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When is a Change Material? The Supreme Court of Canada Clarifies Timely Disclosure Obligations in Lundin Mining Corp. v. Markowich

On November 28, 2025, the Supreme Court of Canada (the "**SCC**") released its decision in *Lundin Mining Corp.* v. *Markowich*, 2025 SCC 29, providing important guidance to publicly traded companies ("**issuers**") relating to an issuer's obligation to publicly disclose the occurrence of certain events. The SCC confirmed that any change in an issuer's business, operations or capital triggers an immediate disclosure obligation, if the change is one that a reasonable person would believe will have a significant effect on the market price or value of the issuer's securities. The decision rejects the more restrictive approach to the interpretation of when a material change has occurred applied by the court of first instance (the Ontario Superior Court of Justice) and affirmed the broader, contextual standard for assessing when a material change has occurred applied by the Court of Appeal for Ontario.

Principally, the SCC clarified the test for leave to commence a class action for breach of an issuer's disclosure obligations under Section 138.8(1) of the *Securities Act* (Ontario) (the "**OSA**"). However, since the issue at the centre of the class action was whether Lundin Mining Corp. ("**Lundin**") was in compliance with its timely disclosure obligation, the ruling also provides important guidance for issuers regarding their disclosure obligations.

Lundin Mining Corp. v. Markowich

On October 25, 2017, Lundin, a Canadian reporting issuer listed on the Toronto Stock Exchange, detected pit wall instability at its flagship property, the Candelaria mine in Chile (the "**Mine**"), subsequently resulting in a localized rockslide six days later. The rockslide ultimately led to a 20% downward revision of the Mine's production forecast. Although Lundin regularly cautions its investors about the possibility of inherent risks represented by pit wall failures in its disclosure documents, Lundin did not disclose either this pit wall instability nor the attendant rockslide until about a month after it occurred, as part of its periodic operational updates at the end of each year. Following disclosure of the rockslide during a conference

call on November 30, 2017, Lundin's share price dropped 16% from the previous day's closing price—representing a loss of more than $1 billion in market capitalization.

Markowich, an investor who purchased shares of Lundin on the open market during the period between senior management of Lundin becoming aware of the pit wall instability, which caused the rockslide, and the date of the disclosure of the rockslide, commenced a class action lawsuit against Lundin. Markowich alleged that the pit wall instability and rockslide constituted a "material change" requiring timely disclosure under the OSA and analogous legislation across Canada. Such timely disclosure would have obligated Lundin to immediately issue a news release disclosing the pit wall instability and rockslide as a "material change" under applicable securities laws, followed promptly by the filing of a material change report. Lundin maintained the opposite position, asserting that the pit wall instability and resulting rockslide were not a material change and, therefore, did not trigger the timely disclosure obligations.

In order to proceed, class action lawsuits require leave of the court. To obtain leave under Section 138.8(1) of the OSA, the plaintiff must demonstrate that (1) the action is being brought in good faith and (2) there is a reasonable possibility of success at trial, based on a plausible interpretation of the statute and the available evidence.

The motion judge in the Ontario Superior Court of Justice who heard the leave application declined to grant it. Since compliance with the material change reporting regime was the central issue, the motion judge necessarily had to consider, in determining whether to grant leave, whether the applicant had a reasonable chance of establishing at trial that the pit wall instability and subsequent rockslide constituted a "material change" requiring immediate disclosure. The motion judge determined that on the facts presented, no "material change" had occurred. Markowich appealed this decision to the Court of Appeal for Ontario, which reversed the decision of the Ontario Superior Court of Justice, determining that the applicant would have a reasonable chance of success at trial based on a more expansive interpretation of the words "change," "business," "operations" and "capital" in the definition of "material change" under the OSA. Lundin appealed the decision of the Court of Appeal for Ontario to the SCC, which dismissed the appeal.

Legal Framework

Section 1(1) of the OSA contains the following definitions:

1. **Material Fact:** a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.
2. **Material Change:** a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer.

Material changes are internal to an issuer, since they must involve a change in the business, operations or capital of the issuer, and they must be disclosed "forthwith" by way of news release, accompanied by the filing of a material change report on www.sedarplus.ca as soon as practicable and in any case no later than 10 days from the date of the material change. Material facts, by contrast, do not require immediate disclosure.

Supreme Court of Canada Decision

Majority

A majority of the SCC dismissed Lundin's appeal, confirming that the terms "change," "business," "operations" and "capital" are intentionally undefined in the OSA to allow for flexibility and contextual application. The SCC emphasized several points:

1. **Broad, Flexible Interpretation and No Bright Line Test**: The test to determine whether a "material change" has occurred is a two-step test. First, an assessment must be made whether a "change" has occurred in the business, operations or capital of the issuer. No measure of the materiality of the change is introduced at this stage—unlike the motion judge, the SCC confirmed any change in the business, operations or capital is sufficient to satisfy the first part of the test. The SCC rejected the notion that only "important and substantial" changes are captured by the first step in the definition of "material change." If it is determined that a change has occurred, the second step of the test requires an objective (and prospective) determination as to whether the change will have a "significant" effect on the market price or value of the issuer's securities. If both legs of the test are satisfied, then the change is a "material change" requiring compliance with timely disclosure obligations under applicable securities laws. The SCC noted the term "change" is to be understood in its ordinary commercial sense, applied to the facts and context of each case, and rejected the motion judge's use of the dictionary definition of the word "change."

2. **Distinction Between Material Fact and Material Change**: The SCC reaffirmed that material changes are dynamic and internal to the issuer (unless some external event has a disproportionate effect on a particular issuer), while material facts can be static and may be internal or external. Material changes require immediate disclosure (same day, or no later than prior to commencement of trading on the following day), while material facts are disclosed periodically with ongoing continuous disclosure filings. The SCC reaffirmed that material changes are a subset of material facts.
3. **Policy Rationale**: The SCC reasoned that adopting a broad, flexible standard for interpreting "material change" best serves the core purpose of securities law—remedying informational asymmetry between issuers and investors—and avoids technical interpretations that could undermine investor protection and market integrity.

Dissent

Justice Côté, in dissent, would have restored the Ontario Superior Court of Justice motion judge's order and endorsed the narrower standard of interpretation applied by the motion judge. Justice Côté cautioned against expanding liability in a way that could overburden issuers or disrupt market stability, noting that over-disclosure has its own risks.

Takeaways

Below are four key takeaways considering the SCC's broad, flexible interpretation of "material change."

1. How to Apply the Two-Step Test Within a Broad Framework:

1) Is there a change in the issuer's business, operations or capital?

- The change must be internal to the issuer, i.e., not merely external events or market conditions unless such external events disproportionately affect the issuer in a way other issuers are not affected.
- The term "change" is broad—any alteration, modification, or development in how the issuer conducts business, operates, or structures capital may qualify. A materiality analysis is not introduced at this stage.

2) Will the change lead to a significant effect on the market price or value of the securities of the issuer?

- This determination is assessed objectively and prospectively. Would a reasonable investor expect the change to significantly affect the market price or value of the securities? The issuer is looking into the future in making this assessment on the heels of the occurrence of the change. Regulators will have the benefit of hindsight, although technically what actually happens should not play into it as this step of the test is satisfied if it would be reasonable to expect a significant effect on the market price or value of the issuer's securities.
- The anticipated effect of the change on both the market price (for issuers trading on an exchange or marketplace) and the value of the securities (for example, for issuers that are thinly traded or not listed) must be canvassed in this second step.

2. Update Disclosure and Training: Issuers should ensure their disclosure controls and policies reflect the SCC's flexible, contextual approach to the interpretation of the definition of "material change" and train management to recognize and escalate potential material changes. The determination that a material change has occurred is a contextual question of mixed fact and law requiring judgment, common sense and close attention to the specific circumstances of each case. The SCC expressly rejected the notion that only "important" or "substantial" changes trigger disclosure for purposes of the first step of the "material change" analysis.

3. Monitor Internal Events Closely: Issuers should regularly review operational, financial and strategic developments for potential disclosure triggers and pay special attention to events that alter forecasts, results, operations, or capital structure.

4. Document Decision Making and Consult Legal Counsel Early: Issuers should carefully apply the SCC's broad framework when evaluating their disclosure obligations and keep clear records of how disclosure decisions are made, including the rationale for determining whether an event constitutes a "material change," erring on the side of transparency when faced with a "close call." Establishing disclosure policies and engaging in processes to make these determinations will assist an issuer when faced with allegations of gaps in disclosure.

Conclusion

The SCC's decision reinforces a flexible, context-driven approach to disclosure obligations under the OSA and analogous provincial legislation. Issuers should carefully evaluate internal changes in real time and their

potential impact on market price from an objective standpoint, ensuring timely and accurate disclosure when required. The Markowich allegations are still to be litigated at trial; however, early indications are a broadening of the timely disclosure regime to which issuers would be well advised to adapt.

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