To disclose, or not to disclose, that is the question

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The Supreme Court of Canada (SCC) is set to revisit the definition of “material change” this year. The SCC’s decision in the appeal in *Lundin Mining Corporation, et al. v. Dov Markowich* (Lundin Mining), heard on January 15, 2025, could have significant consequences for reporting issuers and the broader Canadian capital markets.

Background

Canadian securities law requires reporting issuers to immediately disclose a “material change” through a press release. For Canadian public companies, a “material change” is defined as (a) a change in the business, operations or capital of an issuer that would reasonably be expected to have a significant effect on the market price or value of its securities; or (b) a decision to implement such a change made by the board of directors or other persons acting in a similar capacity or by senior management of the reporting issuer who believe that confirmation of the decision by the board of directors or any other persons acting in a similar capacity is probable.

The SCC’s decision in Lundin Mining will add to the scarce jurisprudence from Canada’s highest court interpreting the definition of a material change, which includes the 2015 decision in *Theratechnologies Inc. v. 121851 Canada Inc.* and the seminal case of *Kerr v. Danier Leather*, decided in 2007.

The Court of Appeal decision

In its 2023 decision, the Ontario Court of Appeal (ONCA) endorsed a broad interpretation of what constitutes a "material change" in the business, operations, or capital of an issuer. The plaintiff (Markowich) brought an action against Lundin Mining Corporation (Lundin) for a failure to disclose a material change after a rockslide at one of Lundin’s mining projects in Chile. Prior to the rockslide, pit wall instability was detected and personnel were evacuated from the applicable area of the mine. Lundin reported the incident in a news release approximately one month after the rockslide took place, and its share price subsequently fell 16 per cent on the following trading day.

Before the ONCA, was the motion judge's dismissal of Markowich's motion for leave to commence a claim for secondary market misrepresentation under s. 138.3 of the *Securities Act* (Ontario) (the Act), which found that it would have no reasonable possibility of success. Specifically, the motion judge ruled that while the rockslide was "material," it did not qualify as a "change" in Lundin's "business, operations, or capital." A material change required the event to bring about a "different position, course, or direction" for an issuer's business. Since Lundin was "able to continue its business, operations and capital as a worldwide mining corporation" and pit wall instability and rockslides are frequent and common occurrences in mining, the rockslide at issue could not be found to be a material change because it did not affect Lundin's viability or alter the fundamental nature of its business.

On appeal, the ONCA unanimously rejected the motion judge's decision on the basis that the definition of material change was interpreted too narrowly when considering the motion for leave. According to the court, the applicant only needed to demonstrate a "reasonable possibility of success" based on a "plausible interpretation of the statute and the evidence."

Contrary to the test applied by the motion judge, the ONCA concluded that a proper interpretation of whether an event constitutes a "material change" involves two distinct elements. First, the court must determine whether there has been a "change" in the "business, operations or capital of the issuer," noting that this part of the test is meant to be broad and should be viewed in the context of the facts of each case. If the first part of the test has been met, the second prong considers whether the change is "material", in the sense that it would be expected to have a significant impact on the value of an issuer's shares. In the ONCA's approach, materiality is captured under the second part of the test, only after it has been established that a change has occurred.

The ONCA based its interpretation on the different standards in the Act for disclosing a "material change" (which must be disclosed immediately) and a "material fact" (which does not require immediate disclosure under securities laws), which is distinct from exchange policies that require immediate disclosure of "material information" which captures both facts and changes related to the business of the issuer. The underlying policy objective for this distinction is to relieve issuers from having to continually update the market on external factors beyond their control. Consequently, a change external to the issuer that may affect the issuer's share price but does not result in a change in its business, operations, or capital cannot be regarded as a material change.

Notably, Markowich's appeal related to a preliminary threshold assessment under s. 138.8 of the Act, whereby a plaintiff must prove a reasonable possibility of success at trial. In its upcoming decision, the SCC will have an opportunity to clarify whether the broad interpretation applied by the ONCA applies broadly to the definition of material change, or only to the narrower statutory test under s. 138.8.

Implications of the upcoming Supreme Court decision

The current state of Canadian jurisprudence dealing with the definition of material change has led to uncertainty amongst issuers with respect to disclosure standards. It is a delicate balance to determine what information issuers share and when; too much disclosure can cause investors to lose confidence in the company, particularly if the

information is unbalanced or negative, whereas under disclosure can create secondary market legal risk.

While other rules attempt to clarify disclosure requirements for material information, such as National Policy 51-201 – *Disclosure Standards* as well as stock exchange rules, uncertainty still remains for reporting issuers as to the threshold for disclosure. Increased clarity on secondary market liability exposure has the potential to increase the efficiency and competitiveness of Canadian public markets, and market participants will be looking to the SCC's decision for guidance on disclosure decisions.

Conclusion

Ultimately, the SCC decision in Lundin Mining has the potential to affect the Canadian public markets and redefine disclosure requirements. Reporting issuers and the Canadian capital markets alike will benefit from greater clarity with respect to whether a change meets the threshold of a "material change" such that disclosure is required.

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