Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue Queen Ouest, Toronto ON M5H 3S8

Citation: The Catalyst Capital Group Inc. (Re), 2020 ONSEC 6
Date: 2020-02-19
File No. 2019-41

IN THE MATTER OF
THE CATALYST CAPITAL GROUP INC.

-and-

IN THE MATTER OF
HUDSON'S BAY COMPANY, RICHARD A. BAKER, LISA BAKER, LISA AND RICHARD BAKER ENTERPRISES, LLC, RED TRUST, YELLOW TRUST, BLUE TRUST, ROBERT BAKER, CHRISTINA BAKER, A TRUST FOR BETTINA JANE RICHMAN, A TRUST FOR EMMA RICHMAN, A TRUST FOR FRANCESCA RICHMAN, ASHLEY S. BAKER 3/15/84 TRUST, LION TRUST, MR. AND MRS. ROBERT BAKER FAMILY FOUNDATION, CHRISTINA BAKER TRUST FOR GRANDCHILDREN, ROBERT C. BAKER TRUST FOR GRANDCHILDREN, WILLIAM MACK, THE WILLIAM AND PHYLLIS MACK FAMILY FOUNDATION, INC., MACK 2010 FAMILY TRUST I, RICHARD MACK, WRS ADVISORS III, LLC, WRS ADVISORS IV, LLC, LEE NEIBART, LEE S. NEIBART 2010 GRAT, HANOVER INVESTMENTS (LUXEMBOURG) S.A., ABRAMS CAPITAL PARTNERS I, L.P., ABRAMS CAPITAL PARTNERS II, L.P., WHITECREST PARTNERS, LP, FABRIC LUXEMBOURG HOLDINGS S.À.R.L, L&T B (CAYMAN) INC. and RUPERT ACQUISITION LLC

REASONS AND DECISION
(Section 127 of the *Securities Act*, RSO 1990, c S.5)

Hearing: December 11, 12 and 13, 2019

Decision: February 19, 2020

Panel:	D. Grant Vingoe	Vice-Chair and Chair of the Panel
	Timothy Moseley	Vice-Chair
	Lawrence P. Haber	Commissioner
Appearances:	Paul Davis	For The Catalyst Capital Group Inc.
	Brett Harrison	
	Adam D. H. Chisholm	
	Sandra Zhao	
	Samantha Gordon	
	Kelly Kan	

R. Seumas M. Woods Jeffrey R. Lloyd Michael I. Gans Ryan A. Morris	For Hudson's Bay Company
Eliot Kolers Libby Nixon Jonah Mann Brian Pukier Sean Vanderpol	For Richard A. Baker, Lisa Baker, Lisa and Richard Baker Enterprises, LLC, Red Trust, Yellow Trust, Blue Trust, Robert Baker, Christina Baker, A Trust for Bettina Jane Richman, A Trust for Emma Richman, A Trust for Francesca Richman, Ashley S. Baker 3/15/84 Trust, Lion Trust, Mr. and Mrs. Robert Baker Family Foundation, Christina Baker Trust for Grandchildren, Robert C. Baker Trust for Grandchildren, William Mack, The William and Phyllis Mack Family Foundation, Inc., Mack 2010 Family Trust I, Richard Mack, WRS Advisors III, LLC, WRS Advisors IV, LLC, Lee Neibart, Lee S. Neibart 2010 GRAT, Hanover Investments (Luxembourg) S.A., Abrams Capital Partners I, L.P., Abrams Capital Partners II, L.P., Whitecrest Partners, LP, and Fabric Luxembourg Holdings S.À.R.L., L&T B (Cayman) Inc. and Rupert Acquisition LLC
Rikin Morzaria Charlie Pettypiece Naizam Kanji Jason Koskela	For Staff of the Commission

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REASONS AND DECISION

I. OVERVIEW

[1] On December 2, 2019, The Catalyst Capital Group Inc. (**Catalyst**) submitted an application (the **Catalyst Application**) to the Ontario Securities Commission (the **Commission**) complaining about alleged abusive or coercive conduct and disclosure deficiencies in connection with a going-private transaction involving Hudson's Bay Company (**HBC**), led by Mr. Richard Baker, HBC's Governor and Executive Chairman (**Baker**).

A. The Proposed Arrangement

[2] On June 10, 2019, the group led by Baker announced the proposal to take HBC private. The going-private transaction was proposed to be implemented through an Arrangement Agreement dated October 20, 2019 (the **Arrangement Agreement**), to give effect to a plan of arrangement (the **Plan of Arrangement**) under the *Canada Business Corporations Act* (**CBCA**).[1] Pursuant to the Plan of Arrangement, Rupert Acquisition LLC, an entity owned by Baker, his family and related interests (**Rupert LLC**) and entities related to four existing shareholders consisting of Fabric Luxembourg Holdings S.à.r.l (**Fabric**), Hanover Investments (Luxembourg) S.A., L&T B (Cayman) Inc. and Abrams Capital Management L.P. (collectively, the **Continuing Shareholders**), would own all of the common shares of HBC (the **Common Shares**) if the Plan of Arrangement was completed (the **Transaction**). The Continuing Shareholders control approximately 57% of the voting shares of HBC.

[3] HBC, Baker, entities and family members associated with Baker, the Continuing Shareholders and Rupert LLC are the Respondents in this proceeding (the **Respondents)**.

[4] Fabric, which is an investment vehicle affiliated with Rhone Capital L.L.C., alone controls 23.5% of the voting shares of HBC. Fabric had been subject to a standstill agreement set out in an Investor Rights Agreement between HBC and Fabric, dated October 24, 2017 (the **Standstill Agreement**). Under the Standstill Agreement, among other restrictions and subject to certain exceptions, Fabric was prohibited from transferring or agreeing to transfer any portion of its Common Shares of HBC to any person or group of persons that would beneficially own or control more than 10% of the Common Shares. As discussed below, the Standstill Agreement was waived by HBC to enable the Continuing Shareholders to pursue the Transaction.

[5] The Continuing Shareholders initially offered a price of C$9.45 per share to the public shareholders who would be bought out in the Transaction. HBC's Special Committee formed to consider the Transaction (the **Special Committee**) found this price to be inadequate. The Continuing Shareholders then increased the price to C$10.30. If this price were applied to all the Common Shares, it would result in a market capitalization of approximately C$1.9 billion for HBC.

[6] By virtue of HBC's by-laws and corporate law, approval of the Transaction requires 75% approval of the votes cast at the meeting called to consider the matter. By virtue of MI 61-101 *Protection of Minority Security Holders in Special*

[1] RSC 1985, c C-44.

Transactions (**MI 61-101**),[2] which is in effect in Ontario,[3] approval of the Transaction also requires the approval of a 'majority of the minority', based on the votes cast at the meeting. For this purpose, the minority excludes the Continuing Shareholders and certain other categories of persons specified in MI 61-101. Under the CBCA, the Transaction would also require the approval of the Ontario Superior Court of Justice, based on the Court's assessment of the fairness of the transaction.

[7] On the same day as, but shortly prior to, the Continuing Shareholders' announcement of the Arrangement Agreement, HBC also announced that it had entered into definitive agreements to sell its remaining European real estate and related European retail joint venture to its then partner, SIGNA Retail Holdings, for proceeds of approximately C$1 billion (the **SIGNA Transactions**). HBC's announcement stated that the SIGNA Transactions were expected to close in the fall of 2019. The parties acknowledged that the proceeds from the SIGNA Transactions would help fund the Transaction.

[8] After a process leading to the increased price and the Special Committee's favourable recommendation of the Transaction, HBC scheduled the shareholders meeting to consider the Transaction for December 17, 2019 (the **Special Meeting**). HBC disseminated a management information circular, dated November 14, 2019, to solicit HBC's shareholders to vote and to obtain proxies to obtain the required votes in favour of the Transaction (the **Circular**).

[9] The Circular contained a valuation of the Common Shares prepared by TD Securities Inc. (**TD Securities**) in accordance with the requirements of MI 61-101 and an opinion concerning the fairness, from a financial point of view, of the consideration to be received by the minority common stock holders (the **TD Valuation and Fairness Opinion**).

[10] The TD Valuation and Fairness Opinion, which was dated October 20, 2019, relied on the third-party appraisals of HBC's real estate holdings. In certain cases, TD Securities adjusted the appraised value.

[11] Notably, the TD Valuation and Fairness Opinion relied on the appraisal of the value of the Saks Fifth Avenue flagship property (the **Saks Flagship**) prepared by CBRE, Inc. (**CBRE**) at the direction of the Special Committee, as at July 15, 2019, and brought forward to October 15, 2019 (the **CBRE Appraisal**).

[12] The TD Valuation and Fairness Opinion stated that:

a. subject to specified assumptions and limitations, "the fair market value of the Common Shares is in the range of C$10.00 to C$12.25 per Common Share"; and

b. the consideration offered in the Transaction of C$10.30 was, in the opinion of TD Securities, fair to the minority shareholders from a financial point of view.

[13] The Circular also included fairness opinions prepared by J.P. Morgan Securities Canada Inc. (**J.P. Morgan Securities**) and Centerview Partners LLC (**Centerview**), each dated October 20, 2019. Each firm concluded, subject to

[2] (2008), 31 OSCB 1321.
[3] MI 61-101 is also in effect in Quebec, Alberta, Manitoba and New Brunswick.

the assumptions and limitations set out in its opinion, that the Transaction was fair to the minority shareholders from a financial point of view.

[14] The CBRE Appraisal was not included in the Circular, but was available for review on HBC's website. The CBRE Appraisal utilized three different scenarios, discussed in greater detail below, and concluded that those three scenarios yielded a market value for the Saks Flagship of US$1.6 billion, US$250 million or US$1.180 billion.

[15] The CBRE Appraisal was an input into the TD Valuation and Fairness opinion and the other two fairness opinions.

[16] The TD Valuation and Fairness Opinion states that TD "reviewed and relied upon (without attempting to verify independently the accuracy of)", among other listed items, the CBRE Appraisal. The Centerview fairness opinion states that it "used and relied on, at the direction of the Special Committee, … the Real Estate Appraisals for purposes of our analysis and this Opinion." Centerview, however, did not express an opinion as to such appraisals or the assumptions on which they were based. The J.P Morgan Securities fairness opinion states that J.P. Morgan Securities assumed the completeness of all information furnished to it by HBC and that it had been provided with "certain third-party appraisals of certain assets of [HBC] provided by [HBC]…", which we infer included the CBRE Appraisal. J.P. Morgan Securities similarly disclaimed any obligation to independently verify such information.

B. The Catalyst Offer

[17] Catalyst is a Canadian private equity firm that controls approximately 17.49% of the Common Shares, acquired principally after the Transaction was announced.

[18] Catalyst has actively opposed the Transaction through its engagement with HBC, through the press and through complaints to Staff of the Commission (**Staff**). On November 27, 2019, Catalyst announced that it had offered to purchase all the Common Shares of HBC at a price of C$11.00 per share (the **Catalyst Offer**). HBC's Special Committee responded on December 2, 2019 by stating that the Catalyst "transaction is incapable of being completed", since a 75% vote was required to complete an acquisition and the Continuing Shareholders, which control approximately 57% of the Common Shares, "are not interested in a transaction that would result in a sale of their interests in HBC".

[19] The Respondents seek no relief in this proceeding regarding the Catalyst Offer. We refer to it solely to provide context for the events that transpired.

C. Orders Sought by Catalyst

[20] The Catalyst Application sought the following orders from the Commission pursuant to s. 127 of the *Securities Act*[4] (the **Act**):

a. an order for documentary discovery of HBC;

b. an interim order, pursuant to s. 127(1)2.1 of the Act, prohibiting the acquisition of shares pursuant to the Plan of Arrangement until this matter is dealt with through a final order of the Commission and no later than January 7, 2020;

[4] RSO 1990, c S.5.

c. an order for an expedited hearing;

d. an order granting standing to Catalyst to pursue the Catalyst Application;

e. an order:

i. pursuant to s. 127(1)2.1 of the Act permanently prohibiting the acquisition of securities pursuant to the Plan of Arrangement or any similar transaction;

ii. or, in the alternative,

(a) an order pursuant to s. 127(1)5 of the Act requiring HBC to amend the Circular to address the issues raised in the Catalyst Application, and to provide Staff with a copy of the Circular so amended (the **Amended Circular**) at least five business days before it is sent to shareholders of the Company;

(b) an interim order requiring HBC to postpone the Special Meeting to a date not earlier than 21 calendar days after the date the Amended Circular is sent to shareholders of HBC; and

(c) an interim order pursuant to s. 127(1)2 of the Act cease trading the securities of HBC in connection with the privatization transaction until such time that HBC complies with clauses e.ii.*(a)* and *(b)* above.

II. PRELIMINARY ISSUES

A. Scheduling and Procedural Issues

[21] At the first attendance in this matter on December 5, 2019, the Commission ordered an expedited exchange of application materials, with the hearing of the application scheduled to begin on December 11, 2019, and to continue, if necessary, on December 12 and 13, 2019. As a result, the hearing was scheduled to end three calendar days (one business day) before the Special Meeting. In order to more readily accommodate the expedited hearing schedule, Catalyst abandoned its request for documentary discovery of HBC.

[22] The Commission also ordered, with the consent of the parties, that all evidence in chief would be entered by way of affidavits. The parties were required to make the affiants available for cross-examination at the hearing of the application.

[23] At the first attendance, the panel directed that the standing of Catalyst would be the first matter to be considered in a potentially bifurcated hearing commencing on December 11, 2019.

B. Standing

[24] Only Staff has the ability as of right to bring an application under s. 127 of the Act. Therefore, on the first day of the hearing, we heard submissions from the parties regarding whether Catalyst ought to be granted standing to bring its application.

[25] In *MI Developments Inc. (Re)*,[5] the Commission enumerated the following factors that were relevant to the exercise of its discretion to permit a private party to bring an application under s. 127 of the Act in appropriate circumstances:

a. the application involves or relates to both past and possible future conduct regulated by Ontario securities law;

b. the application is not purely enforcement in nature;

c. the relief sought by the applicant is future-looking;

d. the Commission has the authority to impose an appropriate remedy in the circumstances;

e. the applicant, as a substantial shareholder of the respondent, is directly affected by the past and future conduct of the respondents; and

f. the Commission is satisfied that it was in the public interest to hear the application.

[26] In subsequent decisions relating to standing, the Commission has applied the factors enumerated in *MI Developments* and has expanded the non-exhaustive list of factors to include whether the application raises a novel issue, whether the issues could have been addressed in prior applications, whether there was a *prima facie* case, and the timing of the application.[6]

[27] After hearing submissions, we gave an oral decision, with reasons to follow, by which we granted standing to Catalyst. The following are our reasons for that decision.

1. Timeliness of the Catalyst Application

[28] Catalyst brought its application on a timely basis, considering the timing of its engagement with HBC and Staff before and after the dissemination of the Circular. The Circular itself was not filed until November 18, 2019. The information in the Circular was restated in material respects by a press release issued on December 6, 2019, entitled "Special Committee of the Board of Hudson's Bay Provides Additional Information Regarding Background to Proposed Privatization Transaction" (the **December 6 Press Release**).[7] The December 6 Press Release goes into considerable detail concerning the SIGNA Transactions and their interrelationship with the Transaction – details that were not initially included in the Circular. Catalyst was entitled to consider this information in evaluating whether it should make a revised complaint to Staff and to determine what relief it should seek from the Commission. The December 6 Press Release was issued one day after the first attendance in this matter. Bearing in mind the new information in the December 6 Press Release, Catalyst was timely in pursuing its application in these circumstances.

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[5] *MI Developments (Re)*, 2009 ONSEC 47, (2009) 32 OSCB 126 (***MI Developments***) at paras 107-110.

[6] *Growthworks Canadian Fund Ltd (Re)*, 2011 ONSEC 17, (2011) 34 OSCB 6755; *Central GoldTrust (Re)*, 2015 ONSEC 44, (2015) 38 OSCB 10768; *Catalyst Capital Group Inc*, 2016 ONSEC 14, (2016) 39 OSCB 4079; *Pearson (Re)*, 2018 ONSEC 53, (2018) 41 OSCB 8795.

[7] Exhibit 3, Affidavit of David Leith sworn December 9, 2019 at Tab 1T, HBC Press Release dated December 6, 2019 (**December 6 Press Release**).

2. Fundamental Securities Regulatory Issues Raised by the Catalyst Application

[29] Catalyst's application raises fundamental securities regulatory issues involving compliance with MI 61-101 and the protection of minority shareholders who are faced with a management-led going-private transaction. Those issues include both process and disclosure issues involving:

a. the timing of the formation and mandate of the Special Committee and its involvement in key decisions after the Lead Director, Mr. David Leith (**Leith**), learned of the Transaction;

b. the Special Committee's role in negotiating the Transaction and its consideration of the interrelationship between the Transaction and the SIGNA Transactions; and

c. the effect of the CBRE Appraisal of the Saks Flagship on the TD Valuation and Fairness Opinion.

[30] These issues were apparent from the application record before us, which demonstrated that before a Special Committee was mandated with considering and negotiating the Transaction, Leith authorized Baker to share material non-public information regarding HBC with Fabric to enable Baker to form the group of Continuing Shareholders.

[31] The application record also demonstrated the close proximity in time of the announcement of the SIGNA Transactions with the announcement of the going-private proposal (approximately six minutes). The record also showed how little the Circular disclosed about the Special Committee's consideration regarding the interrelationship of the two and the committee's involvement with regard to the timing of the two announcements.

[32] In addition, the CBRE Appraisal, which had a central role in the TD Valuation and Fairness Opinion, was ambiguous as to whether CBRE was bound by certain scenarios directed by the Special Committee and whether its appraisal could be properly be relied upon in the formulation of a valuation under MI 61-101.

[33] These concerns, in the context of the need to afford appropriate protections to minority investors in a transaction subject to significant conflicts of interest, are sufficient to demonstrate the existence of a *prima facie* case that should proceed to a full hearing.

3. No Undue Interference with Commercial and Market Expectations

[34] Since the hearing was scheduled to be concluded prior to the Special Meeting and well before the outside date contemplated in the Arrangement Agreement, a hearing on the merits of the application did not unduly interfere with commercial and market expectations.

4. Other Factors and Conclusion on Standing

[35] All other *MI Developments* factors were satisfied:

a. the Catalyst Application relates to both past and possible future conduct regulated by Ontario securities law,

b. the Catalyst Application seeks forward-looking relief,

c. the Catalyst Application is not enforcement in nature, but is directed to the prevention of abusive conduct, compliance with MI 61-101, and disclosure issues that are central to the ability of minority shareholders to make an informed voting decision,

d. the cease-trade orders and remedial disclosure sought by Catalyst are within the Commission's authority, and

e. Catalyst is a significant minority shareholder who is directly affected by the conduct that forms the subject of its complaints.[8]

[36] For these reasons, we granted Catalyst standing to pursue its Application pursuant to s. 127 of the Act.

III. ISSUES

[37] Catalyst's Application raises the following issues:

a. What is the standard for disclosure for the Circular?

b. Did the Circular meet the standard of disclosure?

c. If the standard of disclosure was not met, what is the appropriate relief:

i. Should the Transaction be permanently cease-traded?

ii. Should we require the Circular to be amended and restated so that investors can review the material within the 'four corners' of the document? If so, what additional disclosures should be ordered?

iii. What other relief, if any, is appropriate?

d. Was the process leading to the Transaction abusive to minority shareholders such that the transaction should be permanently cease-traded?

IV. ANALYSIS

A. Law on Protection of Minority Security Holders

[38] The primary securities law framework for considering the Transaction and the Catalyst Application is set out in MI 61-101.

[39] The Transaction is embodied in the Plan of Arrangement and is a business combination that is subject to Part 4 of MI 61-101. It contemplates that the minority shareholders' equity interests in HBC would be terminated in return for cash, without their consent. It involves the Continuing Shareholders, who are acting jointly in pursuing the Transaction and who control approximately 57% of the Common Shares. The Continuing Shareholders are led by Baker and are related parties of HBC. MI 61-101 is premised on the need to protect minority shareholders in such business combinations from:

a. the informational advantages that parties related to the issuer enjoy as a result of their insider status, when those parties seek to buy out the other shareholders, and

[8] See section IV.H of these Reasons for a discussion of Catalyst's allegations concerning early warning and insider reporting.

b. the conflict of interest arising from the insider's role as a buyer acting in its own self-interest by seeking the lowest possible price.

[40] The Companion Policy to MI 61-101 states that:[9]

> We do not consider that the types of transactions covered by this Instrument are inherently unfair. We recognize, however, that these transactions are capable of being abusive or unfair, and have made the Instrument to address this.

We agree with this statement. Such transactions are an established feature of the marketplace and can provide valuable liquidity events for minority shareholders.

[41] MI 61-101 requires the following primary special protections for this type of transaction:

a. Enhanced disclosure requirements, which include the following elements that are particularly relevant to the Catalyst Application:[10]

   i. a description of the background to the business combination,

   ii. disclosure of every prior valuation in respect of the issuer known to the issuer or directors or senior officers that has been made in the prior 24 months,

   iii. a discussion of the review and approval process adopted by, in this case, the Special Committee,

   iv. a summary of the independent valuation obtained by HBC and the other information concerning the valuator and the valuation required by Part 6 of MI 61-101,

   v. any specific direct or indirect benefit to directors or officers of HBC obtained as a result of the transaction, and

   vi. by virtue of the incorporation of the required disclosures in Item 29 of Form 62-104F2 – *Issuer Bid Circular*, any other matter that has not previously been generally disclosed, that is known to the issuer, "and that would reasonably be expected to affect the decision of the security holders of the issuer to accept or reject the offer…."

b. Preparation of a formal valuation of the Common Shares by an independent, qualified valuator, selected and supervised by a special committee. The valuation must express the valuator's opinion (which may be in the form of a price range) as to the fair market value of the Common Shares as of an effective date within 120 days of the earlier of the date the Circular was sent to the Common Share holders or filed. The valuator must not make a downward adjustment for the liquidity of the

[9] Companion Policy 61-101CP to MI 61-101 – *Protection of Minority Security Holders in Special Transactions* (2008), 31 OSCB 1357, s 1.1.

[10] MI 61-101, s 4.2(3).

shares, the effect of the transaction on the shares or the fact that the shares do not form part of a controlling interest.[11]

c. Majority of the minority approval at a shareholders' meeting. The minority in this case would exclude the Continuing Shareholders. It would also exclude, among others, joint actors in relation to the Continuing Shareholders and directors and officers who would be entitled to receive different consideration for their shares or a collateral benefit as defined in MI 61-101.[12]

B. Law on Special Committees

[42] MI 61-101 requires the establishment of a special committee of independent directors only in the case of an insider bid – that is, a take-over bid implemented by insiders of the issuer, rather than an arrangement or other transaction implemented by a shareholder vote such as the Transaction.

[43] Notwithstanding that a Special Committee is not mandated by MI 61-101 in these circumstances, the Special Committee in making its recommendation described its responsibilities in a manner similar to what would be required of a special committee under this instrument, stating in its October 21, 2019 press release:

> The Special Committee of independent directors was established by the HBC Board of Directors … to consider the initial privatization proposal, as well as other alternatives available to the Company, including the status quo, and, if it deemed advisable, to negotiate with the Shareholder Group on pricing and other terms of the arrangement to ensure that the arrangement was fair to the HBC shareholders other than the Shareholder Group.

[44] To a similar effect, the HBC Investor presentation stated twice that the:[13]

> ✓ **Special Committee and its advisors conducted independent and thorough evaluation process**
>
> - Offer price is within the fair market value range provided by TD Securities, the independent valuator
> - Estimated value of real estate at $8.75 per share based on independent appraisals
> - Thorough evaluation of management's operating plan for the retail business

[45] In the Circular, HBC described the role of the Special Committee as follows:

> The Board asked the Special Committee to evaluate the Initial Proposal (and any other privatization proposal) and consider alternatives available to the Company, including the option of doing no transaction at all. The Special Committee

[11] MI 61-101, s 6.4.
[12] MI 61-101, s 8.1.
[13] Exhibit 1, Affidavit of Gabriel De Alba sworn December 6, 2019 (**De Alba Affidavit**) at Tab 2DD, HBC Investor Presentation dated October 21, 2019, pp 3 and 15.

> also was asked to supervise or engage in negotiations with respect to any potential transaction and provide a recommendation to the full Board as to whether any potential transaction considered by the Special Committee is in the best interests of the Company and should be recommended for approval by shareholders.

[46] HBC recognized the value of a special committee in this case in order to assist the board in carrying out its mandate, in mitigating the conflicts of interest of the Continuing Shareholders and to provide a reasonable basis for the required majority of the minority vote.

[47] Where, as in this case, a special committee is established as the appropriate protective mechanism, disclosure of its processes and the basis for its recommendation should be subject to the same disclosure standards in a management information circular that would apply if a special committee was required. This is because in both cases the information is equally important to investors' voting decisions regardless of why the company had to or chose to initiate a special committee process. In each case the standard of disclosure will be what is important to enable an investor to make an informed decision.[14] If a company has embarked on a special committee process and made commitments to investors of the kind made by HBC about the process, investors are entitled to disclosure concerning the mandate, timing and material decisions made by or relating to the special committee to allow for an informed vote on the transaction and to give them confidence that the process supported the special committee's recommendation. This is equally true whether the special committee is mandated by Ontario securities law or put in place by the company for other reasons.

[48] Among other matters, investors reasonably need disclosure concerning decisions related to the Special Committee's power to negotiate or supervise the negotiation of transactions and to consider alternatives. The circular should also describe its approach to the use of independent counsel and its possession of sufficient resources to carry out its mandate, free of undue influence.

[49] Once such a special committee process is set in motion, shareholders are entitled to disclosures that are equally as effective as for other related party transactions posing similar risks to minority shareholders. If a special committee is employed, the disclosures related to its process will be open to the same scrutiny as if its establishment was mandated, whether it was formed as a result of corporate law considerations, securities law requirements, and best practices, or as a perceived necessary step to gain shareholder approval in a conflicted transaction.

C. Law on Standard for Disclosure

[50] In *Magna (Re)*, the Commission summarized the standard for disclosure required by Ontario securities law, corporate law and common law in a management information circular, where the circular relates to a transaction that requires a shareholder vote:[15]

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[14] See section IV.C of these Reasons for a discussion of the standard of disclosure.

[15] *Magna International Inc (Re)*, 2010 ONSEC 14, (2011) 34 OSCB 1290 (***Magna***) at para 109.

> They require that disclosure be provided in the Circular in sufficient detail to enable a reasonable shareholder to make an informed decision on how to vote on the Proposed Transaction. That standard of disclosure constitutes an objective test that must be applied in the specific circumstances.

[51] The Commission in *Magna* emphasized that disclosure in an information circular "must be accurate, complete and not misleading and must be contained within the four corners of the applicable circular".[16]

[52] A circular "must set forth the information that would be important to a reasonable shareholder in deciding how to vote on the particular transaction" and "must not omit facts necessary to make any statement or information not misleading."[17]

[53] *Magna* also states, "while the applicable disclosure standard does not change based on the circumstances, how that standard is applied is contextual and will vary with the circumstances."[18]

[54] We apply this disclosure standard to the disclosure deficiencies asserted by Catalyst with regard to the Circular.

D. Application of the Standard for Disclosure

1. The TD Valuation and Fairness Opinion

[55] The summary of the TD Valuation and Fairness Opinion in the Circular states:

> On October 20, 2019, TD Securities orally delivered its opinion (subsequently confirmed in writing) to the Special Committee that subject to the assumptions, limitations and qualifications set forth in the TD Securities Valuation and Fairness Opinion, it was of the opinion that, as of October 20, 2019, (i) the fair market value of the Common Shares is in the range of $10.00 to $12.25 per Common Share, and (ii) the Consideration to be received by the Common Shareholders other than the Continuing Shareholders pursuant to the Arrangement is fair, from a financial point of view, to the Common Shareholders other than the Continuing Shareholders.

[56] The full text of the TD Valuation and Fairness Opinion is appended to the Circular as Appendix C.

[57] The "Assumptions and Limitations" section of the TD Valuation and Fairness Opinion states:

> …TD Securities relied upon the appraisals of value of HBC's 100%-owned and joint venture owned real estate properties prepared by the Appraisers, as adjusted by TD Securities

[16] *Magna* at para 113.
[17] *Magna* at para 117.
[18] *Magna* at para 128.

> following discussions with the Real Estate Specialists, which is more particularly described in the Valuation.[19]

[58] The section entitled "Approach to Real Estate Value" states that the real estate appraisals prepared by the Appraisers, which included both Cushman and Wakefield, Inc. for 87 of HBC's 100%-owned and joint venture owned real estate properties, and CBRE for the Saks Flagship, conducted their appraisals based on the same defined scenarios for the use of all these properties:

> The Appraisers provided an appraisal of the value of each property, either 100%-owned or owned through the Real Estate JVs, based on the following scenarios, the higher of which was determined to be the appraised value ("Appraised Value"):
>
> 1. value assuming HBC as the tenant (the "As-Is Value"); and
>
> 2. greater of the hypothetical value assuming the property is rented to: (i) a single tenant; or (ii) multiple tenants, other than HBC (the "Dark Value").[20]

[59] The multi-tenant scenario described in 2(ii) above in respect of the Saks Flagship is stated to be based exclusively on a scenario in which "the existing tenant footprint was rationalized to occupy the basement to floor four, the restaurant maintained its current footprint and office tenants occupied the remaining space. The value under this scenario was less than the As-Is Value."[21]

[60] CBRE also disregarded a variant of the above scenario 2(ii) in which upper floors would be converted to residential condominiums based on the stated weakness in the luxury residential market in Manhattan.

[61] TD Securities made certain adjustments to the value of the real estate for purposes of its valuation, utilizing the mid-point of a range calculated by adjusting the gross occupancy cost ratio in the case of the Saks Flagship. The market rents for the Saks Flagship implied a gross occupancy cost ratio at the high end of market benchmarks for comparable properties, as determined by CBRE, but the range was not included in the TD Valuation and Fairness Opinion since the Special Committee considered the sales information for the Saks Flagship, which could be derived from the ratio, to be commercially sensitive.

[62] After the adjustments made by TD Securities, the Saks Flagship is stated to have an Adjusted Real Estate Value Range of between C$2,036.4 million and C$2,162.4 million. HBC's equity value in all real estate holdings is stated to be in the range of C$1,465.4 million to C$1,719.4 million. It is readily apparent that the vast majority of the value of HBC attributable to the Common Shares arises from HBC's equity interest in its real estate holdings, with the Saks Flagship representing a value in the range of approximately 1/4 to 1/3 of HBC's total equity value in real estate.

[63] The CBRE Appraisal, dated October 15, 2019, is addressed to Leith as the Chairman of the Special Committee of the Board of Directors of HBC. The CBRE

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[19] De Alba Affidavit at Exhibit Q, Management Information Circular dated November 14, 2019 (the **Circular**), p C-7.
[20] Circular, p C-30.
[21] Circular, p C-33.

Appraisal was not appended to the Circular, but was made available on HBC's website, with the redactions of the asserted commercially sensitive information.

[64] Throughout its appraisal report, CBRE refers to directions received from "the Client". While CBRE defines "the Client" to be HBC, it is clear from the context that the term refers to the Special Committee specifically.

[65] The TD Valuation and Fairness Opinion gives a fair summary of the scenarios set out in the CBRE Appraisal. However, the CBRE Appraisal states that "at the request of the Client, we have appraised the subject property according [to] the following three scenarios…"

[66] Nowhere in the CBRE Appraisal does it state unequivocally that these scenarios were selected by CBRE as most appropriate.

[67] A plain reading of the language introducing the three scenarios is that CBRE was directed to use these scenarios by the Special Committee rather than independently determining that they were the most appropriate scenarios and that three were sufficient.

[68] This language indicating that the Special Committee directed the use of particular scenarios is repeated elsewhere in the CBRE Appraisal. For example, in the introduction to Scenario 2, the report states:

> At the request of the Client, we have appraised the subject property assuming it is vacant and ready for occupancy. Further, also at the Client's request, this hypothetical scenario assumes a single retail tenant will lease the entire building, replacing Saks Fifth Avenue.

[69] Similar language is used in the case of Scenario 3, which involves a "conversion into a mixed-use office/retail building."

[70] During the hearing, counsel for HBC directed us to a discussion on pages 73 and 74 of the CBRE Appraisal, entitled "Highest and Best Use". This section does not analyze the status quo, with the Saks Flagship in full occupancy, which scenario, in fact, yielded the highest "value conclusion" in the CBRE Appraisal. The section goes on to discuss the application of this appraisal principle to Scenario 2 ("as vacant") and Scenario 3 ("as improved") but expresses very general conclusions regarding the property's continued use for "retail development" and if vacant, as a "mixed-use office/retail property." If the property were vacant, the buyers could be "an investor (land speculation) or a developer" or "Institutional".

[71] For a valuation to comply with Part 6 of MI-101, it must reflect the "valuator's opinion" concerning the fair market value of the subject shares. If the valuator relies without independent investigation on an appraisal of a highly material asset such as the Saks Flagship, and that appraisal is conducted in accordance with scenarios directed by the board of directors or a special committee without the appraiser's or valuator's clear reasoned acceptance of being limited to those scenarios, the valuation has been inappropriately constrained by the board or special committee. The valuator must express its own opinion, constrained only by circumstances beyond its own control and that of its client, and not constrained by limitations imposed by that client. A valuator cannot escape this responsibility for expressing its independent opinion by relying on an appraisal of material assets that is subject to limitations imposed by its client.

[72] We adopt the following language from the Companion Policy to MI 61-101:

> The disclosure in the valuation of the scope of review should include a description of any limitation on the scope of the review and the implications of the limitation on the valuator's conclusion. Scope limitations should not be imposed by the issuer, an interested party or the valuator, but should be limited to those beyond their control that arise solely as a result of unusual circumstances.

[73] The CBRE Appraisal repeatedly stresses that the scenarios have been directed by the Special Committee. It does not state unequivocally that CBRE has concluded that they are the right ones, that they are sufficiently detailed, and that three is the right number, with or without possible variations. The TD Valuation and Fairness Opinion, by virtue of its reliance on the CBRE Appraisal, is therefore similarly constrained. The adjustments made by TD Securities were strictly within the confines of these three scenarios and did not address the appropriateness of the scenarios themselves.

[74] A special committee should test the work done by the valuator to ensure that it results in an appropriate valuation of the subject securities, and it should ensure that the valuator has the necessary access to information to conduct the valuation and help ensure that the valuator is free from undue influence. It should not constrain the valuator to particular scenarios or constrain the work of appraisers of material assets whose work will be a critical input relied upon by the valuator.

[75] Catalyst submits that the CBRE Appraisal is a Prior Valuation as defined in MI 61-101, requiring that it be disclosed in the Circular, since it is an appraisal of a highly material asset, disclosure of which "would be expected to affect the decision of a security holder to vote for or against a transaction…"

[76] HBC argues that we should not consider the CBRE Appraisal to be a "prior valuation". Rather, HBC urges that we consider the CBRE Appraisal to be a "current appraisal" commissioned by the Special Committee to assist TD Securities in preparing the TD Valuation and Fairness Opinion because it was delivered to the Special Committee a month before the date the Circular was filed.

[77] If the CBRE Appraisal were not ambiguous in its language concerning the limitations imposed upon CBRE's work, and if the appraisal had otherwise been adequately disclosed in the TD Valuation and Fairness Opinion, this might have constituted sufficient disclosure of the appraisal for the purposes of MI 61-101. In this case, however, the limitations on the CBRE Appraisal were not clearly disclosed and there was no discussion of whether CBRE had a reasoned acceptance of such scenarios as supporting values based on the highest and best use of the Saks Flagship.

[78] For these reasons, we ordered that HBC amend the Circular to include the following additional information:

a. a description of any limitation on the scope of the review of the appraisal of the value of the Saks Flagship prepared by CBRE, and whether CBRE, in its professional judgment, considered such appraisal to be based on scenarios constituting the highest and best use of the Saks Flagship; and

b. the effect, if any, of the disclosures made pursuant to clause (a) above on the contents of the TD Valuation and Fairness Opinion.

2. Direct and Indirect Benefits

(a) Restricted Share Units and Deferred Share Units

[79] Subsection 4.2 of MI 61-101 incorporates certain disclosure requirements from Form 62-104F2 – *Issuer Bid Circular*, including the requirement that benefits to directors and officers of the shareholders accepting or refusing the offer, or in this case, approving the transaction through the voting requirements applicable to the Transaction, be disclosed.

[80] Catalyst submits that the payouts to directors and officers arising from the cashing out of their Restricted Share Units (**RSUs**) and Deferred Share Units (**DSUs**) should be disclosed. Catalyst submits that this is a distinct disclosure requirement, and that it constitutes material information that would reasonably be expected to affect the voting decisions of the minority shareholders.

[81] The Circular does disclose the treatment of RSUs and DSUs generally, but does not quantify the payout to any one individual or the payouts in aggregate. HBC asserts that these payouts are not material to the voting decision to be made by shareholders.

[82] Item 14 of Form 62-104F2 is unambiguous in requiring disclosure of direct or indirect benefits to "any person" among those specified in Item 11, including directors and officers of HBC. The relevant payouts are specifically required by s. 2.3(f) and (g) of the Arrangement Agreement and therefore are direct cash benefits to directors and officers that must be disclosed.

[83] The amounts of the payouts calculated by Catalyst were not disputed by the Respondents. Catalyst's calculation also included payouts from direct holdings of the Common Shares, but the vast majority of cash proceeds to directors and officers arise from RSUs and DSUs, and all together aggregate close to C$50 million, with Baker receiving approximately C$12.8 million of this amount.[22] The aggregate amount represents over 6% of the total cash proceeds to be received by shareholders.

[84] In our view, disclosure of that information is not just something required by a form. It is material information for minority shareholders to consider in connection with the exercise of their voting rights, particularly given that:

a. the Continuing Shareholders are advancing an offer in which they state that they would not be sellers under any circumstances;

b. cash benefits will be paid to directors and officers, including the most senior officer of HBC, who is leading the bid; and

c. the Special Committee was able to negotiate an 8.25% increase in the initial offer to C$10.30 per share.

[85] Contrary to submissions made by Catalyst, what Baker chooses to do with his proceeds, including rolling them into newly issued shares of HBC, however, is not likely to be material to the voting decision of the minority shareholders. He is

[22] Exhibit 2, Reply Affidavit of Gabriel De Alba sworn December 10, 2019, at Tab 1E, Cash Payout Calculations.

included in the group of Continuing Shareholders and such an additional investment is a future event. There may, however, be circumstances in which disclosure is required. Purely by way of example, if there is an agreement between Baker and HBC arising in connection with the Transaction that he could purchase new shares at a price less than the consideration offered minority shareholders, this could be a direct or indirect benefit to Baker requiring disclosure. The Panel had insufficient information to find that there were any additional benefits of that kind.

(b) Tax Structure

[86] Catalyst submits that the transaction's atypical structure, as a share buyback by HBC rather than a sale to another party, results in a potentially adverse tax treatment to the minority shareholders. This is acknowledged in the Circular, which states: "**As a result, Shareholders may prefer to sell their Common Shares in the public markets with a settlement date that is prior to the completion of the Transaction**" (emphasis in original).[23]

[87] HBC responds by stating:

> The applicable disclosure requirement, however, is to disclose the direct or indirect benefits of the Arrangement, which the Circular clearly discloses by stating that the Continuing Shareholders will own all of the shares of the Company upon completion of the Arrangement. The Agreed Reorganization does not involve third parties and is intended to facilitate structure simplification and repatriate cash held by non-Canadian subsidiaries to [*sic*] of HBC.

[88] We consider HBC's view of the direct or indirect benefits of a transaction to be too narrow. Merely to imply that any structural advantages resulting from the status of the Continuing Shareholders accrue to them in the post-transaction company even if that structure was an affirmative choice with trade-offs as between the financial consequences to the Continuing Shareholders and the minority shareholders is not adequate disclosure. This is especially true where the after-tax return to at least most retail investors who do choose not to sell out in advance in the market may be significantly less than the headline offer price.

[89] In a business combination subject to MI 61-101, there is the ever-present risk that the conflict of interest, to which the management-led continuing shareholders are subject, may result in their interests being favoured in the structuring of the transaction. A special committee, in negotiating or supervising the negotiation of such a transaction, must be alert to all factors affecting value, including tax structuring.

[90] HBC should explain how the Special Committee in this case considered these issues in giving its favourable recommendation. This is particularly important where shareholders are advised that they may be better off selling their shares rather than exercising their voting rights in respect of a transaction, when there is no assurance that the transaction will be approved or that the consideration will not be increased in the future and the selling shareholder will miss the improved price. To the extent that the tax structure benefits the Continuing

[23] Circular, p 20.

Shareholders, and the Special Committee believes it was necessary or appropriate for this benefit to be conferred on them, the Circular should include an explanation.

[91] In light of these considerations, we ordered that the Circular be amended to disclose the direct or indirect benefits to be obtained by the persons specified in Item 11 of Form 62-104F2 - *Issuer Bid Circular* in connection with the Transaction, including, without limitation:

a. those to be obtained by directors and officers of HBC and involving treatment of restricted share units and options; and

b. those to be obtained by the Continuing Shareholders arising from the tax structure proposed to implement the Transaction.

E. Operation of the Special Committee

1. Leith's Authorization of the Sharing of Confidential Information and Use of Historical Transaction Counsel

[92] The December 6 Press Release revealed for the first time significant discussions that had taken place more than two months before June 9, 2019, the date on which the HBC Board enlarged the mandate of the Special Committee to include consideration of the Transaction. Specifically, on or about March 25, 2019, Baker and another director informed Leith, as HBC's lead independent director, about Baker's desire to evaluate a privatization proposal along with the Continuing Shareholders, contingent on the SIGNA Transactions proceeding.

[93] The December 6 Press Release states:

> Mr. Leith consented to Mr. Baker exploring such a transaction and sharing certain limited financial information with the Continuing Shareholders on a confidential basis. Mr. Leith also provided consent to the use by Mr. Baker of the Company's historical transaction counsel in connection with that initial evaluation….

[94] Catalyst and Staff questioned the process by which Leith made these decisions, apparently on his own, without a Special Committee being formed with an appropriate mandate and without the benefit of advice from independent counsel.

[95] These events occurred earlier than disclosed in the unamended Circular, which stated that Baker informed the Board of his evaluation of a privatization proposal in April 2019, and which does not mention the permission Leith granted to Baker.

[96] Leith's explanation under cross-examination was that there were many matters requiring the attention of directors, including the SIGNA Transactions, which were still developing, and that in 2017, Baker had embarked on and later decided not to proceed with a privatization proposal. Leith testified that as a result, when faced with the possible emergence in 2019 of a new proposal, he did not want to use up time and resources until the proposal had greater certainty.

[97] That account, however, does not explain why Leith made some important decisions that might have affected the later negotiation of a proposal, were it to firm up. It is not apparent how, if at all, the fact that Fabric was subject to the Standstill Agreement prohibiting it from joining the group of continuing shareholders figured in his thinking about the permission to share confidential information. It was apparent from Leith's cross-examination that he did not have a precise understanding of the different contractual confidentiality commitments and more general duties of confidentiality to which each of the Continuing Shareholders may be subject. He was not required to have such a detailed understanding, but this fact demonstrates the potential value of a properly mandated and advised special committee.

[98] Even if the going-private proposal was only nascent at that time, Leith's decisions may have had far-reaching consequences. Implicit in Leith's decision to release Fabric from its standstill obligation may have been the assumption that Fabric would likely be part of the Continuing Shareholders, since that is why Baker was seeking permission from Leith. Without Fabric's 23.5%, the Continuing Shareholders would have represented only 33.5% of the Common Shares. This would still have been enough to block any other business combination, given the requirement in HBC's bylaw for 75% approval, but any conclusion as to how the negotiations would have proceeded would be impermissibly speculative. Perhaps Baker would not have proceeded at all if the buyout of the Fabric position was required and he perceived that the financing of the privatization proposal would impose too much leverage on HBC. Perhaps the waiver of Fabric's standstill commitments would nonetheless have been negotiated, but with certain commitments on the terms of the transaction being obtained by the Special Committee. Perhaps new sources of equity could have been lined up by Baker and the Continuing Shareholders, with or without Fabric. It is impossible to know how Fabric would have responded to a transaction had it not been given the right to be a Continuing Shareholder and were it instead to form part of the minority. It is also impossible to know what the effect would be on the price offered to minority shareholders.

[99] Even though these possible outcomes are speculative, they illustrate the advantage of early special committee involvement. Before important decisions are made and rights are given up, a properly mandated and advised special committee should be in place to apply its best and well-informed judgment to the process and the negotiations, and to consider the possible ramifications of these early decisions.

[100] At an early stage of the events giving rise to this proceeding, the SIGNA Transactions were advancing and a Special Committee had been formed to consider options for the European real estate assets and retail joint venture, including the potential SIGNA Transactions. Given that the SIGNA Transactions were interrelated with Baker's privatization proposal in that they were intended to be a source of funding, and given that conflicts of interest arose from that fact alone, prudence would dictate that a special committee would be in place to address all of these transactions and their interrelationships at this early stage. We question whether the absence of a special committee at this time compromised the Special Committee's later effectiveness, since it was not active during the early stage of negotiations, at which time critical issues such as

Fabric's participation and the allocation of the proceeds from the SIGNA Transactions were being addressed.

[101] As noted above, Leith asserted that it would have been an unnecessary use of resources to form a special committee at the stage of his March 25 conversation with Baker. We disagree. The Board was on the verge of establishing a special committee that would consider a transaction that was related to the potential going-private transaction. It would have been an opportune time to combine consideration of these transactions. Indeed, without a properly mandated special committee in place, questions can arise as to whether, in the absence of some express delegated authority, a single director, even the lead independent director, is authorized to make these potentially far-reaching decisions.

[102] The mandate of a newly-formed special committee would address the issue of authorization. As stated above, although MI 61-101 does not require a special committee for this type of business combination, once a special committee process is used in transactions that involve significant conflicts of interest, it will be scrutinized on public interest grounds on the same basis as if it were required. Investors should not have to rely on a weaker process when the special committee asserts that it has had a robust process, based solely on whether the formation of the committee was legally required.

[103] In CSA Notice 61-302, Staff of the Canadian Securities Administrators commented on the timely formation of special committees as follows:[24]

> As part of our reviews, Staff have identified occasions where special committees were formed after a proposed transaction had been substantially negotiated or where it appeared that the special committee was passive and failed to conduct a robust review of the circumstances leading to the transaction, alternatives to the transaction that were available in the circumstances, and the transaction itself. In Staff's view, in those circumstances the special committee was ineffective and failed to fulfill the important functions of considering the interests of security holders and assisting the board of directors in determining whether to recommend the transaction to security holders.

[104] We endorse this concern and would extend it to cases where critical decisions that will later circumscribe the effectiveness of a special committee are made before its formation.

[105] In the same Notice, Staff also stated:[25]

> … where the special committee has not been involved in preliminary negotiations, we believe it is critical that the board of directors and special committee not be bound by any such negotiations and that other aspects of the role of the special committee be robust, such as a mandate to

[24] Multilateral CSA Staff Notice 61-302*, Staff Review and Commentary on MI 61-101 – Protection of Minority Security Holders in Special Transactions*, 40 OSCB 6577 (**CSA Notice 61-302**) at p 4.

[25] CSA Notice 61-302 at p 5.

review, negotiate further, and consider alternatives that may be available.

[106] We agree with this analysis and note that the decisions made by Leith set the groundwork for later negotiations and were potentially difficult to reverse once the Special Committee was operating. Once Fabric was cooperating with the other Continuing Shareholders, how feasible would it be for the Special Committee to refuse to waive the standstill provision? Possible, but unlikely with the course of action set in motion by Leith at the outset. Again, this points to the need for an independently-advised special committee that is charged with considering both the potential going-private transaction and the SIGNA Transactions simultaneously. Leith should not have compromised the process to be undertaken by a special committee by making these important decisions on his own.

[107] We apply the same reasoning to the waiver that allowed HBC's traditional transaction counsel to act for the Continuing Shareholders. We agree that different teams and informational barriers can be used to make this a reasonable course of action. However, the detailed protections could have been usefully reviewed by a special committee, rather than Leith making this decision in a less formal way.

2. Disclosure ordered regarding the Special Committee

[108] We consider below whether these deficiencies in the operation of the Special Committee required us to cease-trade the Transaction because it arose from an irredeemably flawed process. However, for purposes of disclosure, we ordered disclosure concerning:

a. Leith's analysis leading to his decision on or about March 25, 2019, to consent to Baker sharing certain financial information with the Continuing Shareholders on a confidential basis, in the context of exploring a potential privatization transaction, including:

   i. his consideration of the effects of such decision on the confidentiality obligations of each of the Continuing Shareholders at that time; and

   ii. his consideration of the effects of such decision on the Standstill Agreement;

b. Leith's analysis leading to his decision on or about March 25, 2019, to consent to Baker's use of HBC's historical transaction counsel in connection with the initial evaluation of Baker's contemplated privatization proposal;

c. Leith's analysis concerning whether he did make, and if so was authorized to make, and should have made, the decisions described in (a) and (b) above on his sole authority and without the benefit of a special committee authorized to consider the privatization proposal and/or without the advice of counsel; and

d. The HBC Board's reasons for deciding that a special committee was not required to address the conflicts of interest arising from the contemplated privatization proposal until June 9, 2019.

F. Interrelationship with the SIGNA Transactions

1. Timeline of SIGNA Transactions

[109] The December 6 Press Release reveals for the first time that the Transaction was contingent on the SIGNA Transactions, stating:

> While the Special Committee was aware that any privatization proposal, if received, would be conditional on the SIGNA Transactions, the SIGNA Transactions were not conditional on a privatization transaction proceeding.

[110] It goes on to reveal that Baker reiterated on April 27 that he was evaluating the possibility of a privatization transaction, but no terms were provided other than that any proposal would be conditional on the completion of the SIGNA Transactions. However, despite the fact that (according to the press release) no more information was available to the Special Committee on April 27 than it had on March 27, the Special Committee nevertheless retained counsel and a financial advisor to advise it in connection with a privatization proposal "should one be received".

[111] On April 30, the Special Committee discussed the potential timing of the announcement of a going-private proposal in relation to the SIGNA Transactions "including the advantages and disadvantages of the privatization proposal being announced at the same time as the announcement of the SIGNA Transactions or at a different time."[26] At this point, the Special Committee's mandate was not enlarged to include the Transaction and there is no indication that the Special Committee reached a conclusion about the timing of the announcements that they sought to negotiate with Baker.

[112] On May 31st, Baker reiterated that "he was continuing to consider making a going-private proposal with other large shareholders, including Fabric".[27] This should not have been news to the Special Committee since Leith already knew that the other large shareholders were potentially involved on March 27, when he gave his permission to share confidential information for this purpose. Baker again reiterated what was already known; namely, that any going-private transaction was conditional on completion of the SIGNA Transactions. The timing of the respective announcements was also said to have been discussed, but there is no indication of the positions being advanced or this timing issue being treated as a matter for negotiation.

[113] On Tuesday, June 4, the Special Committee received a draft of the Continuing Shareholders' proposal letter and proposed press release "(to follow the Company's announcement of the SIGNA Transactions)".[28] The pricing, however, was not included.

[114] Finally, on Sunday, June 9, the mandate of the Special Committee was enlarged by the Board to include consideration of the Transaction. On this date, the Special Committee formally waived the Standstill Agreement with Fabric because, in its view, allowing Fabric to be part of the Continuing Shareholders

[26] December 6 Press Release, p 3.
[27] December 6 Press Release, p 3.
[28] December 6 Press Release, p 3.

group "was in the best interests of the Company in the circumstances". The Board also approved the SIGNA Transactions.

[115] As stated in the Circular, on June 10, HBC entered into definitive agreements for the SIGNA Transactions and the Continuing Shareholders submitted a formal initial proposal priced at C$9.45 per common share. At the same time, the Continuing Shareholders informed the Special Committee that they would not be sellers in any alternative transaction.

2. Analysis

[116] The announcement of the SIGNA Transactions did not mention the proposal by the Continuing Shareholders. It was followed within minutes by the announcement by the Continuing Shareholders of their proposal.

[117] As previously mentioned, in Leith's evidence under cross-examination, he indicated that he would have preferred a longer period of time between the two announcements, but this was a decision for the Continuing Shareholders to make.

[118] Leith had been aware of the interrelationship of the two transactions since March 2019. His view that the timing of the announcement of the proposal was in the sole control of the Continuing Shareholders appears somewhat conclusory and it is unclear how an earlier mandated special committee could have influenced or directed a result that would have given the market more time to assimilate the effect of the SIGNA Transactions on HBC's financial condition. A special committee with authority to supervise or directly negotiate potential transactions could well have had the bargaining power to insist on a longer period of time between the two announcements – authority that Leith, acting alone, did not apparently believe he possessed.

[119] We are not in a position to determine what price effect, if any, would have resulted if more time had elapsed before a potential ceiling was established by an offer by a 57% percent controlling block, arising, in part by the waiver of Fabric's Standstill Agreement the day before. Similarly, it is uncertain whether an earlier, properly mandated Special Committee could have managed a process under which alternative offers could be considered. At least one offer – the Catalyst offer – did in fact emerge at C$11.00 per share but was rejected by the Special Committee because of the Continuing Shareholders' statement that they would never be sellers. In addition, nothing restricted the Continuing Shareholders from changing their minds if a sufficiently attractive price were offered or a proposal emerged that could affect the majority of minority vote or the value of dissent rights.

[120] The Continuing Shareholders are not legally required to sell to a higher-priced offer. They can say 'thank you but NO!' or words to that effect.[29] However, their ability to make this edict stick was arguably affected by the waiver of Fabric's Standstill Agreement. An earlier mandated special committee could have sought to negotiate:

a. the timing of the announcement of the Transaction,

[29] *Pente Investment Management Ltd v Schneider Corp* (1998), 40 BLR (2d) 244 (Gen Div) at para 13.

b. the waiver of the Fabric Standstill Agreement and any conditions that would be attached to the waiver, and

c. the ability to consider superior proposals.

It was also open to the Continuing Shareholders to change their minds about their stated intention not to sell.

[121] Given that the Special Committee was properly mandated, after numerous approaches and status reports from Baker that he was considering moving forward, there is a paucity of analysis in the Circular, even as amended and restated by the December 6 Press Release, to support the view that an earlier mandated and properly advised Special Committee could not have sought to influence these dynamics in a manner more protective of minority shareholders.

3. Disclosure ordered regarding the SIGNA Transactions

[122] For these reasons, we ordered disclosure of:

a. the HBC Board's analysis of the effect of the potential use of the proceeds of the SIGNA Transactions to partially fund the privatization proposal on the HBC Board's decision not to enlarge the mandate of the Special Committee, which included consideration of the SIGNA Transactions, to also consider the contemplated privatization proposal, until June 9, 2019;

b. the Special Committee's reasons for granting a waiver of the Standstill Agreement and the effect of such waiver on whether alternative transactions to the privatization proposal could emerge, both with and without regard to the Continuing Shareholders' assertion that they would not be sellers under any circumstances;

c. the factors involved in any negotiation by the Special Committee with the Continuing Shareholders of the terms of the "Superior Proposal" definition and related provisions in the Arrangement Agreement and the effect of such provisions on the practicality of alternative transactions emerging; and

d. the Special Committee's discussions and decisions regarding the timing of the two press releases issued on June 10, 2019 (regarding the SIGNA Transactions and the privatization proposal) and the implications of the timing of those press releases, including, without limitation:

   i. on the ability of the market to absorb the significance of the SIGNA Transactions in advance of the announcement of the privatization proposal; and

   ii. on the magnitude of the premium to market reflected in the initial privatization proposal.

G. Reconciliation of the December 6 Press Release, Leith Affidavit and Leith Evidence under Cross-examination

[123] After a review of the December 6 Press Release, the Leith Affidavit and Leith's evidence under cross-examination, it became apparent that the presentation of the facts surrounding the communications between Leith and Baker had inconsistencies. For example, the mandate of the Special Committee as it

evolved is described in differing ways at what appears to be the same point in time.

[124] The Circular states:

> On March 27, 2019, the Board established the Special Committee, … to supervise the review and evaluation of the Company's strategies and options with respect to the Company's Lord + Taylor business unit and its European real estate joint venture and European retail joint venture and real estate assets.[30]

[125] In the December 6 Press Release, the mandate is described somewhat differently:

> On March 27, 2019, the Board established the Special Committee, … to supervise the review and evaluation of the Company's strategies and options with respect to (i) the Company's Lord + Taylor business unit and (ii) its European real estate joint venture and European retail joint venture and real estate assets, which were the subject of the potential SIGNA Transactions. The Special Committee's mandate included oversight and supervision of the review and evaluation of the various possible strategic alternatives that were available to the Company and oversight of the Company's activities in furtherance thereof. In fulfilling its mandate, the Special Committee evaluated such transactions independently from any potential privatization proposal. While the Special Committee was aware that any privatization proposal, if received, would be conditional on the SIGNA Transactions, the SIGNA Transactions were not conditional on a privatization transaction proceeding.[31]

[126] On the other hand, Leith's Affidavit reverts to the more restrictive description in the original Circular.

[127] We agree with Staff's submissions that these variable formulations may leave investors in a state of confusion concerning the scope of the mandate. The scope of the mandate, and its effect as it evolved, should be clarified.

[128] In addition, on cross-examination Leith provided new material details regarding the events preceding the decision to mandate the Special Committee to consider Baker's going-private proposal. The new evidence included the fact that Baker was directly involved in the negotiation of the SIGNA Transactions, and the Special Committee's preference for successive announcements of the SIGNA Transactions and any privatization proposal, with a longer duration between the two announcements than in fact occurred.

[129] We agree with Staff that this information provides valuable additional information related to the background to the Transaction and the process followed prior to and following the expanded mandate for the Special Committee. This information would reasonably be expected to affect the decision of a

[30] Circular, p 22.
[31] December 6 Press Release, p 2.

security holder to vote for or against the Transaction or to retain or dispose of the Common Shares.

[130] These are two examples only. Catalyst also highlighted differences in the narratives concerning the actions taken by Leith and the Special Committee.

[131] For these reasons, we ordered that the Circular be amended so as to provide a reconciliation of the disclosures made in the December 6 Press Release and the evidence contained in the Leith Affidavit, together with his testimony given at the hearing.

H. Early Warning and Insider Reporting

[132] Catalyst alleges that after Leith authorized disclosure of confidential information to the Continuing Shareholders, they were acting jointly or in concert and had formed an intention to exercise control over HBC that should have been reported in revised insider and early warning reports by each of the Continuing Shareholders. Catalyst alleges that the market should have been made aware of a change in intent and group formation at an earlier point in time than June 10, when the Transaction was announced.

[133] This allegation relates exclusively to past conduct, since the information was subsequently disclosed. As such, the allegation is more appropriately the subject of review by Staff. We disregard this allegation for the purposes of this proceeding.

V. RELIEF

A. Temporary Cease-Trade Order was Not Necessary

[134] Because at the end of the hearing we indicated our intention to order amended disclosure, HBC agreed to postpone the Shareholders Meeting until such disclosure could be provided in accordance with an order to be issued later. A cease-trade order was therefore not necessary to give effect to our order for disclosure and no cease-trade order was issued.

B. Permanent Cease-Trade Order was Not Necessary

[135] We also concluded that amended disclosure was a sufficient response to the deficiencies demonstrated at the hearing and that it was not necessary to bar the transaction from proceeding at all.

[136] The *Magna* decision describes the basis for utilizing the Commission's public interest jurisdiction in s. 127 of the Act to prevent a transaction from moving forward as follows:[32]

> The Commission recognized in *Re Canadian Tire* that it should act to restrain a transaction that is clearly abusive of shareholders and of the capital markets, whether or not that transaction constitutes or involves a breach of Ontario securities law. The Commission's mandate under section 127 is not, however, to intervene in transactions under some rubric of ensuring fairness. To invoke its public interest jurisdiction, in the absence of a demonstrated breach of securities law or the animating principles underlying that

[32] *Magna* at para 185.

> law, a transaction must be demonstrated to be abusive of shareholders in particular, or of the capital markets in general. A showing of abuse is something different from, and must go beyond, a complaint of unfairness (See *Re Canadian Tire* [10 OSCB 857, January 14, 1987] … and *Re Canfor Corp*. (1995), 18 OSCB 475, 487).

[137] Catalyst asserts that there was egregious conduct in the process leading to the initial proposal that was coercive to HBC's shareholders, requiring the Transaction to be permanently cease-traded.

[138] The principal grounds raised by Catalyst, and our view of each ground, are set out below.

1. Insiders with a conflict of interest negotiated the SIGNA Transactions

[139] Catalyst asserts that the interrelationship of the SIGNA Transactions and the proposal, which became clear with the December 6 Press Release, presents a conflict of interest leading to a flawed process. The apparent conflict is that Baker and another director, who is also alleged to be conflicted, instigated and negotiated the SIGNA Transactions while knowing that the proceeds would be used to finance the Transaction.

[140] However, in the case of the SIGNA Transactions, once the Special Committee was formed to consider the alternatives with regard to the European assets, it was considering the SIGNA Transactions with knowledge of the potential use of the proceeds for Baker's proposal. This information had been imparted to Leith, who chaired the Special Committee both before and after its mandate was extended to include the going-private proposal. There was no evidence that with this knowledge, the SIGNA Transactions were not considered by the Special Committee on their merits, regardless of the conflict that Baker would have. There was no evidence that the Special Committee's review of the SIGNA Transactions, in which they were advised by counsel and financial advisors, was tainted such that the Special Committee's approval was coercive to HBC's shareholders in connection with the Transaction.

[141] As indicated above, we do believe that the Special Committee should have been mandated to consider both transactions following the March 27 meeting between Leith and Baker, and we have required that HBC make further disclosure on the reasons for and effects of this delay and the staging of the announcements of the two transactions. The record reveals a disclosure deficiency in the description of the background of the Transaction and a delay in the optimal time for a properly mandated Special Committee to be engaged, but we do not consider this to be sufficient, on the record before us, to permanently cease-trade the transaction as abusive.

2. Waiver of the Standstill Agreement

[142] Catalyst asserts that the waiver of the Standstill Agreement was not carefully negotiated, beginning with Leith's decision on March 27 to permit the sharing of confidential information with the Continuing Shareholders, including Fabric.

[143] As we have stated, Leith's decision would have benefitted from a properly mandated and advised Special Committee following the March 27 meeting. By

the time the Special Committee formally waived the Standstill Agreement in June, Fabric's participation in Baker's planning may have become so essential that it could not be reversed. We have required additional disclosure concerning the reasons for and effects of these decisions. The record does not establish a clear case of abuse, as opposed to deficient orchestration of the Special Committee timing and process, and incomplete disclosure. We are loath to take the offer off the table through a cease-trade order on that basis.

3. Disclosure of Material Non-Public Information

[144] As discussed, Leith permitted the disclosure of confidential information to the Continuing Shareholders for the purpose of evaluating a possible going-private proposal. We have ordered that additional disclosure be made about this decision.

[145] There is no indication that any of the Continuing Shareholders traded on such information. It may have given Baker an advantage in accelerating his offer or forming the group of Continuing Shareholders, but such authorization was given with apparent authority by Leith in his capacity as HBC's lead director. Leith could have investigated the confidentiality and standstill requirements more thoroughly and the decision would have benefitted by a properly mandated and advised special committee, but this conduct does not rise to the level of abuse requiring the Transaction to be permanently cease-traded. This is especially true if a Baker-led offer was the most realistic opportunity to provide a premium sale opportunity to HBC's shareholders, and if Leith took at face value the Continuing Shareholders' statement that they were not willing to be sellers. The consequences of Leith's actions are too speculative to say clearly that such conduct was abusive, rather than the Special Committee prematurely giving up negotiation power in these respects. We also must be mindful that in assessing such conduct we not impose on independent directors a standard of perfection, with each flaw justifying barring a transaction.

[146] In addition, with Leith's authorization, s. 76(3) of the Act permitted Baker to share such information with the Continuing Shareholders for the purpose of enabling him to evaluate a business combination in the necessary course of business related to such a combination.

4. Independence of the Special Committee

[147] Catalyst questions the independence of the Special Committee once constituted because of:

a. the role of J.P. Morgan Securities Canada Inc. in both the SIGNA Transactions and in the privatization transaction, for which it prepared a fairness opinion, in light of the interrelationship of the two transactions;

b. Leith's actions prior to the formation of the Special Committee;

c. the purported restatement of the Circular through the December 6 Press Release;

d. the alleged ineffective negotiation of the "Superior Proposal" provisions in the Arrangement Agreement;

e. the Special Committee's waiver of the Standstill Agreement; and

f. the alleged untimely establishment of the Special Committee and lack of robust process and influence of conflicted persons over its conduct.

[148] We consider all these matters to be too inconclusive in their effects on HBC's minority shareholders to bar the Transaction in these circumstances. Instead, we required additional disclosure to shed further light on these issues and to better inform investors regarding how the Transaction came about and the Special Committee's recommendation in favour of the Transaction.

5. Additional Disclosures Ordered

[149] In addition to the other disclosures that we have ordered, we required that HBC disclose "whether the Special Committee continues to view the [Arrangement] as fair and reasonable in accordance with the applicable corporate law standard…."[33]

[150] With regard to all the additional disclosures, we have specified that such amendments only need be made if the Continuing Shareholders proceed with the Transaction or any similar modified transaction.

C. Other Relief

[151] Our order required that the Amended Circular include a blacklined comparison showing the changes, for readers' ease of reference. Our order further required that the Amended Circular be delivered to Staff at least five days before it is mailed to shareholders so that any concerns by Staff can be dealt with. Staff is entitled to receive copies of any records that HBC is required to keep pursuant to s. 19(1) of the Act and are necessary in Staff's opinion to facilitate its review of the amended Circular.

[152] The Amended Circular must be disseminated at least 14 days prior to the revised date of the Shareholders Meeting.

VI. CONCLUSION

[153] For all the above reasons, we issued our order on December 18, 2019, requiring HBC to amend the Circular, if it wishes to proceed with a vote for shareholder approval of the Transaction or any similar modified transaction. We emphasize that this decision arises from the interpretation of the Act and related instruments, particularly MI 61-101, including our public interest jurisdiction pursuant to s. 127 of the Act, based on our securities law mandates to provide investor protection and to foster fair and efficient markets and confidence in capital markets. Our decision should not be interpreted as bearing on the interpretation of the corporate law applicable to any person.

Dated at Toronto this 19th day of February, 2020.

"*D. Grant Vingoe*"
D. Grant Vingoe

"*Timothy Moseley*"
Timothy Moseley

"*Lawrence P. Haber*"
Lawrence P. Haber

[33] *The Catalyst Capital Group Inc (Re)*, (2020) 43 OSCB 28 at para 2(m).