Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED**

AND

**IN THE MATTER OF
HUDBAY MINERALS INC.**

AND

**IN THE MATTER OF
A DECISION OF THE TORONTO STOCK EXCHANGE**

REASONS FOR DECISION
(Sections 8(3) and 21.7 of the Act)

Hearing:	January 19 and 21, 2009	
Decision:	April 28, 2009	
Panel:	James E. A. Turner	- Vice-Chair and Chair of the Panel
	Suresh Thakrar	- Commissioner
	Paulette L. Kennedy	- Commissioner
Counsel:	Kent Thomson Andrea Burke James Bunting Steven Harris Kyler Wells, General Counsel	- For Jaguar Financial Corporation
	Lorne Silver Arthur Hamilton	- For HudBay Minerals Inc.
	Mark Gelowitz Craig Lockwood Jeremy Fraiberg	- For Lundin Mining Corporation
	Linda Plumpton Andrew Gray Michal Pomotor Martine Valcin Molly Reynolds	- For the Toronto Stock Exchange
	Jane Waechter Cullen Price Naizam Kanji Michael Tang	- For Staff of the Commission

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REASONS FOR DECISION

I. BACKGROUND

A. Introduction

[1] This matter arises out of an application by Jaguar Financial Corporation ("**Jaguar**") related to a transaction under which HudBay Minerals Inc. ("**HudBay**") proposes to acquire all of the outstanding common shares of Lundin Mining Corporation ("**Lundin**") pursuant to a plan of arrangement (the "**Transaction**").

[2] On January 6, 2009, Jaguar made an application, the Fresh as Amended Request for Hearing and Review (the "**Application**"), pursuant to sections 8(3) and 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") requesting the Ontario Securities Commission (the "**Commission**") to conduct a hearing and review of a decision of the Toronto Stock Exchange (the "**TSX**"). Jaguar made the Application to request the Commission to set aside the TSX decision and to require HudBay to obtain shareholder approval of the Transaction.

[3] The TSX decision, dated December 10, 2008, approved the listing of the additional common shares of HudBay to be issued in connection with the Transaction, without requiring that the Transaction be approved by HudBay shareholders. The decision of the TSX described in this paragraph is referred to in these Reasons as the "**TSX Decision**".

[4] Jaguar submits that the TSX failed to properly conclude that the Transaction would materially affect control of HudBay within the meaning of section 604 of the TSX Company Manual (the "**TSX Manual**") and that the TSX should have exercised its discretion under sections 603 or 604 of the TSX Manual to require that HudBay obtain shareholder approval of the Transaction as a condition of the listing of the additional common shares to be issued in connection with the Transaction.

[5] Lundin and the TSX were granted full intervenor status in this matter by Commission order dated January 12, 2009.

B. The Commission's Order and Decision

[6] On January 19 and 21, 2009, we held a hearing to consider the Application at which we heard evidence and received submissions from Jaguar, HudBay, Lundin, the TSX and Staff of the Commission ("**Staff**").

[7] On January 23, 2009, we issued our order and decision in this matter with full reasons to follow. We took this approach because the outcome of the Application was a matter of some urgency as the Transaction was to be voted on by Lundin shareholders on January 26, 2009 and, if approved, the Transaction was scheduled to be completed on January 28, 2009.

[8] Our order in this matter dated January 23, 2009, a copy of which is attached as Schedule A to these Reasons, provides as follows:

1. pursuant to subsection 8(3) and section 21.7 of the Act, the TSX Decision is set aside;

2. pursuant to subsection 8(3) of the Act and section 603 of the TSX Company Manual, HudBay shareholder approval of the Transaction is required as a condition to the listing of the [additional common shares of HudBay to be issued in connection with the Transaction]; and

3. pursuant to subsection 8(3) of the Act, HudBay is prohibited from issuing any securities in connection with the Transaction unless it shall have first obtained the approval of the Transaction by a simple majority of the votes cast by HudBay shareholders entitled to vote on the Transaction at a duly convened special meeting of its shareholders.

[9] These are the full reasons for our order and decision in this matter.

C. The Parties

1. Jaguar

[10] Jaguar is a Canadian merchant bank that invests in small cap companies in a variety of industry sectors. Its common shares are listed on the TSX.

[11] Jaguar is a shareholder of HudBay and owns 1,500,000 HudBay common shares representing approximately 1% of the outstanding common shares of HudBay. Jaguar acquired these shares on November 21, 2008 after the public announcement of the Transaction but before the issue of the TSX Decision. According to Victor Alboini ("**Alboini**"), the Chief Executive Officer of Jaguar, Jaguar acquired the HudBay shares because:

> …it believed that shareholders of HudBay would take steps to oppose the Transaction and prevent it from proceeding, and that if the Transaction could be prevented there would be a significant benefit to HudBay. Jaguar also hoped and believed that the TSX or OSC would take the necessary steps to require a vote of the shareholders of HudBay as a pre-condition of permitting the Transaction to proceed.
>
> (*Alboini Affidavit*, at para. 17)

[12] Shortly after the market close on November 21, 2008, Jaguar issued a news release announcing its intention to make an offer to acquire all of the outstanding common shares of HudBay (the "**Jaguar Offer**"). Jaguar indicated that it intended to commence the Jaguar Offer on or about December 8, 2008. The Jaguar Offer was to be conditional on, among other things, the cancellation of the Transaction. On January 23, 2009, following the issuance of our Order and Decision, Jaguar publicly announced that it would not proceed with the Jaguar Offer.

2. HudBay

[13] HudBay is acquiring all of the outstanding common shares of Lundin under the Transaction.

[14] HudBay is an integrated base metals mining, metallurgical processing and refining company. HudBay owns and operates mines, concentrators and/or metal production facilities in Manitoba, Saskatchewan, Ontario, Michigan and New York State. Its registered office is in Winnipeg, Manitoba and its principal executive office is in Toronto, Ontario. HudBay is a reporting issuer (or its equivalent) in all Canadian provinces. Its common shares are listed on the TSX (under the symbol "HBM").

[15] HudBay's market capitalization as of the close of business on November 20, 2008 (the day immediately preceding the public announcement of the Transaction) was approximately $800 million and HudBay had 153,020,124 common shares outstanding.

[16] HudBay has total assets of approximately $1.9 billion, no long-term debt and shareholders' equity of approximately $1.6 billion; of its total assets, HudBay has just over $844 million of cash resources (based on HudBay's Interim Consolidated Financial Statements as at September 30, 2008). HudBay subsequently used approximately $136 million of its cash resources to subscribe for and acquire 19.9% of Lundin's common shares pursuant to the private placement described in paragraph 55 of these Reasons (the "**Private Placement**").

[17] As of November 21, 2008, SRM Advisors (Monaco) S.A.M. ("**SRM**") held approximately 11% of HudBay's outstanding common shares and Corriente Master Fund Limited Partnership ("**Corriente**") held approximately 2.2% of HudBay's outstanding common shares. As of December 5, 2009, Goodman and Co., the manager of Dynamic Mutual Funds, held approximately 6.4% of HudBay's outstanding common shares.

3. Lundin

[18] Lundin is an international mining company with its head office in Toronto, Ontario. Lundin is a reporting issuer (or its equivalent) in Ontario, Alberta, British Columbia, Québec and Nova Scotia. Lundin common shares are listed on the TSX (under the symbol "LUN") and on the New York Stock Exchange. Lundin also has Swedish depository receipts, representing Lundin common shares, listed on the OMX Nordic Exchange.

[19] Lundin's market capitalization was approximately $394 million as of the close of business on November 20, 2008 and Lundin had 390,436,279 common shares outstanding.

[20] Lundin directly or indirectly owns mines and exploration projects in Portugal, Sweden, Ireland and Spain. It has a 49% equity interest in a Cyprus joint venture company formed to develop a project in Russia and a 24.8% equity interest in the Tenke Fungurume Project ("**Tenke**") in the Democratic Republic of Congo ("**DRC**"). In addition, Lundin has equity investments (with a less than a 20% interest) in issuers with mining projects in Australia, Eritrea, British Columbia and Peru. Lundin has no material North American assets.

[21] Lundin has total assets of U.S. $4.3 billion, long-term debt of U.S. $234 million and shareholder's equity of U.S. $3.2 billion (based on Lundin's Interim Consolidated Financial Statements as at September 30, 2008).

[22] Of its total assets, Lundin has just over U.S. $45 million of cash resources and investments of approximately U.S. $1.6 billion, which consists mostly of Lundin's holding in Tenke. The Tenke investment represents over 35% of its total assets.

[23] As of November 21, 2008, Adolf Lundin held approximately 16.2% of Lundin's outstanding common shares. Overall, it appears that persons related to the Lundin family held approximately 21% of the outstanding common shares of Lundin as of that date or 16.9% after giving effect to the Private Placement.

[24] HudBay holds approximately 19.9% of Lundin's outstanding common shares. Those shares were acquired pursuant to the Private Placement.

4. The TSX

[25] The TSX is a stock exchange recognized by the Commission under subsection 21(1) of the Act.

[26] The TSX regulates certain conduct of listed issuers through its applicable by-laws, rules, regulations, policies, procedures, interpretations and practices.

D. The Transaction

[27] On November 21, 2008, HudBay and Lundin publicly announced the Transaction in a joint news release (the "**Joint Release**"). Pursuant to the Transaction, HudBay will acquire all of the outstanding common shares of Lundin on the basis of 0.3919 of a HudBay common share for each Lundin common share. Lundin will become a wholly-owned subsidiary of HudBay.

[28] HudBay will issue an aggregate of 157,596,192 common shares (the "**Additional HudBay Common Shares**") to Lundin shareholders under the Transaction. HudBay had 153,020,124 common shares outstanding as of November 14, 2008. Upon completion of the Transaction, the existing shareholders of HudBay and Lundin will each, as a separate group, hold approximately 50% of the common shares of the continuing company resulting from the Transaction (which we will refer to in these Reasons as the "**merged entity**"). Accordingly, the issue of the Additional HudBay Common Shares will result in the existing shareholders of HudBay being diluted by just over 100%.

[29] The imputed price per share that HudBay agreed to pay pursuant to the Transaction is $2.05 for each Lundin common share (based on the HudBay closing share price on November 20, 2008). This represents a 103% premium to Lundin's closing price of $1.01 on November 20, 2008 and a 32% premium based on the 30-day volume weighted average trading prices on the TSX of the common shares of Lundin and HudBay.

[30] The Joint Release stated that the notice of meeting and proxy circular for the special meeting of Lundin shareholders called to consider the approval of the Transaction would be

mailed in the first quarter of 2009 and that the Transaction was expected to close prior to May 30, 2009.

[31] On November 21, 2008, HudBay entered into 12 lock-up agreements with shareholders of Lundin holding approximately 21.1% of the outstanding Lundin common shares (16.9% after giving effect to the Private Placement). These shareholders agreed to vote all of such shares in favour of the Transaction at the Lundin shareholders' meeting called to consider approval of the Transaction. Accordingly, when aggregated with the common shares of Lundin acquired by HudBay under the Private Placement, approximately 36.8% of the outstanding Lundin common shares will be voted in favour of the Transaction.

E. Events After the Announcement of the Transaction

The Conference Call

[32] Following the issue of the Joint Release, HudBay and Lundin hosted a conference call during which Allen J. Palmiere, the Chairman and Chief Executive Officer of HudBay ("**Palmiere**"), and Philip Wright, the President and Chief Executive Officer of Lundin, answered questions with respect to the Transaction. Palmiere noted that no HudBay shareholder vote would be called to approve the Transaction. Palmiere stated that Lundin shareholders would, however, have an opportunity to vote on the Transaction.

Market and HudBay Shareholder Reaction to the Transaction

[33] Following the announcement of the Transaction, HudBay's share price on the TSX dropped by approximately 40%. The price of the Lundin common shares was not significantly affected.

[34] A number of analysts covering HudBay expressed negative views with respect to the Transaction.

[35] On November 24, 2008, Jaguar and two other shareholders of HudBay sent a notice to HudBay and the HudBay board of directors requisitioning a shareholders' meeting for the purpose of replacing the HudBay board. Subsequently, on December 11, 2008, HudBay advised Jaguar and the other shareholders submitting the requisition that the requisition was invalid because the shareholders were not registered shareholders.

[36] On November 24, 2008, Corriente wrote to the board of directors of HudBay, demanding that the HudBay board of directors take appropriate steps to investigate and take action with respect to alleged breaches by the HudBay directors of their fiduciary duties. Corriente indicated that the Transaction was not in the best interests of HudBay's shareholders. Corriente took issue with the Transaction because, among other things, HudBay would acquire Lundin's debt and extremely high-risk assets located outside Canada. Corriente accused HudBay's management and financial advisers of acting to the detriment of HudBay's shareholders. It concluded that "[i]t is clear that the motivations of [the] management team and financial advisers who own virtually no stock in [HudBay] are not aligned with the interests of [HudBay's] shareholders".

HudBay Notice to the TSX

[37] On November 26, 2008, HudBay filed notice by letter with the Listed Issuer Services Committee of the TSX (the "**Filing Committee**") seeking approval of the listing of the Additional HudBay Common Shares (the letter was filed under section 602 of the TSX Manual). The notice described the Transaction and the Private Placement and included representations by HudBay that insiders of HudBay and Lundin had no beneficial interest, direct or indirect, in the Transaction, which differs from the beneficial interests of other shareholders, and that the Transaction would not materially affect control of HudBay.

HudBay Shareholders' Submissions to the TSX

[38] On December 5, 2008, Jaguar issued a news release outlining the reasons it believed the Transaction should be voted on by minority shareholders of both HudBay and Lundin. Jaguar stated that (i) the Transaction is a related party transaction and is thus subject to shareholder approval by a majority of minority shareholders of each of HudBay and Lundin, (ii) the Transaction will result in a change of control of HudBay, (iii) the decision to approve the Transaction improperly involved directors common to both HudBay and Lundin, and (iv) the involvement of GMP Securities, LP ("**GMP**") as financial adviser to the special committee of independent directors of the HudBay board (the "**Special Committee**") is problematic given its prior business involvement with both HudBay and Lundin.

[39] The TSX received the following communications from shareholders of HudBay opposing the Transaction:

1. a letter dated December 3, 2008 from the British Columbia Investment Management Corporation ("**BCIM**");

2. an e-mail dated December 5, 2008 from Goodman and Co.; and

3. a letter dated December 5, 2008 from counsel for SRM.

[40] The letter from BCIM requested the TSX to exercise its discretion to require a HudBay shareholder vote because of the effect that the Transaction would have on HudBay's liquidity and the negative market reaction to the Transaction. BCIM noted that the Transaction would nearly double HudBay's outstanding shares and reduce its market capitalization from approximately $800 million to $525 million. BCIM also pointed out that major stock exchanges, such as the NYSE, AMEX, NASDAQ, LSE, JSE and HKSE have rules that require a shareholder vote where a transaction significantly dilutes shareholders' economic and voting interests. BCIM stated that a HudBay shareholder vote would "immediately enhance the quality of the marketplace".

[41] The e-mail sent to the TSX by Goodman and Co. requested the TSX to investigate the Transaction, which it believed was rife with improprieties, and supported Jaguar's submissions to the TSX. The e-mail attached Jaguar's news release of December 5, 2008.

[42] SRM's letter requested the TSX to exercise its discretion to require a HudBay shareholder vote because there is a strong factual basis to support the conclusion that the Transaction would

materially affect the control of HudBay. Specifically, SRM stated that the Transaction would create a "fundamental shift in control" because (i) Lundin shareholders will own 50.002% of the common shares of the merged entity, (ii) the board of directors of HudBay will be substantially re-configured without the approval of HudBay shareholders, (iii) five of the nine directors of the combined entity will be individuals who currently sit on the Lundin board, (iv) two of the Lundin directors who were recently appointed to the HudBay board will have a longer connection to Lundin, and (v) the Lundin family will become the largest shareholder of HudBay and will have the ability to influence the outcome of a vote of security holders and generally be in a position to materially affect control of the combined entity. SRM also took the position that because two members of the HudBay board of directors were also members of the Lundin board of directors, insiders or other related parties were involved in the Transaction.

[43] As of December, 2008, Jaguar, BCIM, Goodman and Co. and SRM owned in the aggregate approximately 16% of the outstanding common shares of HudBay.

[44] The TSX forwarded the two letters and e-mail referred to above to HudBay and asked for a response to the issues raised.

[45] HudBay responded to the TSX in a letter dated December 8, 2008 stating that (i) the Transaction would not materially affect control of HudBay, (ii) the Transaction did not involve insiders receiving material consideration, (iii) none of the grounds in section 603 of the TSX Manual were applicable, and (iv) a requirement for shareholder approval has not been imposed by the TSX in other similar transactions.

[46] The TSX also received a letter from Lundin dated December 8, 2008 supporting HudBay's submissions to the TSX.

Jaguar's Request to the TSX

[47] On December 8, 2008, Jaguar spoke with the TSX's Manager of Listed Issuer Services and requested a meeting for the purpose of making submissions with respect to the issues raised by Jaguar and the other objecting shareholders. Later that day, Jaguar was advised that representatives of the TSX would not meet with it but that Jaguar could file written submissions by the end of the following day (December 9, 2008) and that those submissions would be considered by the Filing Committee.

[48] Jaguar filed written submissions with the TSX on December 9, 2008, requesting that the TSX exercise its discretion under sections 603 and 604 of the TSX Manual to require HudBay to obtain approval by its shareholders of the Transaction. The Jaguar letter states that the quality of the marketplace will be affected by the size of the Transaction and the over 100% dilution that will result, by the material effect on control of HudBay and by HudBay's corporate governance practices.

HudBay Response to Shareholder Concerns

[49] On December 9, 2008, HudBay issued a news release and made an online presentation responding to shareholder concerns stating, among other things, that HudBay's independent directors supported the Transaction, that there would be no change of control of HudBay as a

result of the Transaction, and that the exchange ratio for the Transaction was determined in an arm's length negotiation. The news release stated, and the presentation confirmed, that no HudBay shareholder approval of the Transaction was necessary.

F. The TSX Decision

[50] On December 8, 2008, materials relating to the HudBay notice filed with the TSX were circulated to the Filing Committee. Those materials included the agenda for the meeting to be held on December 10, 2008 together with the written complaints from BCIM, Goodman and Co., and SRM.

[51] On December 9, 2008, TSX staff distributed a memorandum (the **"Staff Recommendation Memorandum**") to the Filing Committee, together with a copy of the letter from Jaguar received that day. The Staff Recommendation Memorandum referred to the receipt by the TSX of various shareholder complaint letters and stated, among other things, that shareholders of HudBay "have asked that TSX consider the transaction to materially affect control of HudBay or use its discretion under Section 603 of the Company manual to require that HudBay obtain shareholder approval for the transaction". The Staff Recommendation Memorandum concluded that the Transaction did not materially affect control as the Transaction would not give rise to a control person. While the Staff Recommendation Memorandum indicated that the TSX did have the authority to use its discretion under section 603, it went on to state "that applying such discretion would not be appropriate in this circumstance".

[52] The Filing Committee met on December 10, 2008 to consider HudBay's request for approval of the listing of the Additional HudBay Common Shares. The Filing Committee concluded at the meeting that "in this circumstance the rules would not require that the transaction be approved by HudBay shareholders". The minutes of the meeting of the Filing Committee are discussed in more detail beginning at paragraph 140 of these Reasons.

[53] Following the Filing Committee meeting, the TSX advised legal counsel to HudBay of its decision to conditionally approve the listing of the Additional HudBay Common Shares, subject to receipt of certain documentation. The TSX indicated that HudBay shareholder approval of the Transaction was not required as a condition of such approval.

[54] On December 11, 2008, HudBay issued a news release stating that it had received conditional approval from the TSX for the listing of the Additional HudBay Common Shares and that "the listing of HudBay shares is subject to the ordinary conditions of the TSX for transactions of this nature and does not require the approval of the shareholders of HudBay".

G. Events Subsequent to the TSX Decision

[55] On December 11, 2008, HudBay issued a news release stating that in a private placement connected to, but not conditional upon the completion of, the Transaction, it subscribed for and acquired 96,997,492 Lundin common shares, representing approximately 19.9% of the outstanding common shares of Lundin (after giving effect to the private placement). HudBay paid $1.40 for each Lundin common share, for aggregate gross proceeds to Lundin of approximately $136 million. That price represented a premium of approximately 39% based on the market price of the Lundin common shares on the previous day.

[56] On December 15, 2008, Jaguar sent a letter to HudBay seeking additional information with respect to its concerns about the Transaction and requesting copies of the minutes of the meetings of the HudBay board and the Special Committee at which the Transaction was considered. On December 19, 2008, HudBay replied and stated that it had referred Jaguar's letter to the Special Committee, but that it would be inappropriate to disclose to Jaguar documents which contained "commercially sensitive information".

[57] On December 19, 2008, HudBay issued a news release stating that a registered shareholder had requisitioned a shareholders' meeting for the purpose of removing and replacing HudBay's board of directors. The news release states that HudBay would respond to the requisition on January 2, 2009.

[58] On December 22, 2008, Lundin issued a notice of meeting and proxy circular for a shareholders' meeting to be held on January 26, 2009 to approve the Transaction.

[59] On December 30, 2008, in response to the shareholder requisition referred to in paragraph 57 of these Reasons, HudBay issued a news release announcing that a special meeting of its shareholders would be held on March 31, 2009 for the purpose of considering the removal of its board of directors and the election of new directors.

[60] On January 12, 2009, SRM and Corriente (who together own in the aggregate approximately 13.2% of the outstanding common shares of HudBay) commenced an oppression action in the Ontario Superior Court of Justice seeking an order directing HudBay to call, hold and conduct a special meeting of shareholders of HudBay to consider and vote on the Transaction and to elect a new board of directors of HudBay.

H. The Relief Sought by Jaguar

[61] Jaguar submits that the TSX Decision should be set aside and that HudBay shareholder approval should be required in connection with the Transaction because (i) the public interest and, in particular, protection of the quality and integrity of the marketplace and investor confidence requires such a vote, (ii) the TSX erred in failing to require that a vote be held, (iii) the TSX overlooked material evidence, and (iv) there is new and compelling evidence before the Commission. Jaguar also submits that the Transaction will materially affect control of HudBay.

[62] Jaguar requests that the Commission issue:

1. an order pursuant to subsection 8(3) and section 21.7 of the Act setting aside the TSX Decision;

2. an order pursuant to subsection 8(3) of the Act requiring HudBay to call and hold a meeting of its shareholders to obtain their approval of the Transaction;

3. an order prohibiting HudBay from closing the Transaction without the approval by a simple majority of the votes cast by HudBay shareholders entitled to vote at a duly convened special meeting of its shareholders;

4. an order pursuant to subsection 8(4) of the Act staying the TSX Decision pending final disposition of this matter by the Commission and by any Court to which an appeal of a decision made by the Commission may be taken; and

5. such other relief as counsel may advise and the Commission may deem just.

II. THE ISSUES

[63] Jaguar's Application and the relief requested raise the following principal issues for determination:

1. Does Jaguar have standing to apply for a hearing and review of the TSX Decision under section 21.7 of the Act?

2. If so, what is the appropriate standard of review?

3. Was the process followed by the TSX in making the TSX Decision appropriate?

4. Is there sufficient information before us to permit us to defer to the TSX Decision as it relates to sections 603 and 604 of the TSX Manual?

5. What is our assessment of the effect of the Transaction on the quality of the marketplace within the meaning of section 603 of the TSX Manual?

III. DOES JAGUAR HAVE STANDING TO APPLY FOR A HEARING AND REVIEW OF THE TSX DECISION UNDER SECTION 21.7 OF THE ACT?

A. Applicable Statutory Provisions

[64] A hearing and review of a decision of a recognized stock exchange, such as the TSX, is governed by section 21.7 of the Act. That section provides as follows:

> **21.7(1) Review of decisions -** The Executive Director or a person or company directly affected by, or by the administration of, a direction, decision, order or ruling made under a by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange, recognized self-regulatory organization, recognized quotation and trade reporting system or recognized clearing agency may apply to the Commission for a hearing and review of the direction, decision, order or ruling.
>
> **(2) Procedure** - Section 8 applies to the hearing and review of the direction, decision, order or ruling in the same manner as it applies to a hearing and review of a decision of the Director.

[65] Subsection 8(3) of the Act provides that:

> **8(3) Power on review -** Upon a hearing and review, the Commission may by order confirm the decision under review or make such other decision as the Commission considers proper.

B. Is Jaguar a "Person or Company Directly Affected" by the TSX Decision?

1. Positions of the Parties

[66] Jaguar submits that as a shareholder of HudBay, it is a person "directly affected" by the TSX Decision; therefore it is entitled to bring the Application pursuant to subsection 21.7(1) of the Act. Jaguar relies on the Commission decision in *Re Canada Malting Co.* (1986), 9 O.S.C.B. 3566 ("*Canada Malting*") where the Commission held that a minority shareholder was "directly affected" by a decision of the TSX that no shareholder vote would be required as a condition to the listing of additional common shares issued in two private placements.

[67] The TSX submits that Jaguar was aware when it purchased its shares that HudBay did not intend to seek shareholder approval of the Transaction. Unlike other HudBay shareholders who experienced a decline in the value of their shareholdings following the announcement of the Transaction, Jaguar did not suffer any such decline.

[68] Staff submits that Jaguar is directly affected by the TSX Decision based on (i) the facts relevant to Jaguar's standing to bring the application, (ii) a purposive interpretation of the words "directly affected", and (iii) the principles underlying *Canada Malting*.

[69] HudBay and Lundin made no submissions with respect to this issue.

2. Interpretation of "Directly Affected"

[70] The Commission has stated with respect to section 21.7 of the Act that:

> We accept that in interpreting section 21.7 of the Act, we should adopt a *purposive approach*, reading the words of the Act "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament"… Accordingly, the words of section 21.7 should be interpreted in a *contextual manner in light of all the circumstances* before us in this matter…
>
> [Emphasis added]
>
> (*Re Kasman and Anderson* (2008), 31 O.S.C.B. 11605 (*"Kasman"*) at para. 48)

[71] Such a purposive interpretation should give effect to the fundamental regulatory objectives of the Act and the important role of the TSX as a recognized stock exchange in attaining those objectives.

[72] The Commission has also stated that:

> The words "directly affected" in subsection 8(2) [now 21.7(1)] of the Act should be interpreted in light of all of the relevant circumstances… In each case under subsection 8(2), in determining standing, the Commission must look at the nature of the power that was exercised, the decision that was made, the nature of the complaint being made by the person requesting the hearing and review and the nature of that person's interest in the matter.
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> (*Re Instinet Corp.* (1995), 18 O.S.C.B. 5439 at 5446)

[73] Where a decision affects an applicant's rights or economic interests, the Commission has found that such an applicant is "directly affected" by the decision (*Canada Malting*, *supra* at 3575). The Commission will also consider whether an applicant has a personal and individual interest in the decision and its effects, as distinct from a general interest (*Kasman*, *supra* at para. 65). Where a decision has only an incidental effect on an applicant, no standing will be granted under section 21.7 (*Canada Malting*, *supra* at 3573 and *Kasman*, *supra* at para. 66).

3. Conclusion as to Jaguar's Standing

[74] We find that Jaguar is directly affected by the TSX Decision and has standing to apply for a hearing and review of that decision by the Commission under section 21.7 of the Act. In our view, a shareholder of a listed issuer is directly affected by a decision of the TSX not to require a shareholder vote in connection with a proposed transaction that has direct consequences to that shareholder. That principle was accepted by the Commission in *Canada Malting*. In our view, it is clear that Jaguar's economic interests are directly affected by the TSX Decision.

[75] We acknowledge that Jaguar purchased its shares of HudBay after the Transaction was announced on November 21, 2008. We note, however, that Jaguar held those shares at the time the TSX Decision was made on December 10, 2008. In our view, a person who is a shareholder at the time an application is made to the Commission under section 21.7 of the Act has the status as a shareholder to bring that application, provided they meet the other requirements of section 21.7.

[76] The Ontario High Court of Justice has considered a similar issue in the context of an oppression action. Southey J. stated:

> *I am unimpressed with the argument that no relief should be given in respect of shares purchased after the intention to amalgamate became known.* The submission was that, in respect of those shares, the purchasers "bought into the oppression". If relief is given to anyone in these proceedings, it will mean that the applicant correctly appreciated the legal rights of the preference shareholders. If the applicant and others could not take advantage of those rights with respect to the shares they were bold enough to purchase while those rights were still in dispute, it would mean that less sanguine owners would be deprived of the advantage of selling their shares during the pending litigation at prices reflecting the purchasers' estimate of the chances of success. Any such rule would place a

> new and, in my view, unwarranted restriction on the price of shares that are traded on a stock exchange.
>
> The conduct of the applicant and those associated in the same interest will either turn out to have provided an effective check on unlawful acts by the directors, or it will prove to have been a very expensive exercise in tilting at windmills. The owners of small numbers of shares probably could not afford to run the risks involved in providing such check.
>
> [Emphasis added]
>
> (*Palmer v. Carling O'Keefe Breweries of Canada Ltd. et al.*, [1989] 56 D.L.R. (4th) 128 at 136 and 137)

We agree with that principle. In our view, the Commission should be reluctant to impose restrictions on the ability of a shareholder to bring an application under section 21.7 of the Act in circumstances such as these.

C. Is There a TSX Decision Subject to Review?

1. Applicable Statutory Provision

[77] Section 21.7 of the Act allows the Commission to review a "direction, decision, order or ruling made under a by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange, recognized self-regulatory organization, recognized quotation and trade reporting system or recognized clearing agency". Is the TSX Decision a "decision" of the TSX reviewable under section 21.7?

2. Positions of the Parties

[78] Jaguar submits that the TSX Decision is a "direction, decision, order or ruling" made by a "recognized stock exchange" and is therefore subject to review by the Commission under section 21.7 of the Act.

[79] With respect to whether there is a "decision" of the TSX, Jaguar submits that subsection 602(c) refers to a decision being made under that subsection, which is itself a "rule" of the TSX.

[80] The TSX agrees that the TSX Decision is a decision made under a rule of a recognized stock exchange and is therefore reviewable under section 21.7 of the Act.

[81] Staff submits that a decision made under a regulatory instrument of the TSX is reviewable by the Commission under section 21.7 of the Act even if it is not a decision resulting from a formal hearing (*Re TSX Inc.* (2007), 30 O.S.C.B. 8917). Staff submits that the Commission has jurisdiction to review the TSX Decision based on the analysis in *Canada Malting*.

[82] HudBay and Lundin made no submissions with respect to this issue.

3. TSX Decision Reviewable

[83] Section 21.7 of the Act provides the Commission with a broad discretion to review decisions of the TSX made under its by-laws, rules and policies. In our view, it is clear that the TSX Decision is a decision made by the TSX under a rule or rules of the exchange (i.e. provisions of the TSX Manual).

[84] Accordingly, we find that the TSX Decision is reviewable under section 21.7 of the Act.

IV. WHAT IS THE APPROPRIATE STANDARD OF REVIEW?

[85] We must now determine the appropriate standard of review applicable to our review of the TSX Decision.

A. Positions of the Parties

Jaguar

[86] Jaguar submits that the Commission exercises original jurisdiction when it exercises its powers of review under section 21.7 of the Act. It is not restricted to a more limited appellate jurisdiction. In support of its position, Jaguar relies on the Commission decisions in *Re Taub* (2007), 30 O.S.C.B. 4739 ("*Taub*") and *Re Berry* (2008), 31 O.S.C.B. 5441 ("*Berry*").

[87] Jaguar submits that the Commission can substitute its own judgment for that of the TSX in these circumstances and should do so if that is fair to the applicant. Jaguar also submits that, because of the serious deficiencies in the TSX Decision, the Commission should show no deference to it.

[88] Jaguar concedes that the Commission generally accords deference to a decision of the TSX, but Jaguar submits that the Commission should intervene in a TSX decision if an applicant can show that one of the grounds established in *Canada Malting* is applicable (see paragraph 105 of these Reasons).

[89] Jaguar submits that the Commission should set aside the TSX Decision for any of the following reasons (i) the public interest requires a HudBay shareholder vote, (ii) the TSX erred in failing to require a HudBay shareholder vote, (iii) the TSX overlooked material evidence, and (iv) there is new and compelling evidence before the Commission.

HudBay

[90] HudBay takes the position that although the Commission's powers on a hearing and review under section 21.7 of the Act are broader than on an ordinary appeal, a hearing and review under section 21.7 is not a trial *de novo*. Accordingly, the Commission should not substitute its judgment for that of the TSX merely because the Commission disagrees with the TSX Decision or because the Commission might have come to a different conclusion.

[91] HudBay submits that a trial *de novo* would detract from the two critical issues the Commission must determine, which are whether (i) the TSX Decision is "reasonable", and (ii)

the TSX, in arriving at the TSX Decision, exercised its powers in a manner that accords with the Commission's view of the public interest.

[92] In the alternative, HudBay argues that if the Commission decides to proceed *de novo*, then the Commission ought to do so in exactly the same manner as the TSX in making the TSX Decision, namely, by considering only the information record that was before the TSX when it made its decision.

[93] HudBay submits that Jaguar cannot satisfy the heavy burden that must be met before the Commission will intervene in a decision of the TSX and that the Commission should take a deferential and "restrained approach" on a review under section 21.7 of the Act (*Boulieris v. Investment Dealers Association of Canada*, [2005] 139 A.C.W.S. (3d) 414 (Ont. Sup. Ct. J.) at para. 19). HudBay submits that Jaguar has failed to point to any error in principle or in law on the part of the TSX, to identify material evidence that was overlooked by the TSX, or to submit new and compelling evidence that was not presented to the TSX. Therefore, a high degree of deference should be shown to the TSX Decision.

[94] HudBay also cautions that if the Commission substitutes its own judgment for that of the TSX in this matter, doing so would have the effect of slowing the share issuance process to a crawl and would negatively impact "deal certainty" and merger and acquisition activity among TSX listed issuers. HudBay submits those consequences would detract from the public interest.

Lundin

[95] Lundin submits that the Commission should treat the TSX Decision with deference and unequivocally confirm it. Doing otherwise would have a negative effect on the integrity of the capital markets, which would suffer due to a loss in predictability of regulatory outcomes.

The TSX

[96] The TSX submits that the TSX Decision is entitled to considerable deference and that Commission intervention in circumstances such as these should be based only on very narrow grounds. The issue in dispute involves an application of TSX rules in an area where the TSX has a high degree of expertise (*New Brunswick (Board of Management) v. Dunsmuir*, [2008] 291 D.L.R. (4th) 577 (S.C.C.)). A review should not be an excuse for second-guessing TSX listing decisions because doing so would introduce an unacceptable degree of uncertainty into capital markets.

[97] The TSX submits that in making the TSX Decision, the TSX applied correct principles, made no error in law and referred to all the materials provided to it. The TSX submits that no new facts relevant to the decision have been adduced in Jaguar's evidence and that the TSX Decision is consistent with the Commission's perception of the public interest.

[98] The TSX also submits that Jaguar's argument that the TSX Decision ought to receive a lower level of deference because the reasons provided are inadequate is faulty because (i) there is no requirement that the TSX provide reasons for its listing decisions, (ii) Jaguar is a third party with respect to the TSX Decision, (iii) the TSX Decision includes reasons supporting the

conclusions, and (iv) the reasons provided are more than adequate and fulfill the function of reasons (*Ryan v. Law Society of New Brunswick*, [2003] 1 S.C.R. 247).

[99] The TSX submits that the standard of review adopted by the Commission in this matter should be that of "reasonableness". That is to say that, if the TSX Decision is within the range of decisions that could reasonably be reached in the circumstances, the Commission should defer to that decision. It is not necessary that the Commission conclude that the TSX Decision is correct or that the Commission agrees with it.

Staff

[100] Staff submits that in a hearing and review under section 21.7 of the Act, the Commission exercises original jurisdiction and can substitute its judgment for that of the TSX. Staff submits that a hearing and review under section 21.7 is in the nature of a trial *de novo* and new evidence is permitted.

[101] Staff recognizes that the Commission has generally shown restraint when reviewing a decision under section 21.7 of the Act in order to ensure that a recognized stock exchange (or other self-regulatory organization) maintains adequate control over its own processes and procedures.

[102] As a matter of concern, Staff notes that second-guessing decisions of an exchange may lead to an unacceptable degree of uncertainty in the capital markets. Staff submits that the Commission ought not to intervene in the TSX Decision unless Jaguar meets the heavy burden of establishing at least one of the five grounds for intervention referred to in *Canada Malting*. Simply disagreeing with the TSX Decision is not grounds for intervention. However, Staff also submits that the Commission must be satisfied that, in making the TSX Decision, the TSX had all the facts before it and that the decision was made based on a consideration of all of those facts and the best interests of the shareholders of HudBay.

B. The Appropriate Standard of Review

[103] The Commission generally shows deference to the decisions of the TSX, particularly in the areas of the TSX's expertise. We recognize the important role that the TSX plays within our regulatory framework. The Commission's authority under section 21.7 of the Act should not be used as a means to second-guess reasonable decisions made by the TSX. The Commission will not substitute its own view for that of the TSX simply because the Commission might have reached a different conclusion in the circumstances.

[104] A restrained approach will "give substantial leeway to the discretionary decision-maker in determining the "proper purposes" or "relevant considerations" involved in making a given determination" (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 ("*Baker*") at para. 56).

[105] The Commission has held that there are five grounds upon which the Commission may intervene in a decision of the TSX:

1. the TSX has proceeded on an incorrect principle;

2. the TSX has erred in law;

3. the TSX has overlooked material evidence;

4. new and compelling evidence is presented to the Commission that was not presented to the TSX; and

5. the Commission's perception of the public interest conflicts with that of the TSX.

(*Canada Malting*, *supra* at 3587 and *Berry*, *supra* at para. 59)

[106] If the Commission concludes after considering and assessing these grounds that it ought to intervene in a decision pursuant to section 21.7 of the Act, the Commission then exercises original jurisdiction with respect to the ensuing hearing and review, as opposed to a more limited appellate jurisdiction (*Taub*, *supra* at para. 29; *Re Boulieris* (2004), 27 O.S.C.B. 1597 ("*Boulieris*") at para. 28). As a result, the hearing and review is in the nature of a hearing *de novo* and new evidence may be tendered.

[107] In a hearing *de novo*, the Commission is free to substitute its own judgment for that of the TSX (*Taub*, *supra* at para. 30). Such a hearing and review is broader in scope than an appeal, which is usually limited to determining whether there has been an error in law or whether a rule of natural justice has been contravened (*Taub*, *supra* at para. 31 and *Boulieris*, *supra* at para. 30). As noted by the Commission in *Boulieris*:

> The Commission may "confirm the decision under review or make such other decision as the Commission considers proper." The Commission is, therefore, free to substitute its judgment for that of the [decision-maker below]. *The hearing and review is treated much like a trial de novo where the panel may admit new evidence as well as review the earlier proceedings* and the applicant does not have the onus of showing that the [decision-maker] was in error in making the decision that is the subject of the application.
>
> [Emphasis added]
>
> (*Boulieris*, *supra* at para. 29)

[108] However, the Commission may also intervene if a decision is not made fairly; for example, where the Commission finds there was no evidence upon which the relevant conclusions could be supported (*Security Trading Inc. and the Toronto Stock Exchange* (1994), 17 O.S.C.B. 6097 at 6105; see also *Berry*, *supra* at para. 60).

[109] As noted above, the Commission may also intervene in a decision of a self-regulatory organization when that decision does not reflect the Commission's view of the public interest. The Commission has stated:

> Since the Exchange has the power to impose additional or higher requirements in the ordinary case it would not be our intention to substitute our standards for those

> of the Exchange nor to substitute our discretion for that of the Governors. *If their standards were not consistent with our view of the public interest or their discretion were not exercised fairly, such as an absence of evidence upon which their conclusions could be supported, we would not hesitate to intervene.*
>
> [Emphasis added]
>
> (*Williams v. Toronto Stock Exchange* (1972), 7 O.S.C.B. 87 at 88 and 89)

[110] There is an important policy reason why the Commission retains this discretion in the public interest. The Commission has stated that:

> We believe that the public will support the role of self-regulatory organizations provided that the standards applied by the self-regulatory organizations are or can be made the subject of an appeal to the Securities Commission, the government appointed overseer of the operation of self-regulatory organizations, on the basis that the Commission's perception of the public interest of a particular case should prevail.
>
> (*Re Trizec Equities Ltd.* (1984), 7 O.S.C.B. 2034 at 2040)

C. Conclusion as to the Standard of Review

[111] Accordingly, it is well established that in a hearing and review under section 21.7 of the Act the Commission exercises original jurisdiction and the hearing and review can be conducted as a trial *de novo* (*Boulieris*, *supra* at para. 29 and *Re Taub*, *supra* at para. 30). As a result, the Commission has original jurisdiction to make a decision and can, in its discretion, admit new evidence that was not before the TSX. That general statement is subject to the Commission concluding that it has grounds to intervene based on one of the five grounds for intervention set out in *Canada Malting* (see paragraph 105 of these Reasons).

[112] Our review is not, however, a review only of the information record that was before the TSX when it made its decision. The question we must decide is not whether we would have come to the same conclusion as the TSX based on the information record that was before it. The question is whether, given all of the information and evidence that is now before us, we have grounds to interfere with the TSX Decision. In our view, we are entitled to consider not only the information and documents that were before the TSX in making its decision but also the additional information and evidence before us on this Application (recognizing, however, that the Commission has the discretion to determine the evidence that it is prepared to admit in a review under section 21.7 of the Act). It is important to note that we have concluded that we have before us more extensive information, documents and evidence with respect to HudBay, Lundin and the Transaction than the TSX had before it in making the TSX Decision.

[113] If any additional support for that conclusion is necessary, it can be found in the grounds established by *Canada Malting* for intervention in a decision of the TSX. One of the grounds for intervention established in *Canada Malting* is whether the Commission has received new and compelling evidence that was not before the TSX. In the matter before us, we have received what we consider to be new and compelling evidence with respect to HudBay's governance practices

relating to the approval of the Transaction that was not before the TSX. In addition, we are entitled to intervene where our perception of the public interest differs from that of the TSX. The exercise of our public interest jurisdiction requires us to consider all of the relevant evidence before us, not only the information record that was before the TSX at the time it made the TSX Decision.

[114] We recognize, however, that if the Commission is too interventionist in reviewing decisions made by an exchange, that would introduce an unacceptable degree of uncertainty in our regulatory regime and in capital markets. In *Canada Malting*, the Commission stated:

> The TSE supported the Applicants in their request for standing. However, it went on to note the difficulty that would be created for listed companies if the TSE could be second-guessed by the OSC on the initiative of a company's shareholders every time a notice for filing is accepted under By-law 19.06 [the predecessor of section 604 of the TSX Manual].
>
> If the right of appeal meant that the OSC were to review every decision of the TSE on the merits, then companies issuing securities would be faced with the possibility of subsequently being forced to unwind the transaction or face delisting or trading sanctions on the basis that the Commission had decided to substitute its discretion for that of the TSE under By-law 19.06. In our view, this would introduce an unacceptable degree of uncertainty into the capital markets.
>
> (*Canada Malting*, supra at 3588 and 3589)

We agree with the caution reflected in that statement. Only in very rare circumstances should the Commission substitute its decision for that of the TSX. Subject to the discussion below, before the Commission intervenes in a decision of the TSX pursuant to section 21.7 of the Act, it should ensure that the applicant has met the heavy burden of demonstrating that its case fits squarely within at least one of the five grounds for intervention identified in *Canada Malting*.

D. Reliance on TSX Decision

[115] There is, however, an additional consideration in this matter. In order to show deference to a decision of the TSX, we must be satisfied that we have a reasonable basis upon which to do so. As discussed more fully below under "Was the Process Followed by the TSX Appropriate?", we have concluded that we do not have sufficient grounds to defer to the TSX Decision to the extent that decision relates to the application of section 603 of the TSX Manual.

[116] Given that conclusion, we must review the TSX Decision as it relates to section 603 as a matter *de novo* based on all of the information and evidence that is now before us. In considering the TSX Decision in these circumstances, we are not limited to the five grounds for review established in *Canada Malting*. We are entitled to make our own decision as to the interpretation and application of section 603 based on the evidence before us.

[117] If we had come to a different conclusion with respect to our ability to defer to the TSX Decision as it relates to section 603, we believe that we would nonetheless have had sufficient grounds in these circumstances to review the TSX Decision *de novo* on two of the grounds

established in *Canada Malting* (i) as a result of the new and compelling evidence before us with respect to HudBay's governance practices as they relate to the approval of the Transaction, or (ii) on the basis of our perception of the public interest.

V. WHAT ARE THE RELEVANT TSX RULES?

A. The TSX Manual

[118] Part VI of the TSX Manual – Changes in Capital Structure of Listed Issuers – sets forth the rules applicable where a listed issuer proposes a change in capital structure. We have set forth in Schedule B, relevant extracts from sections 602, 603, 604 and 611 of the TSX Manual. References to those section numbers in these Reasons are references to the relevant sections of the TSX Manual.

B. Giving Notice of a Transaction

[119] A TSX listed issuer is required to immediately notify the TSX in writing of any transaction involving the potential issue of listed securities (other than unlisted, non-voting or non-participating securities) and the issuer may not proceed with that transaction unless the notice is accepted by the TSX (subsections 602 (a) and (b)).

[120] If a listed issuer wishes to issue additional shares, it must give notice by letter to the TSX of the transaction (section 602). Two key issues that must be addressed in the notice are whether any insider has an interest in the transaction and whether the transaction could materially affect control of the listed issuer (subsection 602(e)).

[121] The TSX has the authority to accept or reject the notice (subsection 602(b)). If a notice is not accepted by the TSX, a listed issuer that proceeds with the transaction may face suspension and delisting. The TSX may attach conditions to its acceptance of notice of a transaction (subsection 602(c) and section 603).

C. Shareholder Approval of a Transaction

[122] When a listed issuer seeks approval for the listing of additional shares in connection with an acquisition and the number of shares issued or issuable as consideration exceeds 25% of the number of outstanding shares of the listed issuer (on a non-diluted basis), then shareholder approval is required as a condition to acceptance of the notice of the transaction (subsection 611(c)).

[123] The TSX will not, however, require shareholder approval where the transaction involves a listed issuer acquiring another public company (a reporting issuer or company of equivalent status) that has 50 or more beneficial shareholders, excluding insiders and employees (subsection 611(d)). That exception is expressly subject to the exercise by the TSX of its discretion under sections 603 and 604.

[124] There is no dispute in this matter that the "public company" exception in subsection 611(d) applies to the Transaction. Accordingly, the question before the TSX in this matter was the interpretation and application of sections 603 and 604.

[125] The TSX will generally require shareholder approval of a transaction where, in the opinion of the TSX, the transaction (i) materially affects control of the listed issuer, or (ii) provides consideration to insiders in aggregate of 10% or greater of the market capitalization of the listed issuer and has not been negotiated at arm's length (section 604).

[126] The TSX Manual defines "materially affect control" as the ability of any listed issuer shareholder(s) to influence the outcome of a vote of shareholders. Where a transaction results in one shareholder holding 20% or more of the voting shares of a listed issuer, there is a presumption that the transaction materially affects control.

[127] When determining whether to exercise its discretion to accept or reject notice of a proposed transaction, the TSX must also consider the effect that the transaction may have on the "quality of the marketplace provided by the TSX" (section 603). The factors that the TSX will consider in exercising this discretion include the following:

1. the involvement of insiders or other related parties of the listed issuer in the transaction;

2. the material effect on control of the listed issuer;

3. the listed issuer's corporate governance practices;

4. the listed issuer's disclosure practices;

5. the size of the transaction relative to the liquidity of the issuer; and

6. the existence of an order issued by a court or administrative regulatory body that has considered the security holders' interests.

[128] Accordingly, the TSX has discretion under section 603 to impose conditions on a transaction and that section indicates that in exercising its discretion the TSX will consider the effect of the transaction on the quality of the marketplace. The factors that the TSX will consider include those specifically enumerated in section 603.

[129] Section 603 was the subject of an extensive public review and comment process before it was approved by the Commission (see: *Request for Comments Notice* (2004), 27 O.S.C.B. 249 ("Request for Comments Notice").

D. Current TSX Policy Review

[130] The TSX is currently conducting a policy review to consider whether to implement rules that would require approval by the shareholders of a listed issuer where the dilution resulting from a transaction exceeds a specific threshold (see *Request for Comments Notice* (2009), 32 O.S.C.B. 3053). In our view, that policy review is not relevant to our interpretation of the existing provisions of the TSX Manual. Currently, there is no bright-line test in the TSX rules that requires shareholder approval where a specified level of dilution is exceeded in the acquisition of a public company.

VI. WAS THE PROCESS FOLLOWED BY THE TSX APPROPRIATE?

A. Positions of the Parties

Jaguar

[131] Jaguar submits that the TSX erred in making the TSX Decision because it was reached through a flawed process that was manifestly unfair and that, on those grounds alone, the Commission should substitute its views for those of the TSX. Jaguar complains that the TSX did not provide Jaguar with HudBay's letter to the TSX dated November 26, 2008, the two letters and e-mail from other shareholders objecting to the Transaction, the December 8, 2008 letter from HudBay to the TSX (which responded to the shareholder complaints), Lundin's letter to the TSX dated December 8, 2008, or the Staff Recommendation Memorandum. Jaguar submits that there is a general obligation of a decision-maker to allow those affected by its decision the opportunity to put forward their views and concerns and have them considered by the decision-maker. Alboini testified on cross-examination before us that the TSX process was not transparent and was, in fact, a "very dark, black hole."

HudBay

[132] HudBay submits that the opportunity provided to Jaguar and the other objecting HudBay shareholders to provide full and complete written submissions to the TSX was sufficient to meet any duty of fairness to them. In the circumstances, any duty of fairness was met because (i) there was ample opportunity for opponents of the Transaction to bring forth relevant concerns and make submissions, (ii) the TSX received such submissions before making the TSX Decision, and (iii) all parties that made submissions to the TSX had the opportunity to retain legal counsel.

Lundin

[133] Lundin agrees with the submissions of HudBay on this issue.

TSX

[134] The TSX submits that the process it followed in making the TSX Decision was fair and appropriate in the circumstances. It submits that the degree and content of procedural fairness required in an administrative decision-making process depends on five factors (i) the nature of the decision and the decision-making process employed by the administrative body, (ii) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates, (iii) the importance of the decision to the individuals affected, (iv) the legitimate expectations of the party challenging the decision, and (v) the nature of the deference accorded to the body.

[135] The TSX submits that in making the TSX Decision, it acted in a manner consistent with section 602 of the TSX Manual. That section requires only that a listed issuer provide written notice of a transaction to the TSX. The TSX submits that Jaguar could not have had a legitimate expectation that the Filing Committee would have followed a decision-making process that included the right to an oral hearing or the right to review and respond to materials received by the Filing Committee. Third parties have no right under the TSX listing approval process to

receive and respond to information submitted by others. The TSX must respond quickly and efficiently to listing applications in order to meet the needs of capital market participants. Providing such rights to Jaguar or any other third party would interfere with the TSX's ability to do so.

[136] Notwithstanding, the TSX provided an opportunity to Jaguar and the other objecting shareholders to state their positions and concerns and submit those concerns to the Filing Committee. The TSX submits that the Filing Committee took those concerns into account in making the TSX Decision.

Staff

[137] Staff submits that this case does not centre around procedural fairness to Jaguar and accepts the TSX's position regarding this issue.

B. Conclusion as to the TSX Process

[138] We agree with the submissions of the TSX with respect to the process followed in making the TSX Decision. The TSX made an administrative decision whether to accept the Additional HudBay Common Shares for listing and whether to impose conditions on that acceptance. In doing so, it had an obligation to identify and consider all the facts and circumstances relevant to that decision. The TSX did that through the correspondence it received from HudBay, Lundin, Jaguar and the other objecting shareholders and through its review of that correspondence. In our view, the TSX had no obligation to meet with Jaguar or the other objecting shareholders to discuss their views or to provide them an opportunity to make oral submissions. Nonetheless, the TSX gave Jaguar and the other objecting shareholders a reasonable opportunity to make their views known to the TSX and those views and submissions were before the Filing Committee when it made its decision.

[139] In our view, the TSX was entitled in this matter to make its decision based on the documents, information and representations that were before it. While the TSX must be careful to ascertain that it has all the relevant facts, it does not generally have an obligation to conduct an investigation or carry out due diligence when it is considering the exercise of its discretion under a provision of the TSX Manual. The process followed by the Filing Committee in considering the complaints and submissions of Jaguar and the other objecting shareholders of HudBay was appropriate in the circumstances.

VII. IS THERE SUFFICIENT INFORMATION BEFORE US TO DEFER TO THE TSX DECISION?

A. The Minutes and Reasons of the Filing Committee

[140] The TSX Decision is reflected in the minutes of the meeting of the Filing Committee held on December 10, 2008. The minutes are the only evidence before us of the factors the TSX considered and the analysis and reasoning the TSX applied in making the TSX Decision. Accordingly, it is necessary for us to describe those minutes in some detail. When we refer to the reasons of the TSX, we are referring to the reasons as reflected in the minutes.

[141] The minutes of the meeting of the Filing Committee are just over one page. Except for the single sentence under "Decision" referred to below, the minutes are almost a verbatim reproduction of the Staff Recommendation Memorandum.

[142] The minutes refer to the written complaints from Jaguar and the other shareholders objecting to the Transaction and state the view of those shareholders that the Transaction is a related party transaction and materially affects control of HudBay. The minutes indicate that the objecting shareholders asked the TSX to consider the transaction to materially affect control of HudBay or to use its discretion under section 603 to require that HudBay obtain shareholder approval of the Transaction.

[143] The minutes describe the terms of the Transaction and the level of dilution. The minutes indicate that HudBay has confirmed that (i) the Transaction has been negotiated at arm's length, (ii) no insider of HudBay or Lundin has a beneficial interest, direct or indirect, in the Transaction, which differs from the beneficial interest of the other holders of HudBay or Lundin securities, (iii) the Transaction will not provide consideration to insiders in the aggregate of 10% or greater of HudBay's market capitalization, and (iv) the Transaction will not materially affect control of HudBay.

[144] The minutes indicate that, upon completion of the Transaction, the Lundin family will own 8.2% of the outstanding common shares of HudBay with one of the objecting shareholders holding approximately 5% of the outstanding common shares of HudBay.

[145] Under the heading "Recommendation", the minutes state that:

> Based on the definition of "materially affects control" on [sic] both the Securities Act (Ontario) and the TSX Company Manual this transaction does not materially affect control as this transaction will not create a new control person. While TSX does have the authority to use its discretion as prescribed under section 603 of the Company Manual, it is my view [the view of the TSX staff manager] that applying such discretion would not be appropriate in this circumstance.

[146] The minutes thereafter conclude under the heading "Decision" as follows:

> The filing committee was in agreement that in this circumstance the rules would not require that the transaction be approved by HudBay shareholders.

[147] The only references in the minutes to the application of section 603 are the two references referred to above. The first reference indicates that the objecting shareholders have asked, among other things, that the TSX "use its discretion under section 603 of the Company Manual to require that HudBay obtain shareholder approval for the transaction". The second reference is under "Recommendation" where it is indicated that the "TSX does have authority to use its discretion as prescribed under section 603 of the Company Manual...". The use of that discretion is not, however, recommended in the Staff Recommendation Memorandum.

[148] There is no reference in the minutes to (i) the effect of the Transaction on the quality of the marketplace, (ii) the factors that are expressly required to be considered under section 603,

(iii) the factors that were actually considered by the Filing Committee in making its decision under that section, or (iv) the reasoning and analysis of the Filing Committee. No reasons are given for the recommendation made in the Staff Recommendation Memorandum or for the decision of the Filing Committee. There is simply the one-sentence conclusion referred to in paragraph 146 above under the heading "Decision". The TSX did not submit any additional affidavit or other evidence to assist us in understanding the grounds upon which the TSX Decision was made or explaining the reasoning applied by the Filing Committee.

[149] It is clear that Jaguar raised issues with respect to the effect of the Transaction on the quality of the marketplace in its letter to the TSX (see paragraph 48 of these Reasons) and that letter was before the Filing Committee when it made its decision. Clearly, the Filing Committee knew that the exercise of its discretion under section 603 was an issue it had to consider and decide.

[150] The initial issue we must determine is whether the minutes reflecting the reasons for the TSX Decision establish a sufficient basis for us to defer to the TSX Decision.

B. Positions of the Parties

Jaguar

[151] Jaguar submits that in making the TSX Decision the Filing Committee relied entirely on the Staff Recommendation Memorandum, which was written the day before Jaguar made submissions to the Filing Committee relevant to its decision. Jaguar submits that the reasons provide no detailed analysis by the Filing Committee.

[152] Because the minutes of the Filing Committee meeting simply repeat the recommendation in the Staff Recommendation Memorandum almost verbatim, and provide a one-sentence "Decision", Jaguar says that there is no indication that any of the Filing Committee members were given or actually considered the issues raised by its complaint letter of December 9, 2008.

[153] Jaguar also submits that the minutes relating to the TSX Decision are actually two separate documents: the almost verbatim summary and recommendation from the Staff Recommendation Memorandum and the one-sentence decision of the Filing Committee, which together reflect the basis for the TSX Decision. As such, Jaguar says that the reasons are wholly inadequate. The minutes do not discuss any of the submissions made to the TSX by Jaguar and thereby call into question whether the submissions of Jaguar and the other objecting shareholders were seen, reviewed and considered by the Filing Committee. Jaguar identifies a list of eleven issues raised by Jaguar about which the TSX reasons are silent. (Those issues are identified in paragraph 187 of these Reasons.) Jaguar submits that when compared with the reasons provided by other decision-makers in similar circumstances, the reasons underlying the TSX Decision are manifestly inadequate.

[154] Jaguar submits that the minutes simply contain a conclusive finding expressed in a single, solitary sentence that is completely devoid of reasoning. That conclusion does not advert to the discretion under section 603, let alone exercise that discretion in a thoughtful, careful and well-reasoned fashion. Jaguar also submits that a conclusory decision without analysis is one devoid of reasoning. Therefore, no matter how limited the duty to give reasons might be in

circumstances such as these, the TSX's reasons fall well below any appropriate standard. Jaguar submits that it would hardly create an intolerable burden on the TSX to require the Filing Committee to provide adequate reasons in a matter involving a highly contentious, highly extraordinary transaction of this nature, where there is a right of review by the Commission. This is particularly so given that four shareholders holding approximately 16% of the outstanding HudBay common shares requested the TSX to exercise its discretion under section 603 to require HudBay shareholder approval of the Transaction.

HudBay

[155] HudBay submits that the TSX's reasons are adequate. HudBay submits that the Filing Committee plays a purely administrative, rather than an adjudicative, role and, accordingly, the reasons it provided are adequate.

[156] HudBay submits that the fact that the minutes reflecting the TSX Decision do not provide a "line-by-line" analysis of the Transaction or the parties' positions in no way undermines the validity of the decision made. Courts have repeatedly recognized that administrative bodies have significant leeway or flexibility in the way in which they choose to craft their reasons, acknowledging that the administrative realities in which they operate do not always lend themselves to the provision of detailed reasons. The TSX is not under any obligation to give reasons that deal with all of the issues Jaguar raised in its December 9, 2008 letter.

[157] HudBay submits that the TSX Decision met the two criteria required for an administrative decision-maker to fairly exercise its discretion (i) the TSX Decision demonstrated that the Filing Committee recognized it had the discretion to make a choice, and (ii) there was an indication of the factors the Filing Committee considered in exercising its discretion.

Lundin

[158] Lundin adopts the submissions of HudBay with respect to the adequacy of the reasons for the TSX Decision.

The TSX

[159] The TSX notes that the TSX Manual provides a procedure for the TSX to follow in making decisions with respect to listing additional securities. Within the context of that procedure, the TSX must respond quickly and efficiently to meet the needs of capital market participants. The TSX submits that the minutes reflect the reasoning of and the conclusions reached by the Filing Committee with respect to the Transaction. The TSX submits that the reasons for the TSX Decision as reflected in the minutes are adequate.

[160] The TSX points out that the minutes (i) summarize the concerns raised by the applicant and the other objecting shareholders, in particular the view that the Transaction materially affects control of HudBay, and (ii) reflect the request made by Jaguar and the other objecting shareholders that the TSX conclude that the Transaction materially affects control of HudBay and that the TSX exercise its discretion under section 603 to require HudBay shareholder approval of the Transaction.

[161] The TSX disagrees with the submission of Jaguar that the Filing Committee never saw or considered its December 9, 2008 letter. The minutes state that "TSX has received written complaints from [SRM], the British Columbia Investment Management Corporation, Dynamic Mutual Funds and Jaguar Financial Inc."

[162] The TSX also points out that after setting out the concerns raised in the correspondence from shareholders, the minutes summarize the applicable provisions of the TSX Manual, specifically subsections 611(d) and 604(a)(i). In addition, the minutes describe the relevant terms of the Transaction.

[163] The TSX says that the Filing Committee expressly considered the fact that it had discretion to require HudBay shareholder approval of the Transaction and whether it was appropriate for it to exercise that discretion. Therefore, the TSX submits that the conclusion of the TSX not to exercise its discretion is reasonable in the circumstances and the Commission should defer to it.

Staff

[164] Staff submits that the minutes set out with sufficient particularity the considerations reviewed by the TSX in making its decision with respect to the application of section 604 of the TSX Manual. However, Staff submits that there is no indication in the minutes of the factors the Filing Committee considered when it made its decision under section 603. Staff also submits that the TSX Decision contains "no analysis of the factors in Section 603" and that therefore, it is impossible to tell "whether [the Filing Committee] overlooked material evidence". Accordingly, the Commission does not have the benefit of the Filing Committee's rationale for deciding not to require HudBay shareholder approval under section 603.

[165] As a result, in the submission of Staff, the Commission should determine the principles that should properly be considered in exercising discretion under section 603 and how those principles apply to the circumstances at hand. That is to say that the Commission must interpret and apply section 603.

C. Adequacy of Reasons

[166] The TSX Decision is an administrative decision involving the exercise of discretion by the TSX under the provisions of the TSX Manual. It is not an adjudicative or judicial decision.

[167] The traditional position at common law is that the duty of fairness does not necessarily require that reasons be provided for administrative decisions (*Baker*, *supra* at para. 37). That being said, as stated by Justice L'Heureux-Dubé in *Baker*:

> The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, *when there is a statutory right of appeal*, or in other circumstances, some form of reasons should be required.
>
> [Emphasis added]

(*Baker*, *supra* at para. 43)

While this matter does not involve an allegation that the TSX breached its duty of fairness to HudBay in making the TSX Decision, it is a circumstance in which an application can be made to the Commission to review the TSX Decision (a right similar to an appeal).

[168] Generally, administrative decision-makers should provide reasons with some form of logical explanation for their conclusions. This fosters fair and transparent decision-making (*Baker*, *supra* at para. 38). Simply stating relevant factors with a conclusion is not enough. It has been held that less deference is owed to a decision, even one that might otherwise be entitled to a certain amount of deference, if that decision contains no "reasoned explanation" for its conclusion *(Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)* (2000), 26 Admin. L.R. (3d) 30 (F.C.A.) at para. 25).

[169] Without adequate reasons or some other reasonable explanation, a review of and deference to a decision such as the TSX Decision becomes difficult. The Supreme Court of Canada has stated that:

> Brevity in this era of prolixity is commendable and might well be rewarded by a different result herein but for the fact that the order of the Board reveals only conclusions without any hint of the reasoning process which led thereto. For example, none of the factors which the Board took into account, in reaching its conclusion… are revealed so that a reviewing tribunal cannot with any assurance determine that the statutory mandates bearing upon the Board's process have been heeded.
>
> (*Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684 (*"Northwestern Utilities"*) at para. 46)

[170] The Commission has recognized the importance of reasons that make clear that all relevant factors have been considered when a decision is made by the TSX. The Commission stated in *Canada Malting* that "[t]he reasons given by the [decision maker] for its decision to accept the notice for filing make it clear that the committee considered relevant factors" (*Canada Malting*, *supra* at 3590). It is also clear that the Commission had before it in *Canada Malting* substantial reasons that considered the relevant factors and upon which the Commission could rely with some confidence.

D. Conclusion as to Deference

[171] We accept for purposes of this analysis that the reasons of the TSX are reflected in the minutes of the December 10, 2008 Filing Committee meeting and those minutes include both the excerpts from the Staff Recommendation Memorandum (which constitute virtually all of the minutes) as well as the conclusion stated under "Decision". We also believe that it is fair to conclude that the submissions of Jaguar, as well as the written complaints from the other objecting shareholders, were before the Filing Committee when it made its decision.

[172] In our view, however, in order for us to defer to the decision of the Filing Committee, we must be able to determine the facts and circumstances that were before the Filing Committee and

the factors and considerations it weighed. We must also be able to understand the reasoning the TSX applied in making its decision. As stated in *Northwestern Utilities*, "conclusions without any hint of the reasoning process" are not enough. Adequate reasons or some other reasonable explanation are particularly important in this case because it involves a decision (not to require a HudBay shareholder vote) that is controversial, has very significant consequences to the parties directly affected and to other market participants, and involves considerations as to market quality and integrity.

[173] In a review under section 21.7 of the Act, in order for us to defer to a decision of the TSX, we must have a reasonable basis to do so on the evidence before us. We have an obligation as a supervisory body not to defer to a decision that we cannot conclude is made on a reasonable basis.

E. TSX Decision under Section 604 of the TSX Manual

Effect of Transaction on Control

[174] The TSX concluded under subsection 604(a)(i) of the TSX Manual that the completion of the Transaction would not materially affect control of HudBay. The minutes indicate that the Filing Committee considered the application of section 604 and a number of factors that bear on whether the Transaction would materially affect control of HudBay.

[175] Where a shareholder will acquire 20% or more of the voting shares as a result of a transaction, there is a presumption in the TSX Manual that the transaction materially affects control. It is clear that below the 20% threshold, there is no bright-line test for determining whether a transaction materially affects control. Rather, the determination must be made based on the circumstances of the particular case. The factors that must be considered include the presence or absence of other large shareholdings, the voting behaviour pattern of other shareholders and the distribution of voting shares.

[176] In this case, no single shareholder will own more than 8.2% of the outstanding voting shares of the merged entity after giving effect to the Transaction. While holdings of less than 20% of the voting shares have been held by the Commission to materially affect control in certain circumstances, we are not aware of any decision that has found that a holding below 10% would do so.

[177] Jaguar submits that because of the historical low shareholder turnout at HudBay shareholders' meetings, which has ranged from 36% to 50% of the outstanding shares, a holding of 10.5% of the shares of the merged entity could materially affect control. The 10.5% is the percentage of shares of HudBay that the shareholders of Lundin who have agreed to vote in favour of the Transaction would own after giving effect to the Transaction (calculated prior to the Private Placement). The historical shareholder turnout is one of the factors identified in the TSX Manual that the TSX should consider in assessing whether a transaction materially affects control. Jaguar also argues that the group of shareholders of Lundin who agreed to vote in favour of the Transaction should be viewed as a voting group going forward. On the other hand, HudBay says that simply because those shareholders agreed to vote in favour of the Transaction is no reason to conclude that they will vote together in the future. Certainly, there is no evidence

before us of an agreement, arrangement or understanding among those shareholders to vote together in the future.

[178] The TSX appears from the minutes to have considered the relevant facts and circumstances and to have weighed the relevant considerations in concluding that the Transaction would not materially affect control of HudBay. In our view, that conclusion is reasonable in the circumstances. Accordingly, we defer to the decision of the TSX under subsection 604(a)(i) of the TSX Manual.

Arm's Length Negotiation

[179] Subsection 604(a)(ii) of the TSX Manual provides that the TSX will generally require security holder approval of a transaction if it provides consideration to insiders in aggregate of 10% or greater of the market capitalization of the listed issuer and has not been negotiated at arm's length. A transaction will be regarded by the TSX as not having been negotiated at arm's length if any insider of the listed issuer has a beneficial interest, direct or indirect, in the proposed transaction that differs from other shareholders of the same class.

[180] No one argued before us that insiders of HudBay would receive consideration of 10% or more of the market capitalization of HudBay. With respect to the issue of whether the Transaction was negotiated at arm's length, Jaguar did argue that the very active involvement of Palmiere in the negotiation of the Transaction was not appropriate and that the board and Special Committee processes followed by HudBay in approving the Transaction were defective or inadequate. There was limited evidence with respect to these matters before the TSX in making the TSX Decision or before us on the Application.

[181] In our view, the conclusion of the TSX that subsection 604(a)(ii) does not require shareholder approval is reasonable in the circumstances. Accordingly, we defer to the TSX Decision under subsection 604(a)(ii) of the TSX Manual.

F. TSX Decision Under Section 603 of the TSX Manual

[182] Section 603 of the TSX Manual requires the TSX to consider the effect that the Transaction may have on the "quality of the marketplace". It is clear that the Filing Committee knew that the application of section 603, and the exercise by the TSX of its discretion under that section, were issues it had to consider. This is evident both from the shareholder communications received by the TSX and the references to that section contained in the minutes.

[183] However, there is nothing in the TSX minutes for the December 10, 2008 Filing Committee meeting that assesses the effect of the Transaction on the quality of the marketplace. The TSX did not identify or discuss in the minutes any of the factors enumerated in section 603 or any other factors that the Filing Committee considered in making its decision under section 603. Nor is there any reasoning or analysis provided with respect to its conclusion.

[184] We note that the minutes simply state under "Decision" that no shareholder vote is "required". That conclusion appears to be more apt to the analysis of the application of section 604 which describes circumstances in which a shareholder vote is "required". In contrast, section

603 requires the TSX to consider the exercise of a discretion whether to impose a shareholder vote.

[185] We would reiterate that adequate reasons or some other reasonable explanation are particularly important where the TSX is considering the exercise of a broad regulatory discretion such as that contained in section 603 which engages issues of market quality and integrity.

[186] We do not need extensive reasons or analysis, but we do need to know that the TSX applied the appropriate standard and how and why the discretion under section 603 was or was not exercised.

[187] We note that Jaguar raised with the TSX a number of issues related to the effect of the Transaction on the quality of the marketplace. Those issues included:

1. the enormous impact of the Transaction on the rights and economic interests of HudBay shareholders;

2. the excessive premium payable to Lundin shareholders;

3. the significant and immediate negative reaction of the market to the Transaction;

4. the effect of the Transaction on the liquidity of HudBay;

5. the negative market reaction to the Transaction, including by numerous professional analysts;

6. the material reconfiguration of the HudBay board of directors following the closing of the Transaction;

7. the relevance of the Lundin family's significant shareholder position, prior business relationships and representation on the HudBay board of directors following the closing of the Transaction;

8. the significant dilution of existing HudBay shareholders as a result of the Transaction;

9. the unduly accelerated corporate governance procedures involved in the approval of the Transaction;

10. the issues surrounding the relationship of HudBay and GMP and whether GMP is truly independent; and

11. the fact that no competing bidder appeared to exist, raising the issue of whether the acceleration of the Transaction timetable and lack of a HudBay shareholder vote were appropriate.

[188] There is some overlap in these factors and not all of them may be relevant in this matter in determining the overall effect of the Transaction on the quality of the marketplace. We do need to know, however, whether the Filing Committee considered and assessed any of these or

other factors in the circumstances and what view the TSX ultimately took with respect to them. It is not enough to know only that these issues were raised in correspondence with the TSX and were before the Filing Committee.

[189] We wish to be clear that we are not saying that the Filing Committee has an obligation to prepare reasons for the many administrative decisions it makes every day. It does not have that obligation. We recognize that decisions may have to be made by the Filing Committee quickly and efficiently to respond to the needs of capital market participants and that having to prepare substantial reasons for all those decisions is impractical. However, where an application is made to the Commission for review, there must be a reasonable basis for us to assess and understand the decision made by the TSX.

[190] Nor are we taking the technical position that the minutes of a meeting of a TSX committee at which a decision is made must fully reflect all of the considerations addressed in making the decision. In our view, we are not restricted to reviewing only the minutes related to the making of a TSX decision. We are entitled to review other relevant information, the evidence submitted to us and any other reasonable explanation tendered. In this case, however, the only information before us as to the basis upon which the Filing Committee made its decision is contained in the minutes of the Filing Committee meeting held on December 10, 2008.

[191] Based on the foregoing, we conclude that we cannot defer to the TSX Decision as it relates to the application of section 603 of the TSX Manual.

VIII. EFFECT OF THE TRANSACTION ON THE QUALITY OF THE MARKETPLACE

A. Key Issue for Determination

[192] As we have concluded that we cannot give deference to the TSX Decision as it relates to the application of section 603 of the TSX Manual, we must determine on the Application what effect the Transaction may have on the quality of the marketplace and whether HudBay shareholder approval of the Transaction should be required. We would require HudBay shareholder approval only if we conclude that completion of the Transaction without that approval could significantly and adversely affect the quality of the marketplace. In making this assessment, we must interpret and apply section 603 and consider all the relevant facts and circumstances before us.

1. Positions of the Parties

[193] While all of the parties agree that section 603 gives the TSX discretion to impose conditions on its acceptance of a listing notice related to a transaction, including a condition requiring shareholder approval, there is disagreement as to the proper interpretation and application of section 603.

Jaguar

[194] Jaguar submits that the discretion provided for in section 603 must be invoked so as to protect and improve the quality and integrity of the marketplace and safeguard the public

interest. This necessitates protection against abusive and heavily dilutive share issuances that are forced upon shareholders of public companies against their will.

[195] Jaguar submits that the quality of the marketplace will be substantially undermined if HudBay shareholders are not permitted to vote on a transaction that is transformative in nature and involves 100% dilution. Not requiring shareholder approval in these circumstances would send a message to the marketplace that the discretion given to the TSX in section 603 is essentially meaningless. As a result, investor confidence in Ontario's capital markets would be significantly eroded.

[196] Jaguar submits that in addition to the factors enumerated in section 603, we should consider any additional relevant factors, including, in particular, the fair treatment of HudBay shareholders. Jaguar submits that there is nothing problematic or inappropriate in relying on factors other than those enumerated in section 603. That is precisely what section 603 provides for. Jaguar submits that the use of the words "based on factors *including* the following …" [emphasis added] indicates that the list of factors set out in section 603 is a non-exhaustive list.

HudBay

[197] HudBay submits that it is essential that the securities regulatory framework in Ontario support the twin goals of "deal certainty" and predictability with respect to regulatory outcomes. HudBay states that in identifying "non-enumerated factors" in section 603, Staff focused on "investor protection" as the key principle informing the assessment of the quality of the marketplace. In doing so, Staff did not appropriately consider the interests of HudBay and the value to the marketplace of deal and regulatory certainty.

[198] HudBay submits that in interpreting section 603 from a public interest perspective, Staff made no mention of the limitations recognized by the Commission on the exercise of its public interest jurisdiction. HudBay referred us to Commission decisions that recognize that the Commission's public interest jurisdiction should be exercised with great caution.

[199] HudBay argues that Staff's interpretation of section 603 would delve deeply into matters of corporate governance and board process; matters that until now have been within the purview of the courts when considering issues such as oppression and breach of fiduciary duty. HudBay submits that the Commission should also recognize that, in exercising its public interest jurisdiction, it should have regard to other remedies available to the parties, such as the outstanding oppression action before the Ontario Superior Court of Justice related to the Transaction. HudBay also submits that the TSX should be allowed to regulate, free from the intervention of the Commission in all but exceptional cases.

Lundin

[200] Lundin submits that there was nothing inappropriate in HudBay choosing one transaction structure over another or in determining that the decision to enter into the Transaction should be that of the board and not of the shareholders. Lundin submits that it is not the conventional or prevailing market practice to require a transaction of this nature to be submitted to shareholders for approval. Lundin says that if the shareholders of HudBay wish to change the law in Ontario or the regulatory regime, that should be addressed in a different way.

[201] Lundin submits that the decision in *McEwen v. Goldcorp*, [2006] 21 B.L.R. (4th) 262 (Ont. Sup. Ct.) and the exercise by the TSX of its discretion not to require shareholder approval in similar transactions, all form part of the regulatory landscape in which market participants consider their options and structure their transactions. In order for the integrity of the capital markets to be preserved, that landscape must be stable and outcomes must be predictable. Accordingly, the Commission should defer to the TSX Decision.

The TSX

[202] The TSX submits that Jaguar and Staff are inviting the Commission to import factors into Section 603 that are not expressly enumerated and the TSX says that invitation should be declined.

[203] The TSX submits that the factors that are relevant to the consideration of an application to list additional shares are those that are expressly set out in the TSX Manual. The TSX submits that factors beyond those enumerated in section 603 should not be considered because section 603 is intended to provide clear guidance to market participants regarding the applicable rules. The TSX also notes that the enumerated list of factors set out in section 603 was established as a result of a public consultative process that involved extensive stakeholder input and Commission approval. The TSX takes issue with the suggestion that the Commission should consider factors such as the economic impact of the transaction on shareholders and the views of analysts. It submits that the Commission should not open the door to the consideration of new factors in evaluating the reasonableness of the TSX Decision.

[204] The TSX also objects to the suggestion that there should be a detailed evaluation by the TSX of the role and quality of the Special Committee process followed in connection with the Transaction.

[205] The TSX submits that it is required to assess the impact of the Transaction on the quality of the marketplace. That responsibility requires the TSX to consider a number of stakeholders, not just investors, and to balance competing interests, such as the interests of listed issuers, market integrity and deal and regulatory certainty. The TSX acknowledges that other factors such as the public interest and shareholder interests may also be considered in applying section 603.

[206] The TSX submits that the TSX Decision as it relates to section 603 is reasonable in the circumstances and that the Commission should defer to it.

Staff

[207] Staff submits that the terms “quality of the marketplace” and “integrity of the marketplace” are equivalent. In applying section 603, Staff submits that there ought to be a consideration and balancing of the relevant effects of the Transaction on the quality of the marketplace.

[208] Staff submits that in the exercise of its discretion the TSX must consider the factors enumerated in section 603 as well as other relevant factors that are not enumerated. Staff submits

that factors not specifically referred to in section 603 are relevant based in part on their interpretation of the word "including" used in section 603.

[209] Staff submits that the decision whether to require a HudBay shareholder vote should be based on the mix of relevant factors in the particular circumstances and how the quality of the marketplace for investors would be affected if the Transaction is permitted to proceed without a shareholder vote. The TSX should consider the circumstances under which the Transaction was negotiated, the process by which it was negotiated and its impact on shareholders.

[210] Staff submits that the exercise of the discretion under section 603 should be assessed based on both the magnitude of the individual factors that could affect the quality of the marketplace and the aggregate impact of all the relevant factors.

[211] Staff also submits that when interpreting section 603, the TSX must take into account the primary purpose underlying the discretion granted, which Staff states is investor protection.

2. Meaning of Quality of the Marketplace

[212] The basic question to be addressed under section 603 of the TSX Manual is the effect of the Transaction on the quality of the marketplace. In our view, the "quality of the marketplace" is a broad concept of market quality and integrity. Assessing the impact of the Transaction on the quality of the marketplace requires a careful consideration of all the relevant facts and circumstances and a balancing of all the relevant considerations that bear on that assessment. Section 603 imposes an important regulatory discretion intended to protect the quality of marketplace. In our view, based on the clear wording of section 603, the factors the TSX must consider under section 603 include, but are not limited to, the factors enumerated in that section. That interpretation is consistent with our view of the regulatory nature of the discretion granted by section 603 and the objectives of the grant of that discretion.

The Request for Comments Notice

[213] This interpretation is consistent with the Request for Comments Notice. In that notice, the TSX stated that "The enumerated list of factors in section 603 was not intended to be exhaustive and other factors such as public interest and shareholder interest will be considered in the context of providing a quality marketplace." The TSX also responded in the Request for Comments Notice to a comment related to section 603 as follows:

> The inclusion of these factors in TSX's discretionary decision process was not intended to "punish" or "reward" listed issuers or stakeholders. *These factors will be considered, if relevant, along with any other relevant enumerated or non-enumerated factors by the TSX* within the context of its discretionary abilities in order to ensure market quality and promote transparency. *We would submit that the practical implications of clauses (iii) and (iv) of proposed section 603 would not decrease significantly the level of certainty for issuers proposing to carry out transactions as they are part of current TSX practice.* While an issuer's corporate governance and disclosure practices are not relevant to all transactions being proposed by all issuers, these are factors that have been and will be considered in

> some circumstances when reviewing transactions. In particular, when reviewing an application that may be requesting relief from certain requirements in Parts V and VI of the Company Manual, these factors are important in establishing whether the particular issuer has developed a consistent pattern of non-compliance with TSX requirements. It is not our intent to review an issuer's corporate governance record and disclosure practices for every arm's length transaction but rather only in extraordinary circumstances.
>
> [Emphasis added]
>
> (Request for Comments Notice, *supra* at 309 and 310)

[214] Accordingly, the Request for Comments Notice contemplates that factors not enumerated in section 603, such as the public interest and shareholder interests, are relevant to the analysis and should be considered. We also note the statement that the application of section 603 "would not decrease significantly the level of certainty for issuers proposing to carry out transactions as they are part of current TSX practice".

Enumerated Factors

[215] In interpreting section 603 and considering the relevant factors, it is also instructive to consider the six factors expressly enumerated in section 603 (see paragraph 127 of these Reasons). Two of those factors, the involvement of insiders in the transaction and the effect of the transaction on the control of the listed issuer, are issues required to be considered by the TSX under section 604 and addressed by a listed issuer in the listing notice. A third factor, the size of the transaction relative to the liquidity of the listed issuer, relates to the impact of the transaction on the listed issuer and its shareholders. Two other factors, the listed issuer's governance and disclosure practices, relate to practices of the listed issuer that are particularly important to and affect shareholders of the issuer. The last factor, which requires a consideration of any order by a court or regulator that "has considered the security holders' interests," suggests the need to consider the interests of shareholders of the listed issuer. The nature of these enumerated factors informs our interpretation of the quality of the marketplace and the factors that should be considered in assessing it.

Relevant Decisions

[216] The British Columbia Securities Commission (the "**BCSC**") has accepted that shareholder interests are an important consideration when a stock exchange is deciding whether to require shareholder approval of a transaction by the shareholders of an acquiror. The BCSC has stated:

> …companies undertaking transactions that will have a significant impact on their shareholders should be required to take whatever steps are necessary in the circumstances to ensure that those shareholders are treated fairly. This is the reason behind the requirement in the Exchange's policies for shareholder approval

> in connection with Changes of Control, Changes of Business and Reverse Take-Overs.
>
> (*Re Mercury Partners & Co.*, [2002] B.C.S.C.D. No. 213 at para. 94)

[217] Similarly, in *Re Bradstone Equity Partners Inc.*, [1998] 23 B.C.S.C.W.S. 15 at 52, the BCSC concluded as follows:

> Taking all of these factors into consideration, we are satisfied that the public interest in ensuring the fair treatment of the Peruvian shareholders outweighs both the possible prejudice to Gabriel and the concern respecting the lack of certainty that could result from an effective reversal of the Exchange's decision in this matter. Further, it is fundamental to the integrity of our capital markets that companies undertaking transactions that will have such a significant impact on the rights and economic interests of their shareholders take whatever steps are necessary in the circumstances to ensure that those shareholders are treated fairly. Therefore, we consider it to be in the public interest that Peruvian not distribute shares pursuant to its share exchange take over bid for the shares of Gabriel until the Peruvian shareholders have been provided with prospectus level disclosure respecting Gabriel and an opportunity to approve the transaction.

Fair Treatment of Shareholders

[218] In our view, the fair treatment of the shareholders of HudBay is a key factor that must be considered in interpreting and applying section 603 in the circumstances before us. We believe that the need to consider the fair treatment of shareholders is inherent in and important to assessing the impact of the Transaction on the quality of the marketplace. We note that fairness to shareholders is not a factor expressly enumerated in section 603. It is nonetheless a very important consideration.

An Existing Provision of the TSX Manual

[219] We note that we are interpreting and applying section 603, an existing provision of the TSX Manual. We are not rewriting or changing the TSX Manual or incorporating new factors into it. As a matter of principle, there must be circumstances that can arise in which the TSX would, in exercising its discretion under section 603, impose a requirement for shareholder approval. Otherwise, section 603 would be meaningless. Section 603 by its terms requires consideration of the exercise of a broad regulatory discretion and a broad review of factors relevant to the quality of the marketplace. We cannot ignore these requirements because they create some transaction or regulatory uncertainty. In our view, section 603 exists to address the kinds of issues that are before us in this matter.

Economic Impact on Shareholders

[220] The TSX submits that in applying section 603 we should not consider factors such as the economic impact of the Transaction on shareholders and the views of analysts. To the extent that comment relates to whether we should attempt to assess the business or financial merits of the Transaction, we agree. But we cannot completely ignore the economic impact of the Transaction on HudBay shareholders or the transformational effect of the Transaction on HudBay and its business. These are relevant considerations within the mix of the various considerations before us.

Deal and Regulatory Certainty

[221] In considering this matter, we recognize, as submitted by HudBay and Lundin, the importance of "deal certainty" and "regulatory certainty" to the parties to a merger or acquisition transaction.

[222] By "deal certainty", we mean reasonable certainty that a transaction negotiated and agreed to by the parties will be completed. HudBay submits that requiring HudBay shareholder approval would create deal uncertainty because its shareholders may not vote to approve the Transaction. There is certainly nothing wrong with the parties to a transaction attempting, to the extent legally possible, to obtain certainty that the transaction will be completed. We recognize that this issue may be the subject of significant negotiation and can affect whether a party is prepared to agree to a transaction. We also acknowledge that the public announcement of a transaction may often have a material effect on the market prices of the relevant securities. Accordingly, it is desirable that the announcement of a transaction not be made unless there is a reasonable prospect that the transaction will be completed.

[223] It was submitted to us that many other stock exchanges (or securities regulators) around the world have bright-line tests as to the maximum dilution of an acquiror's shareholders that will be permitted without shareholder approval. For instance, the New York Stock Exchange requires approval by the shareholders of a listed acquirer where dilution would be 20% or more. Clearly, the TSX does not currently have such a rule where a public company is the target of an acquisition. It is worth noting, however, that market participants who are subject to these rules in other jurisdictions have to live with the uncertainty those rules create by requiring shareholder approval in some circumstances.

[224] By "regulatory certainty", we mean the ability of market participants to understand the regulatory regime applicable to transactions and to be able to predict with some certainty the outcomes under that regulatory regime. In this case, regulatory certainty also means some certainty that a decision of the TSX can be relied upon and will not be second guessed by the Commission except in extraordinary circumstances.

[225] However, the exercise of discretion lies at the heart of section 603 and we cannot read that discretion out of the section simply because the parties to a transaction want deal or regulatory certainty. The assessment of the effect of the Transaction on the quality of the marketplace must govern the exercise of discretion under section 603. We cannot ignore the

provisions of section 603, or our responsibility for review of decisions of the TSX under section 21.7 of the Act, simply to ensure certainty. We recognize that in interpreting and applying section 603 we must balance all of the relevant interests and considerations.

Matter of First Instance

[226] The interpretation and application of section 603 is a matter of first instance for the Commission. There are no previous decisions of the Commission that have interpreted section 603 or that have identified the factors that should be considered in determining the effect of a transaction on the quality of the marketplace. This is not surprising given that section 603 is a relatively recent addition to the TSX rules. The fact that matters relating to section 603 have not been brought before the Commission before cannot limit our responsibility to interpret and apply section 603 as we consider appropriate in the circumstances.

Sophisticated Parties

[227] HudBay and Lundin are highly sophisticated parties who must be taken to have known the regulatory context in which the Transaction was taking place. The arrangement agreement entered into by HudBay and Lundin contemplates (in Section 6.2(f)) the possibility that HudBay shareholder approval of the Transaction could be required by regulatory authorities. It is a condition to HudBay's obligations under the arrangement agreement that shareholder approval be obtained if that approval is required by a regulator or court. Accordingly, both HudBay and Lundin knew there was a possibility that HudBay shareholder approval might be required in connection with the Transaction.

TSX Rules Affect Broader Interests

[228] The TSX rules form part of our securities regulatory regime. As discussed above, they can engage broad concepts of market quality and integrity. It is obvious that the interpretation and application of the provisions of the TSX Manual in this case are not matters affecting only HudBay and the TSX. We must interpret and apply those provisions in their larger market context.

Public Interest

[229] Staff submits that the discretion reflected in section 603 should be exercised to protect investors on a basis consistent with the public interest. The concept of the quality of the marketplace is not necessarily the same as the public interest under securities laws. However, both concepts raise similar issues and the considerations in applying the two concepts in any particular circumstances will be similar. We do recognize, however, that the concept of the quality of the market must be interpreted in the context of the marketplace that the TSX regulates. We note in this respect that section 603 refers to "the quality of the marketplace provided by the TSX". Accordingly, in interpreting section 603, we must focus on the marketplace provided by the TSX. We do not believe that anything turns on this distinction given

that the marketplace provided by the TSX comprises a substantial portion of Ontario's capital markets.

[230] We also believe that the public interest must be considered by the TSX in interpreting its rules. The Commission's recognition order of the TSX indicates that "the protection of the public interest is a primary goal of the TSX". In addition, one of the grounds upon which the Commission is entitled to overrule a decision of the TSX is where our perception of the public interest conflicts with that of the TSX (see paragraph 105 of these Reasons). Accordingly, the TSX must give some consideration to the public interest when interpreting its rules.

[231] We are well aware that our public interest jurisdiction should be exercised with great caution. The Commission has recently stated:

> The Commission's "public interest" jurisdiction is broad and powerful, and must be exercised with caution, as recognized in the *Re Canadian Tire* decision. When considering the exercise of this jurisdiction, the Commission needs to have regard to all of the facts, all of the policy consideration [sic] at play, all of the underlying circumstances of the case, and all of the interests affected by the matter and the remedies sought.
>
> (*Re Sterling Centrecorp Inc.* (2007), 30 O.S.C.B. 6683 at para. 212)

[232] In exercising our public interest discretion and the discretion under section 603, we must carefully consider all of the policy issues raised by this matter and the potential impact of our decision on the interests of market participants and on market practice. We must weigh and balance factors such as (i) deal and regulatory certainty, (ii) the ability of the TSX to act quickly and efficiently in interpreting and applying its rules, (iii) the fair treatment of HudBay and Lundin and the other persons directly affected by our decision, and (iv) the fair treatment of the HudBay shareholders.

Opposition to Transaction

[233] Clearly, there are shareholders of HudBay who are adamantly opposed to the Transaction and who have raised significant concerns. There has also been substantial adverse market reaction to the Transaction from the perspective of HudBay. At the same time, HudBay, its board of directors and Special Committee have concluded that the Transaction is in the best interests of HudBay. It was not the role of the TSX in its original review, or the role of the Commission now, to assess the business or financial merits of the Transaction or to resolve these conflicting positions.

Other Governance Issues

[234] We heard submissions from Jaguar raising issues with respect to the role of Palmiere in negotiating the Transaction, the role of the HudBay board and the Special Committee in approving the Transaction, the compressed timetable for due diligence, and the financial advice given by GMP. The suggestion was that the processes leading to the approval by HudBay of the Transaction were defective and demonstrated poor governance.

[235] We agree with the TSX that these are not issues that it can generally be expected to address or resolve in applying section 603. That is not to say, however, that in another case such matters may not be highly relevant factors that should be addressed if they are raised with the TSX and appear to be real concerns. The Commission has considered such matters in other circumstances when applying its public interest jurisdiction (see, for instance, *Re Standard Trustco Ltd. et al* (1992), 6 B.L.R. (2d) 241, *YBM Magnex International Inc.* (2003), 26 O.S.C.B. 5285, *Re Sears Canada Inc.* (2006), 22 B.L.R. (4th) 267, *Re AiT Advanced Information Technologies Corp.* (2008), 31 O.S.C.B. 712, and *Re Rowan* (2008), 31 O.S.C.B. 6515). These kinds of issues are not solely matters for the courts. In our view, however, there was insufficient evidence before the TSX, and there is insufficient evidence before us now, to resolve these issues. Accordingly, we do not address these issues in our Reasons. In any event, our analysis has led us in a different direction.

B. Factors Considered in Determining the Effect on the Quality of the Marketplace

[236] We reiterate that our task is to interpret and apply section 603 of the TSX Manual based on the facts and circumstances before us. In our view, the following factors are relevant in this matter in determining whether the Transaction could have a significant and adverse effect on the quality of the marketplace if it proceeds without HudBay shareholder approval.

1. Dilution

[237] The Transaction will result in the issuance of additional HudBay common shares representing over 100% of the number of HudBay shares currently outstanding. That means that the former shareholders of Lundin will own approximately 50% of the shares of the merged entity following completion of the Transaction. That level of dilution is extreme. It is at the very outer end of the range of dilutions permitted by the TSX in other transactions without shareholder approval.

[238] While the level of dilution is not determinative, it is an extremely important consideration. Dilution can fundamentally affect the economic interests of shareholders and it directly affects shareholder voting, distribution and residual rights.

[239] The level of dilution inherent in the Transaction would lead one to conclude that the Transaction is a “merger of equals”, not an acquisition by HudBay of Lundin. In a merger of equals, there is potentially a much greater impact on the parties in terms of the transformational impact of the transaction and the effect on such matters as the constitution of the board of directors. One must fairly ask, if the Transaction is a merger of equals, why shareholders of one party (Lundin) are entitled to vote on it when the shareholders of the other party (HudBay) are not? We note that the shareholders of Lundin are receiving a substantial premium for their shares while the shareholders of HudBay are suffering extreme dilution and other consequences.

2. Economic Impact on Shareholders

[240] It is common ground that the share price of HudBay fell by approximately 40% immediately following the public announcement of the Transaction. That far exceeds the market reaction one would expect to the announcement of a transaction such as this. The unusual and

substantial drop in the market price of the HudBay shares is one reflection of the significant impact of the Transaction on the shareholders of HudBay.

3. Corporate Governance

(i) Board of Merged Entity

[241] It appears that, upon the completion of the Transaction, five of the nine directors of the merged entity will be former directors of Lundin. HudBay argues that two of those individuals are already directors of HudBay. We note, however, that those two directors were appointed relatively recently to the HudBay board, in April and August, 2008, respectively. Only one of those directors was elected by a vote of shareholders; the other director was appointed by the board of HudBay.

[242] There was also evidence before us that of the nine directors on the board of the merged entity, four are to be nominated by the parties on each side of the Transaction (by management of HudBay, on the one hand, and by the largest shareholders of Lundin, the Lundin family, on the other hand) with the CEO of the merged entity as the ninth "unaligned" director. Essentially, this would create a deadlock at the board level with the deciding vote by the CEO of the merged entity.

[243] In any event, it is clear that the board of HudBay will be substantially reconfigured as a result of the Transaction. The right of shareholders to vote on and determine the make-up of the board is a fundamental governance right. The shareholders of HudBay are being subjected to a radical change in the composition of the board without their consent or concurrence. We recognize that not every change in the composition of a board requires shareholder approval. In our view, such a fundamental change, as a result of the Transaction, does. The proposed restructuring of the board further underscores that the Transaction constitutes, in effect, a merger of equals.

(ii) Timing of Shareholder Meetings

[244] In the Joint Release, HudBay and Lundin initially indicated that the notice of meeting and proxy circular for the special meeting of Lundin shareholders to vote on the Transaction would be mailed during the first quarter of 2009 and that the Transaction was expected to close prior to May 30, 2009. The date of the Lundin shareholders' meeting was accelerated by the mailing of its notice of meeting and proxy circular on or about December 22, 2008 for a shareholders' meeting to be held on January 26, 2009. That is uncommon haste, over the holiday season, that must be attributed, at least in part, to the controversy over the Transaction.

[245] The HudBay shareholders' meeting requisitioned by shareholders for the purpose of removing the HudBay board was scheduled by HudBay for March 31, 2009. The requisition of that meeting is in direct response to the Transaction and is intended as a means for shareholders to, in effect, vote on the Transaction.

[246] These decisions as to the scheduling of the two shareholder meetings were made at approximately the same time. On December 19, 2008, HudBay announced that it would respond to the shareholder requisition it had received by January 2, 2009. On December 22, 2008, Lundin

announced the accelerated date of its shareholders meeting. On December 30, 2008, HudBay announced that the requisitioned shareholders meeting would be held on March 31, 2009. The result was a decision to significantly accelerate the holding of the Lundin shareholders' meeting to vote on the Transaction while delaying for as long as legally possible the holding of the HudBay shareholders' meeting to vote on the removal of the HudBay board.

[247] We note that the board of directors of HudBay knew as early as November 24, 2008 that shareholders were attempting to requisition a shareholders' meeting to remove the HudBay board. The requisition filed by shareholders on that date was rejected by the board on grounds that it was not valid because the shareholders submitting it were not registered shareholders.

[248] While HudBay and Lundin may have the legal right to make these decisions under corporate law, they appear to us to be actions taken for the purpose of frustrating the legitimate exercise by HudBay shareholders of their right to require a shareholders meeting to consider the replacement of the HudBay board, in effect, a shareholder vote on the Transaction. If the Transaction is completed before the requisitioned shareholders meeting, the principal purpose for that meeting will be frustrated. That is manifestly unfair to the shareholders of HudBay. If shareholders wish to challenge a transaction by exercising their fundamental right to elect or remove directors in accordance with their legal rights to do so under corporate law, the board of directors should not be permitted to actively frustrate that objective in this manner.

[249] It appears that the TSX knew, when it made the TSX Decision, that a shareholder of HudBay had filed a requisition for a meeting of HudBay shareholders to remove the board. The TSX may well have concluded that there was sufficient time before the scheduled completion of the Transaction in order to permit the holding of the requisitioned HudBay shareholders meeting. We do not know whether the TSX considered that issue. We do know that the date of the Lundin shareholders meeting was accelerated after the TSX Decision was made on December 10, 2008, and that the fixing of the date of the requisitioned HudBay shareholders meeting also occurred after that date. Accordingly, these important governance matters were not before the TSX when it made the TSX Decision. We have concluded that such matters involve new and compelling evidence presented to the Commission that was not before the TSX when it made the TSX Decision.

[250] These considerations raise serious concerns as to the appropriateness of HudBay's governance practices as they relate to the approval of the Transaction and the fair treatment of HudBay shareholders.

4. Transformational Impact of Transaction on HudBay and its Shareholders

[251] It is clear that the Transaction will have a transformational effect on HudBay and its business. There is evidence before us that the Transaction was viewed by insiders of HudBay as "transformational" and a "radical shift in business plans" for HudBay. The transformational effect is reflected in the number of significant changes described below that will result from the Transaction. The transformational impact of the Transaction on HudBay and its business must be assessed based on the collective effect of these changes.

[252] We recognize that the transformational effect of a transaction may be difficult to assess in any particular circumstances. Clearly, there will be material financial consequences of any significant acquisition; but those consequences may not be transformational in business terms. Nonetheless, in our view, where a transaction will clearly have a transformational effect on an issuer and its business, that effect is a relevant consideration in assessing under section 603 whether shareholder approval of a transaction should be required.

[253] The Transaction will lead to a significant increase in HudBay's risk profile. It will expose HudBay to higher-risk jurisdictions around the world, including Russia and the DRC (compared to HudBay's existing almost-exclusively North American operations). This is amplified by the fact that over 35% of Lundin's total assets are represented by its investment in Tenke. Notes to Lundin's financial statements indicate that "the carrying value of the company's interests may be subject to uncertainty" as a result of the review by the government of the DRC of the mining contracts related to Tenke. HudBay board members have described the Tenke project as a "high-risk investment" both because of that review and because of a civil war in the DRC.

[254] The Transaction will also expose HudBay to minority interests in joint ventures and other investments with corresponding capital and financial obligations. The Transaction will lead to an increase in HudBay's long-term debt and will affect cash per share, liquidity and other financial measures. Palmiere noted in the conference call following the announcement of the Transaction that Lundin needed an injection of cash to support its operations and to resolve "some liquidity issues and some solvency issues". The collective impact of these factors is further magnified by the current credit crisis.

5. Fair Treatment of HudBay Shareholders

[255] The combined effect of the considerations discussed above raise serious concerns as to the fair treatment of HudBay shareholders. In this case, we believe that the fair treatment of HudBay shareholders is fundamentally more important than considerations such as deal or regulatory certainty in assessing the impact of the Transaction on the quality of the marketplace. We are satisfied that ensuring the fair treatment of HudBay shareholders in this case far outweighs any prejudice to HudBay or Lundin of requiring HudBay shareholder approval of the Transaction. We have carefully considered the implications of our decision for market participants and on market practices. In our view, far from undermining confidence in our capital markets, our decision will foster such confidence.

IX. CONCLUSIONS

[256] We have concluded that we can defer to the TSX Decision as it relates to the application of section 604 of the TSX Manual.

[257] We have concluded that we cannot defer to the decision of the TSX in interpreting section 603 of the TSX Manual because we do not have a reasonable basis to do so on the evidence before us. In the circumstances, we must ourselves determine on the Application whether the completion of the Transaction without HudBay shareholder approval could significantly and adversely affect the quality of the marketplace or be contrary to the public

interest. In doing so, we must interpret section 603 and we must consider all of the relevant facts and circumstances including the broader market implications of our decision.

[258] Fair treatment of shareholders is a key consideration going to the quality and integrity of our capital markets. In our view, permitting the Transaction to proceed without a HudBay shareholder vote in these circumstances would be manifestly unfair to HudBay shareholders.

[259] We have concluded, based on the cumulative effect of the considerations discussed above, that the quality of the marketplace (within the meaning of section 603 of the TSX Manual) would be significantly and adversely affected if the Transaction is permitted to proceed without the approval of the shareholders of HudBay. In our view, the circumstances in this matter are extraordinary and justify setting aside the TSX Decision and requiring HudBay shareholder approval of the Transaction as a condition to the listing of the Additional HudBay Common Shares.

[260] As we have stated above, it is not for us to judge the business or financial merits of the Transaction. We are deciding only whether the Transaction should be submitted to a vote of HudBay shareholders for approval. In our view, the HudBay shareholders should be entitled in these circumstances to ultimately decide whether the Transaction is in their best interests and whether it should proceed. That is where the decision properly lies.

[261] We have concluded for the same reasons that permitting the Transaction to proceed without the approval of the shareholders of HudBay would be contrary to the public interest.

[262] We gave effect to these conclusions by issuing our order of January 23, 2009, a copy of which is attached as Schedule A to these Reasons.

X. OTHER MATTERS

Financial Advice to the Special Committee

[263] As noted above, we are not addressing in these Reasons the allegations made by Jaguar that the board and Special Committee processes followed by HudBay in considering and approving the Transaction were defective or inappropriate. That is not to say, however, that we have no concerns based on the material before us. One concern we have relates to the financial advice received by the Special Committee from GMP. GMP, among other things, is advising the Special Committee whether the Transaction is fair from a financial point of view to HudBay shareholders. In connection with its services, GMP is to receive a signing fee when the arrangement agreement is entered into and a much larger success fee payable if the Transaction is consummated.

[264] Such fees create a financial incentive for an advisor to facilitate the successful completion of a transaction when the principal focus should be on the financial evaluation of the transaction from the perspective of shareholders. While the Commission does not regulate the preparation or use of fairness opinions, in our view, a fairness opinion prepared by a financial adviser who is being paid a signing fee or a success fee does not assist directors comprising a special committee of independent directors in demonstrating the due care they have taken in complying with their fiduciary duties in approving a transaction.

HudBay Vote of Shares in Lundin

[265] We also note that HudBay has agreed to vote the 19.9% of the common shares of Lundin acquired by it pursuant to the Private Placement in favour of the Transaction. In our view, HudBay has a different, and potentially conflicting, interest in the outcome of that vote, relative to the other Lundin shareholders.

[266] In our view, having very recently acquired those shares as part of a private placement connected to the Transaction, HudBay should not, as a matter of principle, be permitted to vote them in favour of the Transaction. When those shares are added to the shares already locked-up, the result is that approximately 36.8% of the Lundin shares will be voted in favour of the Transaction. In our view, an acquirer should not generally be entitled, through a subscription for shares carried out in anticipation of a merger transaction, to significantly influence or affect the outcome of the vote on that transaction. The acquirer in a merger transaction has a fundamentally different interest in the outcome of the transaction than the shareholders of the target.

[267] We recognize in expressing this view that it was probably a foregone conclusion that the Lundin shareholders would approve the Transaction regardless of whether HudBay voted those shares in favour of the Transaction.

[268] In any event, the matters discussed in this Part X were not directly raised in the Application and were not addressed by any of the parties in their submissions. We are not influenced by these issues in making our decision in this matter; we are simply expressing our views.

Dated at Toronto this 28th day of April, 2009.

"James E. A. Turner"

James E. A. Turner

"Suresh Thakrar"

Suresh Thakrar

"Paulette L. Kennedy"

Paulette L. Kennedy

Schedule A – Order of January 23, 2009

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
HUDBAY MINERALS INC.

AND

IN THE MATTER OF
A DECISION OF THE TORONTO STOCK EXCHANGE

ORDER
(Sections 21.7 and 8(3) of the Act)

WHEREAS on November 21, 2008, HudBay Minerals Inc. ("HudBay") and Lundin Mining Corporation ("Lundin") announced in a joint press release that they had entered into an arrangement agreement pursuant to which HudBay would acquire all of the outstanding common shares of Lundin on the basis of 0.3919 HudBay common shares for each Lundin common share (the "Transaction");

AND WHEREAS by letter dated November 26, 2008, HudBay gave notice of the Transaction to the Toronto Stock Exchange (the "TSX") pursuant to subsection 602(a) of the TSX Company Manual and requested the approval by the TSX of the listing of an aggregate of 157,596,192 additional common shares of HudBay (the "Additional Common Shares") in connection with the Transaction;

AND WHEREAS pursuant to section 603 of the TSX Company Manual, the TSX has the discretion to impose conditions on a transaction, such as by requiring shareholder approval;

AND WHEREAS the TSX received written complaints from Jaguar Financial Inc. ("**Jaguar**") and other shareholders of HudBay including a request that the TSX exercise its discretion under section 603 of the TSX Company Manual to require that HudBay obtain shareholder approval of the Transaction;

AND WHEREAS on December 10, 2008, the TSX decided that it would not require that the Transaction be approved by the shareholders of HudBay as a condition to the listing of the Additional Common Shares (the "TSX Decision");

AND WHEREAS on January 6, 2009, Jaguar brought an application, being the Fresh as Amended Request for Hearing and Review (the "Application"), to the Ontario Securities Commission (the "Commission") pursuant to sections 8(3) and 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") for a hearing and review of the TSX Decision;

AND WHEREAS by order made January 12, 2009, Lundin and the TSX were granted full intervenor status in this matter;

AND WHEREAS a hearing was held on January 19 and 21, 2009, to consider the Application;

AND UPON HAVING CONSIDERED the evidence filed and the written and oral submissions made by Jaguar, HudBay, Lundin, the TSX and Staff of the Commission;

IT IS ORDERED THAT:

1. pursuant to subsection 8(3) and section 21.7 of the Act, the TSX Decision is set aside;

2. pursuant to subsection 8(3) of the Act and section 603 of the TSX Company Manual, HudBay shareholder approval of the Transaction is required as a condition to the listing of the Additional Common Shares; and

3. pursuant to subsection 8(3) of the Act, HudBay is prohibited from issuing any securities in connection with the Transaction unless it shall have first obtained the approval of the Transaction by a simple majority of the votes cast by HudBay shareholders entitled to vote on the Transaction at a duly convened special meeting of its shareholders.

DATED at Toronto this 23rd day of January, 2009.

"James E. A. Turner"

James E. A. Turner

"Suresh Thakrar"

Suresh Thakrar

"Paulette L. Kennedy"

Paulette L. Kennedy

Schedule B – Relevant Excerpts from the TSX Manual

Sec. 602. General

(a) Every listed issuer shall immediately notify TSX in writing of any transaction involving the issuance or potential issuance of any of its securities other than unlisted, non-voting, non-participating securities.

(b) A listed issuer may not proceed with a Subsection 602(a) transaction unless accepted by TSX. Failure to comply with this provision may result in the suspension and delisting of the listed issuer's listed securities (see Part VII of this Manual).

(c) Subject to Subsection 607(c), TSX will advise the listed issuer in writing generally within seven (7) business days of receipt by TSX of the Subsection 602(a) notice, of TSX's decision to accept or not to accept the notice, indicating any conditions to acceptance or its reasons for non-acceptance. Further information or documentation may be requested before TSX decides to accept or not accept notice of a transaction. In reviewing the transaction described in the notice, TSX will consider the applicable provisions of this Manual.

…

(e) The notice required by Subsection 602(a) should initially take the form of a letter addressed to TSX, requesting acceptance of the notice for filing, unless the applicable section of Part VI requires otherwise. A press release or information circular filed with TSX does not constitute notice under Section 602. The letter should contain the essential particulars of the transaction, and should state whether: (i) any insider has an interest, directly or indirectly, in the transaction and the nature of such interest; and (ii) whether and how the transaction could materially affect control of the listed issuer. A copy of any written agreement in respect of the transaction must be provided with the notice. TSX must be provided with prompt notice of any changes to the material terms of the transaction described in the notice, regardless of whether the amendment could entail a further issuance of securities. This applies even if the transaction as previously accepted by TSX specifically contemplated future amendments, unless the amendment is solely due to standard anti-dilution provisions in the original agreement. The listed issuer may not proceed with the proposed amendment unless it is accepted by TSX.

…

Sec. 603. Discretion

TSX has the discretion: (i) to accept notice of a transaction; (ii) to impose conditions on a transaction; and (iii) to allow exemptions from any of the requirements contained in Parts V or VI of this Manual.

In exercising this discretion, TSX will consider the effect that the transaction may have on the quality of the marketplace provided by TSX, based on factors including the following:

(i) the involvement of insiders or other related parties of the listed issuer in the transaction;

(ii) the material effect on control of the listed issuer;

(iii) the listed issuer's corporate governance practices;

(iv) the listed issuer's disclosure practices;

(v) the size of the transaction relative to the liquidity of the issuer; and

(vi) the existence of an order issued by a court or administrative regulatory body that has considered the security holders' interests.

Sec. 604. Security Holder Approval

(a) In addition to any specific requirement for security holder approval, TSX will generally require security holder approval as a condition of acceptance of a notice under Section 602 if, in the opinion of TSX, the transaction:

(i) materially affects control of the listed issuer; or

(ii) provides consideration to insiders in aggregate of 10% or greater of the market capitalization of the listed issuer and has not been negotiated at arm's length.

If any insider of the listed issuer has a beneficial interest, direct or indirect, in the proposed transaction which differs from other security holders of the same class TSX will regard such a transaction as not having been negotiated at arm's length.

(b) For other transactions, TSX's decision as to whether to require security holder approval will depend on the particular fact situation having specific regard to those items listed in Subsection 604(a). For the purposes of Subsection 604(a)(ii), the insiders participating in the transaction are not eligible to vote their securities in respect of such approval.

(c) If TSX requires security holder approval of a transaction, the resolution to be voted upon must relate specifically to the transaction in question, rather than an unspecified transaction that may take place in the future.

(d) Security holder approval is to be obtained from a majority of holders of voting securities at a duly called meeting of security holders…. The disclosure provided to security holders in seeking security holder approval must be pre-cleared with TSX.

Sec. 611. Acquisitions

(a) Where a listed issuer proposes to issue securities as full or partial consideration for property (which may include securities or assets) purchased from an insider of the listed issuer, TSX may require that documentation such as an independent valuation or engineer's report be provided.

(b) Security holder approval will be required in those instances where the number of securities issued or issuable to insiders as a group in payment of the purchase price for an acquisition exceeds 10% of the number of securities of the listed issuer which are outstanding on a non-diluted basis, prior to the date of closing of the transaction. Insiders receiving securities pursuant to the transaction are not eligible to vote their securities in respect of such approval.

(c) Subject to Subsection 611(d), security holder approval will be required in those instances where the number of securities issued or issuable in payment of the purchase price for an acquisition exceeds 25% of the number of securities of the listed issuer which are outstanding, on a non-diluted basis.

(d) Subject to Sections 603 and 604 and to Subsection 611(b), TSX will not require security holder approval where a reporting issuer (or equivalent status) having 50 or more beneficial security holders, excluding insiders and employees, is acquired by the listed issuer.

…