

**IN THE MATTER OF CORMARK SECURITIES INC., WILLIAM JEFFREY KENNEDY,  
MARC JUDAH BISTRICER AND SALINE INVESTMENTS LTD.**

File No. 2022-24

**MOTION OF CORMARK SECURITIES INC. and WILLIAM JEFFREY KENNEDY**

For Disclosure of Additional Documents by Canopy Growth Corporation

Under Rules 26 and 28 of the Capital Markets Tribunal *Rules of Procedure and Forms*, made under  
the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 25.1

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**AMENDED NOTICE OF MOTION**

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**A. ORDER SOUGHT**

The moving parties, Cormark Securities Inc. (“**Cormark**”) and William Jeffrey Kennedy (“**Kennedy**”, collectively with Cormark, the “**Moving Parties**”) request, with notice, that the Panel make the following Orders:

1. An Order that Staff of the Ontario Securities Commission (“**Staff**”) require that Canopy Growth Corporation (“**Canopy**”) (i) produce all ~~relevant~~ documents in its possession, power or control that are relevant to any matters in issue in this proceeding, and (ii) ~~to~~ produce to the Panel all documents that Canopy identified as responsive to, but withheld production of on the basis of privilege, the summonses dated April 22, 2021, June 24, 2021 and November 1, 2021 (the “**Canopy Summonses**”) for adjudication by the Panel of whether the documents, or any parts thereof, are privileged on the basis of submissions by

the parties and, to the extent the Panel determines them not to be privileged, to be produced to the parties;

2. An Order that Staff require that Bruce Linton (“**Linton**”) (i) produce all documents in his possession, power or control that are relevant to any matters in issue in this proceeding, and (ii) produce to the Panel all documents that Linton identified as responsive to, but withheld production of on the basis of privilege, the summons dated September 28, 2021 (the “**Linton Summons**”) for adjudication by the Panel of whether the documents, or any parts thereof, are privileged on the basis of submissions by the parties and, to the extent the Panel determines them not to be privileged, to be produced to the parties;
3. An Order that Staff require that Tim Saunders (“**Saunders**”) (i) produce all documents in his possession, power or control that are relevant to any matters in issue in this proceeding, and (ii) produce to the Panel all documents that Saunders identified as responsive to, but withheld production of on the basis of privilege, the summons dated September 28, 2021 (the “**Saunders Summons**”) for adjudication by the Panel of whether the documents, or any parts thereof, are privileged on the basis of submissions by the parties and, to the extent the Panel determines them not to be privileged, to be produced to the parties;
4. In addition or in the alternative to (1), an Order issuing a Summons to Canopy to produce, in advance of the hearing of this matter on a schedule to be determined by the Panel on submissions of Canopy and the parties, (i) all non-privileged documents in its possession, power or control that are relevant to any matters in issue in this proceeding, and (ii) all documents and communications in Canopy’s possession, power or control over which Canopy has claimed or could claim privilege in any way connected to the issues in this

matter to the Panel for the Panel to determine, considering the submissions of Canopy and the parties, whether such documents or any portions thereof are privileged and, to the extent the Panel determines them not to be privileged, to be produced to the parties;

5. In addition or in the alternative to (2), an Order issuing a Summons to Linton to produce, in advance of the hearing of this matter on a schedule to be determined by the Panel on submissions of Linton and the parties, (i) all non-privileged documents in his possession, power or control that are relevant to any matters in issue in this proceeding, and (ii) all documents and communications in Linton's possession, power or control over which Linton has claimed or could claim privilege in any way connected to the issues in this matter to the Panel for the Panel to determine, considering the submissions of Linton and the parties, whether such documents or any portions thereof are privileged and, to the extent the Panel determines them not to be privileged, to be produced to the parties;
6. In addition or in the alternative to (3), an Order issuing a Summons to Saunders to produce, in advance of the hearing of this matter on a schedule to be determined by the Panel on submissions of Saunders and the parties, (i) all non-privileged documents in his possession, power or control that are relevant to any matters in issue in this proceeding, and (ii) all documents and communications in Saunders possession, power or control over which Saunders has claimed or could claim privilege in any way connected to the issues in this matter to the Panel for the Panel to determine, considering the submissions of Saunders and the parties, whether such documents or any portions thereof are privileged and, to the extent the Panel determines them not to be privileged, to be produced to the parties;

7. An Order issuing a Summons to Tyler Burns (“**Burns**”), to produce, in advance of the hearing of this matter on a schedule to be determined by the Panel on submissions of Burns and the parties, all documents and communications in Burns’ possession, power or control that are relevant to any matters in issue in this proceeding;
8. An Order issuing a Summons to Mark Zekulin (“**Zekulin**”), to produce, in advance of the hearing of this matter on a schedule to be determined by the Panel on submissions of ~~Burns~~ Zekulin and the parties, all documents and communications in Zekulin’s possession, power or control that are relevant to any matters in issue in this proceeding;
9. An Order issuing a Summons to Jordan Sinclair (“**Sinclair**”), to produce, in advance of the hearing of this matter on a schedule to be determined by the Panel on submissions of ~~Burns~~ Sinclair and the parties, all documents and communications in ~~Burns~~ Sinclair’s possession, power or control that are relevant to any matters in issue in this proceeding;
10. An Order issuing a Summons to Debbie Weinstein (“**Weinstein**”) on her own behalf, and in her capacity as a partner of the law firm LaBarge Weinstein LLP (the “**Weinstein Firm**”) to produce to the parties hereto, in advance of the hearing of this matter on a schedule to be determined by the Panel on submissions of Weinstein and the parties, all documents and communications in Weinstein and/or the Weinstein Firm’s possession, power or control that are relevant to the issues in this proceeding or, to the extent that Weinstein or the Weinstein Firm claim privilege over any such documents, to produce such documents to the Panel so that the Panel may determine, considering the submissions of Weinstein and the parties, whether such documents or any portions thereof are privileged

and, to the extent the Panel determines them not to be privileged, to be produced to the parties;

11. an Order issuing a Summons to Tayyaba Khan (“**Khan**”) to produce to the parties hereto, in advance of the hearing of this matter on a schedule to be determined by the Panel on submissions of Khan and the parties, all documents and communications in Khan’s possession, power or control that are relevant to the issues in this proceeding or, to the extent that Khan claims privilege over any such documents, to produce such documents to the Panel so that the Panel may determine, considering the submissions of Khan and the parties, whether such documents or any portions thereof are privileged and, to the extent the Panel determines them not to be privileged, to be produced to the parties;
12. Such further and other relief as the Panel may deem just.

## **B. GROUNDS**

### **Overview of the Motion**

1. This is a motion for production of documents from the non-parties Canopy, and certain of its former executives, that they refused or failed to produce in response to summonses issued by Staff in the investigation that led to this enforcement proceeding. The Moving Parties seek two categories of documents on this motion:
  - (a) documents and communications not produced to Staff over which Canopy and its former executives improperly claimed privilege;

- (b) relevant documents and communications not produced to Staff over which Canopy has power, possession, or control;
  - (c) relevant documents and communications in the possession of individuals, such as Burns, Zekulin, Sinclair, Weinstein and Khan, who were never summonsed by Staff in relation to its investigation.
- 2. With respect to the first category of documents, the Moving Parties seek an order that Canopy or other parties produce documents over which they claim privilege to the Panel so that the Panel can adjudicate these claims of privilege with the benefit of the parties' submissions on the law of privilege generally (i.e. with only the Panel reviewing the documents). If the Panel determines that any or all of a document is not properly subject to a claim of privilege, the Moving Parties request that these documents or any part thereof that are not privileged be produced to the parties.
- 3. With respect to the second category of documents, despite having received only three internal email communications and no text, WhatsApp or telephone records (although summonsed) from Canopy, a circumstance which is difficult to reconcile with the current disclosure which evidences the fact that the Transactions, as defined below, were discussed among the most senior officers and directors of Canopy, Staff appear not to have made any inquiries of Canopy as to the completeness or responsiveness of its productions. Staff have failed or refused to confirm whether any such steps were taken despite the Moving Parties' request that Staff do so. Accordingly, the Moving Parties request that Canopy be required to produce all relevant records in its power, possession, or control.

4. Staff have not met their *Stinchcombe* obligations and, accordingly, absent the requested disclosure, the Moving Parties will be denied their right to make full answer and defence to the allegations made against them. Equally, the Tribunal ought to be provided with a complete factual record for the purposes of adjudicating this matter in accordance with the principles of natural justice and procedural fairness.
5. Furthermore, in order to determine whether there has been any spoliation of evidence, the Moving Parties are entitled to know what steps have been taken to ensure the appropriate preservation of Canopy documents. Accordingly, the Moving Parties request the Panel to include a direction in any Order or Summons issued on the motion requiring the affected parties to confirm what steps have been taken, if any, to preserve information relevant to Staff's investigation and/or this proceeding.

### **The Proceedings**

6. This motion is brought in the context of enforcement proceedings ("**Enforcement Proceedings**") against:
  - (a) Cormark, a registrant investment bank;
  - (b) Kennedy, who at all material times was a director of Cormark and the head of Equity Capital Markets;
  - (c) Marc Judah Bistricher ("**Bistricher**"), a private individual and at all material times a client of Cormark; and

- (d) Saline Investments Ltd. (“**Saline**”), a private company controlled by Bistricher and also at all material times a client of Cormark.
7. The Enforcement Proceedings concern a series of three transactions (the “**Transactions**”) all arising from the addition of Canopy to the TSX 60 index on March 17, 2017. The Transactions were:
- (a) A private placement, pursuant to which Canopy issued 2.5 million common shares from its treasury to Saline, which were subject to a four-month hold period (the “**Private Placement**”);
  - (b) A share loan transaction, pursuant to which Goldman Holdings Limited (“**GHL**”), the personal holding company of Canopy director Murray Goldman, loaned 2.5 million free-trading common shares of Canopy to Saline, collateralized by the Private Placement shares (the “**Loan**”); and
  - (c) A series of sales on the public market, mostly through the market-on-close function, by Saline of 2.5 million common shares of Canopy which were settled with the Loan shares. The sales were marked as short because they were being settled with the Loan shares.
8. Other key parties involved in the Transactions were:
- (a) Linton, Canopy’s CEO at the time, who introduced Goldman to Saline and managed the internal approval process for the Transactions at Canopy;



- (b) Saunders, Canopy's CFO at the time, who was also responsible for obtaining Canopy board approval of the Transactions;
  - (c) Burns, responsible for Canopy's investor relations at the material time and a member of Canopy's disclosure committee;
  - (d) Zekulin, the co-Chief Executive Officer of Canopy, responsible for governance matters and management of the Board of Directors and a member of Canopy's disclosure committee;
  - (e) Sinclair, responsible for Canopy's public relations and a member of Canopy's disclosure committee;
  - (f) Weinstein, a partner with the Weinstein Firm, who at all material times was the Corporate Secretary to the board of directors of Canopy and held a number of Canopy's securities or options for the purchase thereof. Weinstein provided both business and legal advice to Canopy; and
  - (g) Khan, a former associate at the Weinstein Firm.
9. As the Statement of Allegations demonstrates, Canopy's knowledge of the structure, benefits, and effects of the Transactions, as well as the professional advice received with respect to same, are squarely at issue in these Enforcement Proceedings. Staff alleges that Cormark and Kennedy made misleading statements and hid the benefits of the Transactions, such that "...Canopy could not make an informed decision about whether or not to become involved in the transactions". Cormark and Kennedy require additional productions in order to test and defend against these assertions.

## **The Investigation and the Summonses**

10. On December 7, 2020, the Ontario Securities Commission (the “**Commission**”) issued an order pursuant to section 11 of the *Securities Act*, R.S.O. 1990, c. S.5 (the “***Securities Act***”) appointing various persons “to investigate and inquire into certain matters relating to short selling in advance of public offerings and private placements” (the “**Section 11 Order**”).
11. In connection with the Section 11 Order, the Commission issued various summonses requiring production of documents and attendance of various witnesses to be interviewed under oath. These summonses included the Canopy Summonses, the Linton Summons and the Saunders Summons.
12. Pursuant to the Canopy Summonses, Canopy produced to Staff 251 productions in total. Of these productions Canopy produced:
  - (a) 122 documents, including minutes of board meetings, a number of which contained redactions. Canopy claimed that the redacted material was subject to solicitor-client privilege (the “**Redacted Material**”);
  - (b) 46 internal emails, which together comprised three chains of emails concerning the Transactions; and
  - (c) a privilege log, responsive to summonses issued on April 22, 2021 and June 24, 2021, identifying materials that Canopy claimed were subject to solicitor-client privilege (the “**Privilege Log**”);

- (d) a second privilege log, responsive to the summons issued on December 1, 2021, identifying further materials that Canopy claimed were subject to solicitor-client privilege (the “**Second Privilege Log**”, with the Privilege Log, the “**Privilege Logs**”).
- 13. Invoking solicitor-client privilege, Canopy refused to substantively answer Staff’s inquiry with respect to Canopy’s view on the materiality of the financing, contained in the April 22, 2021 summons.
- 14. Canopy did not produce in response to any summons the following correspondence and documents:
  - (a) Any internal correspondence or documents relating to the extent of Canopy’s knowledge of the materiality of the Transactions;
  - (b) Any internal correspondence between the members of the disclosure committee not summonsed by the Commission, namely Burns, Sinclair, and Zekulin concerning the Transactions;
  - (c) Any internal correspondence between Weinstein, Khan, and Canopy concerning memoranda written to the board of directors relating to the Transactions, or the board of directors’ resolution with respect to same;
  - (d) Any internal correspondence between Weinstein, Khan, and Canopy regarding the closing of the Private Placement;

- (e) Any internal correspondence between Weinstein, Khan, and Canopy regarding the public relations or press release surrounding the Private Placement; and
  - (f) Any internal correspondence between Weinstein, Khan, and Canopy regarding disclosure to the Ontario Securities Commission of the Private Placement through Form 45-106F1, disclosure to the TSX of the Private Placement, through Form 11, or any SEDI filings in connection with the Transactions.
15. In response to a summons from the Commission dated April 21, 2021, Cormark produced a log of communications and documents that included members of the Weinstein Firm that Cormark identified as being potentially subject to a claim of solicitor-client privilege by Canopy, which privilege was potentially not waived by sharing the communications and documents with Cormark employees or other third parties on the basis of transactional common interest privilege (the “**Cormark Privilege Log**”).
16. Canopy subsequently confirmed that it was not asserting a privilege claim over the documents in the Cormark Privilege Log. Cormark accordingly produced the documents in the Cormark Privilege Log to Staff.
17. Pursuant to the Saunders Summons, Staff examined Saunders under oath on October 29, 2021. In this interview, among other things, Saunders deposed that Saunders and Canopy’s board of directors relied on Weinstein’s conclusions as to the materiality of the Transactions. Specifically, Saunders deposed that he “was not going to take advice on [materiality] from an investment banker”.

18. Pursuant to the Linton Summons, Staff examined Linton under oath on November 10, 2021. In this interview, among other things, Linton deposed that:
  - (a) Weinstein was heavily involved with Canopy, due to her position as Corporate Secretary to Canopy's board of directors;
  - (b) He likely discussed the Transactions with Burns and Sinclair;
  - (c) The structure of the Transactions was investigated by and discussed by Canopy's board of directors, including Weinstein, who Linton describes as having a particularly "sophisticated" knowledge of the "security structuring process"; and
  - (d) Canopy made efforts to understand the risk posed by the Transactions, and to ensure that it benefitted from the Transactions.
19. Staff did not challenge any of Canopy, Linton or Saunders' claims of privilege in respect of the Redacted Material or the materials listed in the Privilege Logs.
20. Staff did not challenge the assertions of Linton or Saunders that they did not comprehend the Transactions, and that they relied wholly on Cormark to conduct due diligence on the parties to the Transactions, and to structure the Transactions. It follows that Staff did not request internal correspondence or work product demonstrating this reliance;
21. Staff did not seek the issuance of a summons to Burns, Sinclair, Zekulin, Weinstein, or Khan.

### **The Panel Should Adjudicate Canopy's Privilege Claims**

22. The Panel should adjudicate, on the basis of general submissions concerning the relevant law from Canopy and the parties, Canopy's claims of privilege because the evidence suggests that Canopy may have refused to produce relevant documents on the basis of privilege, which claims of privilege are, in whole or in part, improper. Notably,
- (a) to the extent Canopy waived privilege over the Cormark Privilege Log documents, this waiver must extend to any internal documents necessary to contextualize the Cormark Privilege Log documents, including any correspondence with the Weinstein Firm;
  - (b) communications with Weinstein included in the Privilege Logs, or that were not produced, and Redacted Materials that related to or were created by Weinstein or the Weinstein Firm, are not privileged to the extent that Weinstein, and members of the Weinstein Firm acting as her agents, were acting as a members of the business and not providing legal advice;
  - (c) to the extent Canopy relies on legal advice from the Weinstein Firm, including to support its determination that the Private Placement was not material, this constitutes an implied waiver of privilege over any communications or documents containing that advice and any related communications or documents; and
  - (d) because Canopy has waived any privilege over materials subject to common interest privilege, to the extent any of the Redacted Materials or the Privilege Logs contain any communications or documents involving, or that were shared with,

third parties, Canopy has waived any claim of privilege it could assert over those communications or documents.

23. The Privilege Logs documents, the Redacted Materials, and any other relevant documents that Canopy, its former executives, or Weinstein and Khan have refused to produce on the basis of privilege are relevant to the Enforcement Proceedings, or could influence the Moving Parties' response to the Enforcement Proceedings.
24. To the extent that any of Canopy, Linton, and Saunders' claims of privilege are improper, the failure to adjudicate such claims of privilege and order production of any materials subject to such improper claims of privilege could severely prejudice the Moving Parties' ability to defend the Enforcement Proceedings and amount to an abuse of process.

### **The Panel Should Order Production of Relevant Documents**

#### **Failure to Issue Summonses to Gather Relevant Evidence**

25. On the basis of the evidence produced to the Moving Parties to date, the Weinstein Firm, Weinstein, Khan, Burns, Sinclair and Zekulin were involved in the Transactions and may have relevant evidence.
26. Staff failed to issue summonses to any of the Weinstein Firm, Weinstein, Khan, Burns, Sinclair and Zekulin.
27. So that the Moving Parties can make a full answer and defence at the hearing, and the Panel can adjudicate the issues in this proceeding with a fulsome factual record, the Panel should

issue summonses for these parties to produce any relevant documents in their possession, power or control to Staff and the respondents in advance of the hearing.

**Canopy's Disclosure**

28. The Moving Parties' review of the disclosure made by Staff to date indicates that that Staff did not obtain or confirm the existence or non-existence of many of the categories of documents required to be produced by Canopy pursuant to the summonses issued to Canopy on April 22, 2021, June 24, 2021 and November 1, 2021 (the "**Canopy Summonses**"). In particular:
- (a) despite Staff's requests for internal Canopy communications, only three internal email chains (i.e. those including only individuals using a Canopy or TWEED email address) appear to have been included in the disclosure sets provided to date;
  - (b) no internal Canopy emails have been produced after March 16, 2017;
  - (c) no telephone records appear to have been produced from anyone at Canopy; and
  - (d) no text messages, or electronic communications other than email, appear to have been produced from anyone at Canopy.
29. Despite the Moving Parties' request, Staff have failed or refused to confirm what, if any steps, were taken to confirm the sufficiency and responsiveness of the Canopy's productions. Accordingly, the Moving Parties request an order requiring Canopy to produce all relevant documents so that they may be afforded the right to make full answer



and defence at the hearing, and so that the Panel can adjudicate the issues in this proceeding with a fulsome factual record.

30. The Moving Parties plead and rely on:

- (a) Sections 11 and 13 of the *Securities Act*, R.S.O. 1990, c. S.5;
- (b) Rules 26, 27 and 28 of the Capital Markets Tribunal *Rules of Procedure and Forms*;
- (c) Such further and other grounds as counsel may advise and the Panel may permit.

**C. THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- 1. The statement of allegations in this proceeding;
- 2. The affidavit of Sandra Smith, sworn on February 24, 2023 and exhibits thereto;
- 3. The supplementary affidavit of Sandra Smith, sworn on April 21, 2023 and exhibits thereto;  
and
- 4. Such further and other documentary evidence as counsel may advise and the Panel may permit.

~~February 24~~ April 21, 2023

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