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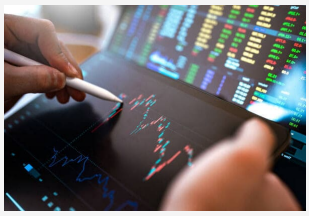
From pit wall to policy: what Lundin means for public company disclosure



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On November 28, 2025, the Supreme Court of Canada released its much-anticipated decision in *Lundin Mining Corp. v. Markowich*.[1] The split decision provides guidance on the distinction between material facts and material changes under the Ontario *Securities Act* (the Act) and is likely to result in earlier, pre-emptive disclosure of certain developments that could be material. This case has significant implications for issuers and their disclosure obligations.

Background

In October 2017, Lundin Mining Corporation (Lundin) detected pit wall instability at its Candelaria copper mine in Chile. A few days later, the unstable wedge failed and caused a rockslide that blocked access to a part of the mine. Lundin publicly disclosed these events in a news release a month after they occurred, reporting that the corresponding business interruption had lowered the 2018 and 2019 production forecasts. A day after the publication of the news release, Lundin's share price declined 16% on the Toronto Stock Exchange, which represented a loss of more than $1 billion of market capitalization.

An investor who acquired shares between the instability/rockslide event and the subsequent disclosure sought leave to commence a statutory secondary market claim based on the alleged failure to make timely disclosure of wall instability and an eventual rockslide at its copper mine in Chile. The plaintiff alleged that the pit wall instability and the subsequent rockslide were each "material changes" within the meaning of the Act requiring immediate disclosure.

Legal framework

The Act (and corresponding rules across other Canadian jurisdictions) requires issuers to make disclosure of "material facts" in certain prescribed disclosure documents (such as an offering prospectus and annual and quarterly reports). A "material change" must be disclosed in a timely manner. A material fact is defined as a "fact" that would reasonably be expected to have a significant effect on the market price or value of an issuer's securities. A material change is defined as 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 an issuer.

The lower court rulings

The motion judge denied the plaintiff's motion for leave to proceed with its statutory secondary market claim. The motion judge accepted that the pit wall instability and rockslide may have constituted "material facts" but held that there was no reasonable possibility that the plaintiff could establish a "material change" in the company's "business, operations or capital" because these were anticipated, inherent risks in Lundin's open pit mining operations that Lundin managed as part of its business.

As previously reported, the Court of Appeal reversed the motion judge's decision and granted the plaintiff leave to proceed with its statutory secondary market claim. The Court of Appeal held that the motion judge misinterpreted the statutory test for a "material change" by adopting restrictive definitions of the terms at issue (*i.e.*, a "change to the company's business, operations or capital") and erred by applying those restrictive definitions to the test for leave. In the Court of Appeal's view, the statutory test required only a "plausible interpretation" of the statutory provisions and sufficient evidence to support granting leave.

In allowing the appeal, the Court of Appeal concluded that there was a reasonable possibility that the pit wall instability and rockslide were "changes" in the company's operations, based on the evidence that these events impacted the company's phasing of the mine and reduced its annual production forecast.

The Supreme Court majority's reasons

Justice Jamal, writing for the majority of the Supreme Court, dismissed Lundin's appeal of the Court of Appeal's reversal of the motion judge's decision, holding that the pit wall instability and rockslide impacted the company's operations at its mine, and that the plaintiff would have a reasonable possibility of success in demonstrating that such events were material changes under the Act.

The decision provides guidance on the distinction between "material fact" and "material change" under the Act:

- A material fact is "static" while a material change is "dynamic". A material fact is a snapshot of an issuer's affairs at a particular point in time, whereas a material change compares an issuer's affairs at two points in time.
- A material fact is defined more broadly than a material change because it can be unrelated to an issuer's business, operations or capital as long as it has a significant effect on the market price or value of the issuer's securities.
- A material change must be internal to the issuer, while a material fact can be internal or external to the issuer. This means that external political, economic and social developments can only give rise to material changes if such developments result in a change in the business, operations or capital of the issuer, and the change is material.
- Negotiations and internal deliberations, without more, will not usually amount to a change in the business operations or capital of an issuer. Rather, if internal negotiations or deliberations are material, they would constitute material facts.

The majority held that the motion judge erred in his interpretation of "material change". First, the motion judge interpreted the meaning of a "change" restrictively based on a dictionary definition, rather than interpreting the word in context of its use, including the fact that the

term was intentionally undefined in the Act so that the term can "acquire meaning by being applied in specific factual circumstances". Second, the motion judge imported a requirement into the definition of "change" that the relevant event is "important and substantial". This interpretation was not based on the underlying policy purpose of securities legislation which is to address informational asymmetries between issuers and investors. Third, the motion judge interpreted "business, operations or capital" by proposing restrictive definitions of each of these undefined terms, even though these terms are similarly and intentionally undefined in the Act, to "preserve their ordinary commercial meaning and flexibility as required by specific factual circumstances."

The majority instead endorsed the Court of Appeal's two-step analysis for determining whether there has been a "material change" — the first step involving an evaluation of the nature of the change and the second step involving a consideration of its magnitude.

On the facts of this case, the majority agreed with the Court of Appeal. The Supreme Court held that had the motion judge correctly interpreted "a change in business, operations or capital," and applied that interpretation to the evidence on the motion, he would have concluded that there was a reasonable possibility that the plaintiff could show that the pit wall instability and rockslide resulted in a change in Lundin's operations. Accordingly, the majority held that there was a reasonable possibility that the plaintiff could demonstrate at trial that there were material changes that Lundin was required to disclose immediately but did not, and that the plaintiff should have been granted leave to commence an action under s. 138.8(1) of the Act.

The dissenting reasons

Justice Côté, in dissent, would have allowed the appeal and restored the motion judge's order denying leave. In her view, "material change" should be confined to changes in the issuer's core or high-level business, operations, or capital — changes that alter the issuer's position, course, or direction at a high level of generality. She expressed the view that there are four exclusions for events affecting an issuer that do not fall within the definition of "change":

- external facts or changes of a political, economic, or social nature that are beyond the control of the issuer unless they actually result in a change in an issuer's business, operations, or capital
- fluctuations in revenue or production
- uncertain internal developments in an issuer's business, operations, or capital (*e.g.*, progressing through interim phases of merger negotiations, engaging in fresh discussions regarding an acquisition, or responding to a takeover bid) and
- events that maintain the status quo for the issuer's business, operations, or capital

On the basis of this approach, the instability/rockslide and resulting resequencing of mining operations, which affected less than 5% of Lundin's annual production at the time, and arose from inherent mining risks, did not amount to a "change" in Lundin's business, operations, or capital. Justice Côté warned that the majority's expansive interpretation of material change risks over-disclosure, increased compliance burdens, and expanded potential liability for issuers and their officers and directors.

Key takeaways

The Supreme Court's decision can be expected to have important implications for capital market participants.

First, the Supreme Court clarified that the concept of "change" carries its ordinary meaning and should not be confined to "core" or "fundamental" matters. The Supreme Court also clarified that "change" does not include considerations of magnitude; magnitude belongs to the materiality assessment. Issuers should avoid imposing threshold qualifiers at the "change" stage of the assessed. Operational developments that alter how an issuer carries on its business — even if localized or seemingly manageable — can constitute a "change" but should continue to be assessed for materiality.

Second, the critical distinction between internal and external developments endures for the purpose of determining a material change. The Supreme Court held that a material change must be internal to the issuer. External political, economic, and social developments only give rise to a material change where such developments result in a change in the business, operations, or capital of the issuer and the change is material. The majority provided the example of *In the Matter of Coventree Inc. et al.*, where the Ontario Securities Commission (OSC) (now the Capital Markets Tribunal) held that the company failed to meet its timely disclosure obligations by not filing a material change report after a credit rating agency announced it would cease providing ratings for certain credit arbitrage transactions, which were a significant part of Coventree's business. The OSC held that these external developments, along with subsequent liquidity events, constituted material changes requiring disclosure, as investors would not have been able to fully assess their impact on Coventree's affairs as these events were unfolding and given the significance of such transactions for Coventree's business.

Notably, the Supreme Court emphasized that 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. For example, merger negotiations between potential transaction counterparties that have not yet crystallized into a decision to implement a merger transaction, or ongoing negotiations with regulators as part of a routine and ongoing regulatory approval process would not generally amount to a "change" in the business, operations or capital. These observations are consistent with market practices and assist legal practitioners when making complex disclosure judgments around these types of situations.

Third, the Supreme Court also provided helpful clarity on the leave threshold for secondary market claims. The majority explained that the standard on a leave motion is more stringent than the test for authorization or certification of a class action insofar as the plaintiff must demonstrate a reasonable or realistic chance of success by a plausible application of the statute to credible evidence. At the same time, courts are not to run "mini-trials" at this stage. The Supreme Court emphasized the requirement of the motion judge to consider the credibility, reliability and comparative strength of the competing evidence tendered by the parties.

The Supreme Court's decision in *Lundin* encourages a purpose-driven approach to timely disclosure obligations, one that prioritizes the levelling of informational asymmetry between issuers and investors. The Supreme Court reaffirms that the determination of whether a material change has occurred is a highly contextual exercise with no bright line test but rather a matter of judgment and common sense. But the majority clarified that this contextual analysis is guided by the overarching purpose of disclosure obligations: to ensure that investors have access to timely and accurate information necessary to make informed decisions, thereby maintaining the integrity of Canada's securities markets and protecting the public interest.

Importantly, the Supreme Court did not decide that a "material change" occurred here. Rather, the majority granted the plaintiff leave to proceed with its secondary market claim. On this record and based on the legal threshold that the plaintiff must demonstrate on a leave motion (*i.e.,* there is a reasonable possibility that the claim will be successful at trial),

the majority was not prepared to conclude that the events did not constitute a material change. However, the merits remain to be determined on a full evidentiary record.

For many public company issuers, the decision is likely to result in early disclosure of developments that could be material. The decision lowers the bar for finding a "change". As a result, by the time that the materiality assessment of the change has been made, the window for making timely disclosure may have passed, thereby militating in favour of premature or conservative disclosure decisions. When combined with the unavailability of business judgment deference in the context of disclosure decisions, the Supreme Court's decision can be expected to result in changes to existing disclosure practice among Canadian public companies as they seek to manage the potential for increased litigation risk. In some cases, that may include disclosure before the effects of a development or change are known or quantified where the implications of the event are likely to take some time to assess and fully understand. This is particularly the case for mining companies and events that affect mining projects such as a pit wall failure, underground tunnel collapse or processing facility fire. While the initial event may be known, given the complexity of operations, the outcome or effects on the issuer's business and operations usually take days or weeks to fully understand and quantify. This can be further delayed given the requirements under Canadian securities laws for scientific and technical disclosure to be prepared or approved by a qualified person. In these cases, we can expect to see more issuers disclosing the occurrence of events without a clear assessment of the implications for the project. Traditionally, the view of practitioners was that premature disclosure does not necessarily assist investors otherwise left to make their own assessments of the potential outcomes in the absence of meaningful information. It remains to be seen how the market will respond to any changes in disclosure practices that provide for earlier disclosure of events that are limited to purely factual information and/or notices to "stand by for further updates" regarding their operational and financial implications.

We will continue to monitor this proceeding and report on developments.

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[1] 2025 SCC 39.