **Existing Underlying Pooled Funds**); and

(b) such other similar investment funds as the Existing Underlying Pooled Funds as may be established and managed by the Filer in the future which will also be mutual funds that are neither subject to NI 81-102 nor reporting issuers in any jurisdiction (the **Future Underlying Pooled Funds**, and together with the Existing Underlying Pooled Funds, the **Underlying Pooled Funds**, and together with the Top Funds, the **Funds**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for the Application;

(b) the Filer has provided notice that subsection 4.7(2) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) that the Exemption Sought is to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut (together with the Jurisdiction, the **Canadian Jurisdictions**).

Interpretation

Terms defined in the Legislation, MI 11-102 and National Instrument 14-101 – *Definitions* have the same meanings in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

<u>TDAM</u>

1. TDAM is a corporation continued under the laws of the province of Ontario.

2. TDAM is a wholly-owned subsidiary of The Toronto-Dominion Bank, a Schedule 1 Canadian chartered bank. The head office of TDAM is located in Toronto, Ontario.

3. TDAM is registered in: (i) each of the Canadian Jurisdictions as an adviser in the category of portfolio manager (**PM**) and as a dealer in the category of exempt market dealer; (ii) Ontario, Québec, Saskatchewan and Newfoundland and Labrador in the category of investment fund manager (**IFM**); (iii) Ontario in the category of commodity trading manager; and (iv) Québec as a derivatives portfolio manager.

4. TDAM, or an affiliate of TDAM, is or will be, the IFM of the Funds. TDAM, or an affiliate of TDAM, is or will be, the PM of the Funds.

5. TDAM is not in default of the securities law of any jurisdiction with respect to the subject matter of this application. However, TDAM has applied for routine exemptive relief to permit certain related party investments made by affiliates or associates of TDAM that are not directly related to the investments described in this Decision

6. An officer and/or director of the Filer, may have a “significant interest” (as such term is defined in section 110(2)(a) of the *Securities Act* (Ontario) (the Ontario Act)) in an Underlying Pooled Fund from time to time. A person or company who is a substantial security holder of a Top Fund, or of the Filer, may also have a significant interest in an Underlying Pooled Fund from time to time.

7. The Filer is, or will be, a “responsible person” of the Top Funds and the Underlying Pooled Funds, as that term is defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*.

<u>The Top Funds</u>

8. A Top Fund is, or will be, an investment fund, to which NI 81-102 applies, organized and governed by the laws of a Canadian Jurisdiction.

9. Each Top Fund has distributed, distributes, or will distribute, its securities pursuant to a simplified prospectus prepared pursuant to NI 81-101 *Mutual Fund Prospectus Disclosure* and Form 81-101F1 or a long form prospectus prepared pursuant to NI 41-101 *General Prospectus Requirements* and Form 41-101F2.

10. Securities of each Top Fund are, or will be, qualified for distribution in the Canadian Jurisdictions.

11. A Top Fund is, or will be, a reporting issuer under the securities legislation of one or more Canadian Jurisdictions.

12. None of the existing Top Funds are in default of securities legislation in any of the Canadian Jurisdictions.

13. The investment objectives and strategies of a Top Fund will permit the Top Fund to invest in one or more Underlying Pooled Funds.

14. Each Top Fund is subject to NI 81-107 and the Filer has established an independent review committee (an **IRC**) in order to review conflict of interest matters pertaining to the Top Funds as required by NI 81-107.

15. No Top Fund that will hold securities of an Underlying Pooled Fund will vote any of those securities.

<u>The Underlying Pooled Funds</u>

16. Each Underlying Pooled Fund is, or will be, a “mutual fund”, as such term is defined under the Ontario Act, formed as a limited partnership, trust or class of shares of a corporation under the laws of Ontario, another jurisdiction of Canada, or a foreign jurisdiction.

17. The investment objective of TD *Emerald* Private Debt Pooled Fund Trust is to seek to provide income and preserve capital over the long term by investing primarily in private debt securities. TD *Emerald* Private Debt Pooled Fund Trust may also invest in other fixed and floating rate debt instruments.

18. The investments of TD *Emerald* Private Debt Pooled Fund Trust, which primarily consist of private debt securities, are primarily illiquid and the units of TD *Emerald* Private Debt Pooled Fund Trust therefore have limited liquidity.

19. The investment objective of TD Greystone Mortgage Fund is to provide a vehicle to invest in Canadian commercial real estate mortgages and to achieve superior long-term total returns while maintaining long-term stability of capital.

20. The investments of TD Greystone Mortgage Fund, which primarily consist of Canadian commercial real estate mortgages, are primarily illiquid and the units of TD Greystone Mortgage Fund therefore have limited liquidity.

21. The Existing Underlying Pooled Funds are not, and the Future Underlying Pooled Funds will not be, reporting issuers in any of the Canadian Jurisdictions or listed on any recognized stock exchange. Units of the Underlying Pooled Funds are, or will be, sold pursuant to exemptions from the prospectus requirements in accordance with National Instrument 45-106 *Prospectus Exemptions*.

22. The Existing Underlying Pooled Funds are not in default of the securities legislation of any of the Canadian Jurisdictions.

23. The Existing Underlying Pooled Funds are valued daily and redeemable monthly at a redemption price per unit equal to the net asset value per unit on the redemption date. A redemption request may be deferred:

    (a) if, in the case of TD *Emerald* Private Debt Pooled Fund Trust, the redemption request would result in proceeds of more than TD *Emerald* Private Debt Pooled Fund Trust's forecast available liquidity; and

    (b) if, in the case of TD Greystone Mortgage Fund, the redemption request would: (i) result in the material diminution in the unit value; (ii) require the sale of assets outside of established parameters; (iii) be contrary to law; (iv) exceed the aggregate of the cash and short-term equivalents of TD Greystone Mortgage Fund on the redemption date; or (v) result in the reduction in liquidity available for investment to a level below which that which the Filer determines to be required in order for TD Greystone Mortgage Fund to continue to meet its obligations as they become due.

24. The value of the portfolio assets of each Existing Underlying Pooled Fund is determined in accordance with Part 14 of National Instrument 81-106 *Investment Fund Continuous Disclosure*.

25. The value of the portfolio assets of TD Greystone Mortgage Fund is independently determined by a party that is arm's length to the Filer, each Underlying Pooled Fund and all other investment funds or vehicles managed by TDAM (the **MF Independent Valuator**) on a monthly basis. TD Greystone Mortgage Fund's auditor will not act as an MF Independent Valuator. TD Greystone Mortgage Fund's net asset value is based on the valuation of the portfolio assets determined by the MF Independent Valuator.

26. The value of the portfolio assets of TD *Emerald* Private Debt Pooled Fund Trust is currently determined utilizing valuation models and methodologies developed by the Filer specifically for private debt (the **Private Debt Valuation Models**). Private debt securities are classified as level 3 assets under IFRS 13 (Fair Value). Level 3 assets are infrequently traded with no available broker-dealer bid/ask quotes, and fair value cannot be determined using market prices. Instead, fair value is determined by using significant inputs that are not observable market data. TDAM uses a fair value price as calculated by a third-party valuation service utilizing the Private Debt Valuation Models. Such valuation service provider constructs daily corporate bond yield curves based on data gathered from thousands of bonds globally. Corporate bond yield curves are broken down by currencies and minor ratings (e.g., A+, A, A). Based on the inputs provided by TDAM, the valuation service discounts the cash flows of each security using a discount rate that is appropriate given the security's ranking, rating, weighted average life, currency and uniqueness premium to calculate the value of each security. The non-observable inputs provided by TDAM are the credit ratings and uniqueness premium for each security and any changes to the uniqueness premium. The application of the Private Debt Valuation Models and the inputs used in the Private Debt Valuation Models are overseen by an internal risk group of the Filer whose members do not include the portfolio management teams who make the investment decisions for TD *Emerald* Private Debt Pooled Fund Trust. The Private Debt Valuation Models may be adjusted from time to time by the Filer at its discretion.

27. A Future Underlying Pooled Fund will either:

    (a) utilize a portfolio valuation process similar to that of TD Greystone Mortgage Fund referenced above (TD Greystone Mortgage Fund and such Future Underlying Pooled Funds, the **Independently Valued Underlying Pooled Funds** and each an **Independently Valued Underlying Pooled Fund**); or

    (b) utilize a portfolio valuation process similar to that of TD *Emerald* Private Debt Pooled Fund Trust referenced above (TD *Emerald* Private Debt Pooled and such Future Underlying Pooled Funds, the **Internally Valued Underlying Pooled Funds** and each an **Internally Valued Underlying Pooled Fund**).

28. No Top Fund will actively participate in the business or operations of the Underlying Pooled Funds.

29. A Top Fund will not invest, directly or indirectly, in an Underlying Pooled Fund unless:

    (a) in the case of an investment in an Independently Valued Underlying Pooled Fund, at the time of purchase, at least 20% of the units of such Independently Valued Underlying Pooled Fund are directly or indirectly held by unitholders that are not affiliated or associated with the Filer (not including any holdings made through the Top Fund); or

    (b) in the case of an investment in an Internally Valued Underlying Pooled Fund, at the time of purchase, at least 50% of the units of such Internally Valued Underlying Pooled Fund are directly or indirectly held by unitholders that are not affiliated or associated with the Filer (not including any holdings made through the Top Fund).

Top Fund on Underlying Pooled Fund Structure

30. The Filer submits that an investment in an Underlying Pooled Fund by a Top Fund will allow the Top Fund to gain cost-effective exposure to private investments through a fund structure with a more diverse portfolio of private investments than would be available if the Top Fund were to invest directly. While it may be possible for the Top Funds to gain exposure to private debt securities by investing in other mandates, the Filer believes it is in the best interests of the Top Funds to have the ability to invest in the Existing Underlying Pooled Funds, because the Filer believes the alternatives available to the Filer are not optimal relative to investing in the Existing Underlying Pooled Funds.

31. An investment by a Top Fund in an Underlying Pooled Fund will be compatible with the investment objective and strategy of the Top Fund.

32. A unit of an Underlying Pooled Fund will be considered an “illiquid asset” within the meaning of NI 81-102. Consequently, if the Exemption Sought is granted, a Top Fund will acquire securities of an Underlying Pooled Fund, whether directly or indirectly, in compliance with section 2.4 of NI 81-102. As a result, a Top Fund will not be able to purchase units of an Underlying Pooled Fund if immediately after purchase, more than 10% of the net asset value of the Top Fund would be made up of “illiquid assets”.

33. The IRC of the Top Funds will review and provide its approval, including by way of standing instructions, for the purchase of units of the Underlying Pooled Funds, directly or indirectly, by the Top Funds, in accordance with section 5.2(2) of NI 81-107.

34. Further to section 3.4(2) of the companion policy to NI 81-102, the Filer understands that, if the Exemption Sought is granted, the Top Funds may rely on section 2.5(7) of NI 81-102, which provides that the “investment fund conflict of interest investment restrictions” and the “investment fund conflict of interest reporting requirements” (as such terms are defined in NI 81-102) do not apply to an investment fund which purchases or holds securities of another investment fund if the purchase or holding is made in accordance with this section.

Generally

35. The Filer does not anticipate that any fees or sales charges would be incurred, directly or indirectly, by a Top Fund with respect to an investment in an Underlying Pooled Fund.

36. Absent the Exemption Sought, a Top Fund would be prohibited by section 2.5(2)(a) and 2.5(2)(c) from purchasing or holding securities of an Underlying Pooled Fund because the Underlying Pooled Funds are not subject to NI 81-102.

37. Investments by the Top Funds in securities of the Underlying Pooled Funds will otherwise comply with section 2.5 of NI 81-102.

38. If the IRC becomes aware of an instance where the Filer, in its capacity as manager of a Top Fund, did not comply with the terms of the decision, or a condition imposed by securities legislation or the IRC in its approval, the IRC of such Top Fund will, as soon as practicable, notify in writing the securities regulatory authority or regulator in the jurisdiction under which the Top Fund is organized.

39. A Top Fund’s investment in an Underlying Pooled Fund will represent the business judgment of a responsible person uninfluenced by considerations other than the best interests of the Top Fund.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that:

(a) each Top Fund will be treated as an arm's-length investor in the Underlying Pooled Fund on the same terms as all other third-party investors with each investment by a Top Fund in an Underlying Pooled Fund made at a price and other terms as favourable for the Top Fund as for all other third-party investors;

(b) a Top Fund will not invest, directly or indirectly, in an Underlying Pooled Fund unless:

(i) in the case of an investment in an Independently Valued Underlying Pooled Fund, at the time of purchase, at least 20% of the units of such Independently Valued Underlying Pooled Fund are directly or indirectly held by unitholders that are not affiliated or associated with the Filer (not including any holdings made through the Top Fund); or

(ii) in the case of an investment in an Internally Valued Underlying Pooled Fund, at the time of purchase, at least 50% of the units of such Internally Valued Underlying Pooled Fund are directly or indirectly held by unitholders that are not affiliated or associated with the Filer (not including any holdings made through the Top Fund);

(c) an investment by a Top Fund in an Underlying Pooled Fund will be compatible with the investment objective and strategy of the Top Fund and included as part of the calculation for the purposes of the illiquid asset restriction in section 2.4 of NI 81-102 for a Top Fund;

(d) in respect of an investment by a Top Fund in an Underlying Pooled Fund, the investment will otherwise comply with section 2.5 of NI 81-102, including in that (i) no sales or redemption fees will be paid as part of the investment in the Underlying Pooled Fund; and (ii) no management fees or incentive fees will be payable by the Top Fund that, to a reasonable person, would duplicate a fee payable by the Underlying Pooled Fund for the same service;

(e) where applicable, a Top Fund's investment in an Underlying Pooled Fund, whether direct or indirect, will be disclosed to investors in such Top Fund's quarterly portfolio holding reports, financial statements and/or fund facts/ETF facts documents;

(f) the prospectus of the Top Fund discloses, or will disclose in the next renewal or amendment thereto following the date of a decision evidencing the Exemption Sought, the fact that the Top Fund may invest, directly or indirectly, in an Underlying Pooled Fund, which are investment funds managed by the Filer;

(g) the IRC of the Top Fund will review and provide its approval, including by way of standing instructions, prior to the purchase of an Underlying Pooled Fund, directly or indirectly, by the Top Fund, in accordance with section 5.2(2) of NI 81-107;

(h) the manager of the Top Fund complies with section 5.1 of NI 81-107 and the manager and the IRC of the Top Fund comply with section 5.4 of NI 81-107 for any standing instructions the IRC provides in connection with the transactions;

(i) where an investment is made by a Top Fund in an Underlying Pooled Fund, the annual and interim management reports of fund performance for the Top Fund disclose the name of the related person in which an investment is made, being an Underlying Pooled Fund; and

(j) where an investment is made by a Top Fund in an Underlying Pooled Fund, the records of portfolio transactions maintained by the Top Fund include, separately for every portfolio transaction effected by the Top Fund through the Filer, the name of the related person in which an investment is made, being an Underlying Pooled Fund.

"Darren McKall"
Manager, Investment Funds and Structured Products Branch
Ontario Securities Commission

Application File #: 2022/0045
SEDAR File #s: 3329230, 3329231, 3329235, 3329236, 3329237, 3329238, 3329240

B.4
Cease Trading Orders

B.4.1 Temporary, Permanent & Rescinding Issuer Cease Trading Orders

Company Name	Date of Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/Revoke
THERE IS NOTHING TO REPORT THIS WEEK.				

Failure to File Cease Trade Orders

Company Name	Date of Order	Date of Revocation
Wittering Capital Corp.	January 6, 2023	January 11, 2023
Major Precious Metals Corp.	January 12, 2023	
Kure Technologies, Inc.	January 6, 2023	January 13, 2023
Koios Beverage Corp.	December 22, 2022	January 13, 2023

B.4.2 Temporary, Permanent & Rescinding Management Cease Trading Orders

Company Name	Date of Order	Date of Lapse
THERE IS NOTHING TO REPORT THIS WEEK.		

B.4.3 Outstanding Management & Insider Cease Trading Orders

Company Name	Date of Order or Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/Expire	Date of Issuer Temporary Order
Performance Sports Group Ltd.	19 October 2016	31 October 2016	31 October 2016		

Company Name	Date of Order	Date of Lapse
Agrios Global Holdings Ltd.	September 17, 2020	
Gatos Silver, Inc.	April 1, 2022	
Gatos Silver, Inc.	April 12, 2022	
Sproutly Canada, Inc.	June 30, 2022	
Gatos Silver, Inc.	July 7, 2022	
iMining Technologies Inc.	September 30, 2022	
PNG Copper Inc.	November 30, 2022	
Mednow Inc.	January 4, 2023	
Luxxfolio Holdings Inc.	January 5, 2023	

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B.7
Insider Reporting

This chapter is available in the print version of the OSC Bulletin, as well as in Thomson Reuters Canada's internet service SecuritiesSource (see www.westlawnextcanada.com).

This chapter contains a weekly summary of insider transactions of Ontario reporting issuers in the System for Electronic Disclosure by Insiders (SEDI). The weekly summary contains insider transactions reported during the seven days ending Sunday at 11:59 pm.

To obtain Insider Reporting information, please visit the SEDI website (www.sedi.ca).

B.9
IPOs, New Issues and Secondary Financings

INVESTMENT FUNDS

Issuer Name:
E Split Corp.
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus (NI 44-102) dated January 11, 2023
NP 11-202 Receipt dated January 13, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3477928

Issuer Name:
PIMCO Global Income Opportunities Fund
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus (NI 44-102) dated January 16, 2023
NP 11-202 Receipt dated January 16, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
PIMCO CANADA CORP.
Project #3452729

Issuer Name:
PIMCO Tactical Income Fund
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus (NI 44-102) dated January 16, 2023
NP 11-202 Receipt dated January 16, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
PIMCO CANADA CORP.
Project #3452732

Issuer Name:
Real Estate Split Corp. (formerly Real Estate & E-Commerce Split Corp.)
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus (NI 44-102) dated January 11, 2023
NP 11-202 Receipt dated January 13, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3477929

Issuer Name:
TD Active Global Enhanced Dividend CAD Hedged ETF
TD Active U.S. Enhanced Dividend CAD Hedged ETF
TD Canadian Bank Dividend Index ETF
TD Global Technology Leaders CAD Hedged Index ETF
Principal Regulator – Ontario
Type and Date:
Final Long Form Prospectus dated Jan 12, 2023
NP 11-202 Preliminary Receipt dated Jan 12, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3479869

Issuer Name:
Mackenzie Corporate Knights Global 100 Index ETF
Principal Regulator – Ontario
Type and Date:
Final Long Form Prospectus dated Jan 11, 2023
NP 11-202 Final Receipt dated Jan 12, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3458126

Issuer Name:
CI Canadian Banks Covered Call Income Corporate Class
CI Energy Giants Covered Call Fund
CI Gold+ Giants Covered Call Fund
CI Tech Giants Covered Call Fund
Principal Regulator – Ontario
Type and Date:
Preliminary Simplified Prospectus dated Jan 11, 2023
NP 11-202 Preliminary Receipt dated Jan 11, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3479546

Issuer Name:
CIBC Active Investment Grade Corporate Bond ETF
CIBC Active Investment Grade Floating Rate Bond ETF
CIBC Canadian Bond Index ETF
CIBC Canadian Equity Index ETF
CIBC Canadian Short-Term Bond Index ETF
CIBC Clean Energy Index ETF
CIBC Emerging Markets Equity Index ETF
CIBC Flexible Yield ETF (CAD-Hedged)
CIBC Global Bond ex-Canada Index ETF (CAD-Hedged)
CIBC Global Growth ETF
CIBC International Equity ETF
CIBC International Equity Index ETF
CIBC International Equity Index ETF (CAD-Hedged)
CIBC Qx Canadian Low Volatility Dividend ETF
CIBC Qx International Low Volatility Dividend ETF
CIBC Qx U.S. Low Volatility Dividend ETF
CIBC U.S. Equity Index ETF
CIBC U.S. Equity Index ETF (CAD-Hedged)
Principal Regulator – Ontario
Type and Date:
Final Long Form Prospectus dated Jan 12, 2023
NP 11-202 Final Receipt dated Jan 12, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3452111

Issuer Name:
CST Spark 2026 Education Portfolio
CST Spark 2029 Education Portfolio
CST Spark 2032 Education Portfolio
CST Spark 2035 Education Portfolio
CST Spark 2038 Education Portfolio
CST Spark 2041 Education Portfolio
CST Spark Graduation Portfolio
Type and Date:
Final Simplified Prospectus dated Jan 12, 2023
NP 11-202 Final Receipt dated Jan 16, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3442545

Issuer Name:
Mackenzie Corporate Knights Global 100 Index Fund
Principal Regulator – Ontario
Type and Date:
Final Simplified Prospectus dated Jan 11, 2023
NP 11-202 Final Receipt dated Jan 12, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3458130

Issuer Name:
Hamilton Canadian Financials Yield Maximizer ETF
Hamilton Enhanced Canadian Financials ETF
Hamilton Enhanced U.S. Covered Call ETF
Principal Regulator – Ontario
Type and Date:
Final Long Form Prospectus dated Jan 13, 2023
NP 11-202 Final Receipt dated Jan 16, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3470349

Issuer Name:
Auspice Diversified Trust
Auspice One Fund Trust
Principal Regulator – Alberta (ASC)
Type and Date:
Preliminary Simplified Prospectus dated Jan 13, 2023
NP 11-202 Preliminary Receipt dated Jan 13, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3480276

Issuer Name:
Fidelity ClearPath® 2065 Portfolio
Fidelity SmartHedge U.S. Equity Fund
Fidelity SmartHedge U.S. Equity Multi-Asset Base Fund
Principal Regulator – Ontario
Type and Date:
Final Prospectus dated Jan 12, 2023
NP 11-202 Final Receipt dated Jan 13, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3469169

Issuer Name:
Arrow Global Opportunities Alternative Class
Principal Regulator – Ontario
Type and Date:
Final Simplified Prospectus dated Jan 12, 2023
NP 11-202 Final Receipt dated Jan 13, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3470830

Issuer Name:
Horizons USD Cash Maximizer ETF
Principal Regulator - Ontario
Type and Date:
Amendment #2 to Final Long Form Prospectus dated January 9, 2023
NP 11-202 Final Receipt dated Jan 11, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3412399

Issuer Name:
Evolve Enhanced FANGMA Index ETF
Principal Regulator - Ontario
Type and Date:
Amendment #1 to Final Long Form Prospectus dated January 6, 2023
NP 11-202 Final Receipt dated Jan 11, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3329705

Issuer Name:
iShares Floating Rate Index ETF
iShares Premium Money Market ETF
iShares Core S&P 500 Index ETF (CAD-Hedged)
iShares Core S&P 500 Index ETF
Principal Regulator - Ontario
Type and Date:
Amendment #3 to Final Long Form Prospectus dated January 12, 2023
NP 11-202 Final Receipt dated Jan 16, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3387864

NON-INVESTMENT FUNDS

Issuer Name:
AbraSilver Resource Corp.
Principal Regulator - Ontario
Type and Date:
Amendment dated January 13, 2023 to Preliminary Shelf Prospectus dated October 14, 2022
NP 11-202 Preliminary Receipt dated January 16, 2023
Offering Price and Description:
$100,000,000.00 - COMMON SHARES, WARRANTS, UNITS, SUBSCRIPTION RECEIPTS, DEBT SECURITIES
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3445859

Issuer Name:
Ankh II Capital Inc.
Principal Regulator - British Columbia
Type and Date:
Preliminary CPC Prospectus dated January 10, 2023
NP 11-202 Preliminary Receipt dated January 10, 2023
Offering Price and Description:
Minimum Offering: $250,000.00 - 2,500,000 Common Shares
Maximum Offering: $1,000,000 - 10,000,000 Common Shares
Price: $0.10 per Common Share
Underwriter(s) or Distributor(s):
PI Financial Corp.
Promoter(s):
Roger E. Milad
Project #3479330

Issuer Name:
O3 Mining Inc.
Principal Regulator - Ontario
Type and Date:
Preliminary Shelf Prospectus dated January 11, 2023
NP 11-202 Preliminary Receipt dated January 12, 2023
Offering Price and Description:
$25,000,000.00 - Common Shares, Debt Securities, Warrants, Subscription Receipts, Convertible Securities, Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3479701

Issuer Name:
Skeena Resources Limited
Principal Regulator - British Columbia
Type and Date:
Preliminary Shelf Prospectus dated January 11, 2023
NP 11-202 Preliminary Receipt dated January 12, 2023
Offering Price and Description:
$200,000,000.00 - Common Shares, Debt Securities, Warrants, Subscription Receipts, Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3479714

Issuer Name:
BIP Investment Corporation
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus dated January 10, 2023
NP 11-202 Receipt dated January 11, 2023
Offering Price and Description:
Senior Preferred Shares - C$3,000,000,000.00
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3475237

Issuer Name:
Brookfield Infrastructure Finance Limited
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus dated January 10, 2023
NP 11-202 Receipt dated January 11, 2023
Offering Price and Description:
$3,000,000,000.00 - Debt Securities
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3475234

Issuer Name:
Brookfield Infrastructure Finance LLC
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus dated January 10, 2023
NP 11-202 Receipt dated January 11, 2023
Offering Price and Description:
$3,000,000,000.00 - Debt Securities
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3475233

Issuer Name:
Brookfield Infrastructure Finance Pty Ltd
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus dated January 10, 2023
NP 11-202 Receipt dated January 11, 2023
Offering Price and Description:
$3,000,000,000.00 - Debt Securities
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3475236

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Issuer Name:
Brookfield Infrastructure Finance ULC
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus dated January 10, 2023
NP 11-202 Receipt dated January 11, 2023
Offering Price and Description:
$3,000,000,000.00 - Debt Securities
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3475231

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Issuer Name:
Fraser Mackenzie Accelerator Corp.
Principal Regulator - Ontario
Type and Date:
Final CPC Prospectus dated January 11, 2023
NP 11-202 Receipt dated January 12, 2023
Offering Price and Description:
Minimum Offering: $1,000,000.00 - (10,000,000 Common Shares)
Maximum Offering: $2,250,000.00 - (22,500,000 Common Shares)
Price: $0.10 per Common Share
Underwriter(s) or Distributor(s):
iA PRIVATE WEALTH INC.
Promoter(s):
-
Project #3445535

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Issuer Name:
Graphene Manufacturing Group Ltd.
Principal Regulator - Alberta
Type and Date:
Final Shelf Prospectus dated January 9, 2023
NP 11-202 Receipt dated January 10, 2023
Offering Price and Description:
CDN$75,000,000.00 - ORDINARY SHARES, WARRANTS, UNITS, SUBSCRIPTION RECEIPTS, DEBT SECURITIES
Underwriter(s) or Distributor(s):
-
Promoter(s):
Craig Nicol
Project #3474294

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Issuer Name:
Los Andes Copper Ltd.
Principal Regulator - British Columbia
Type and Date:
Final Shelf Prospectus dated January 9, 2023
NP 11-202 Receipt dated January 10, 2023
Offering Price and Description:
$50,000,000.00 - COMMON SHARES, WARRANTS, DEBT SECURITIES, UNITS
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #3472155

____

Issuer Name:
Stearman Resources Inc.
Principal Regulator - British Columbia
Type and Date:
Final Long Form Prospectus dated January 11, 2023
NP 11-202 Receipt dated January 12, 2023
Offering Price and Description:
757,000 Common Shares issuable upon deemed exercise of 757,000 outstanding Special
Warrants
6,000,000 Units issuable upon deemed exercise of 6,000,000 outstanding Special Unit
Warrants
2,140,000 Common Shares issuable upon deemed exercise of 2,140,000 outstanding Special
Share Warrants
Underwriter(s) or Distributor(s):
-
Promoter(s):
Steve Mathiesen
Howard Milne
Project #3470084

____

Issuer Name:
Tidewater Renewables Ltd.
Principal Regulator - Alberta
Type and Date:
Final Shelf Prospectus dated January 10, 2023
NP 11-202 Receipt dated January 10, 2023
Offering Price and Description:
$350,000,000.00 - Common Shares, Preferred Shares, Debt Securities, Subscription Receipts, Warrants, Share Purchase Contracts, Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
TIDEWATER MIDSTREAM AND INFRASTRUCTURE LTD.
Project #3472077

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Issuer Name:
Volatus Aerospace Corp.
Principal Regulator - Ontario
Type and Date:
Final Shelf Prospectus dated January 13, 2023
NP 11-202 Receipt dated January 16, 2023
Offering Price and Description:
$25,000,000.00 - Common Shares, Preferred Shares, Debt Securities, Subscription Receipts, Warrants
Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
Glen Lynch
Ian McDougall
Project #3464044

B.10
Registrations

B.10.1 Registrants

Type	Company	Category of Registration	Effective Date
Voluntary Surrender	Caxton (Canada) Ltd.	Portfolio Manager and Commodity Trading Manager	January 16, 2023

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B.11
SRO, Marketplaces, Clearing Agencies and Trade Repositories

B.11.3 Clearing Agencies

B.11.3.1 Canadian Derivatives Clearing Corporation (CDCC) – Proposed Amendments to the Rules of the CDCC to Modify the Final Settlement Price of the One-Month CORRA Futures (COA) – Notice of Commission Approval

CANADIAN DERIVATIVES CLEARING CORPORATION (CDCC)

NOTICE OF COMMISSION APPROVAL

**PROPOSED AMENDMENTS TO
THE RULES OF THE CDCC
TO MODIFY THE FINAL SETTLEMENT PRICE OF
THE ONE-MONTH CORRA FUTURES (COA)**

In accordance with the Rule Protocol between the Ontario Securities Commission (Commission) and the Canadian Derivatives Clearing Corporation (CDCC), the Commission approved on January 10, 2023 the amendments to Rule C-17 of the CDCC to modify the final settlement price calculation of the One-Month CORRA Futures (COA).

A copy of the CDCC Notice was published for comment on November 3, 2022 on the Commission's website at www.osc.ca.

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