Cassels

Ch-ch-ch-ch-changes: Ontario Court Clarifies Meaning of "Change" Under the Securities Act

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On January 6, 2022, in *Markowich v Lundin Mining Corporation*,[1] the Ontario Superior Court of Justice denied leave to commence a secondary market securities class action under Part XXIII.1 of *Securities Act* (Ontario). In coming to that decision, the Court provided important guidance on the distinction between material facts and material changes and the meaning of "change" as used in that context.

The Court also declined to certify common law negligent misrepresentation claims advanced by the proposed representative plaintiff. In doing so, the Court confirmed that, generally, common law negligent misrepresentation claims in securities cases are not suitable for certification.

Background

At issue in *Markowich* was whether (i) a pit wall instability detected on October 25, 2017, and (ii) a subsequent rock slide of approximately 600,000 to 700,000 tonnes of waste material on October 31, 2017, at an open pit mine owned and operated by Lundin Mining were material changes requiring immediate disclosure under the *Securities Act*. The pit wall instability and rock slide were disclosed in the ordinary course in a news release issued on November 29, 2017, which, in addition to including news of the rock slide, included a detailed operational update addressing all of the company's operations. The following day, November 30, 2017, the price of Lundin Mining's common shares trading on the TSX declined by 16%, representing a one-day loss of over $1 billion of market capitalization.

The proposed representative plaintiff sought general and special damages against Lundin Mining and certain of its directors and officers in the amount of $175 million and punitive damages in the amount of $10 million. The plaintiff claimed that the pit wall instability and the rock slide were "material changes" to the company's "business, operations or capital" and, accordingly, that Lundin Mining was required to disclose them immediately through a news release and file a material change report within 10 days.

The Parties' Positions

The proposed representative plaintiff argued that leave under the *Securities Act* should be granted because there was a reasonable possibility that Lundin Mining was required to immediately disclose the pit wall

instability and rock slide since (i) those events were “changes” to the company’s “business, operations or capital” and (ii) those changes were “material” since they “would reasonably be expected to have a significant effect on the market price or value” of Lundin Mining’s common shares.

The plaintiff also argued that certification of its common law misrepresentation claims should be granted (regardless of the outcome of the leave motion) because it met the test for certification under the *Class Proceedings Act*.

Lundin Mining opposed the leave and certification motions, arguing that the plaintiff had no reasonable possibility of success in establishing at trial that either the pit wall instability or the rock slide constituted a material change because they were not “changes” to the company’s business, operations or capital.

Lundin Mining also argued that a class proceeding would not be the preferable procedure for common law misrepresentation claims and that these claims did not raise common issues.

The Decision

The Court found in favour of Lundin Mining and held that there was no reasonable possibility that the plaintiff would be able to establish at trial that either the pit wall instability or the rock slide constituted a “change” to Lundin Mining’s “business, operations or capital” within the meaning of the *Securities Act*.

In reaching that conclusion, the Court noted that a fact-specific inquiry is required to determine whether a change occurred. Following a fact-specific inquiry, the Court found that there was no evidence of any change to Lundin Mining’s business, operations or capital arising from the pit wall instability or rock slide. Rather, the only effect was that 15,200 tonnes of copper production was deferred for a short period of time, with some minor increased costs and decreased revenues arising from milling lower quality copper. The deferred copper represented less than 5% of Lundin Mining’s annual production, which was already scheduled to be reduced due to previously planned resequencing.

There was also no evidence that the pit wall instability or rock slide raised any threat to Lundin Mining’s economic viability. The Court accepted Lundin Mining’s evidence and arguments in respect of its continued operations following the events and found that the company was at all times “able to continue its business, operations, and capital as a worldwide mining corporation”. The Court also noted that the evidence indicated that the pit wall instability and rock slide were inherent risks in open pit mining and that Lundin Mining managed those risks in the ordinary course and operated its business under those risks.

The Court cautioned that the concepts of “material change” and “material fact” must not be conflated – the distinction is deliberate and policy-based. Material facts, which need to be disclosed in the course of an issuer’s periodic disclosure, are matters that may *affect* the issuer’s business, operations, and capital

whereas material changes, which require immediate disclosure, are changes that occur when the event results in a different position, course, or direction to a company's business, operations, or capital. In *Markowich*, while the pit wall instability and rock slide may each have been a material *fact*, there was no evidence to support that either of those events was a material *change* to Lundin Mining's business, operations, or capital that would require immediate disclosure.

Finally, with respect to the motion for leave, the Court held that market impact is not determinative of a change (or materiality) and that it cannot "reason backwards" from a share price decline to find that a change had occurred to Lundin Mining's business, operations or capital.

In addition to dismissing the motion for leave, the Court declined to certify the plaintiff's common law negligent misrepresentation claim on the basis that the claim would not satisfy the preferable procedure requirement of the *Class Proceedings Act*. In that regard, the Court held that each investor's reliance, a required element of a negligent misrepresentation cause of action, could not be "deemed" or "inferred" based on an efficient market theory, rejecting the plaintiff's argument that precedent case law that found the efficient market theory inapplicable could be distinguished in the case of alleged omissions (as opposed to affirmative misrepresentations). As a result, "tens of thousands" of idiosyncratic trials would be required so that each class member could tender evidence on their own reliance, if any, on the alleged misrepresentations.

Looking Forward

This decision provides helpful commentary to issuers on the fact-specific inquiry to be used to determine which events constitute a material fact and which events constitute a material change. While the Court in this case reiterated that the requirement to make timely disclosure of a material change is not an obligation to provide a running commentary on the company's progress during the quarter or to comment on internal or external events that may impact performance, it did note that in cases where the decision is "borderline" the information should be considered material and disclosed.

Going forward, when considering disclosure, issuers should carefully evaluate whether the event under review may result in a different position, course, or direction to the company's business, operations, or capital.

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[1] 2022 ONSC 81 (*Markowich*).

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