

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

File No. 2022-24

MOTION OF STAFF OF THE ONTARIO SECURITIES COMMISSION

(For an order excluding the proposed opinion evidence of Michael Mackasey, proffered as an expert on behalf of Cormark Securities Inc., William Jeffrey Kennedy, Marc Judah Bistricher and Saline Investments Ltd., under Rule 28 of the *Capital Markets Tribunal Rules of Procedure and Forms* and Rule 8 of the *Capital Markets Practice Guideline*)

A. ORDER SOUGHT

The Moving Party, Staff of the Ontario Securities Commission (the “**Commission**”), requests with notice, that the Capital Markets Tribunal (the “**Tribunal**”) make the following orders:

- (a) an order confirming that the opinion evidence of the proposed witness Michael Mackasey (the “**Opinion Witness**”) proffered on behalf of Cormark, Kennedy, Bistricher and Saline (together the “**Respondents**”) is presumptively inadmissible at the merits hearing in this matter;
- (b) an order that any motion seeking to have the evidence of the Opinion Witness admitted by the Tribunal be heard prior to the merits hearing, currently scheduled to commence on March 25, 2024, at 10:00 am;
- (c) an order that the proposed evidence of the Opinion Witness is inadmissible at the merits hearing in this matter;
- (d) an order amending the Order of the Tribunal dated June 28, 2023, and permitting the Commission to deliver an expert opinion responding to the Opinion Witness, if required, after the disposition of this motion; and

- (e) such further and other relief and orders as counsel may advise and the Tribunal may deem appropriate.

B. GROUNDS

The grounds for the motion are as follows.

1. As set out in the Statement of Allegations dated November 9, 2022, the Respondents allegedly engaged in a series of transactions, involving a private placement, a securities loan, and short sales, that resulted in an illegal distribution of Canopy Growth Corporation (“**Canopy**”) shares in the secondary market and acted contrary to the public interest. Additionally, Cormark and Kennedy allegedly failed to deal fairly, honestly and in good faith with Canopy.

2. On June 28, 2023, following the Third Attendance in this matter, the Tribunal issued an Order ordering, *inter alia*, that:

- (a) the Respondents shall serve all parties with any expert report(s) by no later than September 15, 2023;
- (b) the Commission shall serve any expert response report(s) by no later than November 3, 2023; and
- (c) the Respondents shall serve all parties with any expert reply report(s) by no later than December 1, 2023.

3. On September 15, 2023, the Respondents served the Moving Party (the Commission) with the report of their proposed expert, Michael Mackasey, dated September 15, 2023 (the “**Mackasey Report**”).

4. The Mackasey Report provides notice that the Respondents propose to have Michael Mackasey qualified to adduce opinion evidence going to four questions:

- (a) **Question #1:** Are transactions of the same type as the Transactions in issue common in the Canadian capital markets? Were such transactions common in 2017? Are you aware of the same type of transactions having occurred in the Canadian capital markets?

Proposed Opinion #1: “The Transactions belong to a type of transactions known as “Swaps”. They are most frequently used with private placement equity raises for smaller capitalized companies and for companies in higher volatility industry sectors. Throughout my career in the capital markets I have been aware of, and have been involved in, Swaps.”

In answering this question, Mackasey also opines that “a reasonable investment banker in Cormark and Kennedy’s position could reasonably have expected that Canopy would understand that the Transactions would involve a sale of Canopy shares on the open market, and a short sale”.

- (b) **Question #2:** Do transactions of the same type as the Transactions provide any benefits to the capital markets? If so, please describe those benefits.

Proposed Opinion #2: “Swaps foster capital formation benefitting issuers and their shareholders, particularly smaller issuers in more volatile sectors, and improve the efficiency of the markets as increased competition among more suppliers of capital results in larger equity raises, better pricing for issuers and a reduction in the discount demanded for illiquidity risk.”

- (c) **Question #3:** If transactions of the same type as the Transactions were not permitted to occur, what impacts, if any, would this have on the Canadian capital markets.

Proposed Opinion #3: “If Swaps were not permitted to occur, it would have a significant detrimental effect on capital formation in Canadian capital markets. In particular, junior issuers, particularly in more volatile sectors, would have a significantly harder time raising the capital they need to grow their operations.”

- (d) **Question #4:** Canopy was offered a 9% discount to the closing price on March 17, 2017, including fees and expenses of the purchaser, as consideration for the Private

Placement. How does that discount compare to those paid in the same type of transactions, in your experience?

Proposed Opinion #4: “The 9% net discount Canopy paid was significantly below typical market practice. In my experience, Canopy’s issue would have been priced at an 8%-12% discount to its trading price or higher and would have been expected to pay a 6%-4% commission for a total discount of approximately 12%-18% (excluding costs and expenses).”

(i) The Opinions are Inadmissible

5. Although the Moving Party is the Commission, the Respondents bear the burden of establishing the admissibility of the proposed Opinions.

6. Opinion evidence is presumptively inadmissible, but subject to narrow exceptions including expert evidence on matters requiring specialized knowledge. (See *R v Mohan*, [1994] 2 SCR 9 and *White Burgess Langille Inman v Abbott and Haliburton Co* [2015] 2 SCR 182.)

7. Expert opinions are admitted where the proponent of the witness’s evidence satisfies the Tribunal that:

- (a) the opinion evidence is *relevant* to a fact in issue in the proceeding;
- (b) the opinion evidence is *necessary* to assist the Tribunal in understanding the significance of evidence that would otherwise be beyond the Tribunal’s understanding;
- (c) the evidence is not otherwise subject to another exclusionary rule; and
- (d) the expert is properly qualified as someone who is possessed of knowledge or skill that is otherwise beyond the ken of the Tribunal.

8. All four proposed Opinions are irrelevant and therefore unnecessary. Further, the expert does not possess knowledge or skill beyond the ken of the Tribunal. Accordingly, the opinions do not meet the requirements for admissibility.

9. Proposed Opinions #1, #2, and #3 are irrelevant as they are focused on “gypsy swaps”. The Tribunal’s decision in this matter will be based on, and speak to, the facts and circumstances of these particular transactions, not other transactions such as “gypsy swaps”. As the Tribunal held in its reasons and decision on the disclosure motion in this proceeding: “What others might have done or how frequently they might have done it is irrelevant...”

10. Proposed Opinion #4 is also irrelevant. The Commission alleges that, when advising Canopy that the costs of this deal compared favourably with those of Canopy’s last deal, Cormark and Kennedy omitted key information. In particular, they omitted that the entire amount of the offering would be sold short on the day of pricing. Those short sales may have curbed increases in, or reduced, the closing price, affecting the offering price and lowering Canopy’s net proceeds. What is relevant is not the size of the discount, but the closing price to which that discount was applied.

11. Proposed Opinions #1, #2, #3, and #4 are, therefore, not relevant to the allegations made in the Statement of Allegations. If admitted by the Tribunal, this evidence would improperly and impermissibly expand the scope of the merits hearing significantly beyond the allegations set out in the Statement of Allegations. Because the evidence is irrelevant, it risks confusing the issues to be decided by the Tribunal, and causing undue delay and expenditure of scarce hearing resources.

12. The portion of proposed Opinion #1 that speaks to what a reasonable investment banker in Cormark and Kennedy’s position could reasonably have expected Canopy to understand from Cormark and Kennedy’s representations to Canopy is also inadmissible because it does not meet the necessity requirement. It is an opinion as to an “ultimate question or issue” for determination by the Tribunal, specifically whether Cormark and Kennedy’s representations breached their duty

to deal fairly, honestly and in good faith. This falls squarely within the Tribunal's expertise as a specialized tribunal.

13. The Mackasey Report does not indicate the scope of Mr. Mackasey's proposed expertise. Although he is clearly experienced in Canadian and international capital markets, it is not clear that his experience "in the industry" is outside the ken of the Tribunal, which is an expert administrative tribunal composed of leaders in the capital markets.

(ii) Timing of this Motion

14. The Tribunal can determine the issue of admissibility without regard to contested facts and anticipated evidence at the merits hearing.

15. Determining this issue prior to the start of the merits hearing will make the process materially more efficient and effective. It may avoid unnecessary costs to all parties. It will provide greater certainty about how the merits proceeding will proceed.

(iii) Amending the Schedule

16. The Commission should be permitted to respond to the Opinion Witness only if some or all of the proposed Opinions are admissible. If the evidence of the Opinion Witness is inadmissible, all parties will be spared the time and expense associated with a responding expert report and a reply expert report.

(iv) Other Grounds

17. The Commission relies on:

(a) Rules 1 and 28 of the *Capital Markets Tribunal Rules of Procedure and Forms*;

- (b) Rule 8 of the *Capital Markets Tribunal Practice Guideline*;
- (c) Sections 15 and 16 of the *Statutory Powers and Procedure Act*, RSO 1990, c S 22; and
- (d) Such further and other grounds as counsel may advise and the Tribunal may permit.

C. EVIDENCE

The Commission intends to rely on:

- (a) The Order of the Tribunal dated June 28, 2023;
- (b) the affidavit of Michelle Spain, affirmed November 1, 2023; and
- (c) such further and other materials as counsel may advise and the Tribunal may permit.

DATED this 1st day of November, 2023.

ONTARIO SECURITIES COMMISSION

20 Queen Street West, 22nd Floor
Toronto, ON M5H 3S8

Johanna Braden

Senior Litigation Counsel
Email: jbraden@osc.gov.on.ca
Tel: 416-263-7689

Anna Huculak

Senior Litigation Counsel
Email: ahuculak@osc.gov.on.ca
Tel: 416-593-8291

Amethyst Haighton

Litigation Counsel
Email: ahaighton@osc.gov.on.ca
Tel: 416-716-6051