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May 29, 2023

Challenges in Spotting Material Changes

The philosopher Heraclitus observed that “the only constant in life is change”, a maxim as true for the business world as the natural world. Publicly traded companies operate in a dynamic environment, where commodity prices swing, new laws are passed, and scientific breakthroughs are made. So long as those companies wish to maintain their access to public markets, they must carefully consider how day-to-day happenings (and their own reactions to those events) affect their continuous disclosure obligations. These disclosure judgements are fact-specific and often fast-paced, yet they carry potentially significant consequences.

Lundin Mining Corporation faced such a decision when a rockslide occurred at its Chilean mine in October 2017. Luckily an instability in the pit wall had been detected days earlier leading to an evacuation, so there were no apparent fatalities, injuries, or damage to equipment. But the rockslide caused a suspension in the mine’s operations and affected the company’s production forecasts. Lundin disclosed the rockslide approximately one month later in a news release generally addressing the company’s “Operational Outlook”. The market reacted swiftly to the news with a one day drop of more than $1 billion in market capitalization.

A class action was brought alleging Lundin failed to make timely disclosures as required by the *Securities Act*. At the motion to certify the class action, the central question was whether the instability and rockslide were a “material fact” or a “material change”. If the events were merely material facts, then Lundin had correctly disclosed them in the ordinary course. If they were material changes, Lundin had failed to make such disclosures “forthwith”.

On a motion for leave to bring a statutory secondary market claim under the *Securities Act*, the Ontario Superior Court initially sided with Lundin. The Court held that there was no "material change" because there was no change to Lundin's line of business, Lundin did not stop operating the mind, and Lundin did not make any change to its capital structure. As such, the Court found that there was no "change in the business, operations or capital". On that basis, the Superior Court dismissed the leave motion and declined to certify the case as a class action.

In *Markowich v Lundin Mining Corporation*, the Court of Appeal for Ontario disagreed and allowed the plaintiff's appeal. The Court of Appeal held that the Superior Court's approach was an overly narrow interpretation of a "material change" that would limit the term to changes rising to the level of affecting a company's ability to conduct its business. This conflated the concepts of "material" and "change" that ought to be assessed independently.

Contrary to the motion judge's decision, the Court of Appeal held that "the distinction between material change and material fact does not focus on the magnitude of the change but, rather, on whether the change was external to the company as opposed to whether the change was in the business, operations or capital of the company". The Court held that the distinction between "material fact" and "material change" was deliberate and policy based, to relieve issuers from the burden of continually interpreting the effects of external political, economic and social developments. By contrast, the Court noted that a change in "operations" could include "an interruption in production and a change in scheduling due to an accident or equipment failure."

Here, the Court of Appeal noted Lundin's changes to its mining schedule in response to the rockslide *could* be categorized as a change. The Court further held that there was at least a reasonable possibility the plaintiff *could* establish it was a material change to Lundin's operations. Consequently, the Court of Appeal allowed the appeal and granted leave for the case to proceed under the *Securities Act*.

This case illustrates how assessing a "material fact" and "material change" can be very nuanced, fact-based, and challenging. Issuers wanting to avoid the risk of a securities class action may choose to err on the side of caution and release information as soon as possible, but this must be balanced against other risks such as making premature disclosures if the information available is incomplete or potentially unreliable. In the absence of "bright-line tests" issuers can easily be caught-up between a proverbial rock(slide) and a hard place.