# COURT OF APPEAL FOR ONTARIO

CITATION: Peters v. SNC-Lavalin Group Inc., 2023 ONCA 360
DATE: 20230524
DOCKET: C69762

Paciocco, George and Favreau JJ.A.

BETWEEN

John Peters

Plaintiff (Appellant/
Respondent by way of cross-appeal)

and

SNC-Lavalin Group Inc., Kevin Lynch, Neil Bruce, Sylvain Girard and Hartland Paterson

Defendants (Respondents/
Appellants by way of cross-appeal)

Jay Strosberg and Scott Robinson, for the appellant/respondent by way of cross-appeal

Katherine L. Kay, Daniel S. Murdoch, Sinziana R. Hennig and Hesam Wafaei, for the respondents/appellants by way of cross-appeal

Tina Q. Yang and Margaret Waddell, for the Law Foundation of Ontario, respondent by way of cross-appeal

Heard: November 8, 2022

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated July 16, 2021, with reasons reported at 2021 ONSC 5021, and from the costs order, dated September 17, 2021 with reasons reported at 2021 ONSC 6161.

**Favreau J.A.:**

## A. OVERVIEW

[1] The appellant, John Peters, sought leave under s. 138.8, Part XXIII.1, of the *Securities Act*, R.S.O. 1990, c. S.5, to bring a statutory cause of action against SNC-Lavalin Group Inc. ("SNC") and some of its former executives. Mr. Peters alleged that SNC and the other defendants failed to disclose "forthwith" a material change in SNC's "business, operations or capital" as required under ss. 75(1), 138.1 and 138.3(4) of the *Securities Act*.

[2] Mr. Peters also sought certification of a class action under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, advancing claims on behalf of certain shareholders of SNC based on: i) the statutory cause of action under the *Securities Act*; and ii) negligent misrepresentation at common law.

[3] The motion judge dismissed Mr. Peters's motions. The "change" Mr. Peters alleged SNC had an obligation to disclose was the content of a telephone call on September 4, 2018, when the Department of Public Prosecutions Services of Canada (the "PPSC") advised SNC that it would not be invited to negotiate a remediation agreement under Part XXII.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, which would have resolved a pending prosecution against SNC for fraud and corruption.

[4] The motion judge concluded that leave should not be granted to bring a statutory cause of action because there was no reasonable possibility, based on a

plausible interpretation of the *Securities Act* and credible evidence, that the September 4, 2018 call represented a change in SNC's business, operations or capital. Specifically, SNC faced the prospect of prosecution before the call and SNC continued to face the prospect of prosecution after the call. SNC had publicly disclosed the risk of prosecution on many occasions. In addition, even after the call, the PPSC agreed to receive further submissions from SNC on the request for a remediation agreement. It was only on October 9, 2018 that the PPSC said that it did not accept SNC's submissions, and the following day, on October 10, 2018, SNC made a public disclosure about the PPSC's position on a remediation agreement. The motion judge held that, in all the circumstances, there was no reasonable possibility that a court would find at trial that the September 4, 2018 call constituted a change in SNC's business, operations or capital.

[5] As the motion judge did not grant leave, he declined to certify the statutory cause of action as a class proceeding. The motion judge also concluded that the common law claim in negligent misrepresentation was not suitable for certification because the issue of reliance could not be decided on a class basis. Unlike the statutory cause of action, there is no deemed reliance at common law.

[6] On appeal, Mr. Peters no longer seeks to pursue the claim for negligent misrepresentation at common law. The appeal is therefore restricted to the motion judge's refusal to grant leave to the statutory cause of action under the *Securities Act* and to certify that claim as a class proceeding.

[7] Mr. Peters argues that the motion judge erred in his interpretation of "change" and erred in finding that the September 4, 2018 call was not a material change. Mr. Peters argues that, at the very least, the motion judge improperly applied the test for leave. At this stage of the proceedings, Mr. Peters claims that he offered a plausible interpretation of "change" and, based on additional evidence that may become available at trial from the Government of Canada, there was a reasonable possibility of success.

[8] As set out below, I have concluded that the motion judge made no errors. For the purpose of the motion, the motion judge adopted a very broad and generous definition of "change". However, he found that, even adopting that broad definition, the September 4, 2018 call could not be seen as a change in SNC's business, operations or capital. Therefore, there was no reasonable possibility that SNC would succeed at trial. The motion judge made no legal error in adopting an expansive definition of "change". In addition, his application of the legal test for leave is entitled to deference and I see no error in his finding that, based on the largely uncontested evidence in this case, Mr. Peters had no reasonable prospect of success at trial. I would therefore dismiss the appeal.

[9] SNC seeks leave to cross-appeal the motion judge's costs order. The motion judge awarded costs in the amount of $285,000 to SNC. He reduced the costs sought by SNC of $363,184 on the basis that the case raised issues of legal novelty and public interest. SNC argues that the motion judge erred in finding that the case

was legally novel and raised matters of public importance. I would dismiss SNC's motion to appeal the costs order. The motion judge's decision to reduce the amount of costs was discretionary and this is not a case in which the motion judge made any obvious errors.

[10] This decision is being released at the same time as this court's decision in *Markowich v. Lundin Mining Corporation*, 2023 ONCA 359, which also deals with the interpretation of "material change", and specifically the meaning of "change in the business, operations or capital" as defined in s. 1(1) of the *Securities Act.*

## B. BACKGROUND

### (1) The parties

[11] SNC is a Canadian company that provides engineering and project management services throughout the world. SNC has its headquarters in Montreal, Quebec, and has offices around the world. The individually named defendants were SNC executives at the relevant time.

[12] Mr. Peters is a professional engineer who lives in Ontario. He held shares in SNC at the relevant time, which is between September 4, 2018 and October 10, 2018.

**(2) The prosecution against SNC**

[13] The proposed action arises from a prosecution against SNC and two of its subsidiaries in relation to the companies' activities in Libya. For context, I provide a high-level summary of the events leading to the prosecution.

[14] In 2011, the Royal Canadian Mounted Police (the "RCMP") and the World Bank started investigating SNC in relation to the company's activities in Bangladesh and Africa.

[15] On March 26, 2012, SNC announced that it had conducted an internal investigation that resulted in the termination of two high level employees.

[16] On April 13, 2012, the RCMP executed a search warrant at SNC's headquarters in Montreal.

[17] On August 3, 2012, SNC disclosed that the RCMP had laid charges against its two former employees, under the *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34.

[18] On August 3, 2012, SNC also disclosed that the World Bank had temporarily suspended the ability of one of SNC's subsidiaries to bid on new World Bank Projects. On April 17, 2013, SNC announced that it had reached a settlement with the World Bank that precluded it from bidding on any World Bank subsidized projects for a period of 10 years.

[19] On March 6, 2014, SNC disclosed that the RCMP was investigating whether the company had violated the *Corruption of Foreign Public Officials Act* by making improper payments to government officials in Bangladesh and Africa.

[20] On February 19, 2015, the RCMP charged SNC and two of its related companies, SNC International and SNC Construction, with one count of fraud under s. 380 of the *Criminal Code*, R.S.C. 1985, c. C-46, and one count of corruption under s. 3(1)(b) of the *Corruption of Foreign Public Officials Act*. The charges alleged that, between 2001 and 2011, SNC paid public officials in Libya over $47 million to influence government decisions and defraud Lybian organizations of approximately $130 million.

[21] On March 5, 2015, SNC issued a press release in which it acknowledged that the charges could have a significant negative impact on SNC's reputation and ability to do business, including the possibility of being barred from bidding on projects in Canada for up to 10 years (referred to as "debarment"):

> The 2015 outlook also assumes that the federal charges laid against the Company and its indirect subsidiaries SNC-Lavalin International Inc. and SNC-Lavalin Construction Inc. on February 19, 2015 will not have a significant adverse impact on the Company's business in 2015. If these assumptions are inaccurate, the Company's actual results could differ materially from those expressed in or applied by these forward-looking statements…<u>these charges and investigations, and potential results thereof, could harm the Company's reputation, result in suspension, prohibition or debarment of the Company from participating in certain projects,</u>

> reduce its revenue and net income and adversely affect its business. [Emphasis added.]

[22] There is no dispute that a successful prosecution and debarment would have had a devastating impact on SNC.

[23] After the initial disclosure in 2015, SNC's regular filings consistently disclosed the uncertainty caused by the pending prosecutions.

### (3) Amendments to the *Criminal Code* allowing remediation agreements

[24] Remediation agreements, which are also referred to as "deferred prosecution agreements", refer to a regime for resolving criminal prosecutions against organizations, including corporations. Typically, remediation agreements allow the organization to continue operating while requiring the organization to abide by certain conditions.

[25] At the time the charges were laid against SNC, the *Criminal Code* did not allow for remediation agreements. After the charges were laid, starting in February 2016, SNC engaged in active lobbying efforts to encourage the Federal government to amend the *Criminal Code* to allow for remediation agreements.

[26] On February 22, 2018, the Federal government announced that it intended to introduce amendments to the *Criminal Code* that would enact a remediation agreement regime. Bill C-74, which introduced the amendments, received royal assent on June 21, 2018 and came into force on September 19, 2018.

[27] Part XXII.1 of the *Criminal Code* sets out the remediation agreement regime. The relevant provisions allow a prosecutor to negotiate a remediation agreement with an organization facing criminal charges under certain circumstances. The effect of a remediation agreement is that the criminal prosecution is suspended in exchange for the organization agreeing to abide by specified conditions.

[28] Section 715.3(1) defines a remediation agreement as follows:

> ***remediation agreement*** means an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement.

[29] Section 715.31 of the *Criminal Code* sets out the purposes of the remediation agreement regime. These include denouncing an organization's wrongdoing and holding the organization accountable, while reducing the negative consequences of the wrongdoing for people who did not engage in the criminal behaviour, such as employees and pensioners.

[30] Section 715.32(1) of the *Criminal Code* sets out the conditions that must be met for a prosecutor to enter into negotiations of a remediation agreement with an organization facing criminal prosecution. The conditions include a requirement that the prosecutor is of the opinion that there is a reasonable prospect of conviction and that "negotiating the agreement is in the public interest and appropriate in the circumstances". The Attorney General must also consent to negotiation of the agreement.

[31] Section 715.32(2) specifies the factors a prosecutor must consider when deciding whether it is in the public interest and appropriate in the circumstances to negotiate a remediation agreement. These factors include the gravity of the alleged offences, whether the allegations involve senior officials of the organization and the degree of their involvement, any disciplinary steps the organization has taken to deal with the conduct and any reparations the organization has made. Section 715.32(3) specifies that, when considering whether it is in the public interest and appropriate to negotiate a remediation agreement involving allegations that an organization committed an offence under ss. 2 or 3 of the *Corruption of Foreign Public Officials Act*, the prosecutor is not to consider "the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved".

[32] Finally, s. 715.33(1) of the *Criminal Code* provides that a prosecutor who wishes to negotiate a remediation agreement must give written notice, that includes specified information, to the organization.

### (4) Discussions between SNC and the prosecutors about SNC's request to be invited to negotiate a remediation agreement

[33] After the introduction of Bill C-74, but before it was passed or came into force, SNC's counsel began communications with prosecutors at the PPSC with a view to getting SNC invited to negotiate a remediation agreement. Those

communications started in February 2018 and ended on October 9, 2018. Mr. Peters's claim focuses on a telephone call that took place on September 4, 2018 in the context of those discussions, which he says SNC should have disclosed to the public. This section of the reasons provides an overview of the communications during the relevant period.

[34] The counsel for SNC who were primarily involved in these communications were retired justice of the Supreme Court of Canada Frank Iacobucci and William McNamara, a partner with Tory's LLP. For ease of reference, I will refer to "SNC's counsel" when referring to Mr. Iacobucci and/or Mr. McNamara.

[35] Throughout the relevant time, SNC's counsel communicated primarily with Richard Roy, General Counsel at the PPSC, and Anne-Marie Manoukian, a lawyer at the PPSC. For ease of reference, I will refer to the "prosecutors" or the "prosecutor" when referring to Mr. Roy and/or Ms. Manoukian.

[36] SNC's counsel and the prosecutors held a first meeting on April 10, 2018. At the time, the prosecutors expressed their view that discussions about a potential remediation agreement were premature because Bill C-74 had not yet come into force. Nevertheless, it was agreed that any meetings and communications about a potential remediation agreement were confidential. SNC did not disclose the meeting to the public.

[37] After June 21, 2018, when Bill C-74 received royal assent, there were further communications between SNC's counsel and the prosecutors. On July 18 and July 19, 2018, SNC's counsel sent information to the prosecutors, including about its dealings with the World Bank, ethics training it had provided to its board of directors and senior managers, and projects SNC lost due to the criminal charges. On July 26, 2018, SNC's counsel and the prosecutors had a meeting to discuss the prospects that the PPSC would invite SNC to negotiate a remediation agreement. On August 13, 2018, SNC's counsel provided further information in writing regarding its dealings with the RCMP and other authorities since 2012.

[38] By September 4, 2018, Kathleen Roussel, the Director of Public Prosecutions ("DPP") at the PPSC, had prepared a memorandum for the purpose of informing the Attorney General that she had decided not to invite SNC to negotiate a remediation agreement. Ms. Roussel prepared the memorandum in compliance with her obligations under s. 13 of the *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s. 121, which requires the Director to inform the Attorney General "in a timely manner of any prosecution, or intervention that the Director intends to make, that raises important questions of general interest". In her memorandum, Ms. Roussel concluded that "the DPP is of the view that an invitation to negotiate will not be made in this case. No announcement will be made by the PPSC". The memorandum was not disclosed to SNC at the time it was prepared.

[39] However, on September 4, 2018, the prosecutors contacted SNC's counsel to advise that the PPSC did not intend to invite SNC to negotiate a remediation agreement. During the call, SNC's counsel asked for an explanation for the decision. The prosecutors said that they would seek instructions about whether they could provide SNC with the rationale for not inviting SNC to negotiate a remediation agreement.

[40] The next day, on September 5, 2018, one of the prosecutors and SNC's counsel held a telephone call in which the prosecutor explained that SNC would not be invited to negotiate a remediation agreement for two reasons: a) the "nature and gravity" of the alleged offences and b) the "degree of involvement of senior officers in the organization". However, the prosecutor advised SNC's counsel that the PPSC would be prepared to receive additional submissions on these two issues.

[41] Following this telephone conversation, there were further communications between SNC's counsel and the prosecutors. On September 7, 2018, SNC's counsel sent a lengthy letter to the prosecutors setting out the company's position on the benefits of a remediation agreement and addressing the issues raised in the phone call of September 5, 2018. On September 10, 2018, counsel for SNC and one of the prosecutors had a follow-up discussion during which counsel for SNC asked whether there was any additional information SNC could provide and whether the PPSC would be prepared to meet in person. On September 12, 2018,

the parties held a further telephone conversation, during which the prosecutor asked for additional information about SNC's submission that a conviction could be "life-threatening" and about the allegation in the criminal prosecution that the highest level of management at SNC knew about the alleged wrongdoing. SNC's counsel responded to this request for additional information in a lengthy letter dated September 17, 2018. There were additional written and telephone communications between the parties on September 20, 2018. On September 26, 2018, the prosecutor informed SNC's counsel that he expected to deliver a final decision later that week on whether the PPSC would invite SNC to negotiate a remediation agreement. On September 27, 2018, SNC's counsel also provided the prosecutors with a copy of a presentation SNC had prepared for the Department of Finance on the public interest in a remediation agreement.

[42] In the meantime, besides the communications between SNC's counsel and the prosecutors, there were communications within the Federal government about SNC's request to be invited to negotiate a remediation agreement. On September 11, 2018, the Attorney General at that time, Jodie Wilson-Raybould, having reviewed the memorandum prepared by Ms. Roussel, decided that she would not intervene in SNC's request to be invited to negotiate a remediation agreement. On September 17, 2018, Prime Minister Justin Trudeau asked Attorney-General Wilson-Raybould to "help find a solution" to the situation with SNC. Attorney-General Wilson-Raybould advised the Prime Minister that she had

considered the matter and decided not to intervene. These communications between the Prime Minister and the Attorney-General were not disclosed to SNC nor were they known to SNC at the time.

[43] Ultimately, in a letter dated October 9, 2018, the prosecutors advised SNC's counsel that the PPSC had completed its review of all materials, including the additional materials submitted by SNC between September 7 and 27, 2018, and that SNC would not be invited to negotiate a remediation agreement. They also advised that the PPSC would not agree to an in-person meeting with SNC to discuss the matter any further.

**(5) The public disclosure on October 10, 2018 and its consequences**

[44] On October 10, 2018, SNC issued a press release in which it disclosed that it had been advised by the PPSC that it would not invite SNC to negotiate a remediation agreement.

[45] On the morning of October 10, 2018, following issuance of the press release, trading of SNC's securities was temporarily suspended on the TSX. Trading resumed later that day. By the close of trading on October 10, 2018, almost 1.6 million of SNC's shares had been traded. The price of SNC's shares dropped from $51.88 per share to $44.96 per share, representing a decline of over 13% and a loss of over $600 million in market capitalization.

[46] Following the PPSC's decision not to invite SNC to negotiate a remediation agreement, SNC brought an application for judicial review in the Federal Court challenging the decision. On March 8, 2019, the Federal Court dismissed the application on the basis that the decision was a matter of prosecutorial discretion that was not subject to judicial review: *SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service)*, 2019 FC 282, [2019] 3 F.C.R. 327.

[47] On May 29, 2019, the Court of Quebec decided that there was sufficient evidence for the prosecution against SNC and its affiliated companies to be committed to trial. At that time, it was anticipated that the trial would take place in 2019 or 2020.

[48] On December 18, 2019, SNC issued a press release announcing a settlement of the criminal charges. As part of the settlement, SNC Construction agreed to pay a $280 million fine and to be subject to a three-year probation. As this settlement did not include a conviction of SNC but only its subsidiary, there was no bar against SNC participating in government projects.

**(6) The claim against SNC**

[49] Mr. Peters commenced an action against SNC and the other defendants in February 2019.

[50] By the time the motions for leave and certification were heard, the statement of claim had been amended to a Fresh as Amended Statement of Claim dated

October 2, 2019. (Accordingly, all references to the “statement of claim” or the “claim” are references to the Fresh as Amended Statement of Claim).

[51] In the claim, Mr. Peters alleges that SNC and the other defendants failed to make timely disclosure of the September 4, 2018 phone call in which the PPSC advised SNC that it would not invite SNC to negotiate a remediation agreement. Mr. Peters claims that this was a breach of SNC’s obligations to disclose a material change forthwith pursuant to s. 75 of the *Securities Act.* Mr. Peters also alleges that the failure to disclose this information at the time it was communicated constitutes negligent misrepresentation at common law, although he no longer seeks to pursue this cause of action on appeal.

[52] Mr. Peters proposed to bring a class proceeding on behalf of all persons who acquired SNC securities from September 4, 2018 to the time of the trading halt on October 10, 2018. He seeks damages in the amount of $75 million on behalf of the class.

**(7) The motion judge’s decision**

[53] The motion judge dismissed the motions for leave under s. 138.8 of the *Securities Act* and for certification under the *Class Proceedings Act, 1992*.

[54] After reviewing the evidence, including expert evidence, the motion judge first dealt with the motion for leave under the *Securities Act*. The motion judge noted that there was no dispute that the action was brought in good faith, one of

the leave requirements. Rather, the focus of his analysis was on whether there was a reasonable possibility that Mr. Peters and the proposed class could establish that the September 4, 2018 call was a material change such that it had to be disclosed forthwith. Specifically, the motion judge focused on whether the call was a "change in the business, operations or capital", as required by the first part of the definition of "material change" in s. 1(1) of the *Securities Act*.

[55] In his reasoning, the motion judge separately considered whether the call was a "change", and whether it was a "change in the business, operations or capital" of SNC. He found that the call could not be characterized as a "change" for several related reasons.

[56] First, he found that the call did not change SNC's risk. Prior to the call, SNC faced the prospect of prosecution and, after the call, SNC still faced the prospect of prosecution. SNC hoped to be invited to negotiate a remediation agreement, but there was no certainty that this could be achieved nor had SNC publicly suggested that this was certain:

> I agree that Mr. Peters has mischaracterized the business risk that allegedly was not disclosed. Apart from the oddity of characterizing the prospects of a good outcome (obtaining a Remediation Agreement) as a risk, there never was a material change in SNC's prospects of achieving a Remediation Agreement, which always was problematic and uncertain. SNC never presumed that it would inevitably achieve a Remediation Agreement. All that the investors, analysts, the media, and the public knew was that SNC was eager and anxious to negotiate

> a Remediation Agreement. The factual record of the herculean efforts being made by Settlement Counsel belies presumptuousness of achieving a Remediation Agreement.
>
> There never was a sure thing or a done deal for a Remediation Agreement, and the message received by SNC on September 4, 2018 did not change SNC's prospects of: (a) being convicted and debarred; (b) acquitted and not debarred; or (c) being invited to negotiate a Remediation Agreement, which was never a sure thing or a done deal. All the message of September 4, 2018 did was maintain the *status quo*… [Emphasis added.]

[57] Second, the motion judge accepted SNC's argument that the September 4, 2018 call was not a change because it did not close the door to the possibility that SNC could still be invited to negotiate a remediation agreement. He stated that the September 4, 2018 call "was part of a dynamic ongoing situation", after which there were ongoing communications between SNC and the PPSC about SNC's request to be invited to negotiate a remediation agreement.

[58] Third, the motion judge accepted SNC's argument that the September 4, 2018 call was not a change because it amounted to "old news". What SNC learned from the call was not different from the information that was publicly available at that time:

> [I]nvestors, investment advisors, market analysts and the business and general and social media all knew: (a) that SNC was exposed to conviction and the possibility to debarment; (b) that debarment would be disastrous; (c) that SNC was eager and anxious to be invited to negotiate a Remediation Agreement; and (d) that SNC

> had not yet been invited to negotiate a Remediation Agreement. If that is what investors, investment advisers, market analysts, and the business and general and social media knew, then the message of September 4, 2018 was not a change from the old news. There was no material change from the *status quo.*

[59] Having decided that there was no reasonable possibility that Mr. Peters could establish that the September 4, 2023 phone call was a "change", the motion judge nevertheless went on to consider whether it could be a "change in the business, operations, or capital of SNC" (emphasis added). He concluded that the September 4, 2018 call did not change SNC's business, operations or capital:

> On September 4, 2018 and on October 10, 2018, there was no conviction, no debarment, no change to SNC's efforts to obtain an invitation to negotiate, and most pertinently there was no change to SNC's business, operations, or capital.

[60] After addressing the motion for leave, the motion judge addressed the motion for certification under the *Class Proceedings Act, 1992*. He held that, given that he did not grant leave to the statutory cause of action under the *Securities Act*, that aspect of the claim should not be certified.

[61] Having denied leave to the claim for untimely disclosure under the *Securities Act* and having found that the claim for negligent misrepresentation should not be certified as a class proceeding, the motion judge dismissed the motions.

### (8) The motion judge's costs decision

[62] In a decision dated September 17, 2021, the motion judge awarded $285,000 in costs to SNC.

[63] SNC had sought $363,184 in costs. The motion judge found that this amount was fair and reasonable "[h]aving regard to comparable leave and certification motions". However, relying on s. 31(1) of the *Class Proceedings Act, 1992*, he found that a reduction in the costs sought by SNC was warranted because of the "novelty and public importance" of the case.

## C. ISSUES AND ANALYSIS IN MR. PETERS'S APPEAL

[64] Mr. Peters's appeal focuses on the motion judge's decision not to grant leave to the statutory claim under s. 138.8 of the *Securities Act*.

[65] Mr. Peters makes several arguments that I would summarize as follows:

a. The motion judge erred in finding that the September 4, 2018 call was not a "change" within the meaning of "material change" because he adopted an overly narrow interpretation of "change" and did not consider that a "change" could include the risk of a change in SNC's business, operations or capital;

b. The motion judge erred in failing to find that the September 4, 2018 call was "material" within the meaning of "material change"; and

c. The motion judge misapplied the test for leave by making findings of fact that should be left for trial.

[66] In my view, the motion judge did not make any of the alleged errors. I start with a review of the legislated disclosure requirements, followed by a review of the test on a leave motion and I then address the three issues raised by Mr. Peters.

**(1) Standard of review**

[67] The standard of review on a question of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Questions of fact or mixed fact and law that do not raise an extricable question of law are to be reviewed on a standard of palpable and overriding error: *Housen*, at paras. 10 and 36. However, where an error of mixed fact and law can be attributed to the application of an incorrect standard, a mischaracterization of a legal test or a similar error in principle, this is an error of law, reviewable on a correctness standard of review: *Housen*, at paras. 33 and 36; *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641, 132 O.R. (3d) 161, at para. 37.

**(2) Disclosure obligations under s. 75(1) of the *Securities Act***

[68] Section 75(1) of the *Securities Act* requires a reporting issuer to "forthwith issue and file a news release" in circumstances "where a material change occurs in the affairs of [the] reporting issuer" (emphasis added). In addition, s. 75(2) requires the reporting issuer to "file a report of such material change in accordance

with the regulations as soon as practicable and in any event within ten days of the date on which the change occurs".

[69] Section 1(1) of the *Securities Act* defines "material change" in relation to a reporting issuer as:

> (i) 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 [Emphasis added.]

[70] Section 1(1) of the *Securities Act* also defines "material fact". In contrast with "material change", 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". The *Securities Act* imposes various disclosure obligations on issuers with respect to material facts, but, unlike material changes, issuers are not required to disclose material facts "forthwith" at the time they are known.

[71] In *Kerr v. Danier Leather*, 2007 SCC 44, [2007] 3 S.C.R. 331, at para. 32, the Supreme Court emphasized that the *Securities Act* is "remedial legislation" that is to be given a broad interpretation. The *Securities Act* protects investors by imposing disclosure obligations. At the same time, it limits the burden placed on issuers by requiring forthwith disclosure of material changes but not of material facts.

[72] While this case is concerned with the interpretation and application of "material change", the distinction between "material change" and "material fact" is

relevant to understanding the meaning of “material change”. In *Kerr*, at para. 38, the Supreme Court stated that the distinction between a material change and a material fact is “deliberate and policy-based”. The court explained the difference between a material change and a material fact by relying on a statement made by a former chairman of the Ontario Securities Commission (“OSC”):

> The term “material fact” is necessary when an issuer is publishing a disclosure document, such as a prospectus or a take-over bid circular, where all material information concerning the issuer at a point in time is published in one document which is convenient to the investor. The term “material change” is limited to a change in the business, operations or capital of the issuer. This is an attempt to relieve reporting issuers of the obligation to continually interpret external political, economic and social developments as they affect the affairs of the issuer, unless the external change will result in a change in the business, operations or capital of the issuer, in which case, timely disclosure of the change must be made. [Emphasis in original.]

[73] The issue of whether there has been a material change requires a two-step analysis. First, the court must determine whether there has been a change in the business, operations or capital of the issuer. Second, the court must determine whether the change was material, in the sense that it would be expected to have a significant impact on the value of the issuer’s shares: *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, at para. 40; *Cornish v. OSC*, 2013 ONSC 1310, 306 O.A.C. 107 (Div. Ct.), at para. 46.

[74] In *Markowich*, at para. 80, I explained the distinction between the two parts in the definition of material change as follows:

> The case law has established that the definition of "change" was not meant to include its magnitude, but rather its qualitative nature. Changes external to an issuer that may affect share prices but that do not result in a change in the business, operations or capital cannot qualify as a material change. However, changes in the business, operations or capital of an issuer can qualify as a material change as long as they are "material" in the sense that they "would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer".

[75] On this appeal, Mr. Peters argues that the motion judge erred in his interpretation and application of both parts of the definition of "material change", specifically in the context of a motion for leave to proceed with the statutory cause of action.

**(3) Statutory cause of action and test for leave under s. 138.8 of the *Securities Act***

[76] Section 138.3(4) of the *Securities Act* creates a statutory right of action against an issuer who fails to make a timely disclosure. The action can be brought by "a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act or the regulations and the subsequent disclosure of the material change". The statutory cause of action does not require proof of reliance.

[77] While s. 138.3(4) of the *Securities Act* creates a statutory cause of action that eliminates the need to prove reliance, to guard against strike suits, s. 138.8(1) of the *Securities Act* requires that a party obtain leave of the court before proceeding with a claim: see *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, at paras. 67-69; *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719, 137 O.R. (3d) 241, leave to appeal refused, [2017] S.C.C.A. No. 443, at paras. 36-38. The statutory test for leave provides that the court is only to grant leave if it is satisfied that: (a) the action is being brought in good faith, and (b) there is a reasonable possibility that the action will be resolved in favour of the plaintiff at trial.

[78] In *Theratechnologies Inc.*, at paras. 38-39, the Supreme Court explained, in relation to the same provision in the equivalent Quebec statute, that the "reasonable possibility" branch of the test for leave is meant to be "more than a speed-bump" but not meant to be a "mini-trial". When seeking leave, a plaintiff must "offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim": at para. 39. The court explained the rationale for these requirements as follows:

> A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success – and the time and expense they impose – are

> avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What *is* required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour. [Emphasis added.]

[79] In *Rahimi*, at para. 48, this court emphasized that, on a motion for leave under s. 138.8 of the *Securities Act*, a motion judge is to engage in some weighing of the evidence, but this is also to include consideration of the evidence not available at this early stage of the proceeding:

> To be clear, the motion judge's duty to scrutinize the entire record is not restricted to a review of the evidence filed on the motion. The motion judge is also obligated to consider what evidence is not before her. She must be cognizant of the fact that, at the leave stage, full production has not been made and the defendant may have relevant documentation that has not been produced or relevant evidence that has not been tendered. Consideration of these evidential limitations of the leave stage is important because they can work to the prejudice of plaintiffs who have potentially meritorious claims. [Emphasis added.]

**(4) The motion judge did not err in his interpretation of "change"**

[80] Mr. Peters submits that the motion judge erred in his interpretation of the word "change" used in the context of "material change". Mr. Peters argues that the motion judge adopted an overly narrow definition of "change" in the context of a motion for leave under the *Securities Act*, including that he failed to account for the fact that a "change in the business, operations or capital" can include a change in risk to an organization's business, operations or capital.

[81] I do not accept that the motion judge made any such errors. Contrary to the argument made by Mr. Peters, the motion judge adopted a very expansive definition of "change" and he explicitly accepted that a "change in business, operations or capital" can include a change in risk to an issuer's business, operations or capital. While Mr. Peters has framed his disagreement with the motion judge's consideration of whether the September 4, 2018 call was a change in SNC's business, operations or capital as an error of law, in my view, the real focus of his argument is on the motion judge's application of his interpretation of those terms to the circumstances of this case.

[82] Below, I start with a discussion of the motion judge's interpretation of the terms "change in business, operations or capital". I then address Mr. Peters's argument that the motion judge erred in failing to consider that the concept of change includes a change in risk to an organization's business, operations or

capital. I then consider Mr. Peters's real complaint, which is that the motion judge erred in finding there was no reasonable possibility that he could establish at trial that the September 4, 2018 call was a change in SNC's business, operations or capital.

**a) The motion judge properly adopted an expansive definition of "change"**

[83] While Mr. Peters submits that the motion judge erred in relying on an overly narrow interpretation of "change in the business, operations or capital", it is evident from the motion judge's decision that he adopted an expansive and generous approach to these terms. In effect, the motion judge conducted a thorough review of the available case law on the issue and committed no legal errors in his approach to these terms.

[84] Consistent with *Kerr*, the motion judge emphasized the distinction between a material change and a material fact, recognizing that this distinction was "a deliberate and policy-based legislative decision to relieve reporting issuers of the obligation to continually interpret external political, economic, and social developments as they affect the affairs of the issuer, unless the external change will result in a change in the business, operations or capital of the issuer, in which case, timely disclosure of the change must be made." He also emphasized that the meaning of "change" is fact-specific and that there is no "bright-line test".

[85] Relying on a policy statement from the TSX, the motion judge gave examples of the breadth of what may qualify as a change in the business, operations or capital of an issuer:

> The Ontario *Securities Act* does not stipulate what are the matters for which a change might be material. The TSX "*Policy Statement on Timely Disclosure*" provides examples of things that might affect an issuer's business, operations, or capital including: (a) development of new products; (b) developments affecting the company's resources, technology, products or market" (c) entering into a significant contract; (d) losing a significant contract; (e) significant litigation; and (f) other developments connected to the business and affairs of the issuer that would reasonably be expected to significantly affect the market price or value of any of the issuer's securities; or (g) other developments connected to the business and affairs of the issuer that would reasonably be expected to have a significant influence on a reasonable investor's investment decisions.

[86] The motion judge also offered a very expansive definition of the word "change" itself:

> Change encompasses alteration, amendment, conversion, contraction, development, difference, discovery, detection, disruption, divergence, expansion, innovation, makeover, metamorphosis, modernization, modification, renewal, renovation, reversal, revelation, revolution, transition, or transformation. The opposite of change is constancy, continuance, endlessness, immutability, permanence, perpetuity, prolongation, stability, and the *status quo*. Common experience reveals that sometimes change in philosophy, physics, and law is incremental and sometimes change is paradigm shifting. Common experience reveals that sometimes change happens instantly and perceptibly and sometimes change happens progressively and

> imperceptibly until it is perceived by some benchmark of difference.

[87] Ultimately, the only limit the motion judge placed on what could constitute a "change" in the definition of "material change", are the qualifying words in the definition itself to the effect that the change must be "in the business, operations or capital". In other words, external circumstances that may affect share prices but that do not effect a change in an issuer's business, operations or capital do not qualify as change within the meaning of material changes. This approach is entirely consistent with *Kerr*, at paras. 46-47, and *Theratechnologies*, at paras. 50-51.

[88] It is also worth contrasting the motion judge's analysis with the approach taken by Glustein J. in *Markowich v. Lundin Mining Corporation,* 2022 ONSC 81. As set out in the decision released at the same time as this decision, this court found that Glustein J. adopted an overly narrow approach to the terms "change in the business, operations or capital", because he inserted consideration of the magnitude of the change as part of the determination; instead, as I explained in that decision, the issue of the magnitude of the change is to be considered in the second part of the analysis, when determining whether a change was "material" in the sense that it "would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer".

[89] Here, the motion judge made no such error. His interpretation of the term "change" was expansive, consistent with existing case law and properly focused

on whether the September 4, 2018 call constituted a change in SNC's business, operations or capital.

**b) The motion judge did consider that a change includes a change in risk**

[90] As part of his argument that the motion judge interpreted "change" too narrowly, Mr. Peters says that the motion judge failed to consider that a change could include a change in risk. However, it is evident from the motion judge's reasons that he did consider that the obligation to disclose a material change under the *Securities Act* includes an obligation to disclose a material change in risk in an organization's business, operations or capital. He simply did not accept, based on the largely uncontested evidence before him, that the September 4, 2018 call could reasonably be found at trial to constitute a change in the risk SNC's business faced. I see no reversible errors in his reasoning.

[91] As a starting point, it is important to note that SNC does not dispute that a change in risk in its business, operations or capital could constitute a material change for the purpose of the *Securities Act*. In effect, this position is consistent with the decision in *Rex Diamond Mining Corporation et al.*, 2008 ONSEC 18, aff'd 2010 ONSC 3926 (Div. Ct.), cited by the motion judge and cited in other Superior Court decisions to explain the scope and meaning of "material change": see e.g., *Cornish*, at para. 56; *Mask*, at para. 57; *Coffin v Atlantic Power Corp.*, 2015 ONSC

3686, 127 O.R. (3d) 199, at para. 105; *Paniccia v. MDC Partners Inc.*, 2018 ONSC 3470, 142 O.R. (3d) 421, at para. 77. In *Rex Diamond*, the defendant ("Rex") was a diamond mining company. Rex had received several warning letters indicating that its leases for diamond mines in Sierra Leone were going to be cancelled if it failed to comply with certain terms. The notices gave rise to "a very possible risk" (emphasis added) that the leases would be cancelled: *Rex Diamond*, at para. 211. However, these notices were not disclosed to securities holders.

[92] The Ontario Securities Commission (the "OSC"), as affirmed by the Divisional Court, found that the final notice constituted a material change and triggered statutory obligations to disclose forthwith pursuant to s. 75 of the *Securities Act*. The OSC explained that the letters demonstrated a significant possibility that the operations on the property would be halted. This significant possibility was reinforced by the notice of tender and the commencement of the tender evaluation process. Since "the loss of the Sierra Leone Leases eliminated any potential for Rex to generate future revenue from these operations", the OSC concluded that the final notice constituted a change in operations: *Rex Diamond*, at para. 218.

[93] In his decision, the motion judge made clear that he accepted that a change in the risk faced by SNC's business, operations or capital could constitute a material change. However, he did not accept Mr. Peters's characterization of the

September 4, 2018 call as a change in the risk in SNC's business, operations or capital.

[94] The motion judge made clear that he understood that a change can include a change in risk. This is evident from his discussion of the cases and legal principles at issue. For example, in his discussion of *Rex Diamond*, the motion judge distinguished between the business "risk" faced by SNC and the "risk" faced by Rex. He noted that, unlike in *Rex Diamond*, "Mr. Peters was unable to connect the evidence to a change or changed risk to SNC's business, operations, or capital given that SNC had already disclosed the risk associated with conviction" (emphasis added).

[95] Further, the motion judge made clear that he understood Mr. Peters's position that the September 4, 2018 call constituted a change in risk to SNC's business. However, he did not accept that characterization:

> SNC does not dispute that a significant change in business risk can establish a material fact or a material change. However, it disputes Mr. Peters' characterization of the change of business risk in the immediate case as "SNC went from a presumption of [deferred prosecution agreement] in one minute, to a presumption of no [deferred prosecution agreement] in the next."
>
> SNC characterizes the business risk in the immediate case as the risk of a criminal conviction along with the associated consequence of debarment. Thus, SNC argues that it had numerous times already disclosed the risk of conviction and the message of September 4, 2018 did not change its risk of conviction and the associated consequence of debarment. SNC submits that there

> never was a change in risk of debarment or a change in the magnitude of SNC's risk of debarment. Further, SNC submits that there never was a change in SNC's prospects of avoiding debarment or in the magnitude of SNC's prospects of risk avoidance through a Remediation Agreement.
>
> I agree that Mr. Peters has mischaracterized the business risk that allegedly was not disclosed. Apart from the oddity of characterizing the prospects of a good outcome (obtaining a Remediation Agreement) as a risk, there never was a material change in SNC's prospects of achieving a Remediation Agreement, which always was problematic and uncertain. SNC never presumed that it would inevitably achieve a Remediation Agreement. All that the investors, the analysts, the media, and the public knew was that SNC was eager and anxious to negotiate a Remediation Agreement. The factual record of the herculean efforts being made by Settlement Counsel belies presumptuousness of achieving a Remediation Agreement. [Emphasis added.]

[96] Accordingly, the motion judge made no legal error in his interpretation of "change in the business, operations or capital". He accepted that a change could include a change in risk.

**c) The motion judge did not make a palpable and overriding error in finding that the September 4, 2018 call was not a change in SNC's business, operations or capital**

[97] Ultimately, Mr. Peters disagrees with the motion judge's determination that he could not succeed in showing at trial that the September 4, 2018 call was a change to the risk in SNC's business, operations or capital. However, the motion

judge's determination on this issue is not a question of law, but a question of mixed fact and law to which this court owes deference.

[98] The motion judge gave several reasons for finding that the September 4, 2018 call was not a change in SNC's business, operations or capital. Notably, before the call, SNC faced the risk of prosecution and debarment; SNC continued to face those risks after the call. In addition, the September 4, 2018 call was not a line in the sand; communication between SNC and the prosecutors about the possibility of negotiating a remediation agreement continued between September 5, 2018 and October 9, 2018.

[99] In his reasons, the motion judge relied on the Supreme Court's decision in *Theratechnologies*, and characterized that decision as most factually similar to this case. In that case, a pharmaceutical company was awaiting approval from the U.S. Food and Drug Administration ("FDA") for a drug meant to assist HIV patients. In its submissions, it had addressed potential side effects, including the risk of diabetes. During the approval process, the FDA requested follow-up information from the company about the risk of diabetes. The company did not publicly disclose this request. The Supreme Court held that this was not a material change in the company's business, operations or capital. The company had already disclosed the potential side effects of the drug relating to diabetes, including that its clinical trials showed that these side effects were not significant. The FDA request was not

new information representing a change in the company's business, operations or capital.

[100] Here, the motion judge explained that, in his view, *Theratechnologies* was similar to this case because it was "an example where the alleged misrepresentation was an omission to report an alleged change of the status of an application". In both cases, there was no change in the status of the applications and there was no new information disclosed in the government communications that could be characterized as a change in the company's business, operations or capital. In addition, the fact that the market ultimately reacted negatively to the public disclosure of the information does not mean that the information was a material change. It is not appropriate to reason backwards from the market reaction in determining whether an event constitutes a material change.

[101] Ultimately, I agree with SNC that the motion judge did not make any errors in his interpretation and application of the terms "change in the business, operations or capital". He properly understood that a change could include a change in risk, and, based on the uncontested evidence before him, he found that the September 4, 2018 call could not amount to a change in the risk that SNC would be prosecuted and debarred from participating in Canadian projects for up to ten years. This risk was known to investors at the time of the call. At most, the communications between the PPSC and SNC's counsel represented an effort by SNC to be invited to negotiate a remediation agreement. There was never any

assurance an invitation would be forthcoming. In addition, discussions continued after the September 4, 2018 call. As in *Theratechnologies*, there was no change in SNC's business, operations or capital, or to the risks faced by SNC's business, operations or capital on September 4, 2018.

[102] The motion judge made no palpable and overriding errors in characterizing the September 4, 2018 call and in finding that there was no reasonable possibility that Mr. Peters could succeed at trial in showing that the call was a change in SNC's business, operations or capital, including a change in risk.

**(5) The motion judge did not err in failing to find that the September 4, 2018 call was "material"**

[103] Mr. Peters argues that the motion judge failed to consider that the September 2, 2018 call was material. He argues that the evidence on the motion established that the risk of debarment was of significant concern to investors and analysts, and that any increase in this risk would reasonably be expected to affect share prices. This argument does not assist Mr. Peters.

[104] As reviewed above, the issue of whether there has been a material change is a two-step analysis. The first part is whether there has been a change and the second part is whether it is material: *Theratechnologies*, at para. 40. These are two distinct considerations.

[105] In this case, given that the motion judge found that there was no change in SNC's business, operations or capital, it was not necessary for him to consider whether the September 4, 2018 call was material.

[106] If I had found that he made an error in finding that there was no reasonable possibility that Mr. Peters could establish at trial that the call was a change, then it would have been necessary for this court to decide the issue of materiality or to send it back to the court below. But, given my conclusion that the motion judge did not err on the issue of change, the issue of materiality does not arise.

**(6) The motion judge did not err in his application of the test for leave**

[107] Mr. Peters argues that the motion judge went too far in making findings of fact for the purpose of a motion for leave. Specifically, he argues that there may be more evidence available after discoveries about the PPSC's and the Federal government's intentions at the time of the September 4, 2018 call with respect to the issue of whether SNC would be invited to negotiate a remediation agreement. Mr. Peters relies on this court's decision in *Rahimi*, referred to above, to argue that, on a motion for leave under the *Securities Act*, a motion judge should consider the evidence that is available and the evidence that is not available.

[108] The motion judge made no error in his application of the test for leave in the circumstances of this case.

[109] First, the motion judge noted that this was an unusual case because there was extensive evidence available about the circumstances surrounding SNC's efforts to be invited to negotiate a remediation agreement and there was little conflict in the evidence. In effect, Mr. Peters obtained relevant documents through a freedom of information request, and therefore there is significant evidence available regarding internal communications within the Government of Canada at the relevant time.

[110] In any event, it is hard to see how additional information on the issue of internal government communications could be relevant to Mr. Peters's claim. Mr. Peters alleges that SNC failed to disclose the September 4, 2018 call. SNC's obligation to disclose information about the call would arise from what SNC knew or ought to have known about the call and its significance at the time it occurred. Internal communications within the government about whether the PPSC would or should invite SNC to negotiate a remediation agreement are irrelevant to SNC's disclosure obligations unless that information was known to SNC.

[111] Finally, each case is to be decided on its facts. As held by the Supreme Court and this court, on a motion for leave under the *Securities Act*, it is appropriate for the motion judge to weigh the evidence, without going so far as embarking on a mini-trial, for the purpose of determining whether there is a reasonable possibility that the plaintiff will succeed at trial. Here, as mentioned above, there was no

conflicting evidence and Mr. Peters has failed to identify any areas of missing evidence that may be available on discovery that could affect the outcome at trial.

[112] In the circumstances, I see no errors in the motion judge's application of the test for leave.

## D. SNC'S CROSS-APPEAL ON COSTS

[113] SNC seeks leave to appeal the motion judge's costs order.

[114] SNC had sought $363,184 on a partial indemnity basis for its costs of the motions. The motion judge found that this amount was fair and reasonable, and that it was comparable to costs awarded in similar cases. However, relying on s. 31(1) of the *Class Proceedings Act, 1992*, the motion judge held that the costs award should be reduced because of the legal novelty of the case and because it raised matters of public interest. The motion judge ultimately awarded costs of $285,000 to SNC.

[115] SNC submits that the motion judge erred in finding that the motions involved any legal novelty or that they raised matters of public interest. SNC argues that, in *Kerr*, the Supreme Court directed that class actions based on a violation of disclosure requirements under the *Securities Act* do not raise issues of legal novelty or matters of public interest. SNC also argues that, in considering whether the motions raised matters of public interest, the motion judge improperly considered that the action is funded by the Class Proceedings Fund.

[116] The motion judge made no obvious error in exercising his discretion to reduce the costs sought by SNC. I would not grant leave and I would dismiss the cross-appeal.

[117] Leave to appeal a costs decision is only granted sparingly and only in "obvious cases where the party seeking leave convinces the court there are 'strong grounds upon which the appellate court could find that the judge erred in exercising his discretion'": *Brad-Jay Investments Limited v. Village Developments Limited* (2006), 218 O.A.C. 315 (C.A.), leave to appeal refused, [2007] S.C.C.A. No. 92, at para. 21; *Hughes v. Liquor Control Board of Ontario*, 2019 ONCA 305, 145 O.R. (3d) 401, at para. 56. Even where leave is granted, an appellate court will only overturn a costs award if the court below made a legal error or the award is clearly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

[118] Section 31(1) of the *Class Proceedings Act, 1992* explicitly permits the court to consider the novelty of the case and the public interest when awarding costs in a class proceeding:

> In exercising its discretion with respect to costs under subsection 131(1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public importance. [Emphasis added.]

[119] In *Das v. George Weston Limited*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, leave to appeal refused, [2019] S.C.C.A. No. 69, at para. 239, this court explained the purpose of s. 31(1) of the *Class Proceedings Act*, *1992*:

> In applying the s. 31(1) factors, the court must have regard to the circumstances of the particular case and the purposes animating the *CPA*. Those purposes are: promoting access to justice, effecting behavioural modification, and making effective use of limited judicial resources: see *Ruffolo*, at para. 33. When considered alongside the other factors relevant to costs, most notably the outcome of the litigation, the s. 31(1) factors will often lead to some reduction in the costs awarded to a successful defendant. However, defendants who have successfully resisted a class proceeding claim should not routinely be required to shoulder the entire burden of their no doubt significant legal costs merely because the unsuccessful plaintiff's claim raised a novel legal point or involved a matter of public interest. [Emphasis added.]

[120] In this case, the motion judge referred to the correct legal principles in his costs decision. Consistent with *Das*, at para. 245, he noted that legal novelty is on a "continuum". Also consistent with *Das*, at para. 248, he noted that "to be a matter of public interest, the action must have some specific, special significance for, or interest to, the community at large beyond the interests of the parties to the litigation". The motion judge concluded that "the case was a legal novelty in the requisite sense to justify a reduction in costs. In my opinion, the case was a matter in the public interest that would also justify a reduction in the costs to be awarded".

[121] While the motion judge did not explicitly explain why he concluded that the case raised novel legal issues or matters of public importance, he said that his

reasons for decision on the merits of the motions were incorporated into his costs decision. I am satisfied that his conclusion that the case raised novel legal issues and matters of public importance is supported by his lengthy reasons on the merits of the motions.

[122] With respect to the issue of legal novelty, as reviewed above, the motion judge spent a considerable amount of time addressing the issue of what constitutes a “change” in the context of the definition of material “change”. While there has been some legal consideration of this issue, it is fairly limited. Notably, this court was called upon on two appeals around the same time to address the meaning of “change” where the courts below had taken different approaches – in this case and in *Markowich*.

[123] In addition, in his decision on the merits, the motion judge explained the broader context of the case, which involved the intersection of government decisions under the new remediation agreement provisions in the *Criminal Code* and the disclosure obligations under the *Securities Act*. Further, as the motion judge noted, the underlying facts had drawn extensive public attention. In combination, these circumstances suggest that it was not clearly wrong for the motion judge to conclude that the case raised matters of public interest.

[124] I do not accept SNC’s argument that the motion judge erred in not following *Kerr*. In *Kerr*, the Supreme Court decided not to interfere with this court’s

determination that there should be no reduction in costs based on s. 31(1) of the *Class Proceedings Act, 1992.* In reaching this conclusion, the Supreme Court did not accept that the case raised a novel legal issue or matters of public interest. In other words, the court decided not to interfere with this court's exercise of discretion not to reduce the costs sought by the successful party. However, the decision does not stand for the blanket proposition that it would never be appropriate for a court to reduce the costs awarded to a successful party in a case involving a proposed class action based on a failure to disclose a material change under the *Securities Act*.

[125] I also do not accept that the motion judge erred in considering that the action was funded by the Class Proceedings Fund. In *Das*, at paras. 248-50, this court accepted that this may be a relevant, albeit not a determinative, consideration.

[126] Ultimately, the motion judge accepted that the case raised novel legal issues and matters of public interest. He still ordered that the unsuccessful party pay significant costs to SNC, but in a reduced amount. The overall costs awarded remain reasonable. These were matters well within the motion judge's discretion. Accordingly, I see no basis for granting leave on costs and would dismiss the motion for leave to cross-appeal the costs order.

## E. DISPOSITION

[127] I would dismiss the appeal and motion for leave to cross-appeal the costs order.

[128] If the parties are not able to agree on the issue of costs, SNC is to provide its bill of costs and written submissions no longer than three pages within seven days, and Mr. Peters is to provide his bill of costs and responding submissions seven days later.

Released: May 24, 2023 “D.M.P.”

“L. Favreau J.A.”
“I agree. David M. Paciocco J.A.”
“I agree. J. George J.A.”