Lundin Mining v. Markowich: Has there been a material change to “material change”?

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In *Lundin Mining Corp. v. Markowich,* 2025 SCC 39, a majority of the Supreme Court affirmed that there is no bright line test for a material change. An issuer must interpret “change” broadly depending on the facts of the case, bearing in mind that the primary purpose of material change disclosure is to prevent informational asymmetry between the issuer and investors.

The majority opinion also restated the test for leave to proceed with a statutory secondary market misrepresentation action under s. 138.8(1) of the *Securities Act* (Ontario)(the Leave Test), reaffirming that its purpose is to deter meritless litigation brought to coerce settlements.

What you need to know

- “Change” will be interpreted broadly. A development in the affairs of a public company does not need to be “important and substantial” to constitute a change.
- There is no bright line test for determining what amounts to a material change. Determination is a matter of judgment, and common sense should be applied to the unique circumstances of each case.
- Negotiations and internal deliberations, without more, will not usually amount to a change in the business, operations or capital of an issuer, even if they are material.
- Issuers should err on the side of caution when deciding whether material change disclosure is required, bearing in mind that the primary purpose of disclosure is to prevent informational asymmetry between the issuer and investors.

Factual background

The appellant, Lundin Mining Corporation (Lundin), is a Canadian mining company. Its shares are listed on the Toronto Stock Exchange.

As a reporting issuer under the *Securities Act,* Lundin is required to immediately (or “forthwith”, in the words of the *Securities Act*) issue and file a news release when a material change has occurred in its business, operations, or capital. Lundin is also

required to periodically disclose “material facts” in its annual and quarterly periodic filings.

The pit wall instability and the rockslide

On October 25, 2017, Lundin detected pit wall instability in the Calendaria open pit mine, Lundin's premier copper mine. On October 31, 2017, the pit wall instability caused a localized rockslide in the open pit mine.

A month later, Lundin, for the first time, disclosed both the pit wall instability and the rockslide as part of a regular news release series. Between November 29 and close of markets on November 30, 2017, Lundin’s share price dropped 16%, representing a loss of more than $1 billion in market capitalization.

In January 2018, the plaintiff, an investor who purchased 10,000 Lundin shares between November 15 and 27, 2017, commenced a proposed national class action against Lundin and several directors and officers, alleging that the pit wall instability and the rockslide were “material changes” that Lundin failed to disclose in a timely manner. As he made a claim for secondary market misrepresentation under s. 138.3(4) of the *Securities Act*, he needed to satisfy the Leave Test. The plaintiff also alleged common law negligent misrepresentation. The proposed class action advanced claims on behalf of investors who purchased Lundin shares between October 25 and November 29, 2017, and sought $175 million in general and special damages, as well as $10 million in punitive damages.

Lower Court decisions

Ontario Superior Court of Justice

At first instance, the motion judge held the plaintiff did not meet the Leave Test because there was no reasonable possibility that there had been a “change” to Lundin’s “business, operations, or capital”. The motion judge gave these terms narrow definitions, because they are not defined in the *Securities Act*. He defined “change” as “a different position, course, or direction”; “business” as “what an issuer does to generate revenues”; “operations” as how or where the issuer conducts business”; and “capital” as the issuer’s “share structure and rights of shareholders”.

Applying narrow definitions of “change, “business’, “operations”, and “capital”, the motion judge found that the pit wall instability or resulting rockslide did not affect Lundin’s ability to conduct its business as a company mining copper and therefore could not be found to constitute “changes”.

Ontario Court of Appeal

The plaintiff appealed the motion judge’s decision on the Leave Test, as well as certification of the secondary market misrepresentation claim.

In a unanimous decision, the Ontario Court of Appeal allowed the appeal, holding that the motion judge erred in law by interpreting the terms “change”, “business”, “operations”, and “capital” too narrowly, especially in the context of a motion for leave to

commence an action under the *Securities Act*. The Court granted leave for the statutory secondary market misrepresentation claim to proceed. Because the motion judge did not address all elements of the test for certification, the issue of certification was remitted back to the Superior Court for determination.

Supreme Court of Canada decision

An 8-1 majority (with Justice Côté dissenting) dismissed the appeal, agreeing with the Court of Appeal that the motion judge interpreted "change", "business", "operations", and "capital" too restrictively, and that he erred by applying those restrictive definitions to determine whether there was a reasonable possibility that there had been a material change for the purposes of the Leave Test.

Definition of "Change"

For the majority, Justice Jamal held that "change" should be interpreted broadly because a broad, "investor-friendly" disclosure standard better promotes the fundamental purpose of securities regulation, which is to prevent and deter informational asymmetry between issuers and current and prospective investors. The majority was openly critical of a narrow definition of "change" requiring "important and substantial" change, finding that such a standard is inconsistent with the text of the legislation, which intentionally does not define "change", "business", "operations", and "capital".

The majority opinion began by reaffirming that the statutory definition of a "material change" has two components. First, there must be "a change in the business, operations, or capital of the issuer". Second, the change must be material, which means that it "would reasonably be expected to have a significant effect on the market price or value of the securities" of the issuer. At the second step of the test, materiality is objectively determined from the perspective of a reasonable investor, with the applicable standard being defined in strictly economic terms.

Based on caselaw and expert commentary, the majority opinion adopted a number of guiding principles for distinguishing between a material fact and a material change:

- **A material fact is static; a material change is dynamic** : A material fact provides a snapshot of an issuer's affairs at a particular point in time. In contrast, a material change necessarily compares an issuer's affairs at two points in time.
- **A material fact is defined more broadly than a material change** : Only changes in an issuer's "business, operations or capital" can be material changes, but any fact can be a material fact.
- **A material change is necessarily internal to the issuer; a material fact can be internal or external to the issuer** : As noted by the Court of Appeal, a material change must be a change "**in** the business, operations or capital of the issuer". This distinction between a material change and a material fact promotes the purpose of securities law to remedy informational asymmetry between issuers and investors.
- **A material change generally requires more than mere negotiations or internal deliberations** : Negotiations and internal deliberations, without more, will not usually amount to a change in the business, operations, or capital of the issuer, even if they are material.

The Leave Test

The majority also provided guidance on how courts should apply the Leave Test. The majority reiterated that the Leave Test is a preliminary merits test. The plaintiff's burden is to demonstrate that the action has more than a reasonable or realistic chance to succeed, which is a standard higher than the test for certification of a class action. This approach best realizes the legislative intent to eliminate cases with little chance of success.

Dissenting opinion

Justice Côté held that the disclosure standard adopted by the Court of Appeal and the majority opinion was overly broad, inviting over-disclosure and premature disclosure from issuers seeking to inoculate themselves from increased liability. The dissenting opinion found that the motion judge's interpretation of a "change in the business, operations and capital" was true to the legislature's intended meaning, which was to require issuers to assess only changes that alter the nature of the issuer's business, operations, or capital, understood at a high level of generality.

Takeaways

The Supreme Court has affirmed that there is no bright line test for determining whether or not a change in the affairs of an issuer is a "material change" requiring immediate disclosure. In doing so, it definitively rejected the narrower approach to material change emerging in the caselaw, which would only require disclosure if developments significantly disrupt the company's business.

The practical effect of the decision is that issuers should err on the side of caution when considering if and when to disclose developments that impact their business, operations, and capital. A contextual and fact-specific assessment remains necessary to determine whether a material change has occurred. If an internal change at the issuer may create information asymmetry with an investor, and the change has the possibility of significantly affecting the market price of the issuer's securities if disclosed, the issuer should consider disclosure.

Interested parties from the mining industry should follow developments in this ongoing class action. Whether the pit wall instability and rockslide are considered material changes will be determined at trial of the class action if the matter does not settle before then. Any decision may have wider repercussions on the mining industry, and on public companies more generally.

By

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