



Capital
Markets
Tribunal

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des marchés
financiers

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

22e étage
20, rue Queen ouest
Toronto ON M5H 3S8

Citation: *Cormark Securities Inc (Re)*, 2023 ONCMT 46

Date: 2023-11-29

File No. 2022-24

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

REASONS AND DECISION

(Rule 26 of the Capital Markets Tribunal *Rules of Procedure and Forms*)

Adjudicators: M. Cecilia Williams (chair of the panel)
Geoffrey D. Creighton
William J. Furlong

Hearing: By videoconference, June 28, 2023; final written submissions
received September 8, 2023

Appearances:	Anna Huculak	For Staff of the Ontario Securities Commission
	Nicole Fung	
	David Di Paolo	For Cormark Securities Inc.
	Graham Splawski	
	Brianne Taylor	
	Melissa MacKewn	For William Jeffrey Kennedy
	Dana Carson	
	Alan P. Gardner	For Canopy Growth Corporation
	Amanda McLachlan	
	Shaan P. Tolani	

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REASONS AND DECISION

1. OVERVIEW

- [1] Staff of the Ontario Securities Commission have initiated a proceeding against Cormark Securities Inc., Marc Judah Bistricher, William Jeffrey Kennedy, and Saline Investments Ltd., alleging that Cormark, Bistricher and Kennedy carried out a series of transactions that were abusive and contrary to the animating principles of the *Securities Act*.¹ Using Saline, a private holding company, and in anticipation of a private placement by Cormark's client Canopy Growth Corporation, the transactions involved short sales, a private placement, and a share swap.
- [2] Staff made disclosure to the respondents in the normal course. Included within the disclosure were "privilege logs" that had been provided to Staff by Canopy, who is not a party to this enforcement proceeding.
- [3] Cormark and Kennedy (also the **Moving Parties**) seek an order that Canopy produce all the documents contained in the privilege logs so that a privilege review of the documents included in the logs can be conducted. If the documents are found not to be privileged, they request that the documents be disclosed to the parties in this proceeding.
- [4] For the reasons below, we conclude that the documents referred to in the privilege logs meet the test for a summons, as described below, and therefore we are prepared to issue a summons to Canopy for these documents. A privilege review is appropriate in these circumstances where privilege is at issue for the referenced documents.
- [5] To preserve the Tribunal's resources and in support of the Tribunal's ongoing efficiency efforts, we conclude the use of a third-party referee to conduct the privilege review is appropriate. The referee shall determine their own process for assessing the privilege claims after hearing submissions from the Moving Parties and Canopy regarding the process to be followed.

¹ RSO 1990, c S.5

2. PRELIMINARY ISSUES

2.1 Requested Relief and Notice of Withdrawal

- [6] The Moving Parties originally requested three types of relief in their motion, namely orders:
- a. directing Staff to enforce existing summonses in their investigation;
 - b. issuing summonses to individuals, who have not already been the subject of summonses issued in the investigation, to produce documents; and
 - c. conducting a privilege review of documents that were produced by Canopy in response to summonses but withheld on the basis of privilege.
- [7] In their reply submissions, Cormark and Kennedy indicated that, on considering the responding submissions and in the interest of efficiency, they were no longer pursuing certain of the relief sought on the motion (including orders directing Staff to take further steps to enforce existing summonses) and that they would instead rely on their alternative request that the Panel issue summonses. They further advised that if the non-parties that are not in possession of relevant documents provide their responses in the form of sworn evidence, the Moving Parties would be content not to pursue their request for summonses against them.
- [8] On the morning of the hearing of this motion, the Moving Parties advised that they had been able to resolve a significant portion of the motion relating to the requested summonses and that a Notice of Withdrawal had just been filed. The remaining requests included those pertaining to the documents in Canopy's possession over which it had claimed privilege, and a summons directed to Debbie Weinstein, who acted as Corporate Secretary, and as external counsel, to the Board of Directors of Canopy.
- [9] The Moving Parties indicated at the hearing that they would not be addressing the issues with respect to the production of documents from Weinstein and her firm at that time, but that this issue may need to be revisited at a future date. We accordingly did not consider further the proposed summons to Weinstein and her firm.

2.2 Canopy's Status in this motion

- [10] Canopy, a non-party in the enforcement proceeding, filed materials for this motion, including a cross-motion for intervenor participation under rule 21(4) of the Capital Market Tribunal's *Rules of Procedure and Forms* (the **Tribunal's Rules**). It requested that the panel permit it to deliver written and oral submissions only for the motion, which is referred to as *Torstar* standing.²
- [11] Rule 21(4) of the Tribunal's Rules gives the panel the authority to "grant a person or company who is not a Party to a proceeding intervenor status to participate in all or part of the proceeding on the terms the Panel considers appropriate...".
- [12] In our view, it is not necessary in the particular circumstances of this motion to consider whether *Torstar* standing should be granted. While the parties agree that the intended subjects of a summons generally do not have standing to oppose the issuance of a summons, we find that it would be inefficient not to permit Canopy to participate in this motion. A differently constituted panel of the Tribunal ordered that Canopy and any other person or company potentially affected by this disclosure motion were permitted to make submissions regarding the scheduling of this motion and the delivery of related motion materials. The Moving Parties further served the materials on Canopy, and Canopy filed and served responding materials. We accordingly advised Canopy and the parties at the outset of this motion that we would allow Canopy to make oral submissions at the hearing.

2.3 The Power to Summons

- [13] In the Moving Parties' and Canopy's original submissions and in the oral hearing, there was a degree of mixing of the concepts of a summons, and a third-party production order. In submissions sought by the panel subsequent to the oral hearing, the parties and Canopy clarified their positions. They (and this panel) agree that the Tribunal has the authority to issue a summons, but not a third-party production order.

² See *Magna International Inc (Re)*, 2010 ONSC 12 at paras 50-52

- [14] The Moving Parties and Canopy (and this panel) also agree that:
- a. the panel may include in a summons to a non-party a requirement that the summonsed documents be produced before a hearing to ensure a more cost-effective and expeditious proceeding;³
 - b. the panel may first determine whether a summons should be issued to require a representative of Canopy to attend with documents;⁴ and if so,
 - c. the panel has the authority to determine any dispute over any claim for privilege in summonsed documents.⁵
- [15] Where the Moving Parties and Canopy differ are their views on whether a summons should issue, and if so, the process that should then follow.

3. ISSUES

- [16] This motion requires us to consider (i) whether the panel should issue a summons for the documents over which Canopy has claimed privilege; and (ii) if so, whether the panel can review, or cause to have reviewed, summonsed documents over which Canopy has claimed privilege.

4. LAW AND ANALYSIS

4.1 Should we issue a summons?

- [17] Cormark and Kennedy seek a summons for Canopy's Chief Legal Officer to produce "any and all documents" referred to in the two privilege logs (the **Privilege Logs**) produced by Canopy to Staff in response to investigation summonses issued by the Commission to Canopy, dated April 22, 2021, June 24, 2021, and November 1, 2021.
- [18] Staff issued a Statement of Allegations to initiate the underlying enforcement proceeding against Cormark and Kennedy, along with other respondents. The Statement of Allegations describes a series of three transactions (the **Transactions**) involving a private placement, a securities loan, and a short sale.

³ *Debus (Re)*, 2021 ONSEC 22 at para 22 (**Debus**)

⁴ *Statutory Powers Procedure Act*, RSO 1990, c S.22, s 12(1) (**SPPA**); Tribunal's Rules, r 26(1)

⁵ *SPPA*, s 12(1); *Securities Commission Act, 2021*, s 26; *Re Northern Securities*, 2012 IIROC 22; *Hogan v. Ontario (Minister of Health and Long-Term Care)*, 2003 HRTO 16 (**Hogan**)

The Statement of Allegations describes the Transactions being effected on March 17, 2017 and settled on March 22, 2017.

- [19] A key allegation against Cormark and Kennedy is that they misled and deceived Canopy in respect of the Transactions. Staff alleges that Cormark and Kennedy:
- a. presented the private placement and securities loan to Canopy as ordinary-course transactions in connection with Canopy's addition to the S&P/TSX Composite Index, which Staff alleges they were not;
 - b. hid from Canopy the benefits of the transactions to Saline;
 - c. concealed the short selling that facilitated Saline's virtually risk-free profits; and made misleading statements about Canopy's cost of capital and, by implication, Canopy's net proceeds; and
 - d. failed to deal fairly, honestly and in good faith with their client, Canopy. As a result, Canopy could not make an informed decision about whether to become involved in the transactions.⁶

Despite Canopy's submissions to the contrary, we conclude that the Statement of Allegations puts in issue Canopy's knowledge and state of mind.

- [20] The parties agree that the Panel may issue summonses in advance of a hearing under rule 26(1) of the Tribunal's Rules and s 12(1) of the *Statutory Powers Procedure Act (SPPA)*. Rule 26(1) provides that the Tribunal may summons a person to give evidence under oath and produce any document at an oral hearing. The SPPA similarly discusses producing evidence at an oral hearing. A summons requiring production of documents prior to the hearing reduces the need for adjournments and furthers the goal of ensuring just, expeditious, and cost-effective proceedings.⁷
- [21] The Tribunal may only summons documents that are relevant and admissible at a hearing.⁸ Nothing is admissible in evidence at a hearing that would be inadmissible in a court by reasons of any privilege under the law of evidence.⁹

⁶ Statement of Allegations at paras 20-27

⁷ *Debus* at para 22

⁸ SPPA, s 12(1)

⁹ SPPA, s 15(2)(a)

- [22] Staff submits that the Tribunal’s decision to issue a summons should not be based solely on the relevance of the anticipated evidence, as suggested by the Moving Parties. Rather, they point to *Debus (Re)*, which notes that the predominant considerations in determining whether to issue a summons include procedural fairness (and specifically whether the Moving Parties are being afforded the opportunity to be heard), the relevance of the evidence to be provided by the witness, and whether the evidence will be unduly repetitious.¹⁰ We agree with this approach.
- [23] We are persuaded by the Moving Parties that the disclosure in the requested summons is required for them to make full answer and defence. This includes being able to properly prepare for cross-examination of the witnesses Staff may call from Canopy, as Canopy’s state of mind is at issue in the Statement of Allegations. This is important for procedural fairness. There is also nothing to suggest that there is other evidence that would make the requested documents unduly repetitious. Therefore, we focus our analysis on the relevance of the information in the requested summons.
- [24] The threshold for relevance is a low bar for the purpose of issuing a summons. Previous summonses have been issued by the Tribunal where the anticipated evidence “appeared to be relevant” and was “arguably relevant”.¹¹ While the standard is low, a summons cannot be used as a mere fishing expedition.¹²
- [25] For the purpose of ordering the requested summons, we conclude that the documents in the Privilege Logs appear to be relevant. Canopy provided the Privilege Logs in response to questions about the Transactions. The Transactions are the subject of this proceeding, as indicated in the Statement of Allegations.
- [26] Specifically, Canopy’s counsel provided the first Privilege Log in response to the April 22, 2021, and June 24, 2021 summonses from Staff, which asked Canopy to provide the following information, respectively:

¹⁰ *Debus* at para 31, citing *Khan (Re)*, 2013 ONSC 36 at para 33

¹¹ *Debus* at para 33

¹² *Bridging Finance Inc (Re)*, 2023 ONCMT 19 at para 13

- a. “all records of communications with Saline, Cormark Securities, Goldman Holdings and [related parties]” relating to Canopy’s March 22, 2017 news release in respect of the Transactions; and
 - b. “all records of communication” regarding the Transactions including internal communications between individuals at Canopy and prospective purchasers of Canopy shares, including Saline.
- [27] Canopy’s counsel provided the second Privilege Log in response to the November 1, 2021 summons from Staff, which asked Canopy for, amongst other things, copies of any SEDI filings in respect of Murray Goldman or Goldman Holdings Ltd. in connection with the March 2017 Transactions.
- [28] Staff and Canopy submit that the summonses were in connection with the investigation, which was broader in scope than the Statement of Allegations. Therefore, they submit, there might be information in the documents referred to in the Privilege Logs which goes beyond, and is not relevant to, the issues in this proceeding. Staff confirmed that they had not, in fact, reviewed the documents in the Privilege Logs. Thus, Staff’s submission raised the possibility that there were other issues covered in the documents, but they could not confirm whether this was or was not the case.
- [29] Staff disclosed the Privilege Logs to the respondents, after the issuance of the Statement of Allegations in this proceeding and in fulfilment of their disclosure obligations pursuant to rule 27(1) of the Tribunal’s Rules. Rule 27(1) requires Staff to provide every other party “copies of all non-privileged documents in Staff’s possession that are relevant to an allegation.” Staff’s duty of disclosure in an enforcement proceeding is akin to the standard imposed on the Crown in a criminal proceeding.¹³
- [30] By delivering the Privilege Logs as part of their disclosure obligation, establishing that they are at least arguably relevant to Staff’s case or to the Moving Parties’ defence, Staff cannot now claim that the documents are not relevant. In another disclosure motion related to this proceeding, Staff submitted that it understood its disclosure obligation and disclosed everything to the respondents that was

¹³ *BDO Canada LLP (Re)*, 2019 ONSC 21 at para 13, citing *R v Stinchcombe*, [1991] 3 SCR 326

relevant.¹⁴ Staff cannot now claim that they do not understand their disclosure obligation and disclosed documents that are possibly not relevant.

[31] For the reasons above, we find that the documents underlying the Privilege Logs appear to be relevant, and as we already found they are not unduly repetitious, and important to procedural fairness for the Moving Parties, they therefore may be properly summonsed for this proceeding.

[32] We now turn to our analysis of the privilege review.

4.2 Should we order a privilege review?

[33] Section 15(2) of the SPPA states that nothing is admissible in evidence at a hearing that would be inadmissible in a court by reasons of any privilege under the law of evidence. Canopy has previously raised privilege concerns about the documents underlying the Privilege Logs.

[34] Canopy now submits that there are no documents currently before the panel over which Canopy has claimed privilege, and that accordingly it is premature for the panel to order an anticipatory privilege review. However, Canopy acknowledges that the Privilege Logs provided by Canopy to Staff contain documents over which Canopy has previously claimed privilege. Indeed, it is Canopy that labelled them "Privilege Logs".

[35] The Privilege Logs were provided to Staff, and later were disclosed to the respondents in this proceeding following the issuance of the Statement of Allegations. Solicitor-client privilege, which Canopy claimed in the Privilege Logs, is a class privilege. In a class privilege what is important is not so much the content of the particular communication within the class of documents as it is the protection of the type of relationship.¹⁵ Therefore, if a communication is protected by solicitor-client privilege, it is so for all purposes (absent a waiver). Canopy has not suggested that it has waived its previously asserted privilege in the documents we are considering. We find that there is an active claim of privilege before this panel and not an anticipatory or hypothetical one, as suggested by Canopy.

¹⁴ *Cormark Securities Inc (Re)*, 2023 ONCMT 23

¹⁵ *R v National Post*, 2010 SCC 16 at para 42

- [36] Therefore, the next step in our analysis is to consider whether in this case the Tribunal should require a summons recipient to produce relevant documents over which privilege has been claimed, so that the documents can be reviewed for privilege.
- [37] The Moving Parties are asking the panel to order Canopy to produce relevant documents over which solicitor-client privilege is claimed in the Privilege Logs so that the privilege claims can be reviewed. The parties to this motion agree that the Tribunal has the jurisdiction to adjudicate privilege claims. Various tribunals subject to the SPPA, including this Tribunal, have previously considered and reviewed privilege claims.¹⁶
- [38] As outlined by the Supreme Court of Canada, the criteria for solicitor-client privilege are that: (i) the communication is between a lawyer and their client; (ii) the communication is for the purpose of seeking or giving legal advice; and (iii) the parties to the communication have objectively intended the communication to be confidential.¹⁷
- [39] When a person summonsed by the Tribunal claims privilege in summonsed documents, they bear the evidentiary burden to substantiate their privilege claim.¹⁸ What evidence will discharge that burden depends on the circumstances of the particular case; it must allow the Tribunal to make a proper determination of the issue.
- [40] The Moving Parties submit there is evidence strongly indicating that Canopy likely claimed solicitor-client privilege over documents that are not in fact privileged. They point us to the following information in the Privilege Logs:
- a. many documents appear to be emails where neither the author nor recipient of the communication is a lawyer, and counsel is merely copied;
 - b. Canopy has not distinguished between communications where counsel is providing legal advice and non-legal communications made by Canopy's counsel in a non-legal role as corporate secretary; and

¹⁶ See *Cheng (Re)*, 2018 ONSEC 2; *Caldwell Investment Management Ltd (Re)*, 2018 ONSEC 50

¹⁷ *Solosjy v The Queen*, [1980] 1 SCR 821 at 837

¹⁸ *Hogan* at para 30

c. there appear to be emails where third parties are copied.

[41] While we have not reviewed the documents in the Privilege Logs, on their face, the Privilege Logs do include several documents which raise questions as to their privileged nature, based on their authorship and distribution. The questions are compounded by the fact that Weinstein, who acted as Canopy's external counsel, also served in an active non-legal role as its corporate secretary. Many of the documents are parts of email "chains" involving several recipients where counsel is only an occasional author in the chain. While nothing definitive can be taken from these observations, taken as a whole they raise enough of an issue to warrant our conclusion that a privilege review is appropriate in these circumstances.

[42] The process for conducting a privilege review may vary by proceeding, and the parties in this motion made submissions regarding the appropriate approach in these circumstances.

[43] As indicated above, this Tribunal has previously conducted privilege reviews. We accept Staff's suggestion that the use of a third-party reviewer or referee in this matter, while not required, will save Tribunal resources and assists the Tribunal's ongoing efforts for increased efficiency. Cormark and Kennedy do not oppose the use of a referee. We further accept Staff's proposal to bear the costs of the referee.

5. CONCLUSION

[44] We conclude that the information underlying the Privilege Logs meets the test for a summons as described in paragraph [22] and therefore we are prepared to issue a summons to Canopy for these documents. The Moving Parties are to prepare the summons for issuance by the panel and then serve the summons on Canopy.

[45] We are prepared to issue a summons to Canopy's Chief Legal Officer to appear at the first date of the merits hearing, and to produce in advance, within 30 days of the summons, the documents listed in the Privilege Logs to a third-party referee. The summons shall be substantially in the form attached as Schedule "A" to these Reasons. Should the Chief Legal Officer's attendance at the merits

hearing not be required, she will be advised in advance of the hearing by the Moving Parties.

- [46] The Moving Parties, and Staff, are to agree, within fourteen days of the date of these reasons, to a third-party referee to conduct the privilege review. If the Moving Parties and Staff are unable to come to an agreement, they should provide written submissions about their respective proposed third-party referees to the panel for the panel to make a final decision on the referee to conduct the privilege review.
- [47] Once appointed by the panel, the referee shall be provided a copy of this decision by the Moving Parties and shall be responsible for determining their process, after hearing submissions from the Moving Parties and Canopy, and the timeframe for assessing the privilege claims, with the completion to be no later than sixty days from the date of their appointment. As the referee is acting on behalf of the panel in this privilege review, any decision of the referee regarding process shall be binding on the Moving Parties and Canopy.
- [48] The referee shall provide a report to the panel, the parties and Canopy identifying whether there are any non-privileged documents or portions thereof contained in the Privilege Logs.
- [49] If upon review the privilege claims in respect of all or any part of any documents are confirmed by the referee, then those documents or portions thereof are inadmissible pursuant to s.15(2) of the SPPA. If the referee finds there are non-privileged documents or portions thereof contained in the Privilege Logs, then Canopy is ordered to produce the non-privileged documents or portions thereof, if any, to the parties within seven days of the referee's report.

Dated at Toronto this 29th day of November, 2023

"M. Cecilia Williams"

M. Cecilia Williams

"Geoffrey D. Creighton"

Geoffrey D. Creighton

"William J. Furlong"

William J. Furlong

SCHEDULE A

THE SECURITIES ACT, RSO 1990, c S.5

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

File No. 2022-24

**SUMMONS TO A WITNESS BEFORE
THE CAPITAL MARKETS TRIBUNAL**

TO: Christelle Gedeon, Chief Legal Officer
Canopy Growth Corporation
1 Hersey Drive
Smiths Falls, ON K7A 0A8

YOU ARE REQUIRED TO ATTEND TO GIVE EVIDENCE at the hearing of this proceeding on March 25, 2024 at 10:00 a.m., before the Capital Markets Tribunal, located at 20 Queen Street West, 17th Floor, Toronto, Ontario, and to remain until your attendance is no longer required.

YOU ARE REQUIRED TO BRING WITH YOU and produce, within 14 days of this summons being issued, the following documents and things:

1. all documents referred to in the Privilege Log produced by Canopy to Staff of the Ontario Securities Commission (the **OSC**) in response to summonses issued by the OSC to Canopy, dated April 22, 2021 and June 24, 2021; and
2. all documents referred to in the Privilege Log produced by Canopy to Staff of the OSC in response to a summons issued by the OSC to Canopy, dated November 1, 2021;

all as further identified in Appendix A to this Summons.

IF YOU FAIL TO ATTEND OR TO REMAIN IN ATTENDANCE AS THIS SUMMONS REQUIRES, THE SUPERIOR COURT OF JUSTICE MAY ORDER THAT A WARRANT FOR YOUR ARREST BE ISSUED, OR THAT YOU BE PUNISHED IN THE SAME WAY AS FOR CONTEMPT OF THAT COURT.

Date: _____

CAPITAL MARKETS TRIBUNAL

On behalf of the Capital Markets Tribunal

NOTE: You are entitled to be paid the same fees or allowances for attending at or otherwise participating in the hearing as are paid to a person summoned to attend before the Superior Court of Justice. **If you have questions, you should contact the party that requested that the Tribunal issue this Summons:**

David Di Paolo, lawyer for Cormark Securities Inc., Borden Ladner Gervais LLP, Bay Adelaide Centre, East Tower, 22 Adelaide Street West, Suite 3400, Toronto, ON M5H 4E3, ddipaolo@blg.com 416-367-6108

Melissa MacKewn, lawyer for William Jeffrey Kennedy, Crawley MacKewn Brush LLP, 170 John Street, Suite 800, Toronto, ON M5T 1X4, mmackewn@cmblaw.ca, 416-217-0840