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Supreme Court: Public Disclosure Must Level the Playing Field Between Companies and Investors

In *Lundin Mining Corp v Markowich*, the Supreme Court of Canada delivered a significant ruling on the scope of disclosure standards for public companies in Canada, holding that disclosure standards should be interpreted broadly and flexibly to deter informational asymmetry between issuers and investors.

Context: The Continuous Disclosure Regime in Canada

In Canada, public companies are required to provide public disclosure of material information relating to their businesses, so that investors can make informed investment decisions. Such disclosure "is the heart and soul of securities regulation across Canada" and "pivotal for 'an effective securities regime.'"

Specifically, public companies are required to disclose all "material facts" relevant to their business on a periodic basis (e.g., quarterly, annually). A "material fact" is "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities."

In addition to periodic disclosure of all "material facts," public companies are also required to provide disclosure of any "material change," which 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 the issuer." Unlike "material facts," which are disclosed only periodically, any "material change" must be disclosed immediately to ensure the market has timely disclosure of the change.

What is a "Material Change"?

On the appeal, the key question before the Court was – under the *Securities Act*, what is the test for a "material change" and how does a "material change" differ from a "material fact"?

Writing for a majority of the Court, Justice Jamal provided the following key guidance:

- **Static vs. Dynamic** – A material fact is "static," as it "provides a snapshot of an issuer's affairs at a particular point in time." By contrast, a material change is

"dynamic," as it "necessarily compares an issuer's affairs at two points in time." This distinction is reflected in the "evolution of an issuer's disclosure record," wherein an issuer will provide an initial prospectus to the market with full, true, and plain disclosure of all material facts, which it will then "update…whenever there is a material change in its business, operations or capital."

- **Material Fact Is Broader Than Material Change** – A material change must involve a "change" in the "business, operations or capital of issuer," while a material fact "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 securities being issued."
- **Internal vs. External** – "A material change must be *internal* to the issuer," meaning that "external political, economic, and social developments cannot give rise to a material change, unless the development results in a change in the business, operations or capital of the issuer, and unless the change is material."
- **Material Change Should Be Interpreted Broadly** – The legislature specifically left the terms "change", "business, "operations", and "capital" undefined, signalling an intention to allow "courts and regulators to apply the legislation broadly and flexibly as the context and circumstances require." The Court also specifically rejected the notion that a development in a company's business, operations or capital must be "substantial" or "important" to constitute a change – the legislation "simply refers to a 'change', not an important, substantial, significant, core, key, or high-level change."
- **More Than Negotiations or Internal Deliberations** – "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 not material."
- **The Distinction Represents a Balancing** – The first of two main policy reasons for the distinction between a "material fact" and a "material change" is to "balance the burdens that disclosure places on issuers with the need for investors to be informed on a timely basis of material developments in an issuer's affairs."
- **The Distinction Deters Informational Asymmetry** – The second main policy reason for the distinction between a "material fact" and a "material change" is to

"promote the purpose of securities law to remedy informational asymmetry between issuers and investors." As it is difficult for the market to otherwise become aware of internal developments in an issuer's business, operations, and capital, "requiring timely disclosure of a material change thus helps level the informational playing field between issuers and investors."

Key Takeaways: What this Means for Businesses

The Supreme Court's decision in *Lundin* reinforces a number of core principles of Canadian securities law, and offers important takeaways for public issuers:

- **Context is Key** – The Court's decision reinforces the long-standing principle in Canadian securities law that what constitutes a "material change" "is a highly contextual question" that will depend on the "unique circumstances of each case." In other words, companies should understand that what constitutes a "material change" for them will potentially be different than for other companies. Each company should make determinations based on their particular circumstances.
- **Consider Investors** – The Court's emphasis on disclosure as a means to "level the informational playing field between issuers and investors" signals strongly that, in assessing whether a "material change" has occurred in their business, operations or capital, issuers should keep in mind the larger policy goal of ensuring the market has appropriate information to make informed decisions.

Lenczner Slaght represented the intervener, CFA Societies Canada, in this important appeal.