COURT OF APPEAL FOR ONTARIO

CITATION: Markowich v. Lundin Mining Corporation, 2023 ONCA 359
DATE: 20230524
DOCKET: C70305

Simmons, Benotto and Favreau JJ.A.

BETWEEN

Dov Markowich

Plaintiff (Appellant)

and

Lundin Mining Corporation, Paul K. Conibear, Marie Inkster, Paul McRae, Lukas H. Lundin, and Stephen Gatley

Defendants (Respondents)

Joseph Groia, Bethanie Pascutto and Scott Robinson, for the appellant

Lara Jackson and John M. Picone, for the respondents

Heard: October 25, 2022

On appeal from the order of Justice Benjamin T. Glustein of the Superior Court of Justice, dated January 6, 2022, with reasons reported at 2022 ONSC 81.

Favreau J.A.:

A. OVERVIEW

[1] The appellant, Dov Markowich, 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 Lundin Mining Corporation ("Lundin") for Lundin's failure to disclose "forthwith" a

“material change” in Lundin's "business, operations or capital" as required under ss. 75(1), 138.1 and 138.3(4) of the *Securities Act*.

[2] Mr. Markowich 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 Lundin 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. Markowich's motions. The “changes” Mr. Markowich alleged Lundin had an obligation to disclose were pit wall instability detected on October 25, 2017 in part of Lundin's open pit mine at its Candelaria copper mine in Chile, and a subsequent rockslide at the mine during which an estimated 600,000 to 700,000 tonnes of waste material fell down a slope from Phase 10 of the mining operation, restricting access to Phase 9.

[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 there had been a “change” to Lundin's business, operations or capital. He did however conclude that if the matters relied upon by the appellant constituted a “change” they were “material”.

[5] As the motion judge did not grant leave, he declined to certify the statutory cause of action. The motion judge also concluded that the common law claim in

negligent misrepresentation was not suitable for certification because a multitude of mini-trials would be required to address the issue of reliance. Unlike the statutory cause of action, there is no deemed reliance at common law.

[6] On appeal, Mr. Markowich 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 it as a class proceeding.

[7] As set out below, I have concluded that the motion judge made a legal error in his application of the test for leave and in his interpretation of "change", "business", "operations" and "capital". Specifically, he interpreted these terms too narrowly, especially in the context of a motion for leave. At this stage of the proceedings, Mr. Markowich was only required to demonstrate that he had a reasonable possibility of success based on a plausible interpretation of the statute and the evidence. Rather than limiting himself to this determination, the motion judge adopted a restrictive interpretation of the terms at issue, despite the fact that these terms have not yet been definitively interpreted in the jurisprudence. He then erred in applying that restrictive interpretation to the limited evidence available at this stage in the proceedings about the consequences of the pit wall instability and rockslide.

[8] Adopting a more generous interpretation of the words “change in the business, operations or capital”, and applying that interpretation to the evidence available at this time, the motion judge ought to have found that Mr. Markowich has put forward a plausible interpretation and sufficient evidence in support of granting leave to proceed with the statutory cause of action under the *Securities Act*. In the result, I would allow the appeal, grant leave to proceed with the statutory cause of action and refer the issue of certification of that action back to the Superior Court for determination.

[9] This decision is being released at the same time as this court’s decision in *Peters v. SNC-Lavalin Group Inc.*, 2023 ONCA 360, 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

[10] Lundin is a Canadian company, with mining operations in different parts of the world, including Chile. Lundin primarily produces copper, nickel and zinc. The individually named defendants were officers and directors of Lundin at the relevant time.

[11] Mr. Markowich is one of Lundin's shareholders. He purchased 10,000 securities in Lundin between November 15, 2017 and November 27, 2017, at an average price of $9.156, for a total of $91,560.

(2) The Candelaria mine and the events of October 2017

[12] The Candelaria mine is located in the Province of Atacama, Chile. The mine consists of an open pit mine and three underground mines that produce copper ore. Lundin owns 80% of the mine jointly with Sumitomo Corporation, which owns 20% of the mine.

[13] In 2016 and 2017, the Candelaria mine generated 55% to 60% of Lundin's sales revenue. The balance of the revenue came from mining operations in the United States, Portugal and Sweden.

[14] At the relevant time, the mining plan for Candelaria contemplated that the open pit would be mined over several phases for an anticipated remaining 19-year lifespan. In 2017, there were five remaining phases, known as Phases 9 to 13. As of October 2017, Lundin was scheduled to mine Phase 9 and parts of Phase 10 of the mine.

[15] As held by the motion judge, "[m]ining is an inherently risky and unpredictable industry" and "rock slides are routine". In the context of open pit mines, one of the most common risks is slope instability.

[16] Lundin uses radar equipment to monitor for increased risks of slope instability and potential rockslides. On October 25, 2017, the slope monitoring equipment at the Candelaria mine detected pit wall instability in the open pit part of the mine. The motion judge described the cause of the instability as follows:

> In 2012, prior to Lundin acquiring its ownership interest in Candelaria, potential pit wall instability was detected during the mining of Phase 8. This was believed to be associated with the interaction of two intersecting geological structures, forming a wedge of waste material in the open pit wall. In order to manage the unstable wedge, the affected area of the open pit wall was redesigned while mining of Phase 8 continued. This revised mine plan included a "step-in" of the open pit wall to mitigate the risk of further pit wall instability.
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> Further mining revealed a third geological structure below the wedge, which had a flat-lying geological fault that "daylighted" in the redesigned pit wall. Candelaria personnel were not aware of the structure until it was exposed by mining, after which it could be mapped, and potential ramifications could be assessed. The exposure of the third geological structure resulted in further pit wall instability, which was detected on or about October 25, 2017 by real-time slope monitoring radar equipment.

[17] As a result of the pit wall instability detected on October 25, 2017, personnel were evacuated from that area of the mine.

[18] The motion judge pointed out that neither party led direct evidence regarding whether any other areas of the open pit or the underground mines were also shut down or evacuated at that time. He also observed that there was conflicting expert evidence on the likely impact of the detection of pit wall instability. Mr. Markowich's

expert, David Thomas, opined that there would have been a major suspension of operations which would have been considered a “crisis”. Lundin’s expert, Julian Watson said that, in his view, there would have been no reason to shut down any other areas of the open pit or the underground mines, because the pit wall instability was localized and other areas of the mine could be protected through other measures.

[19] On October 31, 2017, the unstable wedge failed, leading to a rockslide. An estimated 600,000 to 700,000 tonnes of waste material from Phase 10 of the open pit moved down slope, restricting access to Phase 9.

[20] The motion judge noted that there was no evidence that the rockslide caused any fatalities, injuries or damage to equipment. However, he also observed that there was no direct evidence regarding the immediate impact of the rockslide on the Candelaria mine’s operations. Again, the parties’ experts speculated on the impact of the rockslide on the mine’s operations. Mr. Thomas, for Mr. Markowich, stated that there would have been a major disruption in operations because the mine would have ceased to operate. In contrast, Mr. Watson stated that the slope failure would only have caused a temporary suspension of operations in a small area of the mine. However, as found by the motion judge, both experts conceded that they did not have direct evidence on this issue.

[21] The motion judge stated that the uncontested evidence about the impact of the rockslide was as follows:

> Lundin removed 87 million tonnes of material in 2017 at the Candelaria open pit mine alone, with daily average production of 227,000 tonnes per day. Consequently, the amount of material in the Rock Slide was 0.8% of 2017 annual production (or the equivalent of approximately three days of mining); and
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> Revisions made to Candelaria's 2018 production guidance resulted in a deferral of approximately 19,000 tonnes of copper (of which Lundin's 80% share is about 15,200 tonnes). Given that Lundin's global production outlook for 2018 was between 317,000 and 344,000 tonnes of base metals, the amount of deferred copper production represented less than a 5% change.

(3) Public disclosure of the pit wall instability and rockslide

[22] Lundin did not publicly disclose the pit wall instability or rockslide at the time these events occurred.

[23] Rather, Lundin first publicly disclosed these events on November 29, 2017, in its November News Release. The News Release referred to "instability in a localized area of the pit's east wall and a slide which occurred October 31, 2017". The News Release reported that these events impacted the 2018 and 2019 production forecasts. The copper production at Candelaria for 2018 was to be 104,000 to 109,000 tonnes, which was 20% less than the previous outlook for that year. The News Release also stated that the near-term plan for the mine was to focus on pushing back the waste from the area of the slide, and to make up the

difference in production with stockpiled low-grade ore. In addition, the News Release explained that the phasing at the Candelaria mine was to be revised.

[24] On November 30, 2017, the price of Lundin's securities fell on the TSX. Lundin's securities went from $8.96 on November 29, 2017 to $7.52 at closing time on November 30, 2017, representing a decline of $1.44 or 16%. This one-day drop amounted to over $1 billion of market capitalization.

[25] In addition, on November 30, 2017, Lundin issued another news release titled "Lundin Mining Operational Outlook Conference Call", announcing that there was to be a conference call the following day to discuss the News Release released the previous day. Lundin subsequently released a transcript from the conference call, which included more detailed information about the pit wall instability and rockslide, and the impact of these events on Lundin's operations.

[26] As found by the motion judge, following these news releases, a "majority of analysts emphasized the negative 2018 and 2019 production revisions" at the Candelaria mine, and some analysts stated that Lundin should have disclosed the rockslide earlier.

(4) The claim

[27] Mr. Markowich commenced an action against Lundin and a group of individual defendants. 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 July 9, 2020. (Accordingly, all references to the "statement of claim" or the "claim" are references to the Fresh as Amended Statement of Claim).

[28] In his claim, Mr. Markowich seeks to bring a class proceeding on behalf of all persons, except for excluded persons, who acquired Lundin Securities between October 25, 2017 and November 29, 2017, and who held some or all of those securities at the close of trading on November 29, 2017.

[29] Mr. Markowich claims that Lundin and the other defendants failed to make timely disclosure of the pit wall instability and subsequent rockslide contrary to its obligations in the *Securities Act* and equivalent legislation in other Canadian provinces, to disclose a material change forthwith. He also alleges that the failure to disclose this information constitutes negligent misrepresentation at common law. However, as I have said, he no longer seeks to pursue this cause of action.

[30] Mr. Markowich seeks $175 million in general and special damages, and $10 million in punitive damages, on behalf of the class.

(5) The motion judge's decision

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

[32] After reviewing the evidence, including expert evidence, the motion judge first dealt with the motion for leave. He noted that there was no dispute that the action was brought in good faith, one of the leave requirements. However, he was not satisfied that there was a reasonable possibility that Mr. Markowich could succeed at trial in showing that the pit wall instability and rockslide were "material changes" within the meaning of the *Securities Act*. Specifically, he found that these events did not constitute a "change in the business, operations or capital" of Lundin, as required by the definition of "material change" under s. 1(1) of the *Securities Act*. In reaching this conclusion, the motion judge relied on evidence that pit wall instability and rockslides are common occurrences in open pit mining and that these events did not affect Lundin's viability.

[33] Nevertheless, the motion judge accepted that, if these events constituted a "change", there was a reasonable possibility that Mr. Markowich could show that they were "material" because they would reasonably be expected to have a significant impact on the market value of Lundin's securities. In reaching this conclusion, the motion judge found that there was competing expert evidence on the market impact of the pit wall instability and rockslide, and that Mr. Markowich's evidence was credible. In addition, he stated that the conference call that followed the first public disclosure of these events showed that the potential for pit wall instability and rockslides were of great concern to Lundin's investors.

[34] After addressing the motion for leave, the motion judge addressed the motion for certification under the *Class Proceedings Act, 1992*. He first stated that, if he had granted leave to proceed with the statutory claim under the *Securities Act*, Lundin and the other defendants did not object that that claim could be certified as a class proceeding. The issue of whether the action should be certified as a class proceeding therefore focused on the common law claim in negligent misrepresentation. The motion judge held that this claim should not be certified as a class proceeding for several reasons. Mr. Markowich does not challenge this finding on appeal.

[35] 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.

C. DISCUSSION

[36] Mr. Markowich's appeal focuses on the motion judge's determination that leave should not be granted under s. 138.8 of the *Securities Act*.

[37] Mr. Markowich raises several grounds of appeal, which I would characterize as raising the two following related issues:

a. Whether the motion judge erred in adopting an overly narrow interpretation of "change in the business, operations or capital", especially in the context of a motion for leave; and

b. Whether the motion judge's narrow interpretation of these terms led him to resolve conflicts and gaps in the evidence that should be left for trial.

[38] I agree with Mr. Markowich that the motion judge erred in his interpretation of "change in the business, operations or capital" and that, as a consequence of this error, he erred in finding that the evidence available on the motion did not support granting leave. Rather than considering whether Mr. Markowich had proposed a plausible interpretation of "change in the business, operations or capital", the motion judge adopted a narrow and definitive interpretation of these terms which had not previously been adopted by any court. The motion judge then evaluated the evidence against this narrow approach and erroneously found there was no reasonable possibility that the action could succeed. Taking a more generous approach to the terms "change in the business, operations or capital" is warranted. Based on this more generous interpretation and the evidence available at this stage of the proceedings, Mr. Markowich should be granted leave to proceed with the action.

(1) Standard of review

[39] 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.

[40] In this case, the primary issue on appeal is the motion judge's interpretation of the definition of "material change" in the *Securities Act*, which is a question of law reviewable on a standard of correctness. Given that the motion judge applied this incorrect definition to the evidence available on the motion, his application of the test is also reviewable on a standard of correctness.

(2) Disclosure obligations under the *Securities Act* and right of action

[41] 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".

[42] 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.]

[43] 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".

[44] The disclosure requirements in the *Securities Act* for material facts and material changes are different. The Act imposes various disclosure obligations on issuers with respect to material facts, but, unlike material changes, does not require that issuers disclose material facts "forthwith".

[45] 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 Act protects investors by imposing disclosure obligations. At the same time, it limits the burden placed on issuers by requiring disclosure "forthwith" of material changes but not of material facts. In *Kerr*, at para. 38, the Supreme Court also stated that the distinction between a material change and a material fact is "deliberate and policy-based".

[46] 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 (Div. Ct.), para. 46. This case focuses on the first step of the analysis. I address the specific meaning of "a change in the business, operations or capital" and the relevant case law further below.

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

[47] Section 138.3(4) of the *Securities Act* creates a statutory right of action for an issuer's failure to make timely disclosure. The provision gives a right of action to a person or company who acquires or disposes of the issuer's security between the time when the disclosure should have been made and the time when the disclosure is made, regardless of whether the person or company relied on the issuer having complied with its timely disclosure requirements.

[48] 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.

[49] In *Theratechnologies*, 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 also explained the rationale for these requirements, at para. 39:

> 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.]

[50] 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 erred in his interpretation of "change in the business, operations or capital"

[51] I begin this section with a review of the motion judge's reasoning on this issue, followed by a review of the relevant case law and a discussion of the motion judge's errors in interpreting "change in the business, operations or capital" in light of the available case law.

(1) The motion judge's reasoning

[52] In order to understand the error made by the motion judge, it is necessary to review his reasoning on the interpretation and application of the terms "change in the business, operations or capital" in some detail.

[53] The motion judge started his analysis by contrasting a material "change" with a material "fact":

> [U]nder the *Securities Act* a material "change" to an issuer's "business, operations or capital" must be reported immediately by a news release and followed as soon as practicable by a material change report. In contrast, a material "fact" must be disclosed to investors in the course of an issuer's periodic disclosure, when the issuer collects and discloses matters that *affect* the issuer's business, operations and capital, but do not constitute a change. [Emphasis in original.]

[54] Relying on the decision in *Cornish,* at para. 46, he then held that the analysis as to whether there was a "material change" involves two components. The court is first to consider whether there has been a "change" and separately whether it was "material".

[55] With respect to the meaning of "change", the motion judge noted that the term is not defined in the *Securities Act*, and that the "only assistance provided

under the *Securities Act* is that the 'change' must be to the 'business, operations or capital' of the issuer" (emphasis added)[1].

[56] The motion judge then reviewed case law contrasting the meaning of "material fact" and "material change", including a comment by Strathy J. (as he then was) in *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, rev'd on other grounds, 2014 ONCA 90, 118 O.R. (3d) 641, aff'd 2015 SCC 60, [2015] 3 S.C.R. 801, at para. 28, that "[t]he requirement to make timely disclosure of a material change is not an obligation to provide a running commentary on the company's progress during the quarter or to comment on internal or external events that may impact its performance." The motion judge then described the distinction between a material fact and a material change as follows:

> Consequently, if a development is material and causes a change in the business, operations or capital, it must be disclosed immediately. If the development is material and affects a company's business, operations or capital without resulting in a change, it is a material fact to be disclosed in the ordinary course of periodic disclosure.

[57] The motion judge emphasized that determining whether there has been a material change is a fact-specific inquiry.

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[1] In a few places in his decision, the motion judge erroneously referred to a "change to the business, operations or capital" rather than a "change in the business, operations or capital" (emphasis added). The appellant submits that this is an error that affected the motion judge's analysis. It is not necessary to focus on this misquote of the definition of "material change". However, I accept that the motion judge's failure to distinguish between the meaning of "in" and "to" may have contributed to his errors in interpreting this provision.

[58] Having conducted this review of the *Securities Act* definitions and the cases that have considered the meaning of "material change", the motion judge concluded that, in order to find that a material change has occurred, the court must be satisfied the event at issue results in a "different position, course, or direction to a company's business, operations, or capital" (emphasis added). In adopting this approach, the motion judge reasoned as follows:

> Applying the grammatical definition of change, a change will occur in the context of s. 1(1) and the disclosure obligations under s. 75(1) upon "a different position, course, or direction". Such an approach maintains the distinction between a material change and material fact, without requiring a "running commentary on the company's progress during the quarter or to comment on internal or external events that may impact performance": *Green* (SC), at para. 28.
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> Consequently, regardless of the adjective used to describe the nature of the "change", the requirement for a "change" remains under s. 1(1). Whether or not the change is considered to be "substantial" or "important", the key conclusion from both *Green* (SC) and *Mask* is that a change occurs when the event results in a different position, course, or direction to a company's business, operations, or capital. Otherwise, the distinction between material change and material fact would be lost.
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> For the same reasons, if there are events which *affect* the company, but do not amount to a *change* in business, operations or capital, those events cannot be a material change requiring immediate disclosure. [Emphasis in original.]

[59] Notably, the motion judge's reference to a "different position, course, or direction" derives from a definition of "change" in the online version of the *Merriam-*

Webster Dictionary. He provides no support for using this definition from any case law interpreting the definition of "material change" in the *Securities Act*, nor does he provide any rationale for adopting this definition of "change" in the context of the *Securities Act*.

[60] After defining "change" as a "different position, course, or direction", the motion judge goes on to address the definitions of the terms "business", "operations" and "capital". Earlier in his decision, he had observed that these terms are not defined in the *Securities Act*. In this section of his decision, he gleaned definitions of these terms from a brief review of case law.

[61] First, with respect to the term "business", the motion judge stated that it had been "broadly described by the OSC as the lines of activity in which the issuer engages to generate revenue". He then concluded that "business" refers to "what the company does".

[62] Second, he concluded that "operations" refers to "where" or "how" a company conducts its business:

> The "operations" of an issuer were reviewed by the OSC in *Rex Diamond* as "where" the company conducted business. The OSC referred to the company's mining "operations" located in various countries: at paras. 8 and 11.
>
> Put differently, the term "operations" is used to refer to the activities conducted by the company to engage in its lines of "business". If a company changes its position,

> course or direction as to how or where it conducts business, it may be considered a change to “operations”.

[63] Third, he determined that “capital” refers to the “share structure and rights of shareholders”.

[64] The motion judge then went on to conclude that in the circumstances of this case, based on his interpretation of what can constitute a “change in the business, operations or capital”, and his review of the evidence in the case, there was no reasonable possibility that the claim could succeed. In reaching this conclusion, consistent with the definitions he adopted above, the motion judge focused on whether the pit wall instability and rockslide changed what Lundin does or compromised the viability of Lundin’s mining business. In order to understand the motion judge’s reasoning, it is helpful to quote from his reasons on this issue at some length:

> There is no evidence of any change to Lundin’s business, operations, or capital arising from the events. The only effect was that 15,200 tonnes of copper mining was deferred until 2020 or 2021, with some increased costs and decreased revenues arising from milling lower quality copper. The deferred copper represented less than 5% of Lundin’s annual production, which was already scheduled to be reduced (by a lower amount) due to previously planned resequencing.
>
> There was no evidence that either the Pit Wall Instability or the Rock Slide raised any threat to Lundin’s economic viability, as acknowledged by Thomas on cross-examination. At all times, Lundin was able to continue its business, operations and capital as a worldwide mining corporation.

> …
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> The evidence is that Pit Wall Instability and the Rock Slide were inherent risks in open pit mining operation, and that Lundin managed those risks with advanced ground radar technology and operated its business under those risks. When such a risk occurred, it may have been a material *fact* which would reasonably be expected to have a significant effect on Lundin's shares, but there is no evidence to support that either of the events was a material *change* to Lundin's business, operations, or capital. It did not constitute a different position, course, or direction. [Emphasis added.]

[65] The motion judge then considered, based on the separate definitions of "business", "operations" and "capital" he adopted, whether the pit wall instability and rockslide constituted a change to the business, operations or capital of Lundin:

> Unlike *Rex Diamond or Cornish*, there is no evidence that either the Pit Wall Instability or the Rock Slide had any effect on Lundin's "line of business". Lundin continued to engage in copper mining by making some additional changes to its resequencing plan. Lundin did not lose the ability to conduct its business.
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> …
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> The evidence before the court is that Lundin engaged in the same operations at the Candelaria mine after the events, but on the basis of some additional modifications to the resequencing plan, the purpose of which was to address the best sequencing method in light of all relevant factors at that time. The evidence is that resequencing is a usual component of Lundin's operations, and there is no evidence that the Pit Wall Instability or Rock Slide ever raised any concerns that Lundin could not carry out its operations at the Candelaria mine.

> There is no evidence of any change to Lundin's capital as a result of the Pit Wall Instability or Rock Slide, nor any evidence that such ought to have been identified upon the occurrence of the events. While Markowich submits that increased costs associated with mining the Rock Slide are a "capital" expenditure, as I discuss above, it cannot be the case that every event that occurs which requires additional expenditures constitutes a material change to capital and requires a running commentary to investors. [Emphasis added.]

[66] As indicated above, while the motion judge found that there was no reasonable possibility that Mr. Markowich could succeed in showing that the pit wall instability and rockslide constituted a change in the business, operations or capital of Lundin, he was nevertheless satisfied that, if these events constituted such a change, they "would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer".

(2) The motion judge's interpretation of "change in the business, operations or capital" is inconsistent with existing case law and the purpose of the *Securities Act*

[67] As reviewed above, on a motion for leave, the court is to conduct a robust review of the law and the evidence. However, with respect to the legal foundation for the claim, the court is only to consider whether the plaintiff has put forward a "plausible" interpretation of the statute: *Theratechnologies Inc.*, at para. 39. The motion judge erred in adopting a definitive interpretation of the terms "change in the business, operations or capital". Moreover, to the extent that these terms have

been considered in other cases, his interpretation of those terms is inconsistent with those decisions.

[68] I start with a review of the cases that have interpreted these terms, including cases referred to by the motion judge. From a review of those cases, it should be evident that, contrary to the motion judge's approach, 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. Consideration of the magnitude or significance of the change arises in the second part of the definition of "material change", where the issue is whether the change would reasonably be expected to have a significant effect on stock prices.

[69] In his decision, the motion judge relied on the Supreme Court's decision in *Kerr* to support his distinction between "material fact" and "material change". As reviewed above, in *Kerr*, at para. 38, the Supreme Court stated that the distinction 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.]

[70] The Supreme Court then went on to find that "changes" in the business, operations or capital of a company do not include external factors outside of the company's control or changes in quarterly results on their own. In that case, the defendant, Danier, had made an Initial Public Offering and the prospectus contained a forecast for the fourth quarter of sales. However, after filing the prospectus, Danier's internal company analysis showed that sales would be lower than expected due to unseasonably warm weather. This poor intra-quarterly performance was not disclosed prior to closing. A class action for misrepresentation was subsequently brought against Danier. Securities holders alleged that Danier failed to abide by s. 57 of the *Securities Act*, which required an issuer to provide post-filing disclosure of a "material change". Importantly, "material change" is defined in s. 57 the same way as it is in s. 75 of the *Securities Act*, which is the provision at issue in this case.

[71] The Supreme Court concluded that the poor intra-quarterly results cannot be characterized as a "change" in operations since they were caused by factors external to Danier (that is, unseasonably warm weather). However, the court

noted, at para. 47, that declining sales could reflect a material change if the reason for the decline was due to a change in the business, operations or capital of the company:

> It almost goes without saying that poor intra-quarterly results may *reflect* a material change in business operations. A company that has, for example, restructured its operations may experience poor intra-quarterly results because of this restructuring, but it is the restructuring and not the results themselves that would amount to a material change and thus trigger the disclosure obligation. Additionally, poor intra-quarterly results may motivate a company to implement a change in its business, operations or capital in an effort to improve performance. Again, though, the disclosure obligation would be triggered by the change in the business, operations or capital, and not by the results themselves. [Emphasis added.]

[72] The motion judge relied on the reasoning in *Kerr* to find that the shut down at the open pit mine following the discovery of the pit wall instability and rockslide was not a change in Candelaria's operations. He explained that, like the poor intra-quarterly results, the shutdown would have had to arise from a "change of business, operations or capital" in order to trigger the disclosure obligation. However, the motion judge erroneously interpreted *Kerr* to stand for an overly restrictive definition of "change". As noted above, the primary constraint which *Kerr* imposed on the definition of "change" was that it could not be external to the corporation.

[73] The motion judge also relied on *Rex Diamond Mining Corporation et al.*, 2008 ONSEC 18, aff'd 2010 ONSC 3926 (Div. Ct.), to support his finding that there was no "change" in the present case. 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" that the leases would be cancelled: *Rex Diamond*, at para. 211. However, these notices were not disclosed to securities holders.

[74] 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.

[75] The motion judge distinguished the present case from *Rex Diamond* on the basis that the pit wall instability and rockslide did not have "any effect on Lundin's 'line of business'". He stated that, in contrast, the diamond mining company in *Rex*

Diamond "risked being unable to conduct its business of mining diamonds." The motion judge failed to appreciate that "[t]he assessment of whether a material change has occurred is a fact specific exercise": *Rex Diamond,* at para. 201. While the mining company in *Rex Diamond* was faced with potentially losing its ability to generate future revenue, the OSC's definition of "change" should not be divorced from the facts of the case. It was an error for the motion judge to interpret *Rex Diamond* to stand for the proposition that every change in business, operations or capital must rise to the level of affecting a company's "ability to conduct its business." Rather, *Rex Diamond* demonstrates that losing the ability to physically operate is a circumstance, amongst other potential circumstances, that constitutes a "change" in the "operations" of an issuer.[2]

[76] As noted above, in adopting a restrictive definition of "change", the motion judge also relied on the statement made by Strathy J. (as he then was) in *Green*, at para. 28, to the effect that "[t]he requirement to make timely disclosure of a material change is not an obligation to provide running commentary on the company's progress during the quarter or to comment on internal or external

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[2] The respondents rely on the decision in *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348, aff'd 2016 ONCA 641, 132 O.R. (3d) 161, and argue that the motion judge's approach to "change" in this case was similar to Belobaba J.'s approach in *Mask*. In *Mask*, Belobaba J. found that there was no reasonable chance that the moving party could succeed in showing a material change based on an undisclosed downward trend in share prices. In that context, Belobaba J., at para. 57, relied on *Rex Diamond* to suggest that the downward trend was not a material change because it was not equivalent to the prospect of having to shut down operations. However, in *Mask*, Belobaba J. referred to *Rex Diamond* as an example of the type of change that could qualify as a material change. In contrast, and consistent with the ruling in *Kerr,* Belobaba J. held that a downward trend, on its own, could not qualify as a material change: at paras. 57-58.

events that may impact its performance." However, this comment in *Green* was made about the obligation to disclose a "material change", and not about the meaning of the words "change in the business, operations or capital" in the definition of "material change" as a whole.

[77] Contrary to the motion judge's approach, in a Superior Court case decided shortly before this case and cited by the motion judge, Perell J. adopted a much more expansive definition of "change": *Peters v. SNC-Lavalin Group Inc.*, 2021 ONSC 5021. In that case, at paras. 151-52, Perell J. 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." However, he also emphasized that the meaning of "change" is fact-specific and that there is no "bright-line test": at para. 153. At para. 154, relying on a policy statement from the TSX, he 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. [Emphasis added.]

[78] At para. 155, Perell J. offered a very expansive definition of the word "change":

> 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.

[79] Perell J.'s approach to the words "change in the business, operations or capital" is more consistent with the wording of the provision and the guidance in *Kerr* and other decisions. As such, this court upheld his approach in the companion decision in *Peters* released at the same time as this decision.

[80] 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”.

[81] In other words, the magnitude of a change in business, operations or capital is reserved for the second part of the “material change” definition. This approach is consistent with *Theratechnologies Inc.*, at para. 40, where the Supreme Court explained that, having found a “change”, the next step is to determine whether the change is “material, which means it would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer.” Materiality is objectively determined from the perspective of a reasonable investor, and the applicable standard is defined in strictly economic terms: *Kerr v. Danier Leather Inc.* (2005), 77 O.R. (3d) 321 (C.A.), at para. 53; aff’d 2007 SCC 44, [2007] 3 S.C.R. 331; *Cornish*, at paras. 55 and 65-66; *Rex Diamonds* (Div. Ct.), at para. 6; *Miller v. FSD Pharma, Inc.*, 2020 ONSC 4054, at para. 64.

[82] Based on my review of the case law above, I do not accept the motion judge’s restrictive interpretation of the terms “change in the business, operations

or capital". Contrary to the approach taken by the motion judge, no other court or adjudicative body has defined "change" for the purpose of assessing whether there has been a material change in isolation and restrictively. There is no rationale for sanctioning the narrow definition adopted by the motion judge. Rather, what qualifies as a "change" must be looked at in reference to the terms "business, operations or capital", and in the context of the facts of each case. I agree with Perell J. in *Peters*: a change is a change and it should be defined broadly, especially in the context of a leave motion under s. 138.8 of the *Securities Act*. Contrary to what the motion judge asserted, the issue is not whether Lundin completely changed directions in its lines of business, stopped operating the mine in Candelaria or changed its capital structure. From the case law, one of the only restrictions on the meaning of change is that it cannot be external to the company without a resulting change in the business, operations or capital of the company, or it cannot simply be an unexplained change in results; rather, it must be a change in the company's business, operations or capital: *Kerr*, at para. 47.

[83] Notably, the word "operations" on its own is very broad; it does not refer only to the location of a business or what the business produces. A change in operations may refer to a broad range of changes within a company, including, as here, an interruption in production and a change in scheduling due to an accident or equipment failure.

[84] As noted above, the magnitude of the change is not meant to be assessed at the first stage of the definition but, rather, in the second part of the definition, which is focused on determining whether the change is material. If the evidence can support a finding that there has been a change in operations, the issue becomes whether that change is such that it would be reasonable to expect that there will be a significant impact on share prices. For example, a change in operations resulting from a minor accident or equipment failure may not be expected to have a significant impact on the price of shares. Alternatively, the change in operations resulting from a major accident or equipment failure may be reasonably expected to have a significant impact on the market or value of the securities.

[85] Accordingly, the motion judge erred in adopting an overly restrictive definition of “change”, in the context of the words “change in the business, operations or capital”.

(5) The motion judge’s errors in interpreting “change in the business, operations or capital” led him to err in his assessment of the evidence

[86] The motion judge’s assessment of the evidence was based on his interpretation of “change in the business, operations or capital”. Specifically, he held that Lundin could not establish that a change occurred because there was no

evidence that the pit wall instability or rockslide led Lundin to change its lines of business, or to stop operating the mine, or to change its capital structure. This was an error of law because it is based on an erroneous application of the legal test to the evidence in the case.

[87] With the proper legal test, the available evidence should have led the motion judge to conclude that there was a reasonable possibility that Mr. Markowich could demonstrate that the pit wall instability and rockslide constituted a change in Lundin's operations. There was some evidence that the open pit mining operation was shut down for a period of time. There was competing evidence over the length and extent of the shutdown, but, as held in *Rahimi*, at para. 48, evidence not yet available is relevant on a motion for leave. In this case, Lundin provided no direct evidence on this issue on the motion, and such evidence will presumably be available at discoveries. More importantly, there was uncontested evidence that, as a result of the rockslide, Lundin had to modify its schedule for the phased mining of the open pit, its expected production for 2019 went down, and it needed to make up for this reduced production with lower grade ore for 2019.

[88] At trial, with the benefit of better evidence on the immediate aftermath of the pit wall instability and rockslide, there is a reasonable possibility that Mr. Markowich could establish that these were changes in Lundin's operations. More importantly, given that the motion judge was satisfied that these events, even though he did not accept they were changes to Lundin's business, operations or

capital, could reasonably be expected to affect stock prices, I am satisfied that there is a reasonable possibility that Mr. Markowich could succeed at trial in demonstrating that these were material changes that Lundin should have disclosed forthwith.

[89] Accordingly, had the motion judge adopted a less rigid interpretation of "change in the business, operations or capital" in the context of the motion for leave, he should have found that there was a reasonable possibility that Mr. Markowich and the proposed class could succeed at trial with the statutory cause of action under the *Securities Act*.

D. DISPOSITION

[90] I would allow the appeal. I would grant leave for the action to proceed under s. 138.8 of the *Securities Act*.

[91] At the hearing before the motion judge, the respondents accepted that, if leave was granted under the *Securities Act*, that aspect of the claim should be certified as a class proceeding. However, the motion judge did not address issues such as the class definition or the issues to be certified. Accordingly, I would decline to certify the action as a class proceeding and remit that issue back to the Superior Court for determination based on these reasons.

[92] I would grant Mr. Markowich his costs of the appeal in the agreed amount of $40,000 inclusive of disbursements and HST. If the parties cannot agree on the

costs below, they can contact the court for directions on making submissions on this issue.

Released: May 24, 2023 “J.S.”

“L. Favreau J.A.”
“I agree. Janet Simmons J.A.”
“I agree. M.L. Benotto J.A.”