Ontario

Capital Markets Tribunal | Tribunal 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)*, 2024 ONCMT 26
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File No. 2022-24

IN THE MATTER OF

CORMARK SECURITIES INC., WILLIAM JEFFREY KENNEDY, MARC JUDAH BISTRICER, AND SALINE INVESTMENTS LTD.

REASONS AND DECISION

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

Adjudicators: M. Cecilia Williams (chair of the panel)
Geoffrey D. Creighton
Jane Waechter

Hearing: In person, March 25, 26, April 11, 12, 15, 16, 30, May 1, 2, 3, 21, 22, 28, 29, June 13, 14, 2024; final written submissions received June 14, 2024

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Melissa MacKewn Dana Carson	For William Jeffrey Kennedy
Joseph Groia Kevin Richard Yona Gal	For Marc Judah Bistricer
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REASONS AND DECISION

1. OVERVIEW

[1] On March 17, 2017, Canopy Growth Corporation was added to the Toronto Stock Exchange's composite index (the **Index**). Prior to Canopy's inclusion in the Index, Cormark Securities Inc. (a registered investment dealer) approached Canopy about participating with a Cormark client in a series of transactions (the **Transactions**).

[2] The proposed structure would allow Canopy to raise capital by taking advantage of the anticipated increased demand for Canopy shares on March 17. Canopy agreed to participate, and the Transactions were carried out when Canopy was added to the Index.

[3] William Jeffrey Kennedy, Cormark's Head of Equity Capital Markets, developed the structure for the Transactions. The Transactions also involved Cormark's clients Marc Judah Bistricer and his company Saline Investments Ltd. Murray Goldman, a Canopy shareholder and a member of its board of directors, also participated in the Transactions.

[4] The Ontario Securities Commission alleges that:

a. the Transactions resulted in an illegal distribution of Canopy's shares;

b. Canopy was Cormark's and Kennedy's client, and Cormark and Kennedy failed to deal fairly, honestly and in good faith with Canopy;

c. in the alternative, if Canopy was not Cormark's and Kennedy's client, Cormark and Kennedy acted in a manner that engages the Tribunal's public interest jurisdiction;

d. all the respondents engaged in other conduct that engages the Tribunal's public interest jurisdiction; and

e. Kennedy and Bistricer are personally accountable for the failures by Cormark and Saline, respectively, to comply with Ontario securities law.

[5] We conclude that the Commission has failed to prove any of its allegations against any of the respondents.

2. BACKGROUND

[6] Cormark was registered with the Commission as an investment dealer and by 2017 was a leading independent investment dealer. Cormark's services included trading, investment banking, and equity capital markets, an investment banking sub-service that focused on structuring capital markets transactions.

[7] Kennedy was a shareholder, director and officer of Cormark, and held the title of Managing Director – Head of Equity Capital Markets and Operations. He was registered with the Commission as a dealing representative so that he could occasionally assist retail clients (typically employees, directors or officers of institutional clients) who were interested in participating in a transaction Cormark was managing for an institutional client. By 2017, Kennedy had decades of experience structuring capital-raising transactions.

[8] Bistricer was the Chief Executive Officer of Murchinson Ltd., an Ontario portfolio manager. Bistricer was registered with the Commission as Murchinson's ultimate designated person. Bistricer was the sole shareholder, director and officer of Saline, his holding company. Bistricer, Murchinson and Saline had been clients of Cormark since 2015.

[9] Canopy was an Ontario cannabis company. It was a reporting issuer in Ontario and graduated from the TSX Venture Exchange to the Toronto Stock Exchange in 2016. In early February 2017, analysts began predicting that Canopy would join the Index on March 17, 2017.

3. READ-INS FROM COMPELLED INVESTIGATIVE INTERVIEWS

[10] Before turning to the substantive issues, we give reasons for rulings we made during the merits hearing about read-ins from transcripts of the Commission's compelled investigative interviews.

3.1 The respondents were not permitted to file excerpts from the Goldman transcript

[11] The respondents advised that they planned to file excerpts from the transcripts of the Commission's compelled investigative interview of Goldman. The Commission objected and the parties filed written submissions. During the

hearing, we decided not to permit those transcript excerpts to be admitted into evidence.

[12] As a threshold matter, the Tribunal may admit relevant hearsay evidence under s. 15 of the *Statutory Powers Procedure Act*.[1]

[13] Goldman was directly involved in the securities loan agreement which was one element of the transactions in issue, and his evidence would meet the relevance test for this hearing. However, neither the Commission nor the respondents called Goldman for oral testimony.

[14] We exercised our discretion not to admit excerpts from the Goldman transcript because we did not receive a satisfactory explanation why Goldman could not give evidence directly. The respondents stressed his advanced age but provided no evidence whatsoever that his age caused a barrier to his testifying. Absent compelling reasons, we should not exercise our discretion to admit hearsay evidence when better evidence is available. Here, the respondents did not demonstrate any compelling reasons.

[15] Also, the Commission told us that Goldman's transcript evidence was expected to contradict, at least in some respects, the testimony of both Kennedy and Bruce Linton, the founder, Chairman and Chief Executive Officer of Canopy. If so, Goldman's evidence should be tested by cross-examination unless there is a compelling reason why he was unable to testify orally, either in person or virtually. In the circumstances of this case, a fair hearing required the ability to challenge the truth of such controverted evidence by cross-examination and we declined to admit excerpts of Goldman's compelled interview transcripts.

3.2 Bistricer and Saline were not permitted to expand the excerpts from the Bistricer transcript the Commission asked to file

[16] Prior to the Commission closing its case, Bistricer and Saline elected not to testify. The Commission asked to file excerpts from Bistricer's compelled interview transcript as part of its case against those two respondents. Bistricer and Saline did not object to the proposed excerpts. However, they asked to read

[1] RSO 1990, c S.22

in additional excerpts to explain, qualify or put into context the Commission's proposed read-ins. Neither Cormark nor Kennedy took a position on the read-ins because the Commission had stipulated that the read-ins would not be used in the Commission's case against them.

[17] We did not permit the additional excerpts to be read into evidence. We concluded that no further explanation or qualification was required for the read-ins the Commission asked to introduce.

[18] Saline and Bistricer submitted that the Tribunal's decision in *Kitmitto (Re)*[2] provided the applicable guiding principles for our decision. In *Kitmitto,* the Tribunal rejected the request from two of the respondents that their entire transcripts be included in evidence. However, the Tribunal recognized that other excerpts, in addition to those proposed by the Commission, could be included in evidence.

[19] The two respondents in *Kitmitto* submitted that without their entire transcripts in the record, there was a risk the record would be incomplete or that there could be an unfair outcome. The Tribunal concluded that those risks were "appropriately addressed through the adverse party's ability to identify other excerpts that explain or qualify those excerpts put forward by" the Commission.[3] The Tribunal stated that had either of the respondents been concerned "about insufficient inclusion of explanatory or qualifying excerpts" they could have raised those concerns with the panel.[4]

[20] Saline and Bistricer submitted that the eight extracts they asked to include all explained, qualified or put into context the read-ins the Commission proposed to rely on.

[21] The Tribunal in *Kitmitto* adopted a test from Rule 31.11(3) of the *Rules of Civil Procedure.*[5] In civil litigation in Ontario, once the pleadings are closed, every party has the right to conduct an examination for discovery of any adverse

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[2] 2022 ONCMT 12 (***Kitmitto***)
[3] *Kitmitto* at para 60
[4] *Kitmitto* at para 60
[5] RRO 1990, Reg 194

party. At any subsequent trial, a party who has conducted an examination for discovery may read into evidence any part of that examination. Rule 31.11(3) provides that where only part of the evidence from an examination for discovery is used in evidence, the trial judge may "direct the introduction of any other part of the evidence that qualifies or explains the part first introduced."

[22] The right of adverse parties to require additional read-ins is limited. It does not shift control of the content to the adverse party, the additional read-ins should not mislead the trier of fact, and it is not an opportunity for the adverse party to introduce evidence favourable to its case that should have been presented through a witness.[6]

[23] Where an answer read in is clear and complete, "separate and distinct questions and answers should not be read in under the pretext of providing context."[7]

[24] The issue for us to determine, according to the Commission, was whether the questions and answers it wanted to read in misrepresented the question and how Bistricer answered the question. The Commission submitted that the questions asked, and the answers given, in their proposed read-ins were clear and complete. They required no explanation or qualification.

[25] The read-ins Saline and Bistricer asked to introduce, purportedly to provide context, risked opening the door to requiring the Commission to introduce as part of its case evidence that it would not otherwise adduce. The Commission submitted that it should not be required to introduce evidence to establish Bistricer's case. Nor should the Commission be required to introduce as part of its case evidence that it does not consider credible or accurate. Doing so would put the Commission in the position of having to challenge its own evidence and explain why the panel should not rely on it.

[26] Saline and Bistricer submitted that the Commission had accurately described the law in civil proceedings and the civil cases that had been provided by the Commission to the Tribunal in *Kitmitto*. However, there is no decision by this

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[6] *Andersen v. St. Jude Medical Inc.,* 2010 ONSC 1824 (***Andersen***) at para 15

[7] *Andersen* at para 20

Tribunal or any other securities tribunal that has adopted the approach used in civil litigation.

[27] The standard they asked be applied was as stated in *Kitmitto,* the read-in of additional excerpts that explain or qualify those proposed by the Commission.[8] In addition, in *Kitmitto*, the Tribunal went on to state that including the entire transcripts as requested by the two respondents "would go beyond providing context and clarification to the statements relied on by" the Commission.[9]

[28] The additional read-ins they requested, Saline and Bistricer submitted, are about providing context and qualifying answers given. This context and qualification are to ensure fairness for the respondents: to ensure the panel has an accurate understanding of their evidence on the issues relied on by the Commission, and to ensure that incomplete answers are not taken out of context.

[29] We agreed with the reasoning in *Kitmitto*. A respondent may introduce additional excerpts that explain or qualify those the Commission is asking to include in its evidence. By deciding not to admit the respondents' entire transcripts, the *Kitmitto* panel applied the civil standard. Admitting the entire transcripts would go "beyond providing context and clarification". We read "context" narrowly, consistent with the standard the Tribunal indicated it adopted; *i.e.*, to explain or qualify. Asking for further read-ins to provide context in a broad sense might require a party to adduce evidence it would not otherwise introduce or that it found unreliable or inaccurate. It could extend to requiring a party to present the adverse party's position or be such that the read-ins provide a means for that adverse party to avoid presenting evidence directly.

[30] We reviewed the eight additional read-ins that Saline and Bistricer proposed to include. In each instance we found that the question and answer the Commission asked to introduce was clear and complete and no further explanation or qualification was required. Since the questions and answers were clear and complete, we did not allow additional read-ins to provide explanation or

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[8] *Kitmitto* at para 60

[9] *Kitmitto* at para 61

qualification because each proposed addition involved one or more of the following characteristics:

a. different questions relating to the same issue or a related issue;

b. follow-ups to clearly asked and answered questions where the substance of the original answer did not change; or

c. questions about one fact from an earlier answer that launched another line of questions.

4. ISSUES AND ANALYSIS

4.1 Introduction

[31] The issues we must decide are:

a. Did the respondents engage in an illegal distribution?

b. Was Canopy a client of Cormark's or Kennedy's?

c. If so, did Cormark and Kennedy fail to deal honestly, fairly and in good faith with Canopy?

d. In the alternative, if Canopy was not Cormark's or Kennedy's client, does Cormark's and Kennedy's alleged misconduct engage our public interest jurisdiction?

e. Did the respondents otherwise conduct themselves in a way that engages the Tribunal's public interest jurisdiction by undermining the protection provided by hold periods, avoiding disclosure, threatening capital market efficiency, or failing to meet the high standards expected of market participants?

f. If Cormark failed to comply with Ontario securities law, did Kennedy authorize, permit or acquiesce in that non-compliance?

g. If Saline failed to comply with Ontario securities law, did Bistricer authorize, permit or acquiesce in that non-compliance?

4.2 The respondents did not engage in an illegal distribution

[32] The Commission alleges that the Transactions constituted an indirect offering of securities to the public, made without the benefit of a prospectus or an exemption from the prospectus requirement. This allegation is based on the Commission's submission that the series of transactions fall within the "extended" definition of a "distribution".

[33] We disagree and conclude that the "extended" definition of distribution does not apply in this case.

[34] We first describe the Transactions before turning to our analysis of the definition.

4.2.1 The Transactions

[35] The parties agree that the Transactions took place on March 17, 2017, the day that Canopy was added to the Index. They disagree about the characterization of certain components of the Transactions and about whether the Transactions, considered together, constituted an illegal distribution.

[36] The Transactions were:

a. Canopy sold 2.5 million common shares to Saline in a private placement, subject to a four-month hold period (the **Restricted Shares**);

b. Saline borrowed 2.5 million freely-trading Canopy common shares (the **Free-Trading Shares**) from Goldman Holdings under a securities loan agreement;

c. Saline provided the Restricted Shares to Goldman Holdings as collateral for the loan of the Free-Trading Shares; and

d. Saline sold short 2.5 million Canopy common shares on the Toronto Stock Exchange through a series of sales on the open market and in the exchange's market-on-close facility, using the Free-Trading Shares to settle the short sales.

[37] The Restricted Shares carried a legend indicating that they were subject to a four-month hold period. The Restricted Shares remained in Goldman Holdings' account at Cormark until the end of the hold period when the legend was

removed. The Restricted Shares were ultimately retained by Goldman Holdings in satisfaction of Saline's obligations under the securities loan agreement.

4.2.2 "Extended" definition of "distribution"

4.2.2.a Introduction

[38] The *Securities Act*[10] (the ***Act***) requires that a person or company that wishes to distribute a security must file a prospectus unless an exemption applies.[11] The prospectus requirement is triggered by a "distribution". The definition of "distribution" in s. 1(1) of the *Act* includes two components. The first component is a list of six specific types of trades, part (a) of which is "a trade in securities that have not been previously issued." The second component, often referred to as the "extended" definition, includes "any transaction or series of transactions involving a purchase and sale or a repurchase and resale in the course of or incidental to a distribution".

[39] The Commission submits that the Transactions amounted to a single distribution by virtue of the extended definition of distribution, because:

a. the private placement to Saline of the Restricted Shares was a trade in securities that had not been previously issued, and was therefore a "distribution" under part (a) of the definition; and

b. the securities loan agreement between Goldman Holdings and Saline, and Saline's short sales of Canopy shares, were part of a series of transactions involving purchases and sales during or incidental to that distribution.

[40] We conclude, for the reasons below, that the extended definition of distribution does not apply in these circumstances. Fundamentally, that is because we do not accept the premise, at the heart of the Commission's submissions, that the Transactions effectively converted the Restricted Shares issued under the private placement into the Free-Trading Shares borrowed under the securities loan agreement. That premise is ill-conceived because it is inconsistent with the facts

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[10] RSO 1990, c S.5

[11] *Act*, s 53(1)

and contrary to the working of the closed system of Ontario's securities law, which is described below.

[41] The Commission submits that the legal analysis is fact-sensitive, taking into consideration the respondents' understanding of the Transactions, including their purpose and effects; the factors listed in Companion Policy 41-101CP *General Prospectus Requirements*; and the anti-avoidance functions of the extended definition. The Commission also asks that we take a purposive approach to this analysis, by considering whether a prospectus is required to protect the investing public.

4.2.2.b The respondents' understanding of the Transactions

[42] The Commission submits that the respondents understood that the securities loan and the short sales were "in the course of or incidental to" the private placement because:

a. Cormark and Kennedy told Canopy, in an email summarizing the Transactions, that "The resulting buyers (new shareholders) of this private placement are index funds, but the trade is facilitated by an intermediate institutional buyer of the private placement who arranges to borrow the stock in order to deliver the index funds "free trading" shares."

b. Bistricer sought and obtained compliance clearance for the Transactions together. He sought approval for "Purchase of WEED CN 4 month hold paper. Short sale of ordinary shares, borrowed by agreement. Done in Saline Investment account at Cormark". The approval Bistricer obtained linked the Transactions by virtue of approving the purchase of 2.5 million shares and a 9% discount on the purchase price. The link, the Commission submits, is that the discount to the closing price was achieved by Saline using the Free-Trading Shares to settle the short sales, the bulk of which were settled at the closing price.

[43] The respondents counter that their subjective intent or "understanding" is not relevant to determining whether there is a distribution. The legislature specifically implemented hold periods, as part of the closed system, to establish objective criteria that replace any inquiry into a purchaser's understanding.

[44] We agree with the respondents. The term "distribution" plays a fundamental role in Ontario securities law. The common theme to the wide range of activities captured by the definition of distribution is an attempt "to capture that moment of initial distribution when a security first becomes available to the public, thereby triggering the disclosure obligations designed to protect investors".[12]

[45] The general concept of a distribution of securities was first introduced in *The Securities Act, 1945*, which incorporated the defined term "primary distribution to the public".[13] Confusion about who constituted a member of "the public" and, therefore, when a prospectus was required[14] led to two important amendments to Ontario securities law in 1978. The phrase "to the public" was removed, with the amended statute using the simple term "distribution", and the "closed system" was introduced.

[46] The prospectus requirement is subject to exemptions and there are resale restrictions on the first trades of prospectus-exempt securities. Securities issued pursuant to an exemption from the prospectus requirement are issued and exist within the "closed system". They "are restricted from entering the secondary market", and thus restricted from getting into the hands of the general investing public.[15] Securities inside the closed system may only be traded pursuant to a prospectus or if applicable resale restrictions are satisfied. Hold periods are a form of resale restriction.

[47] The respondents submit that two important facts make it clear that the Restricted Shares were entirely different shares from, and not interchangeable with, the Free-Trading Shares:

a. the Restricted Shares bore the required resale restriction legend,[16] and

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[12] David Johnston, Kathleen Rockwell and Cristie Ford, *Canadian Securities Regulation*, 5th ed. (Toronto: Lexis/Nexis Canada, 2014) at 5.7

[13] Five Year Review Committee, *Final Report – Reviewing the Securities Act (Ontario)* (Toronto: Queen's Printer, 2003) at s 1, p. 22. The phrase "primary distribution to the public" is defined in the *Securities Act, 1945,* SO 1945, c 22 at s 1(j)

[14] Five Year Review – Final Report at s 12.1, p 134

[15] Five Year Review – Final Report at s 12.1, p 134

[16] National Instrument 45-102 – *Resale of Securities*

b. the Restricted Shares had a different CUSIP number than the Free-Trading Shares (CUSIP numbers being unique identifiers assigned to securities to facilitate their clearance and settlement).

[48] We agree that the Restricted Shares remained within the closed system until the end of the four-month hold period. Saline used the Free-Trading Shares to settle its short sales. The two were distinct sets of securities. The fact that the parties may have understood that the Transactions were designed to work together does not change the reality that the Transactions involved two separate sets of securities.

4.2.2.c Companion Policy 41-101CP *General Prospectus Requirements*

[49] The Commission also submits that the position that the Transactions were one distribution is supported by Companion Policy 41-101CP. While 41-101CP is not part of Ontario securities law, and therefore is not binding on the Tribunal, it sets out a list of considerations relevant to the analysis of whether a distribution under a prospectus is only one transaction in a series of transactions in the course of, or incidental to, the ultimate distribution. Those considerations, and the Commission's submissions about their application in this instance, are:

a. *The number of persons or companies who are likely to purchase securities in each transaction*. Saline buying and then reselling to a larger number of purchasers was akin to an underwriter in a "traditional" public offering rather than an issuer in a "traditional" private placement.

b. *Whether the purchaser's traditional business is that of financing as opposed to investing*. Saline and Bistricer were both in the business of investing, but neither was in the business of investing in Canopy.

c. *Whether a purchaser is likely to acquire more of a specified class of securities of the issuer than it is legally entitled to or practically wishes to, hold*. Saline bought more shares than it wished to hold because it sold the same number of shares short on the market before it acquired the private placement shares.

d. *The type of security distributed and whether the security is convertible into publicly traded securities of the issuer*. The respondents effectively converted the Restricted Shares into Free-Trading Shares.

e. *Whether the purchase price of the securities is set at a substantial discount to their market price*. The discount on the private placement was 9% while the discounts to the closing price on Canopy's previous four bought deals were 6.6%, 11.6%, 8.5% and 4.7% (disregarding, we note, the substantial underwriting fee in each of those prior transactions).

f. *Whether the purchaser is committed to hold the securities it acquires for any specified time period.* Saline demonstrated that it was not committed to holding Canopy's shares for any specified period.

[50] The respondents submit that the scenario contemplated by 41-101CP is one where an "offering" of securities is made to the purchaser, and the purchaser "immediately resell[s]" those securities in the secondary market. 41-101CP is not engaged in this instance because there was no resale of the Restricted Shares in the secondary market.

[51] We are not persuaded by the Commission's submissions, as they would require us to accept that Saline converted the Restricted Shares into Free-Trading Shares. We reject that position. Saline acquired the Restricted Shares and was committed to holding them for four months. There is no impediment to providing shares subject to a trading restriction as collateral for a loan, which Saline did, and those shares remained within the closed system.

[52] We also find that Saline was not acting akin to an underwriter and distributing shares to the public when it sold short the Free-Trading Shares. The Free-Trading Shares were previously issued and outstanding and sold in the secondary market through the Toronto Stock Exchange. In addition, 41-101CP does not state that a purchaser must be in the business of investing in a specific security and the evidence supports the conclusion that Saline and Bistricer engaged in investing generally.

4.2.2.d Anti-avoidance guidance

[53] The Commission directs us to the guidance in Companion Policy 45-106CP *Prospectus Exemptions* and Companion Policy 45-501CP *Ontario Prospectus and Registration Exemptions*, submitting that the guidance makes clear that the extended definition applies to persons and companies acting as underwriters in a distribution. The guidance explains, in s. 1.7 of 45-106CP and s. 3.5 of 45-501CP, that underwriters should not sell securities to the public without providing a prospectus.

[54] The respondents submit that the policy concern addressed in the guidance is the underwriter's ability to resell securities purchased under an exemption to the prospectus requirement in the secondary market without a prospectus. The Commission concedes that the guidance is focused on a situation where an underwriter purchases newly issued securities and then resells those same securities to investors. However, the Commission submits that the anti-avoidance principles in the guidance would apply equally to an underwriter who purchases newly issued securities and resells identical borrowed securities to investors.

[55] The anti-avoidance language in the guidance states that "[i]f a dealer purchases securities through a series of exempt transactions in order to avoid the obligation to deliver a prospectus, the transactions will be viewed as a whole to determine if they constitute a distribution."

[56] We adopt the guidance that underwriters should not sell securities to the public without providing a prospectus but conclude it does not apply in this case because we do not accept that:

a. Saline was acting as an underwriter;

b. the Free-Trading Shares and the Restricted Shares were identical securities; or

c. the Transactions were structured to avoid delivering a prospectus for the distribution of newly issued shares to the public.

[57] Saline purchased shares from Canopy under a prospectus exemption. These shares were subject to a hold period. They were provided as collateral for the securities loan and were not resold to the public. Investors buying Canopy shares through Saline's short sales on the market did not require the protections of a prospectus. They bought free-trading shares that had been issued earlier. Those shares were not, as the Commission submits, "identical" to the shares issued under the private placement. While both the private placement and the short sales involved Canopy common shares, the first transaction was in Restricted Shares and the latter involved Free-Trading Shares. In addition, the mandatory four-month hold period for newly issued treasury shares is designed to ensure that Canopy would make its next quarterly continuous disclosure before the restricted shares became freely tradeable and entered the secondary market.

4.2.2.e Commission's other submissions in support of the extended definition applying in this case

[58] The Commission submits that application of the extended definition to the Transactions is also supported by Crystallex International Corp (Re).[17] We disagree.

[59] In *Crystallex*, the Tribunal found the following series of transactions to be a distribution: Crystallex issued repayment rights to a third-party lender to Crystallex; the lender exercised the repayment rights and received common shares from Crystallex as a result; and then the lender resold those common shares to the public. The Commission submits this is analogous to the Restricted Shares being exchanged for the Free-Trading Shares under the securities loan. We do not accept this view.

[60] In *Crystallex*, the repayment rights that were issued were exercised for the common shares. The repayment rights disappeared once exercised. The situation before us is completely different. The Restricted Shares were not replaced by the Free-Trading Shares. Both continued to exist; the Restricted Shares in Goldman

[17] (1999), 22 OSCB 2595 (***Crystallex***)

Holdings' account at Cormark and the Free-Trading Shares passing to purchasers of the short sales.

[61] The Commission also cited a US Court of Appeals case[18] relating to a "swap scheme" involving the sale of free-trading shares by a party who had replaced those shares with restricted shares. No such swap occurred in the case before us. Further, while the prospectus regimes in the US and Ontario share some features, there are also important differences, and we must be cautious about applying US principles.[19] The Commission did not provide us with any analysis of the similarities or discrepancies between the concept of "distribution" under Ontario securities law and "offer of sale" under US securities law. Therefore, we do not rely on the US case.

4.2.2.f Other available exemptions or analogous regulatory frameworks

[62] The Commission put to Kennedy that he could have achieved the same outcome for Canopy by structuring either an "equity line" or "at-the-market" offering and then seeking exemptive relief. The Commission asserted that there are previous exemptive relief decisions relating to both types of offerings that would have permitted the distribution of Canopy's treasury shares to secondary market purchasers through the facilities of the Toronto Stock Exchange. Kennedy said that he was not familiar with "equity line" offerings. He also stated that an "at-the-market" offering would not have been viable for an index rebalancing offering because it was his understanding that the exemptive relief decisions typically included a cap of 25% of the daily trading volume, and the total number of shares which would be traded during the Index inclusion day would not be known. Kennedy did not approach the Commission to discuss obtaining exemptive relief without the cap in the circumstance of an index rebalancing.

[63] We give no weight to the fact that Kennedy did not consider, or discuss with the Commission, other available types of exemptive relief. We accept his evidence about his lack of awareness of the one and his understanding of the limits of the other. Moreover, we accept his evidence that, in structuring the Transactions, he

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[18] *Zacharias v SEC* 569 F.3d 458

[19] *Tiffin* 2020 ONCA 217

considered issues of regulatory compliance and, if the transaction as proposed did not work, he would have tried to figure out something else or walked away.

[64] The Commission also raised the regulatory framework whereby underwriters may over-allocate up to 15% of a distribution, which allows underwriters to hold a short position in the securities following closing. This in turn allows underwriters to engage in market stabilization to compensate for increased liquidity in the market following the distribution. The underwriter may deliver to purchasers either newly issued shares or shares purchased in the market through the over-allocation. Regardless of the origin of the shares a purchaser receives, they are entitled to the protections of the prospectus for the offering. The Commission asserts that short sales made by underwriters to create an over-allocation position in connection with a prospectus offering "are caught by the extended definition of "distribution"".

[65] The respondents submit that there is no authority to support the Commission's submission that the extended definition applies to short sales conducted as part of an over-allocation. In fact, such short sales are subject to a prospectus requirement because of a specific provision of Ontario securities law, s.11.1 of NI41-101 *General Prospectus Requirements*.

[66] The existence of a specific regulatory regime to provide prospectus protection to shares other than those issued from treasury is, in our view, irrelevant and does not support the Commission's argument that the extended definition of distribution should apply in the unique circumstances before us.

4.2.3 Conclusion

[67] The 2.5 million Restricted Shares issued by Canopy to Saline in the private placement were shares that had not been previously issued. The private placement by Canopy was a distribution under part (a) of the definition. Those shares were subject to a four-month hold period. They bore a legend reflecting that they were restricted from trading.

[68] The Restricted Shares were posted as collateral for the securities loan. A pledge of shares as collateral for a loan is excluded from the definition of 'trade" in s. 1(1) of the *Act*. The Restricted Shares stayed within the closed system until the

hold period ended. There were no further transactions involving the Restricted Shares. In the circumstances of this case, we do not consider it appropriate to extend the definition of distribution to include transactions involving different shares.

[69] We therefore conclude that there were no sales or resales that were "in the course of or incidental" to the distribution of the Restricted Shares by way of private placement. In addition, we conclude Saline was not an underwriter. Saline sold (short) Free-Trading Shares to the public. Those sales were not a distribution because they did not involve newly issued treasury shares.

4.3 Did Cormark and Kennedy fail to deal fairly, honestly and in good faith with Canopy as a client?

4.3.1 Introduction

[70] Registered dealers and advisers, and representatives of registered dealers and advisers, have an obligation under s. 2.1 of OSC Rule 31-505 *Conditions of Registration* to deal fairly, honestly and in good faith with their clients. Cormark is registered as an investment dealer in Ontario. Kennedy was employed by Cormark and acted as a representative of Cormark in his dealings with that firm's clients.

[71] The Commission submits that Cormark and Kennedy misled Canopy about the full scope of the Transactions, concealing the short selling, including sales through the market-on-close facility, and the effect the short sales could have on Canopy's net proceeds.

[72] To determine whether there was a breach of Rule 31-505, we must first determine if Canopy was a client of Cormark and Kennedy. For the reasons below, we conclude that Canopy was not their client.

4.3.2 Applicable law

[73] The *Act* provides that without an exemption, no person or company may "engage in or hold himself, herself or itself out as engaging in the business of trading in

securities" unless the person or company is registered.[20] The Commission relies on what it describes as the Tribunal's fact-sensitive, multi-factor approach to determining whether there is a client relationship. In particular, the Commission directs us to *Marek (Re).*[21] The Commission submits that many of the Tribunal's comments in that case apply here, even though *Marek* involved an advisor-investor relationship.

[74] We are not persuaded that the advisor-investor relationship in *Marek* is analogous to the investment banking-issuer relationship between Cormark, Kennedy and Canopy. However, *Marek* does provide some helpful guidance. The determination of whether a client relationship exists is highly contextual, depends on the relevant circumstances and is guided by the purposes of the Act.[22] In *Marek*, the Tribunal considered a non-exhaustive list of helpful indicia of a client relationship. Those indicia include conducting registrable activities, receipt of a benefit, formal documentation, and the parties' beliefs. None of the factors is definitive, but their presence may assist us in determining if a client relationship exists. We now look at each of the factors in turn.

4.3.3 Registrable activities

[75] Christopher Shaw was a Managing Director in Cormark's investment banking department in March 2017. Shaw approached Linton on March 6, 2017, to see if Canopy would be interested in participating in the Transactions. This would be Canopy's first private placement transaction.

[76] Kennedy explained the proposed Transactions to Linton in a telephone conversation on March 7, 2017. Shaw provided a summary of the structure in an email which Timothy Saunders, Canopy's Executive Vice President and Chief Financial Officer, used as the basis for a memo to the Canopy board. Kennedy had conversations and email exchanges with Deborah Weinstein, a partner in the law firm LaBarge Weinstein LPP, who acted as Canopy's external counsel and Corporate Secretary.

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[20] *Act*, s 25
[21] 2017 ONSEC 41 (***Marek***)
[22] *Marek* at paras 5, 30 and 31

[77] Cormark was only able to identify a portion of the shares needed for the loan portion of the Transactions through its back office. Shaw, therefore, asked Linton if he knew any large shareholders who might be interested in loaning their shares. Linton identified Goldman as a potential lender, contacted Goldman to gauge his interest, and then introduced Goldman to Kennedy. Kennedy met with Goldman to discuss the proposed structure. When Goldman agreed to participate, Kennedy met with him to sign the securities loan agreement and account documentation for Goldman Holdings.

[78] Cormark provided the draft Share Subscription Agreement for the private placement to Canopy and provided comments on the agreement from Saline's perspective. Cormark's client, Bistricer, agreed to buy the private placement shares and later identified one of his companies, Saline, to be the purchaser.

[79] The Commission submits that Cormark's and Kennedy's actions described above made Canopy their client because Canopy was vulnerable to Cormark and Kennedy and because Cormark and Kennedy were engaging in activities requiring registration.

[80] Since this was Canopy's first private placement, the Commission submits Canopy was at an informational disadvantage to Cormark and Kennedy, who were experienced investment bankers. That disadvantage made Canopy vulnerable to Cormark and Kennedy and, the Commission submits, Canopy relied on Cormark and Kennedy.

[81] We do not agree that Canopy was vulnerable to Cormark and Kennedy or relied on them, for the following reasons:

a. Canopy, Linton and Saunders were experienced in raising capital. Linton had extensive experience as an entrepreneur in different sectors and had been involved in a range of securities offerings (for example, private placements, non-brokered deals, and bought deals). Saunders had worked at public and private companies. By March 2017, he had been involved with Canopy's four bought deal offerings.

b. Canopy's lawyer, Weinstein, was an experienced securities counsel. Both Linton and Saunders testified that they relied on her advice regarding the

Transactions. Weinstein reviewed copies of the Share Subscription Agreement and Share Loan Agreement. She also had numerous contacts with Kennedy about the Transactions and their constituent parts.

c. Kennedy testified that he explained the Transactions to Linton, Goldman and Weinstein and believed that they understood the Transactions. We accept his testimony, as there was no evidence to the contrary from either Goldman or Weinstein, and Linton's testimony showed that his attention was focused on the details of the Share Subscription Agreement impacting Canopy.

d. Canopy had an experienced board. Linton, Saunders, Weinstein and Goldman all participated in the board meeting where the Transactions were approved (although Goldman did not vote because of his declared conflict).

[82] The Commission further submits that Cormark and Kennedy engaged in the business of trading securities each time they traded in securities and that Cormark's and Kennedy's dealings with Canopy were acts in furtherance of trades in securities. Since the Transactions benefitted Canopy, those trading activities must also have been for Canopy's benefit.

[83] To the extent that Cormark and Kennedy were carrying out registrable activities in relation to the Transactions, we find that they were doing so on behalf of Cormark's clients, Saline and Goldman. Canopy had its own lawyers to advise and support it. That support was primarily directed toward the only part of the Transactions that Canopy was party to – the Share Subscription Agreement. The balance of Cormark and Kennedy's registrable activity was directed toward Saline's and Goldman's parts of the Transactions. Canopy did benefit from the Transactions, but so did Cormark's clients Saline and Goldman. Linton and Saunders both clearly testified that Canopy did not need the capital at the time and that Canopy would only participate on terms that were acceptable to Canopy. The fact that Canopy benefited from Cormark's and Kennedy's activities is not sufficient for us to conclude, as the Commission asks us to, that there is a strong presumption of a client relationship.

4.3.4 Receipt of a benefit

[84] The Commission submits that the benefits Cormark and Kennedy received from Canopy are persuasive evidence of a client relationship. We do not agree. The alleged benefits are indirect, hypothetical and/or insignificant.

[85] The alleged benefits the Commission submits Canopy conveyed are:

a. by agreeing to the private placement, Canopy enabled Cormark to assist an important client, Bistricer/Saline, to make a substantial, virtually risk-free profit;

b. Canopy introduced Goldman to Kennedy and Kennedy hoped to secure future business from Goldman, and some months later did propose another transaction to Goldman;

c. Cormark hoped to be engaged by Canopy at a senior level going forward;

d. Canopy indirectly paid Cormark's fees through the 9% discount from the market closing price on the private placement purchase price; and

e. Kennedy, as a shareholder of Cormark who received compensation based on firm profitability, would benefit from possible future business.

[86] Bistricer was an established client of Cormark at the time of the Transactions. The fact that Saline made a profit is irrelevant. It is not unreasonable for market participants to have an expectation of profit. It is not surprising or indicative of a client relationship that Cormark and Kennedy would hope that contacts with Canopy, an issuer at a significant point in its growth, or Goldman, an established market participant, may result in future business. At the time of the Transactions, any future business was hypothetical at best. Canopy did not pay Cormark. Saline paid Cormark commissions for the trades. The trading commission Cormark received from Saline, $362,500, was minimal in the context of the Transactions. Kennedy's potential to share in revenue from any trading or future business was yet to be determined by Cormark's compensation committee based on Cormark's profitability.

4.3.5 Formal documentation

[87] The Commission submits that a registrant ought not to be able to avoid their obligations by avoiding formally documenting the relationship.[23] This, the Commission submits, is what Cormark and Kennedy did. Kennedy designed the Transactions to be "non-brokered" (i.e. without an underwriting or agency agreement"). Canopy asked three times about an agreement. Cormark did not provide one.

[88] While the existence or lack of documentation is not determinative of the existence of a client relationship, in this instance we find the lack of an agreement is consistent with Cormark's and Kennedy's understanding that Canopy was not their client.

[89] Kennedy and Shaw both stated that Cormark's practice was to sign either an agency or an underwriting agreement with clients. Cormark was not acting as an agent or an underwriter for Canopy with respect to the Transactions. Kennedy stated that entering into an agency agreement would have changed the economics of the private placement, because agency connotes a different relationship with associated obligations and fees.

[90] Saunders asked Shaw about an engagement agreement. Shaw does not appear to have responded. Weinstein asked Kennedy about an agency or underwriting agreement and Kennedy advised her there would not be an agreement. This is consistent with Kennedy's understanding that Canopy was not engaging Cormark as an agent or underwriter. Weinstein also asked for a representation letter from Cormark for comfort about Cormark's "know your client" obligations regarding the purchaser of the private placement. Kennedy indicated the private placement purchaser (Bistricer, at that stage) was an existing client and that the Share Subscription Agreement would have an accredited investor certificate, which it did.

[91] Weinstein was an experienced securities counsel. Linton and Saunders both stated that they relied on her. Linton also stated that it would be "impossible" to

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[23] *Marek* at para 51

put any restrictions on Weinstein's ability to ask any questions. We conclude that it is more likely than not that had Canopy thought an agreement with Cormark was necessary to reflect its relationship with Cormark and/or to protect its interests, there would be evidence of Linton, Saunders or Weinstein requiring an agreement with Cormark before completing the private placement. There was no such evidence.

[92] The Commission also submits that Cormark and Kennedy deliberately structured the Transactions so there would be no written agreement between Cormark and Canopy. This allegation was not made in the Statement of Allegations. We therefore do not consider this submission.

4.3.6 The parties' beliefs

[93] The Commission submits that while it is not determinative of the existence of a client relationship, some weight ought to be given to the parties' beliefs about the nature of the relationship. The relevant evidence the Commission submits demonstrates that Canopy was Cormark's client, includes:

a. Linton thought Cormark was advising and directing Canopy;

b. Kennedy and Shaw stated in their compelled interviews that Canopy was Cormark's client;

c. Saunders "trusted that this transaction would work the way that Cormark said it would";

d. Linton observed that Canopy had no experience with entering the Index or transactions related to entering the Index and Canopy relied on Cormark to do the transaction and get them the benefit from index funds and "indexers" (traders who attempt to track an index's performance) buying;

e. Kennedy agreed that market participants who deal with Cormark would rely on Cormark's expertise. Kennedy was the one with experience with taking advantage of the increased volume on a company's addition to the Index and he understood that Canopy lacked that knowledge, and Kennedy was adding value by sharing his knowledge with Canopy; and

f. no one at Canopy would have any knowledge of how Saline was trading Canopy shares on March 17; only Cormark had that knowledge.

[94] The respondents submit that Canopy understood it was not Cormark's client. In an email dated March 21, 2017 (four days after the Transactions occurred), Weinstein stated that "Canopy did not retain Cormark, nor is Canopy directly paying their fees". Canopy's counsel at Bennett Jones also confirmed that Canopy was not Cormark's client in a response to a question during the Commission's investigation. They stated: "Cormark acted as the broker for Saline in the transaction. Canopy did not engage, nor pay Cormark's broker fees; these fees were paid by Saline."

[95] In addition:

a. no one at Cormark told anyone at Canopy that Canopy was their client;

b. no one at Canopy told anyone at Cormark that Canopy thought it was Cormark's client;

c. while Linton and Saunders had stated in their compelled interviews that they thought Canopy was Cormark's client, they admitted on cross-examination that Canopy was not Cormark's client;

d. Cormark indicated in multiple emails in March 2017 that Saline was its client; and

e. Cormark, on Saline's behalf, negotiated the terms of the private placement in arm's length negotiations with Canopy.

[96] We are not persuaded that Canopy believed it was Cormark's client or that Cormark believed Canopy was its client. Canopy and Cormark are sophisticated parties. Weinstein, at the time of the Transactions, and Bennett Jones, during the Commission's investigation, confirmed their understanding that Canopy was not Cormark's client. While Linton and Saunders may have thought at the time of their intervIews that Canopy was Cormark's client, both agreed on cross-examination that they did not think Canopy was Cormark's client.

[97] Regardless of what any of the parties thought about whether Canopy was Cormark's client, that question is a legal issue and one of the fundamental issues for us to decide based on the evidence proven before us.

4.3.7 Conclusion

[98] We conclude that Canopy was not Cormark's or Kennedy's client. Canopy, with its experienced management, board and counsel, was not akin to a vulnerable individual investor. The relationship between Canopy and Cormark was not akin to an agency or underwriting relationship. There is evidence that Cormark frequently referred to Saline as its client in communications with Canopy. There is no evidence of Cormark indicating to Canopy that it was its client, nor of Canopy referring to itself as Cormark's client. The alleged benefits accruing to Cormark and Kennedy were hypothetical or minimal.

[99] Because we have determined that Canopy was not Cormark's or Kennedy's client, Rule 31-505 is not engaged. We therefore dismiss the Commission's allegation that Cormark and Kennedy breached that Rule.

4.4 The respondents' conduct does not engage the Tribunal's public interest jurisdiction

4.4.1 Introduction

[100] The Commission alleges that our public interest jurisdiction is engaged in two instances:

a. first, as an alternative allegation against Cormark and Kennedy if we find, as we have, that Rule 31-505 does not apply to the conduct alleged to breach that Rule; and

b. second, because of other alleged misconduct by the respondents, which we detail below.

[101] We deal with each category of public interest allegations below and conclude that the Commission has failed to establish the alleged misconduct. We, therefore, dismiss all the Commission's public interest allegations.

[102] We heard submissions from Bistricer with respect to the standard to be applied when exercising the Tribunal's public interest jurisdiction. Because the

Commission failed to prove its factual allegations, it is not necessary for us to consider the standard.

4.4.2 Cormark's and Kennedy's conduct does not engage the Tribunal's public interest jurisdiction

[103] As an alternative to its allegation that Cormark and Kennedy breached Rule 31-505, the Commission submits that Cormark's and Kennedy's alleged misleading conduct and concealment of details about the Transactions from Canopy engages our public interest jurisdiction and warrants an order under s. 127(1) of the *Act*.

[104] The respondents submit that this argument was not asserted in the Statement of Allegations. Rather, the Commission framed its allegation as a breach of Rule 31-505.

[105] We disagree with the respondents. In the Statement of Allegations, under the heading "Failure to deal fairly, honestly and in good faith", after laying out the allegations about how Cormark and Kennedy misled Canopy and concealed details of the Transactions from Canopy, the Commission alleges that this conduct was contrary to the public interest.[24] We therefore will consider the Commission's alternate argument.

[106] The Commission submits that Cormark and Kennedy had to disclose fully to Canopy the entire series of Transactions. Only then could Canopy make an informed decision as to whether to participate, including whether the short selling was in the best interest of the company and its shareholders. The Commission submits that instead of making that full disclosure, Cormark and Kennedy:

a. misled Canopy about the ordinary course nature of the Transactions;

b. lied to Canopy about the short selling, telling it that the free-trading shares were required so that they could be delivered to index funds;

c. concealed the risk-reward ratio that Saline faced; and

[24] Statement of Allegations, *Cormark*, November 9, 2022 at para 26

d. made a misleading comparison between the Transactions and Canopy's December 2016 bought deal with respect to Canopy's cost of capital and, by implication, its net proceeds.

[107] We consider each of the four alleged failures by Cormark and Kennedy and conclude in each instance that the evidence does not support the allegations.

4.4.3 Cormark and Kennedy did not mislead Canopy about the ordinary course nature of the Transactions

[108] The Commission submits that Cormark and Kennedy told Canopy the Transactions were in the ordinary course in connection with joining the Index. This allegation is based on:

a. Saunders' evidence that Linton told him doing a private placement as a low cost means of getting the private placement shares into the hands of Index funds was "apparently a common drill" when a company first joins the Index;

b. Linton understood from Cormark that it had a "mechanism, a machine, a process" when an issuer is added to the Index. Cormark "came forward with this thing. Okay. Cormark is good at this. Great. Terrific. That's their specialty.";

c. Shaw proposed that Linton take a call with Kennedy, Cormark's "ECM guy …who does these trades." [Emphasis added];

d. Shaw wrote in an email to Saunders on March 9 attaching the draft share purchase agreement: "The price would be at a 9% discount, which includes all fees, commissions and our legal costs (we make about 1.5% on these trades.)" [Emphasis added];

e. an initial draft of a Cormark PowerPoint presentation contained the statement "Cormark has successfully completed several deals in similar structures";

f. in response to a question from Weinstein, Cormark responded that it had done "this type of transaction" for Centerra Gold, but Centerra Gold did not involve an index inclusion, a sale into the market-on-close facility,

short selling or a promise that the private placement shares would end up in the hands of index funds;

g. Kennedy advised Weinstein that a lending arrangement with an individual insider was not a normal transaction for Cormark but failed to advise her that other aspects of the Transactions were also new to him and to Cormark;

h. Shaw believed this was the first time he had ever approached an issuer about a private placement in connection with joining an index;

i. Kennedy:

i. had not executed an index inclusion event for any issuer before March 17, 2017;

ii. had not used this same structure before March 17, 2017;

iii. agreed this was the first time Cormark had engaged in a transaction where short selling was occurring concurrently with a private placement offering; and

iv. agreed that while the various elements of the Transactions were "normal features", he combined them in a way that was not "plain vanilla", "not normal" and "not run-of-the mill".

[109] While Saunders did state that he understood the Cormark proposal was a "common drill", he said this understanding came from Linton. Linton stated that Cormark brought the Transactions to Canopy, and he understood them to have a process that was specialized or that had a normal course in relation to joining an Index. There is no evidence about how Linton came to this understanding or the basis for his "common drill" comment to Saunders.

[110] We found Linton to be a credible witness. However, he did not have a clear memory of the conversations he had with Shaw and Kennedy about the Transactions. These unattributed understandings by Linton are insufficient, in the absence of any direct evidence, to ground a finding that Cormark and Kennedy misled Canopy.

[111] Nor is there any direct evidence of Shaw or Kennedy telling anyone at Canopy that the Transactions were in the ordinary course in connection with an Index inclusion. The two email references by Shaw to "these trades" are too vague and ambiguous to support the conclusion that Cormark and Kennedy misled Canopy. The draft PowerPoint deck that stated that Cormark had successfully completed several of these transactions (which Kennedy stated during cross-examination he didn't believe was true) was never given to Canopy. Nor is there any evidence linking that draft document to any subsequent statement by Shaw about "these trades".

[112] The email exchange between Weinstein and Kennedy about Centerra Gold involved a discussion about an immaterial private placement and did not constitute a representation by Kennedy that the Transactions were ordinary course in relation to an index inclusion. Regarding the email exchange between Weinstein and Kennedy about lending arrangements with insiders, which Kennedy stated was "not the normal type of transaction", there is insufficient basis for us to read into that narrow exchange the need for Kennedy to tell Weinstein that the combined Transactions were unique, particularly when there is no evidence that he had told Weinstein they were ordinary course.

[113] The facts that this was the first time Shaw had approached an issuer about a private placement when the issuer was joining an index, and that Kennedy had not executed an index inclusion transaction before March 2017, are irrelevant given that there is no evidence that either person told Canopy the Transactions were in the ordinary course.

4.4.4 Cormark and Kennedy did not lie about the short selling

[114] For reasons that follow, we conclude that Cormark and Kennedy neither lied about nor concealed the short selling. We also conclude that Linton and Saunders did not focus on or retain information about the mechanics of how Saline was to deliver the Free-Trading Shares to index funds. There was no evidence that Canopy would not have proceeded with the private placement if it had known about the short sales.

[115] Before turning to the analysis of this issue, it is helpful to first lay out the facts and chronology of Canopy's approval of the private placement and the execution of the various aspects of the Transactions on March 17.

Select Chronology

[116] Shaw emailed Linton on March 6 asking for a call to discuss an "idea". They agreed to speak around 13:00 that day. After that meeting, Shaw emailed Linton again (at 13:21) asking Linton to take a call the next day, March 7, with Cormark's "ECM guy" (Kennedy) to "walk through the logistics of how this works and when we can execute it".

[117] In response to a request from Linton for a summary of the proposed Transaction to provide to the Canopy Board, Shaw sent an email on March 10. Saunders copied the email into a presentation to the Board, adding some additional language and an appendix. We discuss the relevant parts of the email and Board presentation further below.

[118] Also, on March 10 Linton told Shaw that Canopy required a "collar" or floor price: if the 9% discount to the market closing price on March 17 fell below a 10% discount to the opening price on March 10, Canopy would not participate in the private placement. Shaw did not immediately pass this information on to Kennedy or anyone else at Cormark.

[119] On March 13, the Canopy Board approved the private placement, as described in the Board presentation. Goldman disclosed to the Board his role in the Transactions as the lender of the Free-Trading Shares to Saline and recused himself from the vote.

[120] On March 17:

a. 10:00 – Kennedy met with Goldman, in Goldman's office, to get Goldman's signature for Goldman Holdings on the securities loan agreement;

b. 10:24 – continuing an exchange that started on March 15, Canopy's counsel Tayyaba Khan, an associate with Weinstein's firm who assisted with the Transactions, advised that March 22 for closing the private

placement may be aggressive and that the closing date should be on or before March 24;

c. 11:03 – Kennedy replied to Khan that the "slight problem" was that the delivery of the Free-Trading Shares needed to happen on March 22;

d. 11:03 – Saline began selling Canopy shares short on the Toronto Stock Exchange's open market, selling 450,000 shares between 11:08 and 15:19;

e. 12:07 – Canopy provided Cormark with a signed Share Subscription Agreement, to be held in escrow pending confirmation of the final price for the private placement;

f. 12:50 – Kennedy sent the Share Subscription Agreement to Bistricer for signature on behalf of Saline;

g. 12:55 – Kennedy emailed Khan (copying Shaw, Saunders and Weinstein) stating that "what my client needs to know is that we have a deal now regardless of the price…";

h. 13:03 – Linton emailed Weinstein, Kennedy and Khan (copying Saunders and Shaw) "Chris knows we have a deal only if price stays with [*sic*] 10% of the open the day we had the discussion.";

i. 13:04 – Kennedy emailed Saunders (copying Shaw, Weinstein, Khan and Linton) stating "That can't work my client will be short by that time and have nothing to provide Murray as collateral if Canopy backs away".

j. 13:07 – Linton emailed Kennedy and Saunders (copying Shaw, Weinstein and Khan) stating "lots of Cormark selling today. May want to work on that so we stay in the agreed limit. Chris made that deal – not a new term."

k. 14:30 – Shaw emailed Kennedy, Linton, Saunders, Weinstein and Khan that the minimum net subscription price would be $9.25, a 9% discount to 90% of the March 10 open price of $11.30;

l. 15:27 – Saline placed an order to sell 2,050,000 shares of Canopy at market in the Toronto Stock Exchange's market-on-close facility;

m. 15:33 – Linton emailed that Canopy was good to proceed with the private placement;

n. 15:56 – Cormark confirmed the receipt of Goldman's Free-Trading Shares from Goldman Holdings' account at another registered dealer;

o. 16:00 – trading in the Toronto Stock Exchange's market-on-close facility resulted in a closing price for Canopy shares of $10.66;

p. 16:00 – Saline sold 2,050,000 Canopy shares short in the market-on-close facility at the established closing price, bringing Saline's total short sales that day to 2.5 million; and

q. 17:26 – Canopy advised it was prepared to release its signature on the Share Subscription Agreement for the private placement.

Parties' submissions and our analysis

[121] The Commission submits that Cormark and Kennedy told Canopy that the buyer of the private placement would borrow shares from Goldman Holdings "in order to deliver the index funds 'free trading' shares." In fact, the Free-Trading Shares were used by Saline to close short sales made in the open market on March 17, before the closing price referenced in the private placement was determined. Short selling, the Commission submits, was important to the structure of the Transactions, but Cormark and Kennedy did not explain this to Canopy.

[122] The Commission's position is supported, it submits, by the fact that:

a. neither Linton nor Saunders knew about the short selling;

b. neither Shaw nor Kennedy could recall using "short" or "short selling" in any correspondence or conversations with anyone at Canopy and there is no evidence that they did so;

c. the only mention of "short" was in Kennedy's email at 13:04 on March 17 and no one at Canopy understood it to mean that short sales in the market were happening;

d. Shaw did not understand that the Transactions involved short selling so we cannot conclude that he explained to Canopy that there would be short selling;

e. Shaw's March 10 email describing the Transactions, which Saunders used as the foundation for the Canopy Board presentation, begins with "As discussed…". It is a reasonable assumption that the email therefore lays out all the salient points discussed about the Transactions, and yet there is no reference to short selling;

f. neither the draft nor final press release refers to short selling;

g. neither Linton nor Saunders was aware of the market-on-close facility where, according to Kennedy, the short sales were to take place and not all the short sales happened in that facility; and

h. not all the buyers were index funds as represented to Canopy, which Canopy would have understood had they been told that the Free-Trading Shares would be sold in the blind market-on-close facility.

Linton and Saunders

[123] We found Linton and Saunders to be credible witnesses. We accept their evidence that they do not recall being told about the short selling or about the market-on-close facility. However, this does not mean that Cormark or Kennedy concealed the fact or lied to them about it either. Their lack of recollection is consistent with Linton and Saunders being focused on the aspects of the Transactions that were most relevant to them – selling 2.5 million shares at a 9% discount with downward price protection.

[124] Linton did not have a clear recollection of the March 7 meeting with Kennedy to "walk through the logistics" of the Transactions. Linton confirmed that he did not ask or know how Saline was going to deliver the Free-Trading Shares to the buyers. Saunders also stated that he did not ask or know how Saline or Cormark would deliver the Free-Trading Shares to the buyers.

[125] Linton and Saunders understood market-on-close to mean the price of the security at close of the market. The Board presentation refers to the private placement being priced based on the market-on-close price, which is consistent with Linton's and Saunder's understanding that it was a pricing mechanism. Part of the private placement's structure was pricing at a discount to Canopy's closing price on March 17. We agree that, given that fact, it is logical to read the Board

presentation as referring to that aspect of the structure. That does not necessarily lead to the conclusion that Cormark and Kennedy lied about the market-on-close facility.

Kennedy

[126] Kennedy had a clear recollection of his meetings with Linton and Goldman. He testified that he explained the mechanics of the Transactions to Linton at the March 7 meeting. He also explained the logistics of the Transactions to Goldman when he met with Goldman to discuss the securities loan. While Kennedy could not recall using the word "short", he stated that the concept of selling borrowed securities was fundamental to the Transactions and he recalled with certainty discussing that with Linton, Goldman and Weinstein.

[127] We accept Kennedy's evidence. We have nothing to contradict it because Linton does not recall the conversation, and we have no evidence from Goldman or Weinstein.

Shaw

[128] Regarding Shaw, we conclude that he did not have a detailed understanding of the logistics of the trading component of the Transactions. If he had, he would have realized the significance of the floor price to the structure when Linton raised it with him on March 10 and would have told Kennedy about it immediately, which he did not.

[129] Shaw stated that he understood the borrowed shares had to be sold to meet the index inclusion demand but did not necessarily know that is the same thing as saying a short sale. Shaw also stated that he was not involved in the "structural mechanics of the trading aspects" of the Transactions. Had there been any questions from Canopy or its counsel about the trading aspects (though he did not recall there being any such questions), Shaw was confident that he would have referred those questions to Kennedy or some other appropriate person at Cormark.

[130] The fact that Shaw did not completely understand the logistics of the trading part of the Transactions does not mean that he lied about or concealed the short selling. He connected Canopy to Kennedy as the person who "does these trades"

to "walk them through the logistics" and Kennedy says that he explained the details to Canopy.

Shaw's March 10 email

[131] We now address Shaw's email of March 10 and the reference to "As discussed" with no following reference to short selling. Kennedy submits that we must assess what Canopy understood based not just on the documentary evidence alone but also on the context of the many conversations that Kennedy had with Linton, Goldman, Weinstein and Khan in connection with the Transactions. The words "As discussed" did not mean that everything that had been discussed was included in the summary and the summary was not a script that would be followed. We agree.

[132] Saunders forwarded Shaw's email to Weinstein. Kennedy had several telephone conversations and email exchanges with Weinstein about the Transactions. During those conversations, Kennedy testified, he discussed with Weinstein that there would be a private placement and a lending agreement, and the loaned shares would be sold on the market using the market-on-close facility. He concluded that at the end of those conversations Weinstein understood the key aspects of the Transactions.

[133] Weinstein was an experienced securities lawyer. Linton and Saunders both stated that they relied on her to advise them about the Transactions. Had Weinstein had concerns about the Transactions it is more likely than not that she would have raised those concerns with Kennedy, Linton and/or the Canopy Board. No party called Weinstein as a witness. The evidence we have is that Kennedy explained the Transactions to Weinstein, he believed she understood them, and Canopy proceeded with the Transactions.

Kennedy's March 17 "my client will be short" email

[134] The parties disagree on the import of Kennedy's March 17 "my client will be short" email. The Commission submits that neither Linton nor Saunders understood the reference to the client being short to mean there was active short selling in the secondary market at that time. The Commission also submits that Kennedy's evidence about the meaning of the email shifted. Initially,

Kennedy said it meant that if Canopy stepped away his client would be short the collateral to provide to Goldman. Later, the Commission submits, Kennedy said the email states that his client will have a short position, and without the private placement his client will have no collateral to deliver for the securities loan agreement.

[135] Saunders testified that he understood the email to mean that there was something in Cormark's sequence for the Transactions that would be out of order, not that there would be short sales. He thought Kennedy was applying pressure to get the transaction done. For Saunders, the deal with Canopy was concluded, agreed and finalized at close of business on March 17. He testified that he had no reason to ask about Saline's trading. We find that Saunders was not concerned about Cormark's "sequence" of events.

[136] Similarly, Linton testified that he understood the email to mean that there was a timing issue and some exposure for others. He did not understand it to mean there was short selling happening. However, Linton also said that he understood the "incentives more than the mechanics" and he understood that "[s]omeone wants to do something on the other side" of the securities loan, "which covers their short position with that stock". Linton went on to say, "They do some mechanism that I'm not up on", but that was his high level understanding. We find that Linton was not concerned with aspects of the Transactions that did not directly impact Canopy.

[137] We agree with Kennedy that his March 17 email says at least two things. First, "my client will be short by that time" is a clear statement that Saline will have sold Canopy short by the time the closing price for the day was established. The email goes on to say "…and have nothing to provide Murray as collateral if Canopy backs away." Again, we find this to be an unambiguous statement of fact that if Canopy were to back away from the private placement, Saline would not have Restricted Shares to deliver to Goldman Holdings as collateral for the loan of the Free-Trading Shares. Kennedy's email is inconsistent with an effort to conceal the short selling.

[138] In addition, Weinstein reviewed the securities loan agreement, was aware that the Restricted Shares were collateral for the loan of the Free-Trading Shares and

was told by Kennedy that the Free-Trading Shares would be sold. Since selling borrowed shares is short selling, we find that Kennedy conveyed to Canopy's counsel that short selling was happening.

[139] While neither Linton nor Saunders said they understood Kennedy's email to mean that Cormark's client would be short or that active short selling was happening, their comments clearly indicate that they were not focused on issues that would not directly impact Canopy, including the risks to Cormark or Cormark's client. Canopy's deal would be complete at the close of business on March 17, provided the 9% discount remained within 10% of the opening price of Canopy's shares on March 10.

[140] We conclude that Linton and Saunders retained, from what they were told, the information that was most important to them. That did not include the mechanics of how the borrowed Free-Trading Shares made it into the hands of the ultimate purchasers on March 17.

Canopy's press release

[141] With respect to Canopy's press release of the private placement, we disagree that the absence of any mention of short selling is evidence that Cormark and Kennedy concealed the short selling or that Canopy was not aware of it.

[142] On March 16, Weinstein emailed Saunders that she had not yet seen a draft press release for the private placement. She had, however, found a precedent where an insider was involved in a lending agreement. Weinstein provided Saunders with draft language about Goldman's role as a lender and stated that disclosure of his role would "close any loop in investor inquiries" regarding why Goldman was making regulatory filings about his shares.

[143] Later that day, a director in Canopy's public relations department asked Saunders if the "bankers" were doing a first draft of the press release. We conclude that Saunders asked Cormark to provide a draft of the press release because on March 18 Shaw emailed Linton and Saunders (copying Weinstein) attaching a draft press release. Saunders testified that the final press release was reviewed by Canopy's Disclosure Committee. Canopy issued a press release on March 22.

[144] Neither Cormark's draft nor Canopy's published press release referred to short selling.

[145] Canopy was in control of its disclosure. The press release reflects the fact that Canopy sold 2.5 million shares in a private placement at a specified discount and an insider was involved in a loan connected to that issue. Weinstein's March 16 email clearly indicates a focus on the private placement and the role of Goldman, an insider, in the securities loan agreement. We concluded earlier that Canopy and Weinstein were told that there would be short selling in the market on March 17. We have no evidence about the internal discussions at Canopy, including at the Disclosure Committee, about the content of the press release. We cannot conclude that the absence of any mention of short selling in the release indicates that Cormark or Kennedy lied about or concealed the short selling.

The identity of the buyers of the Free-Trading Shares

[146] The Commission alleges that Cormark and Kennedy told Canopy that the purchasers would be index funds when in fact a variety of purchasers bought from Saline's short sales, including 157 retail accounts. The Commission submits that had the market-on-close facility been fully explained to Canopy, Linton and Saunders, they would have understood that the purchasers would not be index funds, as they expected. Because the facility is a blind market, the purchasers could be and were anyone including index funds and indexers.

[147] The Commission submits that if Cormark wanted to make clear that the shares were going to be sold short through the market-on-close facility, it could have said so. A reasonable market participant like Canopy, the Commission suggests, would have understood the language Cormark provided to Canopy for the Board presentation to mean that Cormark had lined up institutional buyers to do a pre-arranged block trade.

[148] There is no evidence that Canopy, Linton or Saunders had any more experience with block trades among institutional market participants than they did with private placements and short selling. Nor is there any evidence to support that Canopy thought Cormark and Kennedy had lined up institutional block trades.

[149] Kennedy's evidence is to the contrary. He explained the index funds did not have trade desks you could call on; their trading was mechanical, algorithmic-driven and by direct market access. Kennedy states that he explained that to get the Free-Trading Shares into the hands of index funds and indexers, one had to meet them where they traded, which was in the market-on-close facility.

[150] We accept Kennedy's uncontradicted evidence that he explained the Transactions to Linton, Goldman and Weinstein, including his statement that he explained the market-on-close facility. We conclude it was among the mechanics that neither Linton nor Saunders was concerned about. The fact that Saline sold shares short in the open market prior to placing an order to sell the bulk of the shares in the market-on-close facility does not indicate that Cormark or Kennedy lied to Canopy. Kennedy testified that he was not aware of the earlier short sales, a statement we find to be credible since Bistricer had direct access to Cormark's trading desk.

[151] Bistricer, in the excerpts of his compelled evidence read into the record, said that he "guessed" he had placed the earlier order because "we thought we could get a better price", although when pressed, he was unable to remember with whom he had shared that view. Bistricer went on to say that there was nothing obliging him to do the short sales on a specific date or at a specific time. This is clearly inconsistent with Kennedy's view about the Transactions and the importance of the timing of the private placement and the short sales. We conclude that Saline did not feel bound by the parameters of the structure Kennedy had designed and sold shares in the open market as an opportunity to increase its potential return on the Transactions.

[152] Saunders testified that he did not think Canopy would necessarily have participated in the Transactions if the resulting buyers of the Free-Trading Shares were anyone other than index funds. Linton also stated that he did not recall ever having any information other than that the Transactions were being driven by Canopy's inclusion in the Index and that they were facilitating the index funds buying Canopy's shares. However, there is nothing in the documentary evidence to suggest that anyone at Canopy asked about the identity of the ultimate buyers or sought any representation or warranty about

their identity. In addition, the Commission's investigator testified that all the Saline shares sold in the market on close went to institutional investors. Linton and Saunders confirmed in their oral evidence that they did not ask Cormark or Kennedy who had bought the Free-Trading Shares.

[153] We find that Canopy would have understood that there would be trades in the Free-Trading Shares on the market on March 17 and it was not concerned with whether all the shares went into the hands of index funds or indexers.

4.4.5 Cormark and Kennedy did not conceal Saline's risk-reward ratio

[154] The Commission submits that because Cormark concealed the short selling from Canopy, Canopy was not aware that the Transactions were structured such that they were virtually risk-free for Saline. We do not accept the Commission's submission on this point. Hedging or managing risk is a normal and accepted part of participating in the capital markets. Merely because a structure might reduce or eliminate risk does not make it contrary to the animating principles of the *Act*.

[155] We also do not agree that the structure was virtually risk-free for Saline. Saline entered into the securities loan agreement prior to signing the Share Subscription Agreement. It agreed to the Share Subscription Agreement after entering short sales in the open market and after learning that Canopy had a floor price. If Canopy's share price dropped below the floor, Canopy could walk away from the private placement. If it did, Saline would have had no collateral to deliver for the securities loan, which would be in default, leaving Saline without Free-Trading Shares to settle the short sales. Saline accepted that risk.

[156] The Commission submits that Shaw's email to Linton on March 9 misrepresented the relationship between the 9% discount and the lending fee. That email stated there would be room for a 'small' discount for Saline, while Saline ended up with substantial profits.

[157] Shaw's email was a response to Linton's question about how much Goldman would be paid as a lending fee, information Linton wanted to have before he approached Goldman about lending his shares. The email states "To achieve a 9% discount, we could pay 6.5% annualized on the borrow, which leaves us

enough room for small discount for buyer and us to make 1-1.5% commission (including paying our legal costs)."

[158] Goldman negotiated a loan fee of $875,000. Kennedy testified this was a 10.8% annualized return or 3.6% of the 9% discount. Cormark's commission on Saline's trades was 1.5%. That left 3.9% for Saline, a 0.3% difference from Goldman.

[159] Shaw's email only conveyed what might be paid for a loan. It was based on what Cormark might pay if it borrowed from other dealers through the dealers' back office. In fact, Cormark was not the borrower, and the terms of the loan were negotiated between Goldman and Saline. Linton and Saunders both knew that Goldman would receive a fee for lending his shares to Saline. They both testified that they did not ask what fee Goldman had negotiated. Had either been concerned about what profit, if any, Saline was making on the Transactions, they could have followed up with either Goldman or Cormark. They did not. In addition, Weinstein received a copy of the securities loan agreement from Cormark with the lending fee displayed on the first page. There is no evidence before us to suggest that Weinstein raised any issues about that information.

[160] There is no basis for us to conclude that Saline's risk-reward ratio was even relevant to Canopy's decision to participate in the Transactions. Nor can we conclude that a hypothetical number provided in response to a specific question about a possible lending fee that would be negotiated by other parties amounts to Cormark concealing Saline's risk-reward ratio from Canopy.

4.4.6 Cormark and Kennedy did not fail to disclose the risk to Canopy's net proceeds from the Transactions

[161] The Commission submits that the short sales put Canopy's net proceeds at risk. Canopy was unaware of that risk because Cormark and Kennedy concealed the short sales from them. We concluded earlier that Cormark and Kennedy did not conceal the short sales from Canopy, but rather the details of the Transactions were explained to Canopy, and Linton and Saunders retained what was most relevant to them. However, we deal briefly with the question of whether Canopy's net proceeds were at risk.

[162] The parties agree that net proceeds were an important metric to Canopy. The minutes of Canopy's March 13 board meeting indicate that the Board considered Canopy's net proceeds from the private placement. Saunders stated that the Board was cautious about the Transactions and carefully considered them. Canopy knew that trading in the market on March 17 would affect its net proceeds because the private placement was to be priced at a discount to that day's closing price.

[163] At the time of the Board meeting, Linton also knew that Canopy had downward price protection. He had told Shaw on March 10 that Canopy would only do the private placement if the 9% discount from the March 17 closing price was no lower than 10% below the March 10 opening price. The board presentation included the fact that Canopy had a "no cost" out. Linton said the floor price was important for price certainty, and he could not recommend the deal to the Board without it. Saunders stated that the Board's approval was based on having the floor price. We conclude that Canopy's Board carefully considered the net proceeds from the Transactions. Given the floor price, there was no risk to Canopy's net proceeds beyond the risk it had negotiated to accept.

[164] The Commission also submits that Cormark and Kennedy made a misleading comparison between the Transactions and Canopy's December 16 bought deal with respect to Canopy's cost of capital and, by implication, its net proceeds. The March 7 email addressed to Shaw stated that "The 9% is an all-inclusive discount and compares favourably to your last deal which was ~12% (including underwriting fees and expenses)." The Board package that Saunders prepared included that statement. However, it also included an appendix that Saunders had prepared, that compared the 9% discount with the cost of Canopy's four previous bought deals.

[165] We conclude that Canopy did its own assessment of how the cost of this transaction compared to its previous capital raising activities and was not misled by Cormark or Kennedy. Canopy had the information necessary to do that analysis and factored in the downward price protection provided by the negotiated floor price. There is no evidence that Kennedy made a specific statement to anyone at Canopy comparing Canopy's cost of capital (and

therefore its net proceeds) for the Transactions versus Canopy's most recent bought deal. Kennedy denied drafting or providing input to the email and did not agree with the Commission's proposition that Shaw received the statements in the email from Kennedy.

[166] We conclude that the Commission has failed to establish that Cormark and Kennedy engaged in the alleged misconduct. We therefore dismiss this alternate allegation.

4.5 Does the respondents' conduct otherwise engage the Tribunal's public interest jurisdiction?

[167] We now turn to the second category of the Commission's public interest allegations. The Commission submits that in addition to the conduct set out above relating to Cormark and Kennedy, the respondents behaved in a manner that engages our public interest jurisdiction because they:

a. undermined the investor protection provided by hold periods;

b. avoided disclosure by sizing the private placement to be immaterial and by making misleading statements in the draft press release Cormark provided to Canopy;

c. threatened capital markets efficiency and confidence because Saline's short sales were unlikely to contribute to an efficient trading price; and

d. failed to meet the high standards of fitness and business conduct expected of market participants and registrants.

[168] As indicated above, we conclude that the Commission has failed to establish the alleged misconduct. Our public interest jurisdiction is therefore not engaged, and we dismiss these allegations.

4.5.1 The respondents did not undermine the investor protection provided by hold periods

[169] The Commission alleges that the securities loan was not really a loan. Rather, it asserts that the agreement was structured to enable Saline to avoid the hold periods of Ontario securities law. The Commission alleges that:

a. the respondents used the securities loan agreement to "effectively convert the restricted shares into free-trading shares that were distributed to the public"; and

b. having successfully subverted the hold periods, Saline and Goldman Holdings abandoned the agreement and failed to comply with the remainder of its terms.

[170] We agree with the Commission about the importance of hold periods and the role they play in Ontario securities law. However, we cannot conclude that the respondents subverted any hold periods.

[171] We concluded earlier that the Restricted Shares were not converted into the Free-Trading Shares. There is nothing to prevent the Restricted Shares from being used as collateral for the securities loan. The Restricted Shares remained restricted and were held for four months in Goldman Holdings' account at Cormark. The Free-Trading Shares were not subject to any hold period and there was nothing to prevent Goldman Holdings from loaning those shares to Saline and Saline in turn using them to settle its short sales.

[172] We conclude that Saline and Goldman Holdings did not abandon the securities loan agreement when the hold period expired. When the hold period expired the Restricted Shares became free-trading shares. The separate identifying number for the Restricted Shares was changed by the Canadian Depository Service into the identifying number for Canopy's common shares.

[173] We agree with the respondents that there is nothing untoward about Saline and Goldman Holding agreeing to use the now free-trading shares to settle their obligations under the securities loan agreement. The securities loan agreement provided, in s. 10(b) and (d), that Saline's obligation at the end of the term of the agreement was to return "Equivalent Loaned Securities" – shares that are "of an identical type, nominal value, description and amount" to the Free-Trading Shares it borrowed. Once the hold period expired and the restriction on the Restricted Shares was lifted, they became interchangeable with and therefore equivalent to the Free-Trading Shares Saline had borrowed.

[174] The Commission also alleges that investor protection was undermined because the Transactions increased the public float. Goldman Holdings was willing to loan the Free-Trading Shares (willing to swap them, in the Commission's words) because it had no intention of selling them and therefore the Free-Trading shares became part of the public float.

[175] We were not given a clearly applicable definition of public float. However, in our view, one is not necessary for our purposes. Common sense allows us to conclude that no new shares were added into the public market until the hold period expired and the Restricted Shares become free trading. We have no direct evidence of Goldman's intentions regarding his holdings and agree with the respondents that it is irrelevant because, there being no restrictions on those shares, Goldman was free to do whatever he wished with them.

4.5.2 The respondents did not avoid disclosure

[176] The Commission alleges that our public interest jurisdiction is engaged because the respondents avoided disclosure by:

a. breaching the prospectus requirement for full, true and plain disclosure by failing to provide a prospectus for the indirect offering of 2.5 million Canopy shares into the market; and

b. minimizing the timely, accurate and efficient disclosure of information about the Transactions by:

   i. sizing the private placement to not be a material change for Canopy;

   ii. Cormark and Kennedy discouraging Canopy from making timely disclosure of the Transactions; and

   iii. Cormark and Kennedy providing a draft press release to Canopy that was misleading in three respects:

   - by stating that the Transactions were "non-brokered", Cormark and Kennedy were trying to hide their role in the Transactions;
   - by stating that "no finder's fees were paid as part of" the private placement it might have suggested that Cormark was

not receiving any compensation for the Transactions when they received a commission from Saline; and

- by omitting to state that the Restricted Shares were being converted into free-trading shares and used to settle short sales made to the public on March 17.

[177] We have already concluded that the Transactions did not constitute a "distribution" and therefore we will not deal with the Commission's first allegation. We have also previously concluded that the Restricted Shares were not converted into the Free-Trading Shares and therefore, find no fault with disclosure that did not refer to something that did not happen. With respect to the Commission's remaining allegations under this heading, we conclude that the respondents did nothing wrong.

4.5.2.a Sizing the private placement to not be a material change and discouraging timely disclosure

[178] The Commission alleges that the private placement was deliberately sized so that it was not a material change, and no timely disclosure would be required. Although the Commission alleges that the "respondents" engaged in this alleged conduct there is no evidence that Bistricer or Saline had any role in determining the size of the private placement (other than agreeing to buy 2.5 million shares) or in any discussions with Canopy about whether Canopy should issue a press release or the contents of that release.

[179] We accept Kennedy's evidence that he thought carefully about regulatory compliance when structuring the Transactions, that the private placement had to be immaterial for the Transactions to work, and if that part of the Transactions did not work for Canopy, he would have figured something else out or walked away.

[180] There is nothing about Kennedy's and Cormark's efforts to comply with insider trading rules that is inconsistent with the animating principles underlying those rules. Shaw's and Kennedy's statements to Canopy that the private placement was immaterial are consistent with that. Saline wanting to ensure that its short

sales would not be considered insider trading is an attempt to ensure that it was following applicable securities laws.

[181] Cormark and Kennedy had no control over Canopy's disclosure. Had Canopy decided the private placement was material, there would have been consequences for Cormark, Kennedy and Saline. Recognizing that and seeking assurance from Canopy about whether it developed a view that the private placement was material is consistent with wanting to ensure that the Transactions would not have to be restructured or abandoned to comply with all applicable laws.

[182] We find that telling Canopy that the private placement was designed to be immaterial does not amount to Cormark and Kennedy discouraging Canopy from making timely disclosure. The private placement being immaterial was part of the structure. If Canopy had a different view, the structure would have been changed or abandoned.

4.5.2.b Draft press release

[183] Canopy asked Cormark to provide a draft press release. The draft did not refer to Cormark, stated that the private placement was non-brokered and stated that no additional finder's fees were paid. The Commission alleges the draft release was misleading and demonstrated that the respondents did not want their roles disclosed in Canopy's news release. We concluded earlier there was no evidence that Bistricer or Saline had any role in the draft press release.

[184] We heard evidence and received submissions about the meaning of "non-brokered" and "finder's fee" versus "commissions". In our view none of that is relevant to our decision. This was a draft press release. Cormark and Kennedy had no control over what Canopy disclosed. The fact that the press release was reviewed by Canopy's Disclosure Committee and that Canopy made changes to the draft Cormark provided to it is consistent with that conclusion.

[185] There is no evidence that Canopy concluded that Cormark's role in structuring the Transactions, or Saline's involvement in them, were important to Canopy's disclosure.

4.5.3 Saline's short sales did not threaten capital markets efficiency or confidence

[186] The Commission alleges that the Transactions threatened the efficiency of Ontario's capital markets and confidence in them as an efficient pricing mechanism because Saline's short sales were unlikely to contribute to an efficient trading price. They may have prevented Canopy's share price from rising as much as it would have without the short sales or caused that price to decline – all for reasons unrelated to the merits of Canopy shares as an investment. The short sales risked the proceeds that selling Canopy shareholders received in the secondary market and Canopy's offering proceeds.

[187] We note that market participants can and do trade for reasons other than an issuer's merits and that all trading, regardless of the traders' reasons for being in the market, contribute to pricing a security. Short sales are a common element in many trading strategies. Had any party wished to, they might have sought to introduce expert evidence to assist us to conclude whether Saline's short sales had the outcomes or resulted in the risks the Commission alleges they might have had. We conclude that hypothetical outcomes that have not been established to have occurred are insufficient to conclude that the respondents did anything wrong.

4.5.3.a Cormark, Kennedy and Bistricer did not fail to meet the high standards of fitness and business conduct expected of market participants and registrants

[188] One of the primary means for achieving the purposes of the *Act* are the requirements for the maintenance of high standards of fitness and business conduct by market participants.[25] Registrants ought to be held to a higher standard of conduct[26] than non-registrants and their conduct has been found to

[25] *Act*, s 2.1(2)(iii)

[26] *Kitmitto* at para 241, affirmed *Kitmitto v Ontario (Securities Commission),* 2024 ONSC 1412, leave to appeal to the Ontario Court of Appeal currently sought by Appellants (***Kitmitto***)

have engaged the Tribunal's public interest jurisdiction when it violates the high standards applicable to them.[27]

[189] Cormark is a registered investment dealer. Kennedy was a registered dealing representative. Bistricer was an ultimate designated person for Saline. The Commission alleges that they failed to meet the high standards applicable to them by failing to act effectively as gatekeepers for the capital markets. The Commission alleges that Cormark, Kennedy and Bistricer deployed their knowledge and skills to enrich themselves improperly at the expense of the investing public and the capital markets.

[190] We disagree. The Commission's specific allegations are based on the premise that the Restricted Shares were converted into or swapped for the Free-Trading Shares so that investors who bought the Free-Trading shares were receiving newly issued treasury shares from Saline as an underwriter without the benefit of the protections of a prospectus. We concluded earlier that this is factually not what happened and is also contrary to the functioning of the closed system. Investors who bought from Saline's short sales received the Free-Trading Shares Saline had borrowed from Goldman Holdings for that very purpose. Saline was not acting as an underwriter and the investors did not require a prospectus.

[191] We also agree with the respondents that Cormark, Kennedy and Bistricer using their knowledge and skills, and benefitting from their efforts, is what is expected of market participants and registrants. We conclude that their conduct in this case was not improper, and we also conclude that there is no evidence that the investing public in this instance suffered from the Transactions.

[192] Having found that the Commission has not proven any of its numerous allegations of misleading, dishonest or other wrongful conduct, we conclude that these allegations against the respondents were an overreach. The unfortunate consequence is that the respondents have incurred significant costs due to this proceeding, both financial and reputational, which they cannot recover.

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[27] *Donald (Re)*, 2012 ONSEC 26 at para 319; *Agueci (Re)*, 2015 ONSEC 2 at para 175; *Kitmitto*

4.6 Remaining allegations

[193] Because we concluded that neither Cormark nor Saline breached Ontario securities law we do not need to consider if either Kennedy or Bistricer was liable under s. 129.2 of the *Act*.

5. PRELIMINARY ISSUE

[194] Before concluding, we set out our reasons for our December 21, 2023 order, which:

a. held that the issue of whether the respondents' expert's opinion (the **Mackasey Opinion**) was admissible would be decided at the merits hearing; and

b. varied the timelines for the filing of responding and reply expert reports, if any.

[195] The Respondents subsequently elected not to call Mackasey as a witness.

5.1 OSC motion Regarding Admissibility of Respondents' Expert Report

5.1.1 Background

[196] On November 1, 2023, the Commission filed a notice of motion asking, among other things:

a. that the Tribunal hear a motion to have the Mackasey Opinion excluded prior to the merits hearing; and

b. to amend its order dated June 28, 2023, and permit the Commission to deliver an expert opinion responding to the Mackasey Opinion, if required, after the Tribunal's disposition of the motion.

[197] The respondents filed joint submissions requesting that the Commission's motion be denied. At an attendance on November 15, 2023, a differently constituted panel ordered that the following two preliminary issues would be heard by this hearing panel on December 19, 2023:

a. Should the question of whether the Mackasey Opinion is admissible be determined prior to or during the merits hearing?; and

b. Should the Commission be granted an extension for filing an expert response report?

5.1.2 Should the question of whether the Mackasey Opinion is admissible be heard prior to or during the merits hearing?

[198] The parties agreed that the test for determining if the issue of admitting the expert report should be decided prior to or at the merits hearing is as set out in *Mega-C Power Corporation (Re)*.[28] They disagreed on the result that comes from applying the *Mega-C* criteria in these circumstances.

[199] In determining whether to decide a principal issue at a preliminary stage, the Tribunal has determined that it is appropriate to ask three questions:

a. Can the issues raised in the motion be resolved without regard to contested facts and the anticipated evidence that will be presented at the hearing on the merits?

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

c. Will the resolution of the issues raised in the motion make the process materially more efficient and effective?[29]

[200] If the answer to any of the three questions is "yes", then the motion should be heard in advance of the hearing on the merits, absent strong reasons to the contrary. If the answer to all three questions is no, then the Tribunal should be reluctant to hear the motion before the merits hearing.[30]

[201] The Commission conceded that it is not necessary for its motion to be heard before the merits hearing. We therefore needed to address only the first and third questions. We concluded that the answer to both questions is "no". Therefore, the issue of whether the expert opinion is admissible would be addressed at the merits hearing.

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[28] 2070 ONSEC 4 (***Mega-C***)

[29] *Solar Income Fund Inc. (Re) 2021 ONSEC 2* (***Solar Income***) at para 32, citing *Mega-C* at para 44

[30] *Solar Income* at para 33, citing *Mega-C* at paras 35-36

5.1.2.a Could the issues in the motion be resolved without regard to the contested facts and anticipated evidence in the merits hearing?

[202] Opinion evidence is generally inadmissible, subject to narrow exceptions including expert evidence on matters requiring specialized knowledge. The Commission submitted that in determining whether the Mackasey Opinion met the test set by the Supreme Court of Canada in *R v. Mohan*[31] (*Mohan*) for admission of expert evidence there was no need for us to resolve the contested facts in the merits hearing.

[203] To be admissible under the *Mohan* test, the expert opinion must be relevant, necessary, not subject to an exclusionary rule and proffered by a qualified expert.[32] For the purposes of this motion, we were not determining whether the Mackasey Opinion was admissible but rather when that question should be resolved. We considered the parties' submissions on the *Mohan* factors only to the extent necessary to resolve the timing issue.

[204] According to the Commission, what is *relevant* at the merits hearing is determined by the Statement of Allegations and the Commission cannot expand the issues through the evidence led at the merits hearing.

[205] The respondents submitted that resolving the admissibility of the Mackasey Opinion before the merits hearing would require the Tribunal to make findings, without the full evidentiary record, on at least two contested issues (whether the Transactions were ordinary course in connection with Canopy joining the Index, and whether the respondents misled Canopy about the Transactions such that Canopy could not make an informed decision about participating). This would negatively affect the respondents' ability to make full answer and defence to the allegations against them.

[206] We agree with the Commission that we can determine the relevance of the Mackasey Opinion to the allegations against the respondents as set out in the

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[31] [1994] 2 SCR 9 (***Mohan***)

[32] *Mohan* at para 20

Statement of Allegations, without resolving these or any other contested issues because relevance is determined by the Statement of Allegations.

[207] The Commission submitted that it is not *necessary* for a specialized Tribunal to have the full context of the merits hearing to decide whether the issues are outside of the Tribunal's experience and knowledge and that an expert's opinion is needed.[33] The respondents submitted that if the Commission leads evidence that the Transactions are abusive and contrary to the public interest, the Mackasey Opinion would be *necessary* to the Tribunal as it would provide evidence on industry practices regarding similar transactions and evidence that compares the Respondent's practices to those prevalent in the industry. Such evidence has been found necessary by the Tribunal in the past.[34]

[208] We disagree that an allegation that conduct engages our public interest jurisdiction necessarily requires expert evidence. The Tribunal can determine whether the issues raised in a Statement of Allegations are outside of the Tribunal's knowledge and expertise.

[209] The Commission submitted that the respondents would have to establish that the Mackasey Opinion was not subject to any other exclusionary rule, including the *"ultimate issue"* rule. That rule generally prohibits opinion evidence that usurps the role of the trier of fact.[35] The Commission submitted that whether all or any of the Mackasey Opinion addresses issues that were for the Tribunal to determine at the merits hearing could be determined prior to the hearing without reference to contested facts or anticipated evidence.

[210] Whether the Mackasey Opinion was subject to some other exclusionary rule, the respondents submitted that the opinion compared Cormark's, Kennedy's and Canopy's understanding of the transactions at issue with what could be reasonably expected of a similarly situated investment bank and issuer. This would provide necessary context to the allegations that Canopy was misled and would not be an opinion on the ultimate issue.

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[33] *Paramount (Re)*, 2020 ONSEC 12 at para 15 (***Paramount***)

[34] *Paramount* at para 12

[35] *R v Sekhon,* 2014 SCC 15 at para 75 (***Sekhon***)

[211] We agree with the Commission that the Tribunal can determine whether the Mackasey Opinion addresses issues that were for us to determine without having reference to the contested facts or anticipated evidence.

[212] In addition, the respondents submitted that *Mega-C* should be considered in a broader context of requiring a balancing of interests – ensuring the fairness of the proceedings and that all procedural rights the parties are entitled to are properly and effectively provided. The manner of achieving that goal will depend on the circumstances of each case, "including the sanctions and outcomes sought and what is ultimately at stake" for the respondents.[36] In this instance, the respondents faced very serious consequences including, for Cormark, revocation of the right to carry on business in the securities industry. The respondents submitted that the Tribunal should, therefore, in exercising our discretion balance in favour of the respondents' ability to make full answer and defence.

[213] While we agree with the Commission that whether the Mackasey Opinion met the *Mohan* test could be determined prior to the merits hearing, we concluded that in balancing the interests of the parties to ensure that the respondents are able in these circumstances to make full answer and defence to the very serious allegations and their attendant consequences, the question of whether the opinion was admissible should be determined in the context of the merits hearing. The answer to the first question was therefore "no".

5.1.2.b Would the resolution of the issues raised by the motion make the process materially more efficient and effective?

[214] We also concluded, for the reasons below, that the answer to the third question was "no".

[215] The Commission submitted that resolving the issue of whether the Mackasey Opinion was admissible before the merits hearing would be materially more efficient and effective regardless of the outcome. If the Commission were successful there would be no need for a responding or reply opinion and no need

[36] *Mega-C* at para 31

for Mackasey or any other expert to testify. Regardless of who would be successful there would be greater certainty about how the merits hearing would proceed, because the scope of the relevant issues would have been clarified. Dealing with the question of admissibility mid-hearing might result in delays needed to schedule the experts, hear their evidence, and for the panel to make its decision.

[216] The respondents submitted that no efficiencies would be gained from determining this issue on a preliminary basis. They submitted that given that several of the Commission's allegations could not be tested without factual findings and reference to the anticipated oral evidence, a full hearing would be required. This would duplicate the merits hearing.

[217] In addition, the respondents submitted that *Mega-C* cannot be interpreted to read that a process that is merely more efficient trumps the right of the respondents to make full answer and defence to the serious allegations and their potential consequences for the respondents.

[218] We agreed with the respondents that while there may be some efficiencies from resolving the issue of whether the Mackasey Opinion is admissible on a pre-hearing basis, those efficiencies do not reach a level of materiality suggested by *Mega-C*.

[219] We heard submissions about the few cases in which the Tribunal has considered the admissibility of an expert opinion. In *Solar Income,* the issue was dealt with pre-hearing and the expert report was ruled inadmissible. In that case*,* the Commission had sought to introduce an expert opinion to presumptively rebut anticipated evidence from the respondents, but the respondents undertook not to lead evidence on the issue in question. In *Kraft (Re),*[37] the parties exchanged expert opinions and submissions and chose a day close to the start of the merits hearing on which the issue was addressed. In *Mithaq Canada Inc. (Re),*[38] the

[37] 2023 ONCMT 36 (***Kraft***)
[38] 2024 ONCMT9 (CanLII) (***Mithaq***)

Tribunal dealt with whether an expert report was admissible at the outset of the merits hearing. In each instance, the Tribunal's decision is very fact specific.

[220] The efficiencies that might be gained in this instance from addressing this issue before the merits hearing would be minor. In balancing the interests of efficiency against the potential serious consequences faced by the respondents in this matter, we concluded the balance weighed more heavily on the side of ensuring that all the procedural protections were available to the respondents. We concluded that the answer to the third *Mega-C* question was also "no".

[221] We now turn to the reasons for our decision to vary the scheduling order and extend the time for the Commission to file a responding expert opinion, if any.

5.1.3 Should the Commission be granted an extension for filing a responding expert opinion?

[222] The respondents served two expert reports on September 15, 2023. The Commission had until November 3, 2023, to serve any expert reports in response but served none. On November 1, 2023, the Commission brought its motion. We granted the Commission an extension to file any responding expert report by January 15, 2024. The Commission did not file any such report.

[223] The Commission conceded that it would have been ideal if it had served its notice of motion earlier. However, the *Kraft* decision, dealing with a similar issue, was issued on October 20, 2023. Four days later, the parties were advised that the panel was no longer available on five hearing dates. The parties were asked for submissions on whether the dates should be rescheduled or vacated. The number of days required for the merits hearing depended, in the Commission's view, on whether the Mackasey Opinion was admissible. The Commission advised the respondents on October 26, 2023, that it would be challenging the opinion and filed its motion on November 1, 2023.

[224] The Commission submitted that it brought this motion in good faith with the aim of streamlining the proceeding. There was ample time in the hearing schedule, with several breaks built into the schedule, for a responding opinion to be served if one were required. If its motion were denied, the Commission could file a reply expert opinion by January 15, 2024. In its written submissions the Commission

had said an expert response report could be filed within two weeks. The amended request to be able to file by January 15, 2024, was because of the pending holidays.

[225] The respondents submitted that the schedule was set in June 2023, and it was inappropriate for the Commission to have waited until November 1, 2023, to bring this motion. The Commission could have filed a responding expert opinion without prejudice by the deadline or filed its motion earlier. The respondents submitted that the Commission was pursuing a de-risking strategy that the Tribunal should not sanction by granting the requested relief. The Commission intended to take the position that the Mackasey Opinion is irrelevant and if unsuccessful then it would serve a responding opinion two months late, hedging the need for it to provide a responding expert opinion. The Commission had made its decision about what evidence it needed to prove its case and should not be given an opportunity to lead additional evidence if that decision proved to have been wrong.

[226] The Commission's proposed approach, the respondents submitted, put the merits hearing schedule at risk and was not efficient. The respondents had incurred the cost of their expert's report and had to attend this motion hearing and, if the Commission were successful, attend an admissibility hearing. If the Commission were unsuccessful at the motion hearing and were allowed to file a late responding expert opinion, the respondents would then have to consider preparing and serving a reply opinion, while having to prepare for the merits hearing itself.

[227] Expert evidence is intended to assist the Tribunal with understanding technical issues that are outside the scope of the Tribunal's expertise. If the Tribunal found the Mackasey Opinion to be admissible and there were no responding expert evidence, the Tribunal may be disadvantaged. The Tribunal would not have the benefit of a fully argued opinion on whatever issues the Tribunal determined it needed assistance with.

[228] We took the Commission at its word that it was not engaged in a de-risking strategy but acting in good faith to make the proceeding more efficient. It would have been better for the Commission to have brought its motion earlier.

However, to proceed without a responding opinion in this instance could have led to an unfair result. We therefore granted the Commission an extension to file a responding expert report.

6. CONCLUSION

[229] We conclude that the Commission has failed to establish any of its allegations. We therefore dismiss this proceeding.

Dated at Toronto this 6th day of November, 2024

"M. Cecilia Williams"

M. Cecilia Williams

"Jane Waechter"

Jane Waechter

"Geoffrey D. Creighton"

Geoffrey D. Creighton