FILE NO. 2017-65

IN THE MATTER OF
LAND AND BUILDINGS INVESTMENT MANAGEMENT, LLC

MOTION OF THE MOVING PARTY,
LAND AND BUILDINGS INVESTMENT MANAGEMENT, LLC
(Disclosure Motion – 5.4 of the Statutory Powers Procedure Act, Rule 3, 27, 28 of the OSC Rules of Procedure)

November 24, 2017

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IN THE MATTER OF
LAND AND BUILDINGS INVESTMENT MANAGEMENT, LLC

MOTION OF THE MOVING PARTY,
LAND AND BUILDINGS INVESTMENT MANAGEMENT, LLC
(Disclosure Motion – 5.4 of the Statutory Powers Procedure Act, Rule 3, 27, 28 of the OSC *Rules of Procedure*)

A. ORDER SOUGHT

The Moving Party, Land and Buildings Investment Management, LLC ("**LBIM**"), requests with notice, that the Ontario Securities Commission (the "**Commission**") grant the following relief:

1. An order granting disclosure of the relevant documents set out in Schedule "A" attached to this notice of motion;
2. An order granting the Applicant leave to amend the Notice of Application in the form set out in Schedule "B" to this notice of motion; and
3. such further and other relief as counsel may advise and the OSC may deem appropriate, including but not limited to the issuance of one or more summonses.

B. GROUNDS

The grounds for the motion are:

A. Nature of the Allegations

1. As set out in the Applicant's Notice of Application, the following is alleged:
    a. Hudson's Bay Company ("**HBC**" or "**the Company**") is a corporation incorporated under the *Canada Business Corporations Act,* 1985, c. C-44. The common shares of HBC trade on the TSX (the "**Common Shares**").

b. Three shareholders of HBC (the "**Controlling Shareholders**") wield significant control over HBC's board of directors (the "**Board**"). Together the Controlling Shareholders hold approximately 48% of the Common Shares.

c. HBC has publicly acknowledged that the "significant influence" of the Controlling Shareholders over the Company poses a "material risk" to HBC's business, and by extension to the value of the Common Shares. In its most recent Annual Information Form, HBC admitted that the Controlling Shareholders interests "may not in all cases be aligned with the interests of our other shareholders."

d. LBIM is a registered investment manager specializing in publicly traded real estate and real estate related securities. LBIM owns approximately 4% of HBC's issued and outstanding Common Shares.

e. Throughout 2017, LBIM privately and publicly called for the HBC Board to focus on increasing shareholder value by unlocking the substantial value contained in the Company's real estate portfolio. Some of the steps LBIM took publicly include:

    i. An open letter to the Board raising these concerns on June 19, 2017;

    ii. An open letter to HBC shareholders on July 31, 2017 expressing frustration with the Board's lack of progress;

    iii. A press release in September 6, 2017 expressing dissatisfaction with the Board's lack of urgency in addressing the undervaluation of its Common Shares. LBIM stated that it was considering requisitioning a special meeting of shareholders to remove the directors of HBC; and

    iv. A press release on October 23, 2017 stating it intended to requisition a special meeting of HBC shareholders to remove directors from the Board.

f. On October 24, 2017, the day after LBIM's press release, HBC announced that it would be entering into a strategic transaction with Rhône Capital (and

affiliates/subsidiaries), WeWork Companies and WeWork Property Advisors (the "**Transaction**").

g. The Transaction is transformative, highly dilutive and represents a fundamental change to HBC. HBC intends to issue 50,919,608 Preferred Shares at $9.82/share USD ($12.42/share CDN) for an aggregate purchase price of $500 million USD ($632 million CDN). Rhône, who will subscribe for the Preferred Shares at closing, will hold 100% of the issued and outstanding HBC Preferred Shares. The Preferred Shares include the following features:

    i. The Preferred Shares will be entitled to vote as soon as those shares are issued for all matters on which Common Shares vote, on an as converted basis;

    ii. Holders of the Preferred Shares will be entitled to convert their Preferred Shares into Common Shares at any time until the eight-year anniversary of their issuance, at which time they will automatically convert. The number of shares will be calculated based on the then-accreted value of the Preferred Shares at the time of conversion;

    iii. The Preferred Shares initially will be convertible on a one-for-one basis into Common Shares, representing 21.8% of the issued and outstanding Common Shares;

    iv. The liquidation preference of the Preferred Shares will accrete at a rate of 5% per annum, compounded quarterly, increasing the number of Common Shares into which each Preferred Share is convertible;

    v. On the eighth anniversary of the issuance of the Preferred Shares, Rhône would hold, on a *pro forma,* basis Common Shares representing approximately 30% the issued and outstanding Common Shares;

vi. The Preferred Share conversion price may also be adjusted if, prior to the first anniversary of the closing, HBC issues certain other equity securities below the initial Preferred Share conversion price. This could result in a massive dilution on Common Shares in the next twelve months; and

vii. Rhône will be granted pre-emptive rights that prevent its shares from being diluted post-closing if there is a new issuance of Common Shares (or securities convertible into Common Shares) until Rhône holds less than 50% of the Preferred Shares originally issued.

B. Issues Raised in the Pleadings

2. The Transaction (and the issuance of the Preferred Shares more specifically) raises a number of significant concerns and issues about the Board's conduct in approving the Transaction. In particular, LBIM has raised the following concerns about HBC's conduct and the Transaction itself:

a. The Board failed to apply necessary corporate governance measures protections in approving the Transaction without:

i. forming a special committee of independent directors to negotiate and take carriage of the Transaction and consider possible alternative transactions;

ii. retaining independent legal counsel or independent financial advisors;

iii. obtaining a fairness opinion for the Transaction;

iv. providing its shareholders with full and plain disclosure of the terms of the Transaction, the process by which the Transaction was approved and the basis or justification for the urgency with which HBC pursued the completion of the Transaction; or

v. calling a special meeting of shareholders to provide disclosure to or seek

approval from all shareholders;

vi. disclosing the basis or justification for the urgency with which HBC pursued the Transaction.

b. The Transaction is highly dilutive and will affect all shareholders, including minority shareholders like LBIM;

c. The speed in which the Transaction came to be was unusual for such a complex, multi-faceted transformative transaction, given that it was brought without notice, a shareholder vote or even full disclosure;

d. It is unusual for preferred shares to be granted immediate voting rights on an as-converted basis for all matters on which holders of common shares can vote;

e. The price per share of the Preferred Shares was approximately 34% of the net asset value (and the inherent value) that HBC itself assigns to its real estate of approximately $35 per Common Share;

f. At no time prior to the announcement of the Transaction did HBC disclose to the public a need for liquidity;

g. The Transaction materially affects control because the Controlling Shareholders already control almost 48% of the Common Shares. The addition of Rhône to the Controlling Shareholders voting bloc gives them near-total control of the Company;

h. HBC did not provide sufficient details regarding changes to existing voting covenants;

i. The mandatory voting support of Rhône to the existing Board further entrenches the current Board;

3. A just, expeditious, and cost-effective resolution of this Application will require disclosure of a limited set of documents relevant to these issues.

Review of the TSX Decision

4. On or about November 7, 2017, the TSX conditionally approved the issuance and reservation of the Common Shares to be issued upon the conversion of the Preferred Shares issued pursuant to the Transaction.

5. The TSX did not have, and therefore did not consider, material evidence relating to the Transaction. Specifically, apart from generic consent forms from consenting shareholders, the TSX did not obtain:

    a. documentation or statements from consenting shareholders demonstrating that full disclosure had indeed been made to them, that they understood the nature of the Transaction, and that any existing voting agreements did not require that they consent to the Transaction;

    b. documentation or statements from independent board members or non-independent board members concerning their consideration of the Transaction, the inherent conflict for certain board members, the advice provided by financial advisors, or consideration of alternative transactions;

    c. the following information and documentation, all of which is necessary to obtain a full understanding of the rationale for the Transaction, the need for a shareholder meeting, and the determination of the appropriate voting structure and eligible voters at such shareholder meeting:

        i. **Board Approval Documents:**

            1. For all Board of Director and Committee meetings between January 1, 2017 and present:

a. Copies of approved minutes;

b. For meetings that have taken place but for which minutes have not yet been approved, unapproved minutes;

c. Board and committee materials; and

d. Written resolutions of the Board of Directors and committees of the Board.

ii. **Financial Advisor Documents:**

1. Copies of any communications between HBC or its Board of Directors and its financial advisors with respect to the Transaction; and

2. Copies of any materials provided by its financial advisors.

iii. Consenting Shareholder Documents:

1. Detailed summary of all relationships between Board members, management and each of the consenting shareholders;

2. Copies of all materials provided to consenting shareholders;

3. All communications with consenting shareholders, with respect to the Transaction and the consent that was sought, up to the present date;

4. For each consenting shareholder, a detailed summary of all verbal communications with the consenting shareholder with respect to the Transaction and the consent that was sought, including the name(s) of the individual who spoke with the shareholder, and the date(s) of such discussion(s);

5. Copies of all non-disclosure agreements in place with consenting shareholders between September 1, 2017 and present;

6. Copies of all consent forms signed by consenting shareholders; and

7. A list of all shareholders who did not agree to provide a consent to the Transaction.

iv. **Rhône Documents:**

1. Agreement(s) with Rhône regarding the Transaction;
2. All communications between HBC or its Board of Directors and Rhône or their respective advisors regarding the voting agreements and modified voting agreements;
3. A detailed summary of any pre-existing relationship between existing board members and the Rhône nominees;
4. Information regarding how the introduction of Rhône was made (i.e. who approached who and when); and
5. All agreements and communications between L&T, Hanover, HBC and Rhône (or any of them) regarding L&T's and Hanover's governance rights between June 1, 2017 and present.

6. The documents and information the TSX relied on in reaching its decision (the "**TSX Record**") was not disclosed to LBIM during the course of the approval process. In fact, the TSX Record was only released to the parties on the evening of November 20, 2017, after the commencement of this Application.

7. Gowling WLG ("**Gowling**") was retained by LBIM on November 21, 2017, after LBIM's

previous counsel was disqualified on the basis of a conflict of interest, and after the Notice of Application was filed in this matter. Gowling was served with the TSX Record on November 21, 2017

8. Rule 3, 27 and 28 of the *Rules of Procedure* and section 5.4 of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22

C. EVIDENCE

The Moving Party (Parties) intends to rely on the following evidence for the motion:

1. The TSX Record

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Schedule A

1. **Board Approval Documents:**

    a. For all Board of Director and Committee meetings between January 1, 2017 and present:

        i. Copies of approved minutes;

        ii. For meetings that have taken place but for which minutes have not yet been approved, unapproved minutes;

        iii. Board and committee materials; and

        iv. Written resolutions of the Board of Directors and committees of the Board.

2. **Financial Advisor Documents:**

    a. Copies of any communications between HBC or its Board of Directors and its financial advisors with respect to the Transaction; and

    b. Copies of any materials provided by its financial advisors.

3. **Consenting Shareholder Documents:**

    a. Copies of all materials provided to consenting shareholders;

    b. All communications with consenting shareholders, with respect to the Transaction and the consent that was sought, up to the present date;

    c. For each consenting shareholder, a detailed summary of all verbal communications with the consenting shareholder with respect to the Transaction and the consent that was sought, including the name(s) of the individual who spoke with the shareholder, and the date(s) of such discussion(s);

    d. Copies of all non-disclosure agreements in place with consenting shareholders between September 1, 2017 and present;

    e. Copies of all consent forms signed by consenting shareholders; and

    f. A list of all shareholders who did not agree to provide a consent to the Transaction.

4. **Rhône Documents:**

    a. Agreement(s) with Rhône regarding the Transaction;

b. All communications between HBC or its Board of Directors and Rhône or their respective advisors regarding the voting agreements and modified voting agreements;
c. A detailed summary of any pre-existing relationship between existing board members and the Rhône nominees;

d. Information regarding how the introduction of Rhône was made (i.e. who approached who and when); and

e. All agreements and communications between L&T, Hanover, HBC and Rhône (or any of them) regarding L&T's and Hanover's governance rights between June 1, 2017 and present.

Schedule B

IN THE MATTER OF A HEARING AND REVIEW UNDER SECTIONS 8, 21.7 AND 127 OF THE SECURITIES ACT, R.S.O. 1990, c. S.5

AND

IN THE MATTER OF HUDSON'S BAY COMPANY

AMENDED NOTICE OF APPLICATION

TAKE NOTICE that, pursuant to sections 8, 21.7 and 127 of the *Securities Act*, R.S.O. 1990, c. S. 5 (the **Act**), Land and Buildings Investment Management, LLC (**Land and Buildings**) applies for a hearing and review of the decision of the Toronto Stock Exchange (the **TSX**) made on or about November 7, 2017 (the **TSX Decision**) to accept notice of and grant conditional approval of the issuance and reservation of common shares of Hudson's Bay Company (**HBC** or the **Company**) issuable upon the conversion of 50,919,608 Series A convertible preferred shares of HBC (the **Preferred Shares**), which are to be issued to Rhône Capital LLC and/or its affiliates (collectively, **Rhône**) pursuant to the terms of a subscription agreement and other documentation entered into between HBC and Rhône on or about October 24, 2017.

FURTHER TAKE NOTICE that Land and Buildings seeks the following relief:

(a) a hearing and review of the TSX Decision;

(b) an order setting aside the TSX Decision pursuant to sections 8(3) and 21.7 of the Act and directing HBC to call a meeting of shareholders and obtain majority of the minority shareholder approval (excluding L&T and/or the controlling shareholders) of the issuance of the Preferred Shares;

(c) an order staying the TSX Decision pursuant to sections 8(4) and 21.7(2) of the Act until such time as the Ontario Securities Commission (the **OSC**) determines the issues herein;

(d) an order permanently cease trading the issuance of the Preferred Shares pursuant to section 127(1)2.1 of the Act;

(e) an order for ~~discovery, including the~~ disclosure of relevant documents ~~and pre-hearing examinations~~ pursuant to section 5.4 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (**SPPA**) and Rules 1, 3 and 27 of the OSC *Rules of Procedure and Forms*; and

(f) such further and other relief as counsel may advise and the OSC may deem appropriate, including but not limited to the issuance of one or more summonses.

I. THE FACTS

The Parties

1. HBC is a corporation incorporated under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44. HBC operates more than 480 stores in addition to its global e-commerce business and has more than 66,000 employees around the world. The common shares of HBC (the **Common Shares**) trade on the TSX. As of October 24, 2017, the date that HBC announced that it would be entering into a transaction involving Rhône, WeWork Companies and WeWork Property Advisors, a joint venture between Rhône and WeWork Companies (the **Transaction**), HBC had approximately 182,649,049 issued and outstanding Common Shares and no issued and outstanding Preferred Shares.

2. Three shareholders of HBC (the **Controlling Shareholders**) wield significant control over HBC's board of directors (the **Board**). Together, the Controlling Shareholders hold approximately 48% of the Common Shares. In particular:

(a) L&T B (Cayman) Inc. (**L&T**) is a Cayman Islands limited partnership with close ties to the Board and HBC's senior management. L&T is partly owned and controlled by Richard Baker, HBC's Governor and Executive Chairman and now interim CEO, and three other members of the Board – Robert Baker (Richard Baker's father), William Mack and Lee Neibart. All four men are also directors and principal shareholders of L&T and have historical understandings of mutual support. As of October 24, 2017, L&T owned 31,679,852 Common Shares, or about 17.37% of the Common Shares. Pursuant to a nominating rights agreement entered into in 2012 (the **2012 Nominating Agreement**), L&T is currently entitled to nominate two directors to the Board. Further, pursuant to the 2012 Nominating Agreement, L&T is contractually obligated to vote in favour of the Board's slate of director nominees.

(b) Hanover Investments (Luxembourg) S.A. (**Hanover**) is a company governed by the laws of Luxembourg and indirectly wholly-owned and controlled by the Abu Dhabi Investment Council, an institution of the Government of the Emirate of Abu Dhabi. As of April 24, 2017, Hanover owned 32,250,510 Common Shares, or about 17.7% of the Common Shares. Hanover has close business ties to L&T. In particular, Hanover and L&T are both partners of Hudson's Bay Trading Company, L.P., which distributed almost all of its Common Shares to L&T and Hanover in August 2016. Hanover is also a party to the 2012 Nominating Agreement with L&T and HBC, pursuant to which it is currently entitled to

nominate one director to the Board. Like L&T, Hanover is contractually obligated to support the Board's slate of director nominees.

(c) 2380162 Ontario Limited (**238 Ontario**) is a subsidiary of the Ontario Teachers' Pension Plan, and like L&T and Hanover, it has contractual rights to Board representation. As of April 24, 2017, 238 Ontario owned 23,022,236 Common Shares, or about 12.6% of the Common Shares. In 2013, 238 Ontario entered into a nominating rights agreement with HBC pursuant to which it is currently entitled to nominate one director to the Board.

3. HBC has publicly acknowledged that the "significant influence" of the Controlling Shareholders over the Company poses a "material risk" to HBC's business, and by extension, to the value of the Common Shares. In HBC's most recent Annual Information Form, for example, the Company openly admits that:

> "The interests of L&T B Group, Hanover and 238 Ontario may not in all cases be aligned with interests of our other shareholders. In addition, L&T B Group, Hanover and 238 Ontario may have an interest in pursuing acquisitions, divestitures and other transactions that, in the judgment of its management, could enhance its equity investment, even though such transactions might involve risks to our shareholders and may ultimately affect the market price of the Common Shares."

4. Land and Buildings is a U.S. registered investment manager that specializes in publicly-traded real estate and real estate related securities. Land and Buildings is a shareholder of HBC and as of November 13, 2017, owned over 4% of HBC's issued and outstanding Common Shares.

Land and Buildings Advocates for Change at HBC

5. Land and Buildings first raised its concerns with HBC's management and the Board in January 2017. In or around June 2017, Land and Buildings began publicly expressing its concerns and advocating for change at HBC. On June 19, 2017, Land and Buildings issued an open letter to the Board calling for a greater focus on unlocking the substantial value contained in HBC's real estate portfolio.

6. On July 31, 2017, Land and Buildings issued an open letter to HBC's shareholders outlining Land and Buildings' plan to improve HBC's share price and announced that if Land and Buildings did not see substantial progress by the Board, Land and Buildings may have no choice but to call a special meeting of HBC's shareholders to change the Board.

7. On September 6, 2017, Land and Buildings issued a press release regarding its dissatisfaction with HBC's lack of urgency in addressing the undervaluation of its Common Shares and expressed that it would consider calling a special meeting of shareholders to remove the directors of HBC.

8. On October 23, 2017, Land and Buildings again issued a press release expressing its frustration with the Board and stating its intention to requisition a special meeting of HBC's shareholders to remove directors from the Board. Land and Buildings has been contacted by other minority shareholders who share the same concerns.

HBC Announces Highly Dilutive Transaction

9. On October 24, 2017, HBC announced that it would be entering into the Transaction.

10. The Transaction is transformative, highly dilutive, and represents a fundamental change to HBC. According to HBC, the terms of the Transaction include:

(a) Rhône will subscribe for 50,919,608 Preferred Shares at U.S.$9.82 (C$12.42) per share for an aggregate purchase price of U.S.$500 million (C$632 million);

(b) the Preferred Shares will represent 100% of HBC's issued and outstanding preferred shares upon closing of the Transaction;

(c) holders of the Preferred Shares will be entitled to vote as soon as the Preferred Shares are issued, on an as-converted basis, for all matters on which holders of Common Shares vote. It will not be necessary for a holder of Preferred Shares to convert its Preferred Shares into Common Shares in order to exercise the voting rights enjoyed by holders of the Common Shares;

(d) holders of the Preferred Shares will be entitled to convert their Preferred Shares into Common Shares at any time based on the then-accreted value of the Preferred Shares;

(e) the Preferred Shares will automatically convert into Common Shares on the eighth year anniversary of their issuance based on the then-accreted value of the Preferred Shares;

(f) the Preferred Shares initially will be convertible on a one-for-one basis into 50,919,608 Common Shares representing 21.8% of the issued and outstanding Common Shares, diluted to account for the 50,919,608 Preferred Shares, based on an initial liquidation preference and a conversion price of U.S.$9.82 (C$12.42) per Preferred Share;

(g) the liquidation preference of the Preferred Shares will accrete at a rate of 5% per annum, compounded quarterly (the **Liquidation Preference**), increasing the number of Common Shares into which each Preferred Share is convertible. The conversion price of the Preferred Shares is also subject to further adjustment in certain circumstances;

(h) following the mandatory conversion of all of the Preferred Shares upon the eighth anniversary of the closing of the Transaction and assuming a quarterly dividend of C$0.0125 on the Common Shares during such period, Rhône would hold on a *pro forma* basis 78,322,658 Common Shares representing approximately 30% of HBC's issued and outstanding Common Shares on a non-diluted basis at such time, subject to certain assumptions made by HBC and not adjusting for any potential anti-dilution events; and

(i) in addition to certain customary adjustments, the Preferred Share conversion price may also be adjusted if, prior to the first anniversary of the closing date of the Transaction, HBC issues certain other equity securities at a price below the initial Preferred Share conversion price. Such adjustments could cause dilution to the holders of Common Shares well in excess of 100% of HBC's issued and outstanding Common Shares. In an increasingly challenging retail environment, it is questionable why the Board would risk such massive dilution in the next twelve (12) months, without first obtaining minority shareholder approval.

11. In addition, pursuant to the Transaction, Rhône will be granted pre-emptive rights that are favourable to it and which are not granted generally to other shareholders. Such rights prevent Rhône's investment from being diluted post-closing of the Transaction if HBC issues

Common Shares (or securities convertible into Common Shares) until Rhône holds less than 50% of the Preferred Shares originally issued.

The Transaction Raises Red Flags

12. The Transaction raises a myriad of independent and interconnected concerns, each one necessitating minority shareholder approval to mitigate such concerns.

13. First, the Transaction is massively dilutive. The issuance and conversion of 50,919,608 Preferred Shares alone will fundamentally and irreparably affect all of HBC's shareholders, including minority shareholders such as Land and Buildings. The fact that the Preferred Shares will inherently accumulate even more voting power over the next eight years serves only to intensify the prejudice to HBC's minority shareholders.

14. Second, the Transaction is highly unusual. In particular:

(a) it is unusual for such a complex, "multi-faceted" and "transformative" transaction to be brought without notice, a shareholder vote or even full disclosure;

(b) it is unusual for preferred shares to be granted immediate voting rights on an as-converted basis (as at the closing date) for all matters on which holders of common shares can vote;

(c) it is unusual because the issuance and conversion price of the Preferred Shares of C$12.42 per share is approximately 34% of HBC's own stated net asset value (and the inherent value of its real estate) of approximately C$35 per Common Share;

(d) it is unusual because, according to Richard Baker, one of the purposes of the Transaction is to "enhance our liquidity". Yet, as recently as September 5, 2017,

the Company disclosed that it "expects to generate adequate cash flow from operating activities to sustain current levels of operations." At no prior point has the Company indicated any need for liquidity; and

(e) as detailed below, the lack of a robust governance process undertaken by HBC in connection with the Transaction is also highly unusual.

15. Third, the Transaction materially affects control because the Controlling Shareholders already control almost 48% of the Common Shares. The addition of Rhône to the Controlling Shareholders' voting bloc will not only strengthen their grip over HBC, it will give them near-total control of the Company with approximately 69% of the Common Shares on a *pro forma* basis. To make matters worse, HBC has announced that the terms of the Transaction will require Rhône to support the Board's slate of nominees for the duration of the investor rights agreement between Rhône and HBC. Together with the existing support agreements, both legal and *de facto*, the mandatory voting support of Rhône will concentrate the control of HBC and the Board even further.

16. Fourth, HBC has failed to disclose key details of the Transaction. Despite announcing its intention to close the Transaction as early as November 15, 2017, and despite demands from Land and Buildings, HBC has failed to disclose critical aspects of the Transaction to its shareholders. By restricting access to key information about the Transaction to insiders, HBC has placed its shareholders and the market in the dark with respect to the Transaction. In particular, HBC has:

(a) failed to disclose the names of the shareholders that purportedly approved the Transaction and in particular, whether the Controlling Shareholders or other insiders were involved;

(b) failed to provide any justification for the urgency with which HBC is pursuing the Transaction; and

(c) despite the vague press release issued on November 7, 2017, HBC has failed to provide sufficient details regarding changes to existing voting covenants between L&T, Hanover and HBC. In particular, HBC has failed to provide sufficient detail regarding:

(i) the terms on which the existing voting covenants of L&T and Hanover are to be "released" (as announced for the first time on November 7, 2017) and whether other implicit assurances or covenants have been provided in exchange for same;

(ii) the impact, if any, on the remaining director nomination or other rights that are contained in such agreements with L&T and Hanover;

(iii) the interplay of such voting covenants with L&T and Hanover with the terms of the Transaction and the composition of the Board more generally; and

(iv) the current Board members who represent nominees of shareholders who have various representation rights on the Board and under which material agreements of HBC such persons are nominated to the Board.

17. Fifth, HBC failed to follow adequate governance protections. Due to the close ties between the Controlling Shareholders and the Board, and due to the "material risk" posed by the Controlling Shareholders' influence over HBC and the Board, there was a clear need for robust governance protections designed to ensure informed and proper decision-making at the Board level, free from conflict or influence. However, it does not appear that HBC had the

necessary governance protections in place when the Board considered, and ultimately approved, the Transaction. In particular, HBC:

(a) failed to form a special or independent committee to consider the Transaction;

(b) failed to retain independent counsel or independent financial advisors for the Board or any special or independent committee;

(c) failed to obtain any opinion on the fairness of the Transaction;

(d) failed to provide its shareholders or the market with full and plain disclosure, as noted above; and

(e) chose to proceed with the Transaction without a shareholders' meeting and instead by way of written approval of shareholders holding more than 50% of the Common Shares, but nonetheless refuses to identify the shareholders that provided their written approval of the Transaction.

18. Sixth, the Transaction creates conflicts of interest. The involvement of the Controlling Shareholders in approving the Transaction perpetuates and exemplifies the conflict of interest at HBC. The conduct of L&T is especially concerning and impugns the Transaction in the eyes of HBC's minority shareholders and the market at large. Notably, the historical understandings and arrangements of mutual support that exist between Richard Baker, Robert Baker, William Mack, and Lee Neibart (the directors and principal shareholders of L&T), whether contractual or otherwise, are particularly concerning. In particular:

(a) as management, L&T (specifically, Richard Baker) negotiated the Transaction;

(b) as directors, L&T (specifically, Richard Baker, Robert Baker, William Mack and Lee Neibart) voted on the Transaction;

(c) as shareholders, L&T (specifically, Richard Baker, Robert Baker, William Mack and Lee Neibart) "approved" the Transaction; and

(d) as a party with contractual rights to Board representation, L&T (specifically, Richard Baker, Robert Baker, William Mack and Lee Neibart) will substantially benefit from the Transaction.

As a result of this conduct, L&T should not have voted to approve the Transaction.

19. Seventh, the Transaction entrenches the current Board. As noted above, the Transaction provides that Rhône will support certain Board nominees. In light of the nominating rights agreements already in existence between HBC and certain major shareholders, the Transaction will result in the Board's nominees becoming insulated against challenges from HBC's shareholders. In fact, HBC has itself acknowledged that the Transaction will entrench the current Board, and on November 7, 2017, two weeks after the Transaction was first announced, HBC announced that it would "release its other shareholders from their existing voting covenants that committed those shareholders to vote for directors put forward for election by HBC". However, this last minute attempt to redress the entrenchment does nothing to diminish the historical and *de facto* commitment that the Controlling Shareholders have shown to the current Board or lessen the power of the Controlling Shareholders' approximately 48% voting bloc.

19A. In discussions with Bill Mack in January 2017, Land and Buildings was told that "this is a closely held company, there is nothing you can do". Then, in discussions with Richard Baker in March and in the summer of 2017, Land and Buildings was told that "we have agreements", the clear suggestion being that there is nothing that LBIM can do to change the composition of the board.

19B. After the Transaction was announced, Land and Buildings spoke with Richard Baker again and asked him why HBC issued preferred shares convertible into so many common shares which is highly dilutive. His response was: “my CFO asked the same question … and because of you”, a clear reference to Land and Buildings’ intention to change the composition of the Board.

19C. In light of the terms of the Preferred Shares granted to management's self-selected "partner", management - without a full shareholder vote - made themselves and HBC virtually immune to the wishes of other shareholders.

20. The minority shareholders of HBC, including Land and Buildings, will receive no economic benefit from Rhône’s voting covenant in favour of the Board, yet such minority shareholders have, in essence, financed the inclusion of this covenant (and its entrenching features) through the dilution of their positions.

The Transaction Constitutes a Reorganization pursuant to OSC Rule 56-501

21. In addition to the concerns identified above, the Transaction fails to comply with Ontario securities laws. While the Preferred Shares are equal to the Common Shares in terms of voting rights at the time of issuance, immediately following issuance, the Preferred Shares will accrue additional voting rights by virtue of the passage of time. Additional voting rights will accrete through: (a) the Liquidation Preference; (b) any cash dividend paid on the Common Shares; and (c) other conversion price adjustments.

22. The chart below shows the increase in voting power of one Preferred Share over time, and assuming an issuance of Common Shares immediately following the closing of the Transaction at U.S.$9.00 (Scenario 1), U.S.$5.00 (Scenario 2) and U.S.$3.00 (~~Senario~~Scenario 3), the same scenarios and share prices provided in HBC’s October 24, 2017 press release.

23. As a result, the Transaction constitutes a “reorganization” pursuant to OSC Rule 56-501 – *Restricted Shares* (**Rule 56-501**), and is subject to the requirements of section 624 of the TSX Company Manual (the **Manual**).

24. In particular, under Rule 56-501, a “reorganization” includes the creation of a class of shares that are “restricted shares”, either directly or indirectly, including by way of resolution of the board of directors of an issuer setting the terms of a series of shares of the issuer.

25. If the Preferred Shares are issued in accordance with the Transaction, the Common Shares of HBC will cease to be “common shares” pursuant to Rule 56-501, which defines “common shares” as:

> **equity shares to which are attached voting rights** exercisable in all circumstances, irrespective of the number or percentage of shares owned, **that are not less, on a per share basis, than the voting rights attaching to any other shares** of an outstanding class of shares of the issuer, unless the Director makes a determination under section 4.1 that the shares are restricted shares. [Emphasis Added]

26. In this case, the Common Shares will become “restricted shares” as a result of the Transaction and the issuance of the Preferred Shares. Accordingly, the Transaction constitutes a “reorganization” pursuant to Rule 56-501.

27. In conjunction with Rule 56-501, section 624 of the Manual imposes requirements respecting restricted shares that are applicable to all listed issuers having restricted shares listed on the TSX, regardless of when the securities were listed. In particular,

(a) section 624(m) provides that the TSX will not consent to the issuance of any securities that have voting rights greater than those of the securities of any class of listed voting securities of the listed issuer, unless the issuance is by way of a distribution to all holders of the listed issuer's voting residual equity securities on a *pro rata* basis; and

(b) section 624(n) provides that the TSX will not consent to a capital reorganization which would have the effect of creating a class of restricted shares unless the proposal receives minority approval.

The TSX Decision

28. On or about November 7, 2017, HBC disclosed that the TSX granted conditional approval of the issuance and reservation of the Common Shares to be issued upon the conversion of the Preferred Shares issued pursuant to the Transaction. Land and Buildings is not privy to the record considered by the TSX, or the reasons for the TSX Decision.

29. Section 603 of the Manual provides the TSX with the discretion to accept notice of a transaction and to impose conditions on a transaction.

30. Section 603 also requires the TSX to consider the effect that a transaction may have on the quality of the marketplace, based on factors including: (i) the material effect on control of the issuer; (ii) the issuer's corporate governance practices; and (iii) the size of the transaction relative to the liquidity of the issuer. All three of these factors are relevant to this Transaction. The public interest and the fair treatment of shareholders must be taken into account by the TSX in assessing the impact of a transaction on the quality of the marketplace.

31. In deciding whether to provide its conditional approval, the TSX was required to consider Rule 56-501 as well as the requirements in section 624 of the Manual.

32. In light of the circumstances detailed above, Land and Buildings raised its concerns with the TSX about the Transaction in writing on multiple occasions between October 25, 2017 and November 3, 2017. ~~To date, the TSX has not provided Land and Buildings with its record or any reasons for its decision.~~

32A. The TSX, in its reasons for decision, found that the issuance of preferred shares would have a material effect on control of the company and would result in potential dilution in excess of 25% of common shares. It also found that the preferred share conversion price is potentially below allowable discount thresholds. For these and other reasons, the TSX concluded that shareholder approval was required.

32B. Having determined that shareholder approval was required, the TSX assessed whether a shareholder meeting was required and whether all of the consents (including the consent of L&T) should be accepted. The TSX erred by (among other things):

a. exercising its discretion to not require a meeting of shareholders; and

b. exercising its discretion to accept the consents of the Controlling Shareholders.

32C. In reaching its decision, the TSX did not have, and therefore did not consider, material evidence relating to the Transaction, details of the governance process undertaken by HBC, the accuracy and completeness of the Form 11 filed by HBC, the consents, and the shareholders who provided those consents. Specifically, the TSX did not have:

a. documentation or statements from consenting shareholders demonstrating whether they understood the nature of the Transaction, whether they considered themselves obligated to vote in favour of the Transaction, and whether they were bound to silence by non-disclosure agreements;

b. documentation or statements from independent board members and the conflicted board members concerning their consideration of the Transaction, the inherent conflict of certain board members, the advice provided by financial advisors, or consideration of alternative transactions;

c. documentation including Board of Director and Committee meeting minutes, materials prepared by financial advisors, and written resolutions of the Board of Directors and any Committees of the Board;

d. information concerning the existence of shareholders who refused to sign a consent in respect of the transaction and the reasons why shareholders (including the Applicant) were not approached about the transaction; and

e. information concerning the rationale for the voting agreement with Rhone and the consideration provided by HBC to obtain that benefit for the Controlling Shareholders or some of them.

II. HEARING AND REVIEW

The OSC Must Review the Transaction *de novo*

33. Had the TSX applied the law correctly, considered the facts in their entirety, and exercised its discretion reasonably, it would not have accepted notice of or given conditional approval to HBC for the Transaction.

34. The patent shortcomings of the TSX Decision compel the OSC to intervene and review the Transaction *de novo* pursuant to section 21.7 of the Act and the decision of *Canada Malting Co., Re*, (1986) 9 O.S.C.B. 3566. In particular, the TSX:

(a) demonstrated that its perception of the public interest fundamentally conflicts with that of the OSC in these circumstances by providing conditional approval despite the harm to the quality of the marketplace caused by inadequate disclosure, insufficient governance protections, evidence of entrenchment, and serious conflict of interest concerns;

(b) overlooked material evidence as it relates to the Transaction and did not obtain significant evidence that was material to the decisions under consideration;

(c) erred in law by failing to interpret and apply section 603 of the Manual correctly and with a view to all of the relevant facts; and

(d) erred in law and in principle by failing to interpret and apply section 624 of the Manual correctly (and, as a result, Rule 56-501).

The OSC Must Intervene to Protect the Public Interest

35. In addition to the foregoing, the OSC must intervene in the public interest pursuant to section 127 of the Act. Section 127 of the Act provides the OSC with the jurisdiction to intervene in activities related to the Ontario capital markets when it is in the public interest to do so. The OSC has a very wide discretion in such matters.

36. The issuance of the Preferred Shares, which accrete in voting power over time, to a party that will be contractually obligated to support the Board serves no *bona fide* business purpose. The Transaction is abusive of the integrity of the Ontario capital markets. It has been engineered to appear to comply with regulatory requirements when, in fact:

(a) the Transaction was entered into without proper governance protections to ensure independent consideration of this “transformative” Transaction;

(b) the Transaction aggregates control into a new class of securities of the Company without regard to the typical protections afforded to shareholders when dual class share structures are created, including the approval of minority shareholders;

(c) despite the above, HBC is rushing to implement the Transaction without providing full transparency or even attempting to convene a shareholders' meeting where the Company's disclosure can be scrutinized and openly debated; and

(d) the Transaction, when combined with the existing legal and *de facto* voting support arrangements with HBC's largest shareholders, will entrench control of the Board in the hands of a few shareholders while bulletproofing the Board from legitimate challenge.

37. As a result, the Transaction is manifestly unfair to public minority security holders. The interests of HBC's minority shareholders, who lack Board representation and who are not parties to voting support arrangements, are prejudiced unless they receive proper protection. In addition, there is both manifest unfairness, and the appearance of same, that risks undermining investors' confidence in the public markets.

38. As this Application concerns matters affecting the public interest and as Land and Buildings is materially affected by the TSX Decision, Land and Buildings seeks standing from the OSC to pursue relief under section 127 of the Act.

The OSC Must Impose Conditions on the Transaction

39. In the circumstances, and on the basis of its jurisdiction to review the Transaction *de novo*, Land and Buildings respectfully submits that the OSC ought to make an order cease-

trading the issuance of the Preferred Shares to Rhône on certain terms and conditions. In particular, the OSC ought to prohibit HBC from issuing the Preferred Shares unless and until:

(a) HBC provides sufficient disclosure of all terms of the Transaction, including the equity investment by Rhône and any other related agreement, to enable HBC's shareholders to evaluate the material terms of the Transaction and make informed investment decisions;

(b) HBC convenes a special meeting of shareholders to consider and vote on the Transaction, and in particular, the issuance of the Preferred Shares; and

(c) HBC seeks approval of the Transaction from disinterested shareholders (or a majority of the minority at a special meeting of the shareholders).

The Transaction Must be Stayed Pending Expedited Hearing

40. A stay of the completion of the Transaction until the matter can be heard by the OSC is warranted for the following reasons:

(a) there is a serious issue to be tried, as set out above, and this Application is neither vexatious nor frivolous;

(b) to allow the Transaction to close would cause Land and Buildings and other minority shareholders irreparable harm. Moreover, if the OSC varies the TSX Decision after the Transaction has closed, the OSC's decision will have no effect as it will not be possible to "unscramble" the Transaction or undo the harm to Land and Buildings and other minority shareholders; and

(c) the balance of convenience favors Land and Buildings. The fair treatment of HBC's shareholders, particularly its minority shareholders, must be preferred to the commercial interests of parties who will suffer no material harm if the closing of the Transaction is postponed until the conclusion of the hearing and review. Further, there is no urgency to close the Transaction. HBC has provided no reason in its public announcements for seeking to close the Transaction in November 2017.

Discovery is Warranted in these Circumstances

41. In accordance with section 5.4 of the SPPA, the OSC may make an order for the exchange of documents, the oral or written examination of a party, and any other form of disclosure at any stage of the proceeding.

42. The understanding which exists between L&T, Hanover, HBC and Rhône, and their voting agreements with respect to the Board are highly relevant to this appeal and specifically, the impact of the Transaction on the quality of the marketplace.

43. HBC has failed to provide adequate disclosure regarding the Transaction since its first press release on October 24, 2017 through its most recent announcement on November 7, 2017. Significant additional details of the Transaction was subsequently made available in the early warning report filed by Rhone on October 26, 2017. Most notably, as described above, two weeks after announcing the Transaction, HBC disclosed that it now suggests that it will "release its other shareholders [referring to L&T and Hanover, each of whom have executed voting covenants in favour of HBC] from their existing voting covenants" without reason or explanation. Such disclosure is confusing to the market and vague and exemplifies HBC's general lack of transparency around the nature of the relationships between the Controlling Shareholders

44. In its announcement of the TSX Decision on November 7, 2017, HBC announced that Rhône would provide a "limited and customary voting covenant to support director nominees recommended" by the Board, but that it would not be required to vote for any person nominated by any shareholder. While this language appears to change the position taken in earlier disclosure, regardless, the Board is effectively controlled by L&T and current management and it is an artificial distinction to assert that Rhône's voting covenant is unrelated to the will of L&T and HBC.

45. Pre-hearing discovery is necessary in the circumstances to allow the OSC and the shareholders of HBC, including Land and Buildings, to fully understand and assess the impact of the Transaction on the Company and the marketplace. In particular, and without limiting the foregoing, Land and Buildings requires: (i) disclosure of minutes from all Board meetings relevant to the Transaction; (ii) disclosure of emails and other correspondence between L&T,

Rhône and HBC; and (~~ii) the right to orally examine representatives of HBC and Rhône~~iii) various other documentation identified in paragraph 32C above and in ~~advance of the hearing~~the Applicant's motion for disclosure.

Land and Buildings Has Standing to Bring Application

46. Pursuant to sections 21.7 and 127 of the Act, Land and Buildings is a party directly affected by the TSX Decision and has standing to bring this Application given that:

(a) Land and Buildings is a shareholder of HBC;

(b) Land and Buildings' investment in HBC is impacted by the Transaction and, along with other shareholders, will be diluted as a result of the Transaction; and

(c) Land and Buildings is involved in a public and ongoing dispute with the Board regarding HBC's undervalued Common Shares which is directly impacted by the Transaction.

Conclusion

47. Land and Buildings intends to rely upon affidavit evidence, to be sworn, and written submissions to be delivered in advance of the hearing. Further, Land and Buildings intends to rely upon evidence disclosed by HBC and its representatives pursuant to the OSC's *Rules of Procedure and Practice Guideline*.

48. Land and Buildings requests the record of the TSX Decision (the **TSX Record**) and any reasons for said decision (the **Reasons for Decision**) for filing with the OSC. Land and Buildings reserves the right to amend or supplement this Notice of Application once the TSX Decision, Reasons for Decision and the TSX Record have been made available to it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ~~13~~24th day of November, 2017

~~**NORTON ROSE FULBRIGHT** **GOWLING WLG (CANADA) LLP**~~
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Style change	0
Format changed	0
Total changes	34

CLEAN VERSION

IN THE MATTER OF A HEARING AND REVIEW UNDER SECTIONS 8, 21.7 AND 127 OF THE SECURITIES ACT, R.S.O. 1990, c. S.5

AND

IN THE MATTER OF HUDSON'S BAY COMPANY

AMENDED NOTICE OF APPLICATION

TAKE NOTICE that, pursuant to sections 8, 21.7 and 127 of the *Securities Act*, R.S.O. 1990, c. S. 5 (the **Act**), Land and Buildings Investment Management, LLC (**Land and Buildings**) applies for a hearing and review of the decision of the Toronto Stock Exchange (the **TSX**) made on or about November 7, 2017 (the **TSX Decision**) to accept notice of and grant conditional approval of the issuance and reservation of common shares of Hudson's Bay Company (**HBC** or the **Company**) issuable upon the conversion of 50,919,608 Series A convertible preferred shares of HBC (the **Preferred Shares**), which are to be issued to Rhône Capital LLC and/or its affiliates (collectively, **Rhône**) pursuant to the terms of a subscription agreement and other documentation entered into between HBC and Rhône on or about October 24, 2017.

FURTHER TAKE NOTICE that Land and Buildings seeks the following relief:

(a) a hearing and review of the TSX Decision;

(b) an order setting aside the TSX Decision pursuant to sections 8(3) and 21.7 of the Act and directing HBC to call a meeting of shareholders and obtain majority of the minority shareholder approval (excluding L&T and/or the controlling shareholders) of the issuance of the Preferred Shares;

(c) an order staying the TSX Decision pursuant to sections 8(4) and 21.7(2) of the Act until such time as the Ontario Securities Commission (the **OSC**) determines the issues herein;

(d) an order permanently cease trading the issuance of the Preferred Shares pursuant to section 127(1)2.1 of the Act;

(e) an order for disclosure of relevant documents pursuant to section 5.4 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (**SPPA**) and Rules 1, 3 and 27 of the OSC *Rules of Procedure and Forms*; and

(f) such further and other relief as counsel may advise and the OSC may deem appropriate, including but not limited to the issuance of one or more summonses.

I. THE FACTS

The Parties

1. HBC is a corporation incorporated under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44. HBC operates more than 480 stores in addition to its global e-commerce business and has more than 66,000 employees around the world. The common shares of HBC (the **Common Shares**) trade on the TSX. As of October 24, 2017, the date that HBC announced that it would be entering into a transaction involving Rhône, WeWork Companies and WeWork Property Advisors, a joint venture between Rhône and WeWork Companies (the **Transaction**), HBC had approximately 182,649,049 issued and outstanding Common Shares and no issued and outstanding Preferred Shares.

2. Three shareholders of HBC (the **Controlling Shareholders**) wield significant control over HBC's board of directors (the **Board**). Together, the Controlling Shareholders hold approximately 48% of the Common Shares. In particular:

(a) L&T B (Cayman) Inc. (**L&T**) is a Cayman Islands limited partnership with close ties to the Board and HBC's senior management. L&T is partly owned and controlled by Richard Baker, HBC's Governor and Executive Chairman and now interim CEO, and three other members of the Board – Robert Baker (Richard Baker's father), William Mack and Lee Neibart. All four men are also directors and principal shareholders of L&T and have historical understandings of mutual support. As of October 24, 2017, L&T owned 31,679,852 Common Shares, or about 17.37% of the Common Shares. Pursuant to a nominating rights agreement entered into in 2012 (the **2012 Nominating Agreement**), L&T is currently entitled to nominate two directors to the Board. Further, pursuant to the 2012 Nominating Agreement, L&T is contractually obligated to vote in favour of the Board's slate of director nominees.

(b) Hanover Investments (Luxembourg) S.A. (**Hanover**) is a company governed by the laws of Luxembourg and indirectly wholly-owned and controlled by the Abu Dhabi Investment Council, an institution of the Government of the Emirate of Abu Dhabi. As of April 24, 2017, Hanover owned 32,250,510 Common Shares, or about 17.7% of the Common Shares. Hanover has close business ties to L&T. In particular, Hanover and L&T are both partners of Hudson's Bay Trading Company, L.P., which distributed almost all of its Common Shares to L&T and Hanover in August 2016. Hanover is also a party to the 2012 Nominating Agreement with L&T and HBC, pursuant to which it is currently entitled to nominate one director to the

Board. Like L&T, Hanover is contractually obligated to support the Board's slate of director nominees.

(c) 2380162 Ontario Limited (**238 Ontario**) is a subsidiary of the Ontario Teachers' Pension Plan, and like L&T and Hanover, it has contractual rights to Board representation. As of April 24, 2017, 238 Ontario owned 23,022,236 Common Shares, or about 12.6% of the Common Shares. In 2013, 238 Ontario entered into a nominating rights agreement with HBC pursuant to which it is currently entitled to nominate one director to the Board.

3. HBC has publicly acknowledged that the "significant influence" of the Controlling Shareholders over the Company poses a "material risk" to HBC's business, and by extension, to the value of the Common Shares. In HBC's most recent Annual Information Form, for example, the Company openly admits that:

> "The interests of L&T B Group, Hanover and 238 Ontario may not in all cases be aligned with interests of our other shareholders. In addition, L&T B Group, Hanover and 238 Ontario may have an interest in pursuing acquisitions, divestitures and other transactions that, in the judgment of its management, could enhance its equity investment, even though such transactions might involve risks to our shareholders and may ultimately affect the market price of the Common Shares."

4. Land and Buildings is a U.S. registered investment manager that specializes in publicly-traded real estate and real estate related securities. Land and Buildings is a shareholder of HBC and as of November 13, 2017, owned over 4% of HBC's issued and outstanding Common Shares.

Land and Buildings Advocates for Change at HBC

5. Land and Buildings first raised its concerns with HBC's management and the Board in January 2017. In or around June 2017, Land and Buildings began publicly expressing its concerns and advocating for change at HBC. On June 19, 2017, Land and Buildings issued an open letter to the Board calling for a greater focus on unlocking the substantial value contained in HBC's real estate portfolio.

6. On July 31, 2017, Land and Buildings issued an open letter to HBC's shareholders outlining Land and Buildings' plan to improve HBC's share price and announced that if Land and Buildings did not see substantial progress by the Board, Land and Buildings may have no choice but to call a special meeting of HBC's shareholders to change the Board.

7. On September 6, 2017, Land and Buildings issued a press release regarding its dissatisfaction with HBC's lack of urgency in addressing the undervaluation of its Common Shares and expressed that it would consider calling a special meeting of shareholders to remove the directors of HBC.

8. On October 23, 2017, Land and Buildings again issued a press release expressing its frustration with the Board and stating its intention to requisition a special meeting of HBC's shareholders to remove directors from the Board. Land and Buildings has been contacted by other minority shareholders who share the same concerns.

HBC Announces Highly Dilutive Transaction

9. On October 24, 2017, HBC announced that it would be entering into the Transaction.

10. The Transaction is transformative, highly dilutive, and represents a fundamental change to HBC. According to HBC, the terms of the Transaction include:

(a) Rhône will subscribe for 50,919,608 Preferred Shares at U.S.$9.82 (C$12.42) per share for an aggregate purchase price of U.S.$500 million (C$632 million);

(b) the Preferred Shares will represent 100% of HBC's issued and outstanding preferred shares upon closing of the Transaction;

(c) holders of the Preferred Shares will be entitled to vote as soon as the Preferred Shares are issued, on an as-converted basis, for all matters on which holders of Common Shares vote. It will not be necessary for a holder of Preferred Shares to convert its Preferred Shares into Common Shares in order to exercise the voting rights enjoyed by holders of the Common Shares;

(d) holders of the Preferred Shares will be entitled to convert their Preferred Shares into Common Shares at any time based on the then-accreted value of the Preferred Shares;

(e) the Preferred Shares will automatically convert into Common Shares on the eighth year anniversary of their issuance based on the then-accreted value of the Preferred Shares;

(f) the Preferred Shares initially will be convertible on a one-for-one basis into 50,919,608 Common Shares representing 21.8% of the issued and outstanding Common Shares, diluted to account for the 50,919,608 Preferred Shares, based on an initial liquidation preference and a conversion price of U.S.$9.82 (C$12.42) per Preferred Share;

(g) the liquidation preference of the Preferred Shares will accrete at a rate of 5% per annum, compounded quarterly (the **Liquidation Preference**), increasing the number of Common Shares into which each Preferred Share is convertible. The conversion price of the Preferred Shares is also subject to further adjustment in certain circumstances;

(h) following the mandatory conversion of all of the Preferred Shares upon the eighth anniversary of the closing of the Transaction and assuming a quarterly dividend of C$0.0125 on the Common Shares during such period, Rhône would hold on a *pro forma* basis 78,322,658 Common Shares representing approximately 30% of HBC's issued and outstanding Common Shares on a non-diluted basis at such time, subject to certain assumptions made by HBC and not adjusting for any potential anti-dilution events; and

(i) in addition to certain customary adjustments, the Preferred Share conversion price may also be adjusted if, prior to the first anniversary of the closing date of the Transaction, HBC issues certain other equity securities at a price below the initial Preferred Share conversion price. Such adjustments could cause dilution to the holders of Common Shares well in excess of 100% of HBC's issued and outstanding Common Shares. In an increasingly challenging retail environment, it is questionable why the Board would risk such massive dilution in the next twelve (12) months, without first obtaining minority shareholder approval.

11. In addition, pursuant to the Transaction, Rhône will be granted pre-emptive rights that are favourable to it and which are not granted generally to other shareholders. Such rights prevent Rhône's investment from being diluted post-closing of the Transaction if HBC issues Common

Shares (or securities convertible into Common Shares) until Rhône holds less than 50% of the Preferred Shares originally issued.

The Transaction Raises Red Flags

12. The Transaction raises a myriad of independent and interconnected concerns, each one necessitating minority shareholder approval to mitigate such concerns.

13. First, the Transaction is massively dilutive. The issuance and conversion of 50,919,608 Preferred Shares alone will fundamentally and irreparably affect all of HBC's shareholders, including minority shareholders such as Land and Buildings. The fact that the Preferred Shares will inherently accumulate even more voting power over the next eight years serves only to intensify the prejudice to HBC's minority shareholders.

14. Second, the Transaction is highly unusual. In particular:

(a) it is unusual for such a complex, "multi-faceted" and "transformative" transaction to be brought without notice, a shareholder vote or even full disclosure;

(b) it is unusual for preferred shares to be granted immediate voting rights on an as-converted basis (as at the closing date) for all matters on which holders of common shares can vote;

(c) it is unusual because the issuance and conversion price of the Preferred Shares of C$12.42 per share is approximately 34% of HBC's own stated net asset value (and the inherent value of its real estate) of approximately C$35 per Common Share;

(d) it is unusual because, according to Richard Baker, one of the purposes of the Transaction is to "enhance our liquidity". Yet, as recently as September 5, 2017,

the Company disclosed that it "expects to generate adequate cash flow from operating activities to sustain current levels of operations." At no prior point has the Company indicated any need for liquidity; and

(e) as detailed below, the lack of a robust governance process undertaken by HBC in connection with the Transaction is also highly unusual.

15. Third, the Transaction materially affects control because the Controlling Shareholders already control almost 48% of the Common Shares. The addition of Rhône to the Controlling Shareholders' voting bloc will not only strengthen their grip over HBC, it will give them near-total control of the Company with approximately 69% of the Common Shares on a *pro forma* basis. To make matters worse, HBC has announced that the terms of the Transaction will require Rhône to support the Board's slate of nominees for the duration of the investor rights agreement between Rhône and HBC. Together with the existing support agreements, both legal and *de facto*, the mandatory voting support of Rhône will concentrate the control of HBC and the Board even further.

16. Fourth, HBC has failed to disclose key details of the Transaction. Despite announcing its intention to close the Transaction as early as November 15, 2017, and despite demands from Land and Buildings, HBC has failed to disclose critical aspects of the Transaction to its shareholders. By restricting access to key information about the Transaction to insiders, HBC has placed its shareholders and the market in the dark with respect to the Transaction. In particular, HBC has:

(a) failed to disclose the names of the shareholders that purportedly approved the Transaction and in particular, whether the Controlling Shareholders or other insiders were involved;

(b) failed to provide any justification for the urgency with which HBC is pursuing the Transaction; and

(c) despite the vague press release issued on November 7, 2017, HBC has failed to provide sufficient details regarding changes to existing voting covenants between L&T, Hanover and HBC. In particular, HBC has failed to provide sufficient detail regarding:

(i) the terms on which the existing voting covenants of L&T and Hanover are to be "released" (as announced for the first time on November 7, 2017) and whether other implicit assurances or covenants have been provided in exchange for same;

(ii) the impact, if any, on the remaining director nomination or other rights that are contained in such agreements with L&T and Hanover;

(iii) the interplay of such voting covenants with L&T and Hanover with the terms of the Transaction and the composition of the Board more generally; and

(iv) the current Board members who represent nominees of shareholders who have various representation rights on the Board and under which material agreements of HBC such persons are nominated to the Board.

17. Fifth, HBC failed to follow adequate governance protections. Due to the close ties between the Controlling Shareholders and the Board, and due to the "material risk" posed by the Controlling Shareholders' influence over HBC and the Board, there was a clear need for robust governance protections designed to ensure informed and proper decision-making at the Board level, free from conflict or influence. However, it does not appear that HBC had the necessary

governance protections in place when the Board considered, and ultimately approved, the Transaction. In particular, HBC:

(a) failed to form a special or independent committee to consider the Transaction;

(b) failed to retain independent counsel or independent financial advisors for the Board or any special or independent committee;

(c) failed to obtain any opinion on the fairness of the Transaction;

(d) failed to provide its shareholders or the market with full and plain disclosure, as noted above; and

(e) chose to proceed with the Transaction without a shareholders' meeting and instead by way of written approval of shareholders holding more than 50% of the Common Shares, but nonetheless refuses to identify the shareholders that provided their written approval of the Transaction.

18. Sixth, the Transaction creates conflicts of interest. The involvement of the Controlling Shareholders in approving the Transaction perpetuates and exemplifies the conflict of interest at HBC. The conduct of L&T is especially concerning and impugns the Transaction in the eyes of HBC's minority shareholders and the market at large. Notably, the historical understandings and arrangements of mutual support that exist between Richard Baker, Robert Baker, William Mack, and Lee Neibart (the directors and principal shareholders of L&T), whether contractual or otherwise, are particularly concerning. In particular:

(a) as management, L&T (specifically, Richard Baker) negotiated the Transaction;

(b) as directors, L&T (specifically, Richard Baker, Robert Baker, William Mack and Lee Neibart) voted on the Transaction;

(c) as shareholders, L&T (specifically, Richard Baker, Robert Baker, William Mack and Lee Neibart) "approved" the Transaction; and

(d) as a party with contractual rights to Board representation, L&T (specifically, Richard Baker, Robert Baker, William Mack and Lee Neibart) will substantially benefit from the Transaction.

As a result of this conduct, L&T should not have voted to approve the Transaction.

19. Seventh, the Transaction entrenches the current Board. As noted above, the Transaction provides that Rhône will support certain Board nominees. In light of the nominating rights agreements already in existence between HBC and certain major shareholders, the Transaction will result in the Board's nominees becoming insulated against challenges from HBC's shareholders. In fact, HBC has itself acknowledged that the Transaction will entrench the current Board, and on November 7, 2017, two weeks after the Transaction was first announced, HBC announced that it would "release its other shareholders from their existing voting covenants that committed those shareholders to vote for directors put forward for election by HBC". However, this last minute attempt to redress the entrenchment does nothing to diminish the historical and *de facto* commitment that the Controlling Shareholders have shown to the current Board or lessen the power of the Controlling Shareholders' approximately 48% voting bloc.

19A. In discussions with Bill Mack in January 2017, Land and Buildings was told that "this is a closely held company, there is nothing you can do". Then, in discussions with Richard Baker in March and in the summer of 2017, Land and Buildings was told that "we have agreements", the clear suggestion being that there is nothing that LBIM can do to change the composition of the board.

19B. After the Transaction was announced, Land and Buildings spoke with Richard Baker again and asked him why HBC issued preferred shares convertible into so many common shares which is highly dilutive. His response was: “my CFO asked the same question … and because of you”, a clear reference to Land and Buildings’ intention to change the composition of the Board.

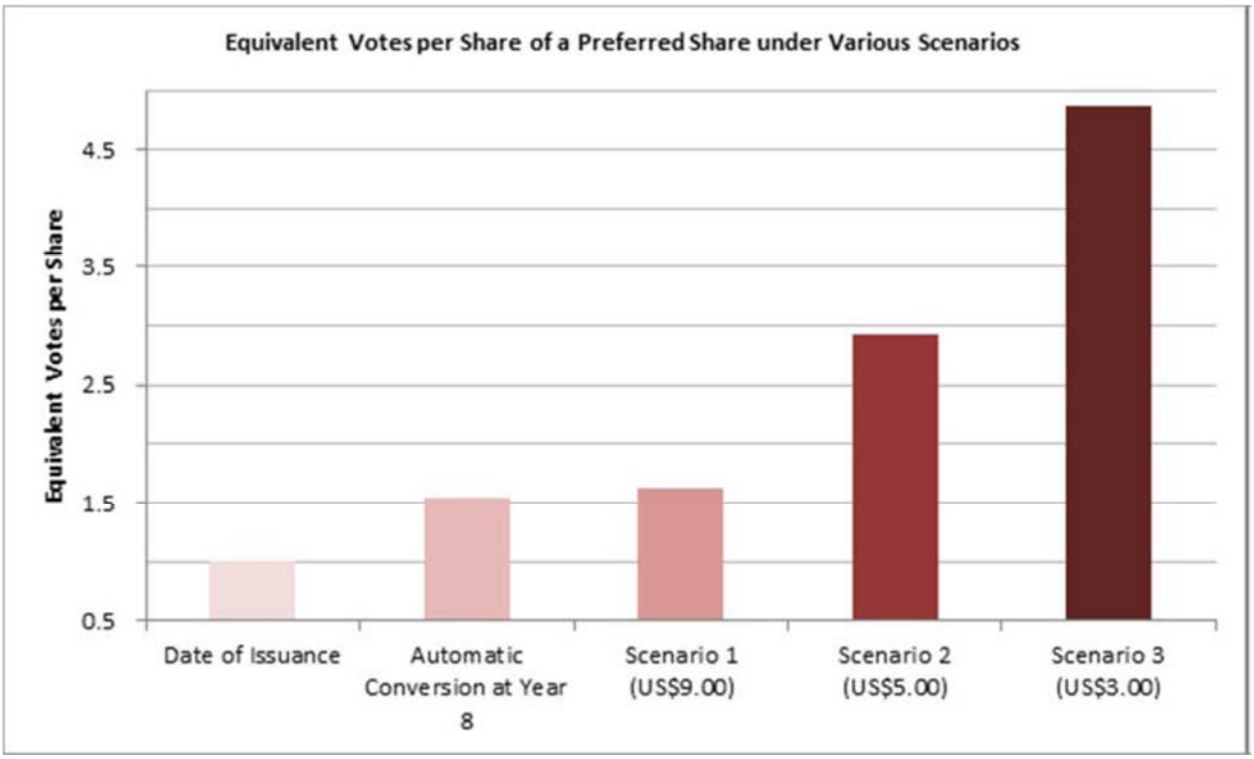
19C. In light of the terms of the Preferred Shares granted to management's self-selected "partner", management - without a full shareholder vote - made themselves and HBC virtually immune to the wishes of other shareholders.

20. The minority shareholders of HBC, including Land and Buildings, will receive no economic benefit from Rhône’s voting covenant in favour of the Board, yet such minority shareholders have, in essence, financed the inclusion of this covenant (and its entrenching features) through the dilution of their positions.

The Transaction Constitutes a Reorganization pursuant to OSC Rule 56-501

21. In addition to the concerns identified above, the Transaction fails to comply with Ontario securities laws. While the Preferred Shares are equal to the Common Shares in terms of voting rights at the time of issuance, immediately following issuance, the Preferred Shares will accrue additional voting rights by virtue of the passage of time. Additional voting rights will accrete through: (a) the Liquidation Preference; (b) any cash dividend paid on the Common Shares; and (c) other conversion price adjustments.

22. The chart below shows the increase in voting power of one Preferred Share over time, and assuming an issuance of Common Shares immediately following the closing of the Transaction at U.S.$9.00 (Scenario 1), U.S.$5.00 (Scenario 2) and U.S.$3.00 (Scenario 3), the same scenarios and share prices provided in HBC’s October 24, 2017 press release.



23. As a result, the Transaction constitutes a "reorganization" pursuant to OSC Rule 56-501 – *Restricted Shares* (**Rule 56-501**), and is subject to the requirements of section 624 of the TSX Company Manual (the **Manual**).

24. In particular, under Rule 56-501, a "reorganization" includes the creation of a class of shares that are "restricted shares", either directly or indirectly, including by way of resolution of the board of directors of an issuer setting the terms of a series of shares of the issuer.

25. If the Preferred Shares are issued in accordance with the Transaction, the Common Shares of HBC will cease to be "common shares" pursuant to Rule 56-501, which defines "common shares" as:

> **equity shares to which are attached voting rights** exercisable in all circumstances, irrespective of the number or percentage of shares owned, **that are not less, on a per share basis, than the voting rights attaching to any other shares** of an outstanding

class of shares of the issuer, unless the Director makes a determination under section 4.1 that the shares are restricted shares. [Emphasis Added]

26. In this case, the Common Shares will become "restricted shares" as a result of the Transaction and the issuance of the Preferred Shares. Accordingly, the Transaction constitutes a "reorganization" pursuant to Rule 56-501.

27. In conjunction with Rule 56-501, section 624 of the Manual imposes requirements respecting restricted shares that are applicable to all listed issuers having restricted shares listed on the TSX, regardless of when the securities were listed. In particular,

(a) section 624(m) provides that the TSX will not consent to the issuance of any securities that have voting rights greater than those of the securities of any class of listed voting securities of the listed issuer, unless the issuance is by way of a distribution to all holders of the listed issuer's voting residual equity securities on a *pro rata* basis; and

(b) section 624(n) provides that the TSX will not consent to a capital reorganization which would have the effect of creating a class of restricted shares unless the proposal receives minority approval.

The TSX Decision

28. On or about November 7, 2017, HBC disclosed that the TSX granted conditional approval of the issuance and reservation of the Common Shares to be issued upon the conversion of the Preferred Shares issued pursuant to the Transaction. Land and Buildings is not privy to the record considered by the TSX, or the reasons for the TSX Decision.

29. Section 603 of the Manual provides the TSX with the discretion to accept notice of a transaction and to impose conditions on a transaction.

30. Section 603 also requires the TSX to consider the effect that a transaction may have on the quality of the marketplace, based on factors including: (i) the material effect on control of the issuer; (ii) the issuer's corporate governance practices; and (iii) the size of the transaction relative to the liquidity of the issuer. All three of these factors are relevant to this Transaction. The public interest and the fair treatment of shareholders must be taken into account by the TSX in assessing the impact of a transaction on the quality of the marketplace.

31. In deciding whether to provide its conditional approval, the TSX was required to consider Rule 56-501 as well as the requirements in section 624 of the Manual.

32. In light of the circumstances detailed above, Land and Buildings raised its concerns with the TSX about the Transaction in writing on multiple occasions between October 25, 2017 and November 3, 2017.

32A. The TSX, in its reasons for decision, found that the issuance of preferred shares would have a material effect on control of the company and would result in potential dilution in excess of 25% of common shares. It also found that the preferred share conversion price is potentially below allowable discount thresholds. For these and other reasons, the TSX concluded that shareholder approval was required.

32B. Having determined that shareholder approval was required, the TSX assessed whether a shareholder meeting was required and whether all of the consents (including the consent of L&T) should be accepted. The TSX erred by (among other things):

a. exercising its discretion to not require a meeting of shareholders; and

b. exercising its discretion to accept the consents of the Controlling Shareholders.

32C. In reaching its decision, the TSX did not have, and therefore did not consider, material evidence relating to the Transaction, details of the governance process undertaken by HBC, the accuracy and completeness of the Form 11 filed by HBC, the consents, and the shareholders who provided those consents. Specifically, the TSX did not have:

a. documentation or statements from consenting shareholders demonstrating whether they understood the nature of the Transaction, whether they considered themselves obligated to vote in favour of the Transaction, and whether they were bound to silence by non-disclosure agreements;

b. documentation or statements from independent board members and the conflicted board members concerning their consideration of the Transaction, the inherent conflict of certain board members, the advice provided by financial advisors, or consideration of alternative transactions;

c. documentation including Board of Director and Committee meeting minutes, materials prepared by financial advisors, and written resolutions of the Board of Directors and any Committees of the Board;

d. information concerning the existence of shareholders who refused to sign a consent in respect of the transaction and the reasons why shareholders (including the Applicant) were not approached about the transaction; and

e. information concerning the rationale for the voting agreement with Rhone and the consideration provided by HBC to obtain that benefit for the Controlling Shareholders or some of them.

II. HEARING AND REVIEW

The OSC Must Review the Transaction *de novo*

33. Had the TSX applied the law correctly, considered the facts in their entirety, and exercised its discretion reasonably, it would not have accepted notice of or given conditional approval to HBC for the Transaction.

34. The patent shortcomings of the TSX Decision compel the OSC to intervene and review the Transaction *de novo* pursuant to section 21.7 of the Act and the decision of *Canada Malting Co., Re*, (1986) 9 O.S.C.B. 3566. In particular, the TSX:

(a) demonstrated that its perception of the public interest fundamentally conflicts with that of the OSC in these circumstances by providing conditional approval despite the harm to the quality of the marketplace caused by inadequate disclosure, insufficient governance protections, evidence of entrenchment, and serious conflict of interest concerns;

(b) overlooked material evidence as it relates to the Transaction and did not obtain significant evidence that was material to the decisions under consideration;

(c) erred in law by failing to interpret and apply section 603 of the Manual correctly and with a view to all of the relevant facts; and

(d) erred in law and in principle by failing to interpret and apply section 624 of the Manual correctly (and, as a result, Rule 56-501).

The OSC Must Intervene to Protect the Public Interest

35. In addition to the foregoing, the OSC must intervene in the public interest pursuant to section 127 of the Act. Section 127 of the Act provides the OSC with the jurisdiction to intervene in activities related to the Ontario capital markets when it is in the public interest to do so. The OSC has a very wide discretion in such matters.

36. The issuance of the Preferred Shares, which accrete in voting power over time, to a party that will be contractually obligated to support the Board serves no *bona fide* business purpose. The Transaction is abusive of the integrity of the Ontario capital markets. It has been engineered to appear to comply with regulatory requirements when, in fact:

(a) the Transaction was entered into without proper governance protections to ensure independent consideration of this "transformative" Transaction;

(b) the Transaction aggregates control into a new class of securities of the Company without regard to the typical protections afforded to shareholders when dual class share structures are created, including the approval of minority shareholders;

(c) despite the above, HBC is rushing to implement the Transaction without providing full transparency or even attempting to convene a shareholders' meeting where the Company's disclosure can be scrutinized and openly debated; and

(d) the Transaction, when combined with the existing legal and *de facto* voting support arrangements with HBC's largest shareholders, will entrench control of the Board in the hands of a few shareholders while bulletproofing the Board from legitimate challenge.

37. As a result, the Transaction is manifestly unfair to public minority security holders. The interests of HBC's minority shareholders, who lack Board representation and who are not parties to voting support arrangements, are prejudiced unless they receive proper protection. In addition, there is both manifest unfairness, and the appearance of same, that risks undermining investors' confidence in the public markets.

38. As this Application concerns matters affecting the public interest and as Land and Buildings is materially affected by the TSX Decision, Land and Buildings seeks standing from the OSC to pursue relief under section 127 of the Act.

The OSC Must Impose Conditions on the Transaction

39. In the circumstances, and on the basis of its jurisdiction to review the Transaction *de novo*, Land and Buildings respectfully submits that the OSC ought to make an order cease-trading the issuance of the Preferred Shares to Rhône on certain terms and conditions. In particular, the OSC ought to prohibit HBC from issuing the Preferred Shares unless and until:

(a) HBC provides sufficient disclosure of all terms of the Transaction, including the equity investment by Rhône and any other related agreement, to enable HBC's shareholders to evaluate the material terms of the Transaction and make informed investment decisions;

(b) HBC convenes a special meeting of shareholders to consider and vote on the Transaction, and in particular, the issuance of the Preferred Shares; and

(c) HBC seeks approval of the Transaction from disinterested shareholders (or a majority of the minority at a special meeting of the shareholders).

The Transaction Must be Stayed Pending Expedited Hearing

40. A stay of the completion of the Transaction until the matter can be heard by the OSC is warranted for the following reasons:

(a) there is a serious issue to be tried, as set out above, and this Application is neither vexatious nor frivolous;

(b) to allow the Transaction to close would cause Land and Buildings and other minority shareholders irreparable harm. Moreover, if the OSC varies the TSX Decision after the Transaction has closed, the OSC's decision will have no effect as it will not be possible to "unscramble" the Transaction or undo the harm to Land and Buildings and other minority shareholders; and

(c) the balance of convenience favors Land and Buildings. The fair treatment of HBC's shareholders, particularly its minority shareholders, must be preferred to the commercial interests of parties who will suffer no material harm if the closing of the Transaction is postponed until the conclusion of the hearing and review. Further, there is no urgency to close the Transaction. HBC has provided no reason in its public announcements for seeking to close the Transaction in November 2017.

Discovery is Warranted in these Circumstances

41. In accordance with section 5.4 of the SPPA, the OSC may make an order for the exchange of documents, the oral or written examination of a party, and any other form of disclosure at any stage of the proceeding.

42. The understanding which exists between L&T, Hanover, HBC and Rhône, and their voting agreements with respect to the Board are highly relevant to this appeal and specifically, the impact of the Transaction on the quality of the marketplace.

43. HBC has failed to provide adequate disclosure regarding the Transaction since its first press release on October 24, 2017 through its most recent announcement on November 7, 2017. Significant additional details of the Transaction was subsequently made available in the early warning report filed by Rhone on October 26, 2017. Most notably, as described above, two weeks after announcing the Transaction, HBC disclosed that it now suggests that it will "release its other shareholders [referring to L&T and Hanover, each of whom have executed voting covenants in favour of HBC] from their existing voting covenants" without reason or explanation. Such disclosure is confusing to the market and vague and exemplifies HBC's general lack of transparency around the nature of the relationships between the Controlling Shareholders

44. In its announcement of the TSX Decision on November 7, 2017, HBC announced that Rhône would provide a "limited and customary voting covenant to support director nominees recommended" by the Board, but that it would not be required to vote for any person nominated by any shareholder. While this language appears to change the position taken in earlier disclosure, regardless, the Board is effectively controlled by L&T and current management and it is an artificial distinction to assert that Rhône's voting covenant is unrelated to the will of L&T and HBC.

45. Pre-hearing discovery is necessary in the circumstances to allow the OSC and the shareholders of HBC, including Land and Buildings, to fully understand and assess the impact of the Transaction on the Company and the marketplace. In particular, and without limiting the foregoing, Land and Buildings requires: (i) disclosure of minutes from all Board meetings relevant to the Transaction; (ii) disclosure of emails and other correspondence between L&T, Rhône and

HBC; and (iii) various other documentation identified in paragraph 32C above and in the Applicant's motion for disclosure.

Land and Buildings Has Standing to Bring Application

46. Pursuant to sections 21.7 and 127 of the Act, Land and Buildings is a party directly affected by the TSX Decision and has standing to bring this Application given that:

(a) Land and Buildings is a shareholder of HBC;

(b) Land and Buildings' investment in HBC is impacted by the Transaction and, along with other shareholders, will be diluted as a result of the Transaction; and

(c) Land and Buildings is involved in a public and ongoing dispute with the Board regarding HBC's undervalued Common Shares which is directly impacted by the Transaction.

Conclusion

47. Land and Buildings intends to rely upon affidavit evidence, to be sworn, and written submissions to be delivered in advance of the hearing. Further, Land and Buildings intends to rely upon evidence disclosed by HBC and its representatives pursuant to the OSC's *Rules of Procedure and Practice Guideline*.

48. Land and Buildings requests the record of the TSX Decision (the **TSX Record**) and any reasons for said decision (the **Reasons for Decision**) for filing with the OSC. Land and Buildings reserves the right to amend or supplement this Notice of Application once the TSX Decision, Reasons for Decision and the TSX Record have been made available to it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of November, 2017

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