

What is a “Material Change”? Guidance from the Supreme Court of Canada

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In the recent decision *Markowich v. Lundin Mining Corp. (Lundin Mining)*,¹ the Supreme Court of Canada has provided further guidance on the interpretation of “material change” in securities legislation across Canada and clarification regarding the leave test for securities class actions.

Why This Matters

The distinction between a material fact and material change drives the timing of disclosure for Canadian reporting issuers. Issuers must disclose material changes “forthwith” under provincial securities legislation across Canada, while material facts are to be disclosed periodically.

The materiality standard is the same for both: the disclosure of the fact or change would “reasonably be expected to have a significant effect on the market price or the value of the securities.” The difference is that a material change arises when there is a “change” in the “business, operations or capital” of an issuer (all terms that are undefined in securities legislation).²

Public companies and their boards of directors often find themselves considering whether a given material development must be disclosed immediately (as a material change) or at a later time (during periodic disclosure). Distinguishing between a “material fact” and “material change” has been described as “perhaps the most difficult area of securities law.”³

The SCC Decision was eagerly anticipated by market participants across the country for its potential to provide meaningful guidance to companies and boards in making these difficult disclosure decisions.

Lower Court Decisions

The Ontario *Securities Act*⁴ requires that any plaintiff who wants to bring a secondary market class action must first obtain leave of the court. The leave test was implemented when securities class actions were first introduced in Canada and was designed to prevent so-called meritless “strike suits.” The test requires a plaintiff to demonstrate that they are acting in good faith and have a reasonable prospect of success at trial.

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In *Lundin Mining*, the defendant public company (the Company) disclosed that there had been pit wall instability and a subsequent rockslide at its open pit mine in Chile. The disclosure was made as part of a regularly scheduled operational update, which was released approximately one month after the events in question.

The plaintiff, on behalf of a proposed class of investors, claimed that the Company should have disclosed these events immediately on the basis they were material changes rather than just material facts. The plaintiff sought leave to commence a class action on behalf of investors who purchased their shares after the events and before their disclosure.

The motion judge dismissed the plaintiff's leave application, finding that the plaintiff established a reasonable prospect of success in proving that the events were material, but not that the events were material changes.⁵ The motion judge interpreted the meaning of material change as requiring a "different position, course, or direction" to a company's "business, operations, or capital"⁶ and found that the plaintiff would not be able to prove a material change at trial.⁷ The motion judge further found that pit wall instability and rock slides were inherent risks in open pit mining operations, and that the Company managed those risks with advanced ground radar technology and operated its business under those risks.⁸ The motion judge found that there was no evidence of any change to the Company's business, operations or capital arising from the events.⁹ Accordingly, he concluded that it was not reasonably possible that the plaintiff could establish at trial that either the pit wall instability or the rockslide were material changes that required immediate disclosure.¹⁰

The Court of Appeal reversed the motion judge's decision, favouring a broader definition of "material change" that recognizes a "change is a change" and should be defined broadly.¹¹ The Court of Appeal declined to apply any reference points for considering whether a "change" had occurred beyond referring to the the terms "business, operations or capital" in the context of the facts of each case and determined that the available evidence should have led the motion judge to grant leave to the plaintiff to commence the securities class action.¹²

The Supreme Court of Canada Addresses the Meaning of Material Change

The Company obtained leave to appeal to the Supreme Court of Canada on the following two questions:

- What is a "material change" for the purpose of Canadian securities law; and
- Should the Ontario *Securities Act* leave requirement modify or lessen the burden to show a "material change"?

In the majority decision written by Justice Jamal, the Supreme Court adopted the broader disclosure standard for reporting issuers favoured by the Court of Appeal and rejected the approach applied by the

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motion judge. The Supreme Court emphasized that a material change must be interpreted broadly and contextually, based on the facts of each case and industry norms, and that its interpretation is informed by the overarching principle that continuous disclosure aims to level the playing field between issuers and investors.¹³ The Supreme Court also held that this approach should be taken when interpreting “business, operations or capital” and these terms should be understood based on their ordinary commercial meaning.¹⁴

The Supreme Court’s decision included the following key principles, which issuers should consider when assessing whether a development is a material fact or a material change:

- the approach to material change must be informed by the core policy purpose of disclosure, which is to prevent and deter informational asymmetry between investors and issuers;
- a material change is “dynamic” because it compares an issuer’s affairs at two points in time, whereas a material fact is “static,” providing a snapshot at a single point in time;¹⁵
- an assessment of whether a material “change” has occurred is a two-step inquiry. First, an issuer must evaluate the nature of the change. Second, it must determine whether a change is material. The issuer is best positioned to assess whether a change is “material”, given their industry knowledge and intimate familiarity with their business, operations or capital;¹⁶
- a material change is “internal” to the issuer (i.e., a change *in* the business, operations or capital), whereas a material fact can be internal or external to the issuer. External political, economic and social changes will not be material changes unless they result in a change in the business, operations or capital and are material;¹⁷ and
- negotiations and internal deliberations (without more) do not usually amount to a change.¹⁸

Aside from these guiding principles, the majority of the Supreme Court decided that imposing specific judicial definitions on the intentionally undefined terms “change” and “business, operations or capital” would “ossify the *Securities Act*” and undermine the purpose of continuous disclosure obligations.¹⁹ It therefore adopted the broader interpretation applied by the Court of Appeal in favour of adopting a more specific definition for “change,” as the motion judge did below.

Dissent

In dissent reasons, Justice Côté disagreed with the majority on the approach to material change. She found that the broader disclosure standard envisioned by the Court of Appeal and adopted by the majority of the Supreme Court collapses the distinction between a “material fact” and “material change,” and ultimately creates a disclosure standard that is broader and more onerous than the Ontario *Securities Act* contemplates. Justice Côté warned against the “far-reaching impacts” of this standard and held that she would have instead adopted a standard requiring a change in the high-level or core aspects of an issuer’s business, operations or capital.²⁰

Raising the Bar or Lowering It? The Standard on a Leave Motion

The Supreme Court also considered whether the “reasonable possibility of success” part of the leave test meant that the plaintiff need only demonstrate a “plausible interpretation” of legislation at the leave stage, as suggested in the Court of Appeal Decision.²¹

The Supreme Court confirmed the interpretive exercise is not different at the leave stage compared to trial: the modern principles of statutory interpretation apply at both stages. The plaintiff must show a “plausible application of the legislation to the facts,”²³ not merely a plausible interpretation of the legislation. The Supreme Court further confirmed that a “plausible application” to the facts is appropriate at the leave motion due to the limited evidence available, as compared to trial.²³

Implications For Issuers

Distinguishing between a “material fact” and “material change” will likely remain one of the most difficult areas of securities law. The Supreme Court’s confirmation that a broad approach should be taken to material changes means issuers must continue to carefully consider whether any given material developments should be disclosed immediately, while also ensuring that any such disclosure is meaningful and accurate. It remains to be seen whether the Supreme Court’s decision will result in more frequent disclosure by issuers, the filing of more material change reports, or the commencement of more “material change” securities class actions.

The authors Lara Jackson, John M. Picone, Kate Byers, and Laura Cloutier represented the appellants.

¹ *Lundin Mining Corp. v. Markowich*, [2025 SCC 39](#) [“SCC Decision”].

² *Securities Act*, [RSO 1990, c S.5](#) [“Ontario Securities Act”], s. [1\(1\)](#).

³ SCC Decision, para. [1](#).

⁴ *Ontario Securities Act*, s. [138.8\(1\)](#).

⁵ *Markowich v. Lundin Mining Corporation*, [2022 ONSC 81](#) [“Motion Decision”].

⁶ Motion Decision, para. [151](#).

⁷ Motion Decision, para. [171](#).

⁸ Motion Decision, paras. [54](#), [56](#).

⁹ Motion Decision, paras. [173](#), [190](#).

¹⁰ Motion Decision, para. [192](#).

¹¹ *Markowich v. Lundin Mining Corporation*, [2023 ONCA 359](#) [“Court of Appeal Decision”], para. [82](#).

¹² Court of Appeal Decision, paras. [82](#), [87](#).

¹³ SCC Decision, para. [72](#).

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¹⁴ SCC Decision, paras. [63](#), [71-73](#).

¹⁵ SCC Decision, para. [48](#).

¹⁶ SCC Decision, para. [78](#).

¹⁷ SCC Decision, para. [51](#).

¹⁸ SCC Decision, para. [60](#), citing *AIT Advanced Information Technologies Corporation* (2008), [2008 ONSEC 3 \(CanLII\)](#), *Theratechnologies inc. v. 121851 Canada inc.*, [2015 SCC 18](#), and *Peters v. SNC-Lavalin Group Inc.*, [2023 ONCA 360](#).

¹⁹ SCC Decision, para. [95](#).

²⁰ SCC Decision, para. [257](#).

²¹ Court of Appeal Decision, para. [7](#), stating that the motion judge interpreted the legislation “too narrowly, especially in the context of a motion for leave”.

²² SCC Decision, paras. [119](#), [121](#).

²³ SCC Decision, paras. [7](#), [115](#).

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