2025 SCC 39 (CanLII)

SUPREME COURT OF CANADA

CITATION: Lundin Mining Corp. *v.* Markowich, 2025 SCC 39

APPEAL HEARD: January 15, 2025
JUDGMENT RENDERED: November 28, 2025
DOCKET: 40853

BETWEEN:

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

and

Dov Markowich
Respondent

- and -

Canadian Coalition for Good Governance,
Ontario Securities Commission,
Mining Association of Canada,
CFA Societies Canada Inc.,
LiUNA Pension Fund of Central and Eastern Canada,
Insurance Bureau of Canada and
Canadian Chamber of Commerce
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 127)	Jamal J. (Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, O'Bonsawin and Moreau JJ. concurring)
DISSENTING REASONS: (paras. 128 to 284)	Côté J.

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2025 SCC 39 (CanLII)

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Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

2025 SCC 39 (CanLII)

Securities — Liability for secondary market disclosure — Statutory action for failure to make timely disclosure — Material change — Test for leave to commence action — Pit wall instability and ensuing rockslide at mine owned by issuer disclosed as part of periodic updates — Investor seeking leave to commence class action against issuer for failure to make timely disclosure on basis that pit wall instability and rockslide resulted in material changes that had to be disclosed forthwith — Whether investor had reasonable possibility of showing that there had been material changes such that he should be granted leave to commence action —— Securities Act, R.S.O. 1990, c. S.5, ss. 1(1) "material change", 178.8(1).

A Canadian mining company detected pit wall instability at its premier mine. Within days, the pit wall instability caused a localized rockslide in the open pit mine that required the company to shut down at least part of the mine for a time and to revise the mine's production forecast downward by 20 percent for the next year. The mining company, an issuer under Ontario's *Securities Act*, did not disclose the pit wall instability or rockslide to investors immediately. When it disclosed these developments about a month later as part of its regular or periodic updates, the company's share price dropped 16 percent the next day.

An investor who had purchased shares of the mining company's stock after the pit wall instability and rockslide had occurred but before the company disclosed those developments commenced a proposed class proceeding against the mining company and several of its officers and directors. He alleged that they failed to make

2025 SCC 39 (CanLII)

timely disclosure of the pit wall instability and rockslide, contrary to their obligations under the *Securities Act*, since the pit wall instability and rockslide each resulted in a "material change", as defined in s. 1(1) of the *Securities Act*, in the company's "business, operations or capital" that should have been disclosed "forthwith" under s. 75(1) of the *Securities Act*. The investor brought a motion under s. 138.8(1) of the *Securities Act* for leave to pursue the statutory cause of action, and also moved for certification of the proposed class proceeding.

The motion judge refused to grant leave for the investor to pursue the statutory cause of action and accordingly dismissed the motion for class certification. He concluded that since the mining company continued its business and operations as a mining company, there was no reasonable possibility that the investor could establish that either the pit wall instability or the rockslide resulted in a "material change" in the mining company's affairs requiring immediate disclosure. He held that neither development resulted in a change in the mining company's business, operations or capital. The Court of Appeal allowed the investor's appeal, granting him leave to proceed with the statutory cause of action but referring issues regarding the certification of the class proceeding back to the lower court. It held that based on a more generous interpretation of the words "change in the business, operations or capital", there was a reasonable possibility that the pit wall instability and rockslide involved changes in the mining company's operations, given the undisputed evidence that the developments impacted the company's phasing of the mine and reduced its next annual production

2025 SCC 39 (CanLII)

forecast. Consequently, the investor had advanced a plausible interpretation and sufficient evidence to support granting leave.

Held (Côté J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, **Jamal**, O'Bonsawin and Moreau JJ.: The motion judge erred by relying on restrictive definitions of "change", "business", "operations" and "capital", and then by applying those definitions to determine whether there was a reasonable possibility that there had been a material change. The Ontario legislature intentionally left these terms undefined to allow the legislation to be applied flexibly and contextually to a wide range of industries and corporate structures. Moreover, the test for leave under s. 138.8(1) of the *Securities Act* requires a plausible analysis of the applicable legislative provisions and some credible evidence in support of the claim. A plausible analysis is not a plausible statutory interpretation, but rather a plausible application of the legislation to the facts. The uncontested evidence in the instant case was that the pit wall instability and rockslide impacted the company's operations at its mine. Accordingly, a plausible analysis of the applicable legislative provisions and evidence on the motion showed a reasonable or realistic chance that the action could succeed; as a result, the investor should have been granted leave to commence an action for the alleged breach of the mining company's timely disclosure obligations.

Section 1(1) of the *Securities Act* defines a "material fact" as "a fact that would reasonably be expected to have a significant effect on the market price or value

2025 SCC 39 (CanLII)

of the securities". It also defines a "material change", in subcl. (a)(i) of the definition, as "a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer". Under the *Securities Act*, material facts need only be disclosed periodically, while material changes must be disclosed immediately, or in the words of s. 75(1), "forthwith". This imposes an obligation on issuers to make timely disclosure of material changes. Proper disclosure is the heart and soul of the securities regulations across Canada and is pivotal for an effective securities regime. Disclosure helps maintain a level playing field of information between investors and issuers, and preventing and deterring informational asymmetry between investors and issuers is essential to the integrity of the securities system and the public interest. Disclosure also promotes the efficiency of capital markets by helping investors to identify and direct capital to the most deserving public companies.

The distinction between a "material fact" and a "material change" must be resolved under the modern principle of statutory interpretation. A statutory provision is interpreted based on its text, context, and purpose to find a meaning that is harmonious with the legislation as a whole. Under the *Securities Act*, material changes are distinct from the broader category of material facts. A material fact is static, because it provides a snapshot of an issuer's affairs at a particular point in time, whereas a material change is dynamic, because it necessarily compares an issuer's affairs at two points in time. For a material change to occur, there must be a change, as opposed to the existence of a fact. Moreover, material changes are related to changes in the issuer's

2025 SCC 39 (CanLII)

business, operations or capital, they must be internal rather than external to the issuer, and they usually involve more than mere negotiations or internal deliberations. Like material facts, however, material changes must be reasonably expected to have a significant effect on the market price or value of securities. There are two main policy reasons for the distinction between a material fact and a material change: (1) it balances the burden that disclosure places on issuers with the need for investors to be informed on a timely basis of material developments in an issuer's affairs; and (2) it promotes the purpose of securities law to remedy informational asymmetry between issuers and investors.

The term "change", which is not defined in the *Securities Act*, should not be interpreted restrictively. The inherent flexibility of what can be a "change" suggests that the ordinary meaning of the term should not be constrained by dictionary definitions. Substituting a dictionary definition for the intentionally undefined term "change" restricts the reach of the legislation, contrary to the legislature's purpose. The Ontario legislature's intentional decision to leave the word "change" undefined and to use that term with a group of other undefined words has several consequences. First, the legislature intended the word "change" to retain its ordinary meaning. Second, the word "change" takes meaning from the particular context of securities legislation, where the purpose of continuous disclosure obligations is to level the informational playing field between issuers and investors. Third, by leaving the term "change" undefined, the legislature has maintained flexibility for the *Securities Act* to apply to widely varying factual scenarios. Finally, although the legislature left "change"

2025 SCC 39 (CanLII)

undefined, regulators and courts have provided helpful interpretive guidance on what constitutes a "material change" in various policy documents and judicial decisions.

A development does not need to be important or substantial to constitute a change. The magnitude or significance of a development in an issuer's affairs is therefore not to be imported as a consideration for whether it constitutes a change. The undefined term "change" does not include qualifiers such as core, fundamental, or key. Evaluating the nature of the change is qualitative, while considering the magnitude of the change or whether it is significant is a question of materiality. While a narrower disclosure standard has developed in the jurisprudence and provides that a change must be important and substantial to need to be disclosed immediately, this narrower standard is inconsistent with the text of the legislation, which simply refers to a "change", and is mistaken as a matter of doctrine and policy.

Similarly, the undefined terms appearing in the phrase "business, operations or capital" should not be interpreted restrictively. Not only are the terms not defined in the *Securities Act*, they are also not defined in the leading judicial decisions, regulatory decisions, securities law textbooks or in the key regulatory instruments or policy statements. The legislature left these terms undefined for several reasons. First, the *Securities Act* relies on the ordinary commercial meaning of these widely understood commercial concepts, rather than creating rigid statutory definitions. Second, leaving the terms undefined allows courts and regulators to apply the legislation as broadly and flexibly as the context and circumstances require. Finally,

2025 SCC 39 (CanLII)

the phrase "change in the business, operations or capital" is a holistic standard to be applied, rather than a requirement to parse each element separately.

Whether there has been a material change in a given case is a highly contextual question of mixed fact and law. While disclosure decisions are a matter of legal obligation, there is no bright line test and the determination is a matter of judgment and common sense applied to the unique circumstances of each case. The contextual exercise of identifying a material change is guided by the purpose of disclosure obligations to level informational asymmetry between issuers and investors, which serves to maintain the integrity of the securities system and protect the public interest.

Pursuant to s. 138.8(1) of the *Securities Act*, a plaintiff must obtain leave of a court to commence an action for breach of timely disclosure obligations under the *Securities Act*. The test for leave in s. 138.8(1) provides that the court should grant leave only where it is satisfied that "the action is being brought in good faith" and "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff". It is a preliminary merits test, but does not require proof on a balance of probabilities that the action will succeed at trial. The test is, however, more stringent than the test for authorization or certification of a class action. It is a threshold screening mechanism intended to deter meritless litigation brought to coerce unjust settlements. The plaintiff must establish a reasonable or realistic chance, and not merely a possibility, that the action will succeed at trial, based on a plausible analysis of the applicable legislative provisions and some credible evidence in support of the claim. A

2025 SCC 39 (CanLII)

plausible analysis of the applicable legislative provisions is not simply a plausible interpretation of those provisions. On a motion for leave, the interpretation of the provisions at issue must still be correct. Statutory interpretation is not conducted less stringently or in a more relaxed fashion than at a trial on the merits. The plaintiff must show a plausible application of the relevant legislative provisions, based on the limited evidence available at this early stage of the proceedings.

Per **Côté** J. (dissenting): The appeal should be allowed, the judgment of the Court of Appeal set aside, and the motion judge's order dismissing the investor's motion for leave restored. The Court of Appeal erred in concluding that the investor could satisfy the leave requirement. With the proper interpretation of "material change", the investor would not be able to satisfy the court that he had a reasonable possibility of successfully establishing at trial that the pit wall instability or rock slide constituted a change in the mining company's business, operations, or capital.

A "material change" is a change in the core or high-level aspects of the issuer's business, operations, or capital. In drawing the distinction it did between "material fact" and "material change", the legislature intended to oblige issuers to assess only changes that alter the nature of their business, operations, or capital, understood at a high level of generality, for materiality and potential disclosure. Four principles have emerged from the common law for circumscribing the meaning of "a change in the business, operations or capital of the issuer". They consist of four exclusions for events affecting an issuer that do not come within the definition of

2025 SCC 39 (CanLII)

"change" such that, even if the events in question may reasonably be expected to have a significant effect on an issuer's share price, they do not require immediate disclosure. The first type is external facts or changes beyond the control of an issuer. These cannot constitute a material change unless they actually result in a change in an issuer's business, operations or capital. The second type is simple fluctuations in revenue or production. Even explained changes in results that do not stem from alterations in an issuer's business, operations, or capital can fall outside the category of "material change". The third type is uncertain developments in an issuer's business, operations or capital, such as moving through interim stages of a merger negotiation, having new discussions relating to an acquisition, or responding to a take-over bid. The fourth type is events that maintain the status quo of an issuer.

An ordinary reading of the text of the definition of "material change" in s. 1(1) of the *Securities Act* indicates, and the context and purpose strongly support, that only changes to high-level or core elements of an issuer constitute a change in its "business, operations or capital". The text of the provision and the constituents of immediate context support this interpretation. The meaning of "change" must be understood in relation to the terms it acts upon, namely, "business, operations or capital". Those words are to be interpreted in accordance with the "associated words" rule of statutory interpretation that takes the surrounding terms into account. Considered as a group, the words all suggest a high level of generality and all relate to the core aspects of an issuer. The textual emphasis on high-level alterations is also signalled in subcl. (a)(ii) of the definition of "material change", that defines the term

2025 SCC 39 (CanLII)

"material change" to also mean "a decision to implement a change referred to in subclause (i) made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer". This strongly suggests that a "change" under both subclauses excludes minor alterations in the affairs of the issuer that are beneath the purview of these decision makers and therefore concerns decisions that affect an issuer's business, operations, or capital at their core or at a high level.

The motion judge's analysis of the ordinary meaning of the key terms at play in the instant case is accepted. He interpreted the term "change" by adopting its ordinary and grammatical meaning. He construed a "change" as a shift in the issuer's core aspects that puts it in a different position, or on a different course, or direction. His interpretations of "business", "operations" and "capital" also accord with the legislature's focus on understanding those terms at a high level of generality, as evidenced by both the general words chosen and their association with other terms. In addition, the motion judge's use of the dictionary definition of "change" was not improper given that the definition he found was tested against, and supported by, his assessment of the purpose of the statute and legislative intent. The motion judge's interpretation, by linking "change" to "business, operations or capital", properly focusses on the core aspects or high-level elements of an issuer while excluding consideration of external, production or revenue-oriented, uncertain, routine, or ordinary developments that do not rise to the level of "changes".

2025 SCC 39 (CanLII)

The broader context and purpose of the *Securities Act* also support the motion judge's interpretation. In particular, his interpretation accords with the legislature's deliberate distinction between "material change" and "material fact", the various policy considerations underlying the distinction, and the purposes that underlie the *Securities Act*'s disclosure regime. Investor protection and the remedying of informational asymmetry do not exclusively favour a low threshold for disclosure; too much disclosure can also be prejudicial to investors. Moreover, investor protection does not override the other objectives of the *Securities Act*. The legislature chose to impose balanced disclosure obligations on issuers using the distinction between "material fact" and "material change"; the importance of this distinction has been repeatedly recognized. In making this distinction, the legislature struck a balance between ensuring meaningful investor protection and avoiding undue burdens on issuers, thereby crafting a disclosure regime with limits. The legislature sought periodic disclosure of a broad array of information affecting an issuer, and immediate disclosure of only a narrower subset of changes.

The impacts or consequences of the majority's overbroad understandings of the terms "change", "business", "operations" and "capital" will be that almost every event that affects the affairs of an issuer will have to be reviewed for materiality and almost every analysis of "material change" will become a question of materiality alone. In effect, the words "business, operations or capital" are given no meaning, the clear legislated distinctions are collapsed, and the regulatory burden is increased in a manner that is not justified by the text, context, and purpose of the *Securities Act*. It is unclear

2025 SCC 39 (CanLII)

how the four common law exclusions for events affecting an issuer that do not come within the definition of "change" can survive the expansive definitions adopted by the majority. There is, however, agreement with the majority that it is not desirable to attempt to create a bright line test for material change. To decipher whether a "material change" has occurred, the inquiry will always be fact-specific. This preserves the flexibility that courts require to consider the unique facts of each case.

Overbroad disclosure obligations that conflate "material change" and "material fact" run contrary to the *Securities Act*'s delicate policy considerations and have practical consequences. Specifically, the conflation may encourage over-disclosure or premature disclosure beyond what is required by the statute, carrying with it an increased regulatory burden and risks to the efficiency of capital markets. The impact may incentivize issuers to over-disclose or disclose prematurely to mitigate compliance and liability risk. This presents at least two concerns for investors. First, this market noise may very well prevent investors from assessing the true character and activities of an issuer, valuing its securities, and making informed investment decisions, resulting in increased costs in corporate transactions. Second, over-disclosure or premature disclosure may also frustrate the goal of directing capital to the most deserving issuers, which may stunt efficiency and the allocation of capital within the market, ultimately reducing overall returns for investors. Issuers will also be required to undertake internal changes that could prove costly to respond to the majority's upholding of the Court of Appeal's broad interpretation, as they will also be required to assess every event affecting their affairs for materiality. This is not practicable, nor

2025 SCC 39 (CanLII)

is it just when civil liability may follow from a failure to disclose. Finally, the potential liability of directors and officers will also be expanded by this broad and undefined disclosure standard, with negative impacts.

As for the standard to be met for granting leave to a plaintiff who argues that an issuer has failed to immediately disclose a material change, there is agreement with the majority that the definition of "material change" remains static at all stages of litigation. The interpretation of the statute must be correct and does not change based on the stage of proceedings. There is also agreement with the majority that the requirement in s. 138.8(1)(b) of the *Securities Act* that there be "a reasonable possibility that the action will be resolved at trial in favour of the plaintiff" means that the plaintiff must offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. There is further agreement that the language "plausible interpretation" requires that the application of the statute to the available evidence be plausible. As a result, the motion judge was correct to apply his own interpretation of the term "material change" rather than leaving the interpretation open for the parties to settle at trial.

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By Jamal J.

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2025 SCC 39 (CanLII)

S.C.R. 331, aff'g (2005), 77 O.R. (3d) 321; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Coventree Inc.* (2011), 34 OSCB 10209, aff'd 2013 ONSC 1310, 306 O.A.C. 107; *AiT Advanced Information Technologies Corporation* (2008), 31 OSCB 712; *Peters v. SNC-Lavalin Group Inc.*, 2023 ONCA 360, 166 O.R. (3d) 756; **referred to:** *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, aff'g 2014 ONCA 90, 118 O.R. (3d) 641, rev'g 2012 ONSC 3637, 29 C.P.C. (7th) 225; *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225 rev'd 2014 ONCA 90, 118 O.R. (3d) 641, aff'd 2015 SCC 60, [2015] 3 S.C.R. 801; *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348, aff'd 2016 ONCA 641, 132 O.R. (3d) 161; *Cartaway Resources Corp. (Re)*, 2000 BCSECCOM 88, [2000] B.C.S.C.D. No. 92 (Lexis), 2000 CarswellBC 3125 (WL); *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310, 306 O.A.C. 107; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15; *R. v. Monney*, [1999] 1 S.C.R. 652; *An Informer v. A Chief Constable*, [2012] EWCA Civ 197, [2013] Q.B. 579; *Rex Diamond Mining v. Ontario Securities Commission*, 2010 ONSC 3926; *Miller v. FSD Pharma, Inc.*, 2020 ONSC 4054; *Coffin v. Atlantic Power Corp.*, 2015 ONSC 3686, 127 O.R. (3d) 199; *YBM Magnex International Inc.* (2003), 26 OSCB 5285; *Rex Diamond Mining Corporation* (2008), 31 OSCB 8337; *Amaya inc. v. Derome*, 2018 QCCA 120; *Ironworkers Ontario Pension Fund (Trustee of) v.*

2025 SCC 39 (CanLII)

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By Côté J. (dissenting)

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2025 SCC 39 (CanLII)

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2025 SCC 39 (CanLII)

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2025 SCC 39 (CanLII)

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APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Benotto and Favreau JJ.A.), 2023 ONCA 359, 166 O.R. (3d) 732, 44 B.L.R. (6th) 33, [2023] O.J. No. 2547 (Lexis), 2023 CarswellOnt 7651 (WL), setting aside a decision of Glustein J., 2022 ONSC 81, [2022] O.J. No. 37 (Lexis), 2022 CarswellOnt 58 (WL) and remitting issues regarding the certification of the class proceeding to the Superior Court. Appeal dismissed, Côté J. dissenting.

Lara Jackson, *John M. Picone*, *Kate Byers* and *Laura Cloutier*, for the appellants.

2025 SCC 39 (CanLII)

Joseph Groia, *Jay Strosberg*, *Scott Robinson* and *Yona Gal*, for the respondent.

John A. Fabello, *Gillian B. Dingle* and *Lauren Nickerson*, for the intervener Canadian Coalition for Good Governance.

Aaron Dantowitz and *Charlie Pettypiece*, for the intervener Ontario Securities Commission.

Luis Sarabia, *Jonathan Bilyk* and *Matthew Howe*, for the intervener Mining Association of Canada.

Monique Jilesen, *Brian Kolenda* and *Devon R. Kapoor*, for the intervener CFA Societies Canada Inc.

Vlad Calina and *Caitlin Leach*, for the intervener LiUNA Pension Fund of Central and Eastern Canada.

Dana M. Peebles and *Valérie Lord*, for the intervener Insurance Bureau of Canada.

Wendy Berman, *Brandon Kain* and *Aya Schechner*, for the intervener Canadian Chamber of Commerce.

2025 SCC 39 (CanLII)

The judgment of Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. was delivered by

JAMAL J. —

I. Overview

[1] This appeal requires the Court to address what has been described as "perhaps the most difficult area of securities law" — the distinction between a "material fact" and a "material change" under the Ontario *Securities Act*, R.S.O. 1990, c. S.5, and equivalent legislation across Canada (Ontario Securities Commission, "Consolidation of Remarks of Peter J. Dey Concerning Disclosure Under the *Securities Act* Made to Securities Lawyers in Calgary and Toronto on June 7 and 9" (1983), 6 *O.S.C. Bull.* 2361 ("Dey Remarks"), at p. 2361). The appeal also requires the Court to clarify the test under s. 138.8(1) of the *Securities Act* for leave to commence an action for breach of an issuer's disclosure obligations.

[2] A "material fact" is defined under the *Securities Act* as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities" (s. 1(1) (see Appendix)). Material facts need only be disclosed periodically under the legislation. By contrast, a "material change" is defined in relevant part as "a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer" (s. 1(1)). Material changes must be disclosed immediately, or in the words

2025 SCC 39 (CanLII)

of the statute, "forthwith" (s. 75(1)), imposing an obligation to make timely disclosure. The test for leave to commence an action under the *Securities Act* for breach of an issuer's disclosure obligations provides that the court should grant leave only where it is satisfied that "the action is being brought in good faith" and "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff" (s. 138.8(1)).

[3] This case arises in the wake of a Canadian mining company detecting pit wall instability at its premier mine. Within days, the mine experienced a rockslide that required the company to shut down at least part of the mine for a time and to revise the mine's production forecast downward by 20 percent for the next year. When the company disclosed these developments to investors about a month later, the company's share price dropped 16 percent within a day, resulting in a loss of over $1 billion in market capitalization. Soon afterwards, an investor applied for leave to commence an action for breach of the company's timely disclosure obligations and for certification of a class proceeding.

[4] The motion judge at the Ontario Superior Court of Justice accepted that the pit wall instability and rockslide may have been "material facts", but ruled that there was no reasonable possibility that the investor could establish a "material change" in the company's "business, operations or capital". The motion judge relied on a dictionary definition of the word "change" as "a different position, course, or direction" (2022 ONSC 81, at para. 150, quoting the definition of "change" in the *Merriam-Webster Dictionary* (online)), and drew on case law to define the terms "business",

2025 SCC 39 (CanLII)

“operations”, and “capital”. He ruled that since the company continued its business and operations as a mining company, there was no reasonable possibility that either the pit wall instability or the rockslide resulted in a “change” in the company’s “business”, “operations”, or “capital”. As a result, the company had not been required to disclose the developments “forthwith”. Leave under s. 138.8(1) was therefore denied. The motion judge went on to determine that if there had been a change, then there was a reasonable possibility that the change would have been material.

2025 SCC 39 (CanLII)

[5] The Court of Appeal for Ontario allowed the appeal. It ruled that the motion judge misinterpreted the statutory test for a “material change” by adopting restrictive definitions of the terms at issue, which it said “have not yet been definitively interpreted in the jurisprudence” (2023 ONCA 359, 166 O.R. (3d) 732, at para. 7). The motion judge then erred by applying those restrictive definitions to the test for leave, which the Court of Appeal said required only a “plausible interpretation” of the statutory provisions at issue and sufficient evidence to support granting leave. In the Court of Appeal’s view, there was a reasonable possibility that the pit wall instability and rockslide involved “changes” in the company’s operations, given the undisputed evidence that these developments impacted the company’s phasing of the mine and reduced its next annual production forecast.

[6] I would dismiss the appeal. In my view, the motion judge erred by relying on restrictive definitions of “change”, “business”, “operations”, and “capital”, and then erred by applying those definitions to determine whether there was a reasonable

possibility that there had been a material change. The Ontario legislature intentionally left these terms undefined to allow the legislation to be applied flexibly and contextually to a wide range of industries and corporate structures. The disclosure standards in the *Securities Act* should be applied to promote the statutory purpose of preventing and deterring informational asymmetry between issuers and investors, while recognizing that the statutory terms at issue acquire meaning by being applied in concrete factual circumstances. By contrast, adopting rigid definitions would ossify the *Securities Act* and would frustrate the statutory purpose.

[7] Moreover, as this Court has stated, the test for leave under s. 138.8(1) of the *Securities Act* requires a "plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim" (*Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, at para. 39 (emphasis added), quoted in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, at para. 121). A "plausible analysis" is not a plausible statutory *interpretation*, but rather a plausible *application* of the legislation to the facts. Statutory interpretation is conducted in accordance with the modern principle, both on a motion for leave and at a trial on the merits. A plausible analysis must, however, show how the legislation applies to the facts by accounting for the limited evidence available on a motion for leave, which is brought before there has been documentary production or oral discovery.

2025 SCC 39 (CanLII)

[8] Here, the uncontested evidence on the motion was that the pit wall instability and rockslide impacted the company's operations at its mine. Hence, the evidence showed that these events could have resulted in a "change". No one challenges the conclusion of the courts below that there is a reasonable possibility these events could be shown at trial to be "material". Accordingly, a plausible analysis of the applicable legislative provisions and evidence on the motion showed a reasonable or realistic chance that the action could succeed.

2025 SCC 39 (CanLII)

II. Background

A. *Lundin Mining Corporation and the Candelaria Mine*

[9] The appellant, Lundin Mining Corporation, is a federally-incorporated Canadian mining company whose shares trade on the Toronto Stock Exchange. The company has operations in different parts of the world and primarily produces copper, nickel, and zinc. The individual appellants were officers and directors of Lundin at the relevant times.

[10] Lundin held an 80 percent ownership interest in the Candelaria mine in Chile, which produces copper ore from an open pit mine and three underground mines. The Candelaria mine accounted for between 55 percent and 60 percent of Lundin's total sales revenue in 2016 and 2017, with the open pit mine accounting for about 95 percent of all material mined at Candelaria. In 2017, the Candelaria mine had 19 years left in its lifespan and 5 remaining phases, known as Phases 9 to 13. Phase 9 and

part of Phase 10 were scheduled to be mined in October 2017. Lundin removed 87 million tonnes of material from the Candelaria open pit mine in 2017.

B. *Lundin Detects Pit Wall Instability at the Candelaria Mine and a Rockslide Soon Follows*

[11] On October 25, 2017, Lundin detected pit wall instability at the Candelaria open pit mine. Lundin regularly warned investors of the risks of pit wall instability and rockslides, which are common in the mining industry. In this instance, the instability was localized and all personnel were evacuated from that area of the mine. There was no direct evidence before the court as to whether the rest of the open pit mine or the underground mines were evacuated or shut down.

[12] On October 31, 2017, the pit wall instability caused a localized rockslide in the open pit mine. About 600,000 to 700,000 tonnes of waste material fell down a slope, restricting access to Phase 9. This volume of material represented about 0.8 percent of Candelaria's 2017 annual production, roughly equivalent to three days of mining. The rockslide caused no fatalities, injuries, or damage to equipment. There was no direct evidence before the court of the immediate impact on the mine's operations.

C. *Lundin Discloses the Pit Wall Instability and Rockslide to Investors a Month Later*

2025 SCC 39 (CanLII)

[13] Lundin did not disclose the pit wall instability or rockslide to investors immediately. The company did so about a month later, on November 29, 2017, after the close of trading, as part of a regular news release series providing operational updates. This news release set out an update on the company's operations for the next 3 years beginning in 2018 and on its 10-year guidance for the Candelaria mine.

[14] The news release described "recent instability in a localized area of the pit's east wall and a slide which occurred October 31, 2017" (A.R., vol. II, at p. 340). As a result, the company lowered its copper production forecasts at the Candelaria mine for 2018 and 2019. The revised 2018 forecast was now between 104,000 and 109,000 tonnes, down 20 percent from the previous outlook for 2018. In the near-term, Lundin planned to focus on pushing back the waste from the area of the rockslide and to make up the lost copper production with ore from a low-grade stockpile. Lundin's cash costs at Candelaria were expected to increase and the phasing at the mine would be revised.

D. *Lundin's Share Price Drops 16 Percent*

[15] The next day, on November 30, 2017, Lundin's share price dropped 16 percent from the previous day's closing price — representing a loss of more than $1 billion in market capitalization.

[16] After the close of trading, Lundin released a technical report describing the rockslide, the changes to the life of the mine, the future reductions in copper production, and the low-grade stockpile material to be used instead of the higher-grade copper ore.

2025 SCC 39 (CanLII)

E. *Lundin Hosts a Conference Call with Investors*

[17] On December 1, 2017, before the market opened and trading resumed, Lundin hosted a conference call with investors and stock analysts to provide an operational update and to answer questions. Lundin's then-chief executive officer acknowledged investor concerns about the pit wall instability and rockslide and the "big hit" to the company's stock price the day before, which he described as a "black eye for us" (A.R., vol. III, at p. 268). He noted that Candelaria's "localized pit instability" would result in the company being "down on copper for next year, which is obviously a concern to a lot of investors and one of the key elements . . . resulting in our significant stock decline yesterday" (pp. 253-54). He also accepted that the company "had not communicated well enough" and "apologize[d] for not communicating more clearly on some of the background behind the investments in the production plan" (pp. 254 and 268). Lundin's president and managing director added that they "actually had indications that [the rockslide] was going to happen about 5 days prior" (p. 255).

F. *An Investor Commences a Proposed Class Action for Failure to Make Timely Disclosure*

[18] The respondent, Dov Markowich, is an investor who purchased 10,000 shares of Lundin between November 15 and 27, 2017. In January 2018, Mr. Markowich commenced a proposed national class proceeding before the Ontario Superior Court against Lundin and several of the company's officers and directors, alleging that they

2025 SCC 39 (CanLII)

had failed to make timely disclosure of the pit wall instability and rockslide, contrary to their obligations under the *Securities Act* and the equivalent provincial and territorial securities legislation across Canada. He alleged that the pit wall instability and rockslide each resulted in a "material change" in Lundin's "business, operations or capital" and should therefore have been disclosed "forthwith" under s. 75(1) of the *Securities Act*. He also claimed damages for negligent misrepresentation at common law. The proposed class proceeding advances claims on behalf of investors who purchased Lundin shares between October 25 and November 29, 2017 and seeks $175 million in general and special damages and $10 million in punitive damages.

[19] Mr. Markowich brought a motion under s. 138.8(1) of the *Securities Act* for leave to pursue the statutory cause of action. He also moved for certification of the proposed class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

III. Prior Decisions

A. *Ontario Superior Court of Justice, 2022 ONSC 81 (Glustein J.)*

[20] The motion judge dismissed the motions for leave to commence an action under the *Securities Act* and for class certification. He found that while the motion for leave was brought in good faith, there was no reasonable possibility that Mr. Markowich could establish that either the pit wall instability or the rockslide resulted in a "material change" in Lundin's affairs requiring immediate disclosure to investors

2025 SCC 39 (CanLII)

pursuant to the obligation to make timely disclosure under the *Securities Act*. Neither development resulted in a “change” in Lundin’s “business, operations or capital”.

[21] The motion judge defined the “business” of an issuer as what it does to generate revenues; “operations” as how or where the company conducts business; and “capital” as the company’s share structure and rights of shareholders. He defined a “change” as “a different position, course, or direction” (para. 150, quoting the definition of “change” in the *Merriam-Webster Dictionary* (online)). In his view, “a change occurs when the event results in a different position, course, or direction to a company’s business, operations, or capital” (para. 151, citing *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225, rev’d on other grounds 2014 ONCA 90, 118 O.R. (3d) 641, aff’d 2015 SCC 60, [2015] 3 S.C.R. 801, and *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348, at paras. 57-58, aff’d 2016 ONCA 641, 132 O.R. (3d) 161).

[22] Although there was no direct evidence before the court on the effect of the pit wall instability or rockslide on the Candelaria mine’s operations, there was competing expert evidence on this issue. Lundin’s expert opined that the pit wall instability was modest and localized and would have provided no reason to shut down other areas of the open pit or underground mines. The rockslide would have been an ordinary event leading to only a temporary suspension of operations in a small area of the open pit mine, with minimal impact on the mine’s overall production or operations. By contrast, Mr. Markowich’s expert was of the view that the pit wall instability would

2025 SCC 39 (CanLII)

have led to a major, crisis-level suspension of operations. The rockslide would have caused the mine to effectively cease operating, threatening its economic viability.

[23] The motion judge ruled that there was no basis to find that either the pit wall instability or the rockslide involved a "change" in Lundin's business, operations or capital. There was no evidence that either development led Lundin to change its line of business, to stop operating the mine, or to change its capital structure. Although these developments caused Lundin to defer some of its copper mining at Candelaria until 2020 or 2021, the deferral represented less than 5 percent of Lundin's annual production. Nor was there any evidence that either development threatened Lundin's economic viability. Lundin continued its business and operations as an international mining company. The motion judge noted that pit wall instability and rockslides are inherent risks in open pit mining and that Lundin managed and operated its business under those risks. Finally, the motion judge found no evidence that either development caused any change in Lundin's capital structure. He stated that not every development that requires additional expenditure is a material change to capital. As a result, the motion judge refused leave under s. 138.8(1) and dismissed the motion for class certification.

[24] In the alternative, the motion judge stated that had he found a change in Lundin's business, operations or capital, he would have granted leave. There was a reasonable possibility that any change would have been material, because it would reasonably be expected to have had a significant effect on the market price or value of

2025 SCC 39 (CanLII)

Lundin's securities. There was competing expert evidence on the market effect of the pit wall instability and rockslide, and the motion judge found that Mr. Markowich's evidence was credible. The conference call after Lundin's disclosure also showed that investors were greatly concerned by these developments.

[25] Had the motion judge granted leave, he would have certified a class proceeding regarding the statutory cause of action, which Lundin and the other defendants did not oppose. However, the motion judge refused to certify the claims for negligent misrepresentation at common law (this issue was not appealed further).

B. *Court of Appeal for Ontario, 2023 ONCA 359, 166 O.R. (3d) 732 (Favreau J.A., Simmons and Benotto JJ.A. concurring)*

[26] The Court of Appeal allowed the appeal. The court held that the motion judge erred in law by interpreting the terms "change", "business", "operations", and "capital" too narrowly, especially in the context of a motion for leave to commence an action under the *Securities Act*. At this stage of the proceedings, Mr. Markowich simply had to show "that he had a reasonable possibility of success based on a plausible interpretation of the statute and the evidence" (para. 7). The court stated that the motion judge "adopted a restrictive interpretation of the terms at issue", even though they "have not yet been definitively interpreted in the jurisprudence" (para. 7). The motion judge "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" (para. 7).

2025 SCC 39 (CanLII)

[27] In the court's view, based on a more generous interpretation of the words "change in the business, operations or capital", there was a reasonable possibility that Mr. Markowich could demonstrate that the pit wall instability and rockslide constituted changes in Lundin's operations. There was some evidence that the open pit mining operation was shut down for a period of time and uncontested evidence that Lundin modified its schedule for the phased mining of the open pit, reduced its expected production for 2018 and 2019, and as a result, would be required to use lower grade ore in the near-term. Consequently, Mr. Markowich had advanced a plausible interpretation and sufficient evidence to support granting leave to proceed with a statutory cause of action under the *Securities Act*.

[28] Finally, the court noted that although Lundin and the individual defendants agreed that granting leave under s. 138.8(1) to commence an action should result in the certification of the action, it declined to certify the class proceeding because the motion judge did not address issues such as the class definition or common issues. The court referred these issues back to the Superior Court for determination.

IV. Issues

[29] The main issue on this appeal is whether Mr. Markowich should have been granted leave to commence an action against Lundin and the individual appellants for their alleged failure to make timely disclosure of "material changes" in Lundin's affairs. This raises two questions. First, what is the test for a "material change" and

2025 SCC 39 (CanLII)

how does a “material change” differ from a “material fact” under the *Securities Act*? Second, what is the test for leave under s. 138.8(1)?

V. Positions of the Parties

[30] The appellants, Lundin and its officers and directors, submit that the Court of Appeal interpreted “material change” too broadly. They claim that the Court of Appeal erroneously focussed on the internal or external nature of a development and thus collapsed the distinction between a “material fact” and a “material change”. In the appellants’ view, the motion judge correctly interpreted the terms “change”, “business”, “operations”, and “capital”, and correctly found that the pit wall instability and rockslide could not have resulted in a change in Lundin’s business, operations or capital. The appellants also submit that the Court of Appeal erred in applying the test for leave under s. 138.8(1) of the *Securities Act*. In their view, the motion judge correctly refused to grant leave in accordance with this Court’s decision in *Theratechnologies*, because the respondent failed to advance a plausible interpretation of the relevant provisions of the *Securities Act*.

[31] The respondent, Mr. Markowich, claims that the Court of Appeal correctly interpreted the statutory term “material change”. He submits that the legislature intentionally left the terms “change”, “business”, “operations”, and “capital” undefined to provide a flexible, remedial timely disclosure standard. In the respondent’s view, a “change” is not limited to fundamental shifts in the business, operations or capital of an issuer. Such a high standard would conflate change and materiality. The respondent

2025 SCC 39 (CanLII)

also submits that the Court of Appeal properly applied the test for leave under s. 138.8(1) in accordance with this Court's decision in *Theratechnologies*. In his view, based on the evidence available, the Court of Appeal correctly concluded that there was a reasonable possibility of establishing a material change at trial.

2025 SCC 39 (CanLII)

VI. Analysis

[32] I will address the issues in three parts. First, I will consider the statutory interpretation of a "material change" in the business, operations or capital of a reporting issuer under the *Securities Act*. Second, I will review the test for leave under s. 138.8(1) and discuss whether, as the Court of Appeal found, the term "material change" should be interpreted more flexibly at the leave stage. Finally, I will apply the relevant legal principles to this case.

A. *The Interpretation of a Material Change*

(1) Legislative and Policy Background

(a) *The Role of Disclosure in Securities Regulation*

[33] Section 1.1 of the *Securities Act* identifies four purposes of the legislation: "(a) to provide protection to investors from unfair, improper or fraudulent practices; (b) to foster fair, efficient and competitive capital markets and confidence in capital markets; (b.1) to foster capital formation; and (c) to contribute to the stability of the

financial system and the reduction of systemic risk”. Each purpose is promoted by the foundational role of disclosure in securities regulation.

[34] Businesses (“issuers”) issue a wide range of investment products (“securities”), including shares of stock in corporations, to raise capital from investors (*Securities Act*, s. 1(1) “issuer”, “security”). The integrity of the market for securities necessarily depends on the quality of the information disclosed by issuers to investors. As is well known, “[i]nvestors pay enormous amounts of money to strangers for completely intangible rights, whose value depends entirely on the quality of the information that the investors receive and on the sellers’ honesty” (D. Johnston, K. D. Rockwell and L. Levine, *Canadian Securities Regulation* (6th ed. 2025), at ¶1.1, quoting B. S. Black, “The Legal and Institutional Preconditions for Strong Securities Markets” (2001), 48 *U.C.L.A. L. Rev.* 781, at p. 782).

[35] This Court has recognized that “proper disclosure is the heart and soul of the securities regulations across Canada” and is pivotal for “an effective securities regime” (*Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331, at paras. 5 and 64). Disclosure helps maintain a “level playing field” of information between investors and issuers, which has been described as “the most fundamental principle of securities regulation” (*Theratechnologies*, at para. 25, quoting *Cartaway Resources Corp. (Re)*, 2000 BCSECCOM 88, [2000] B.C.S.C.D. No. 92 (Lexis), 2000 CarswellBC 3125 (WL), at para. 216, and *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310, 306 O.A.C. 107 (Div. Ct.), at para. 40; see also Dey Remarks, at p.

2025 SCC 39 (CanLII)

2362; Johnston, Rockwell and Levine, at ¶8.13; M. R. Gillen, *Securities Regulation in Canada* (4th ed. 2019), at pp. 7-10 and 295-98; C. C. Nicholls, *Securities Law* (3rd ed. 2023), at pp. 362-63; S. Rousseau, *Droit des valeurs mobilières: Théorie et pratique* (2023), at pp. 45-50 and 292). This Court has also recognized that the *Securities Act* is "remedial legislation and is to be given a broad interpretation" (*Kerr*, at para. 32).

2025 SCC 39 (CanLII)

[36] As a result, preventing and deterring informational asymmetry between investors and issuers is essential "to maintain the integrity of the securities system and protect the public interest" (*British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 77). This is the "core policy goal that underlies securities law" (D. Sarro, "Material Change Standards in Securities Law" (2025), 69 *Can. Bus. L.J.* 1, at p. 2, citing A. Anand and M. Condon, "Weather, Leather, and the Obligation to Disclose: *Kerr v. Danier Leather Inc*." (2006), 44 *Osgoode Hall L.J.* 727, at pp. 735-36, and H. A. Sale, "Disclosure's Purpose" (2018), 107 *Geo. L.J.* 1045, at pp. 1045-46; see also E. M. Iacobucci, "On Lemons and Leather: Liability for Misrepresentations of Forward-looking Information in *Danier Leather*" (2009), 48 *Can. Bus. L.J.* 3, at pp. 15-17).

[37] Disclosure also promotes the efficiency of capital markets by helping investors to identify and direct capital to the most deserving public companies. Armed with appropriate information, investors are more confident and participate more actively in securities markets, thereby enhancing the efficiency and competitiveness of capital markets more generally (*Theratechnologies*, at para. 26; Johnston, Rockwell

and Levine, at ¶8.14; Gillen, at p. 295; Rousseau (2023), at pp. 42-44; J. Biron, "Gouvernance et assemblées d'actionnaires", in *Jurisclasseur Québec — Collection Droit des affaires — Valeurs mobilières* (loose-leaf), fasc. 8, at No. 41).

2025 SCC 39 (CanLII)

(b) *Disclosure of Material Facts in the Primary Market*

[38] To illustrate the meaning of a material fact, it is useful to consider the disclosure required when an issuer first sells its securities directly to investors, known as an "initial public offering" or "IPO". An issuer undertaking such an offering is said to be participating in the "primary market" for its securities (Johnston, Rockwell and Levine, at ¶12.69; Gillen, at pp. 238-40; Nicholls, at pp. 6-7; Rousseau (2023), at pp. 131-33 and 148-51). An issuer commonly becomes a "reporting issuer" by preparing a comprehensive disclosure document, known as a prospectus, filing it with securities regulators under the securities law of a jurisdiction, and delivering it to purchasers of the securities (Johnston, Rockwell and Levine, at ¶7.5; Gillen, at pp. 197-202; Nicholls, at pp. 7-8; Rousseau (2023), at pp. 148-51; *Securities Act*, s. 1(1) "reporting issuer"). A prospectus must provide "full, true and plain disclosure of all <u>material facts</u> relating to the securities issued or proposed to be distributed" (s. 56(1)).

[39] A "material fact" is defined under the Ontario *Securities Act* as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities" (s. 1(1)). Similar definitions are contained in provincial and territorial securities legislation across the country (see *Securities Act*, R.S.B.C. 1996, c. 418, s. 1(1)); *Securities Act*, R.S.A. 2000, c. S-4, s. 1(gg); *The Securities Act, 1988*, S.S. 1988-

89, c. S-42.2, s. 2(1)(z); *The Securities Act*, C.C.S.M., c. S50, ss. 112(1) and 140.1; *Securities Act*, CQLR, c. V-1.1, s. 5; *Securities Act*, S.N.B. 2004, c. S-5.5, s. 1(1); *Securities Act*, R.S.N.S. 1989, c. 418, s. 2(1)(w); *Securities Act*, R.S.P.E.I. 1988, c. S-3.1, s. 1(1)(gg); *Securities Act*, R.S.N.L. 1990, c. S-13, s. 2(1)(x); *Securities Act*, S.N.W.T. 2008, c. 10, s. 1(1); *Securities Act*, S.Y. 2007, c. 16, s. 1(1); *Securities Act*, S. Nu. 2008, c. 12, s. 1(1)).

(c) *Continuous Disclosure Obligations in the Secondary Market: Periodic Disclosure of Material Facts, but Timely Disclosure of Material Changes*

[40] After an issuer has sold securities directly to investors in the primary market, subsequent trades of securities between investors occur in the "secondary market" (Johnston, Rockwell and Levine, at ¶12.69; Gillen, at pp. 293-95; Nicholls, at pp. 7-8; Rousseau (2023), at pp. 151-52). As elaborated below, a reporting issuer whose shares trade on the secondary market is subject to continuous disclosure obligations, which require regular, ongoing disclosure of certain information to investors and to the relevant provincial or territorial securities regulator.

[41] There are two categories of continuous disclosure obligations. The first is the obligation to make periodic disclosure of every "material fact". By law, material facts must be disclosed at regular intervals, such as in annual and quarterly financial statements, annual information forms, and information and proxy circulars (*Theratechnologies*, at para. 23; Johnston, Rockwell and Levine, at ¶8.3; Gillen, at pp. 8 and 293-94; Nicholls, at p. 363; Rousseau (2023), at pp. 295-306).

2025 SCC 39 (CanLII)

[42] The second category of continuous disclosure obligation is the obligation to make timely disclosure of every "material change" in the issuer's affairs. Material changes must generally be disclosed "forthwith" by issuing and filing "a news release authorized by a senior officer disclosing the nature and substance of the change" (s. 75(1); see also *Theratechnologies*, at para. 24; Johnston, Rockwell and Levine, at ¶¶8.3, 8.106 and 8.107; Gillen, at p. 293; Nicholls, at p. 388; Rousseau (2023), at pp. 320-22).

[43] As previously stated, a "material change" (in relation to an issuer other than an investment fund) is defined in relevant part as "a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer" (s. 1(1)). Decisions to implement such a change, made by the board of directors or by senior management where they believe that confirmation by the board of directors is probable, are also defined as material changes (s. 1(1)). Similar definitions are contained in the provincial and territorial securities legislation across Canada (*Securities Act* (B.C.), s. 1(1); *Securities Act* (Alta.), s. 1(ff); *The Securities Act, 1988* (Sask.), s. 2(1)(y); *The Securities Act* (Man.), s. 1(1); *Securities Act* (Que.), s. 5.3; *Securities Act* (N.B.), s. 1(1); *Securities Act* (N.S.), s. 2(1)(v); *Securities Act* (P.E.I.), s. 1(1)(ff); *Securities Act* (N.L.), s. 2(1)(w); *Securities Act* (N.W.T.), s. 1(1); *Securities Act* (Yukon), s. 1(1); *Securities Act* (Nu.), s. 1(1)).

[44] As this Court has noted, the statutory definition of a "material change" has two components. First, there must be "a change in the business, operations or capital

2025 SCC 39 (CanLII)

of the issuer”. A change in any one of the issuer’s business, operations or capital is sufficient. Second, the change must be material, which means that it “would reasonably be expected to have a significant effect on the market price or value of the securities” of the issuer. Both components are required to trigger an obligation of timely disclosure (*Theratechnologies*, at para. 40; *Securities Act*, s. 1(1); see also *Cornish*, at para. 46).

[45] Since 2004, most continuous disclosure obligations for Canadian reporting issuers have been consolidated in a national instrument adopted by securities regulators nationwide, which sets out harmonized disclosure obligations found in provincial and territorial legislation (Ontario Securities Commission, National Instrument 51-102, *Continuous Disclosure Obligations* (2004), 27 OSCB 3439 (“NI 51-102”); see also Johnston, Rockwell and Levine, at ¶8.2; Gillen, at p. 300; Nicholls, at p. 364; Rousseau (2023), at p. 291). Regulators have also issued a policy statement on disclosure standards that identifies examples of potentially “material information”, which encompasses both material facts and material changes (Ontario Securities Commission, National Policy 51-201, *Disclosure Standards*, (2002), 25 OSCB 4492, s. 4.3). However, this policy cannot, and does not, replace the statutory tests for identifying “material facts” and “material changes” (*Theratechnologies*, at para. 53; Sarro, at p. 8, fn. 47).

(2) The Distinction Between a “Material Fact” and a “Material Change”

[46] The distinction between a “material fact” and a “material change”, both of which are defined by legislation, must be resolved under the modern principle of

2025 SCC 39 (CanLII)

statutory interpretation. A statutory provision is interpreted based on its text, context, and purpose to find a meaning that is harmonious with the legislation as a whole (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 117).

[47] The distinction between a material fact and a material change has been described as a "conundrum" (Anand and Condon, at p. 730), and sometimes causes "considerable uncertainty" (Johnston, Rockwell and Levine, at ¶6.9) and "considerable confusion" (Ontario, *Five Year Review Committee Final Report — Reviewing the Securities Act (Ontario)* (2003, Purdy Crawford, chair) ("Crawford Report"), at p. 142). Determining whether a material change has occurred is a contextual question of mixed fact and law (see *Cornish*, at paras. 51 and 53). Even so, several guiding principles from the case law and expert commentary help explain the distinction.

(a) *A Material Fact Is Static; A Material Change Is Dynamic*

[48] A material fact is "static", because it provides a snapshot of an issuer's affairs at a particular point in time. A material change is "dynamic", because it necessarily compares an issuer's affairs at two points in time (Johnston, Rockwell and Levine, at ¶6.8; see also *Kerr*, at para. 38, citing Dey Remarks, at p. 2368). For a material change to occur, "there must be a 'change' (as opposed to the existence of a 'fact')" (Crawford Report, at p. 143; see also J. D. Fraiberg and R. Yalden, "*Kerr v.*

2025 SCC 39 (CanLII)

Danier Leather Inc.: Disclosure, Deference and the Duty to Update Forward-Looking Information" (2006), 43 *Can. Bus. L.J.* 106, at p. 109).

[49] The distinction between a material fact and a material change "is perhaps best understood from the perspective of the evolution of an issuer's disclosure record" (Crawford Report, at p. 142). To illustrate, recall the role of a prospectus as a base disclosure document that must contain full, true, and plain disclosure of all material facts relating to the securities issued or proposed to be issued. Any fact will be a material fact, whether or not it is related to the issuer, if it would reasonably be expected to have a significant effect on the market price or value of the securities being issued. After a preliminary prospectus has been filed, the issuer must update its disclosure whenever there is a material change in its business, operations or capital (p. 142; see also Dey Remarks, at p. 2368).

(b) *A Material Fact Is Defined More Broadly Than a Material Change*

[50] A material fact is defined more broadly than a material change. "[O]nly changes in an issuer's 'business, operations or capital' can be material changes, but any fact can be a material fact" (Johnston, Rockwell and Levine, at ¶6.8; see also *Kerr*, at paras. 35 and 38; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 597). Put another way, "the 'change' must be in the business, operations or capital of the issuer", while "a material 'fact' can be unrelated to an issuer's business, operations or capital as long as it has a significant effect on the market

2025 SCC 39 (CanLII)

price or value of the securities being issued" (Crawford Report, at p. 143; see also Fraiberg and Yalden, at p. 109).

(c) *A Material Change Is Internal to the Issuer; A Material Fact Can Be Internal or External to the Issuer*

[51] A material change must be *internal* to the issuer — there must be a change "in the business, operations or capital of the issuer" (s. 1(1)). External political, economic, and social developments cannot give rise to a material change, unless the development results in a change in the business, operations or capital of the issuer, and unless the change is material.

[52] In *Kerr*, this Court applied the distinction between internal and external developments and held that Danier Leather Inc., a leather apparel company, was not required to update its prospectus to make timely disclosure of poor intra-quarterly financial results caused by unseasonably warm weather — an external factor — because it did not involve a change in the company's business, operations or capital. The company was entitled to wait until its next round of periodic disclosure before disclosing what was accepted to be a material fact. Poor intra-quarterly results, the Court explained, may reflect a material change in business operations, even though the results themselves would not amount to a material change:

> 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

2025 SCC 39 (CanLII)

> 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 in original; para. 47.]

2025 SCC 39 (CanLII)

[53] By comparison, in *Pezim*, this Court held that information contained in drilling results for a company's mine, an internal development, could amount to a material change in the "business, operations, assets or ownership of the issuer" (pp. 574-75, quoting *Securities Act* (B.C.), s. 1(1)), and thus would have to be disclosed on a timely basis. As the Court explained, "from the point of view of investors, new information relating to a mining property (which is an asset) bears significantly on the question of that property's value", and thus "a change in assay and drilling results can amount to a material change, depending on the circumstances" (p. 600). In addition, the Court ruled that the issuer's failure to make timely disclosure of a multimillion-dollar contractual dispute, another internal development, also involved a failure to disclose a material change (p. 606).

[54] An example of an external development that caused a material change in an issuer's affairs arose in *Coventree Inc.* (2011), 34 OSCB 10209, aff'd *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310, 306 O.A.C. 107 (Div. Ct.). The Ontario Securities Commission ruled that Coventree Inc., an investment bank specializing in structured finance, failed to comply with its obligation to file a material change report after a credit rating agency issued a press release advising that it would no longer provide credit ratings for certain credit arbitrage transactions. Such

transactions formed a significant part of Coventree's business. The Commission ruled that the company had an obligation to disclose the credit rating agency's press release and subsequent liquidity events it experienced as material changes because investors likely would not have been able to fully assess the effect on Coventree's affairs as these events were unfolding.

[55] Although a material change is necessarily internal to the issuer, a material fact may be internal or external. In *Kerr*, for example, the unseasonably warm weather that led to the decline in Danier Leather's intra-quarterly financial performance was a material fact external to the issuer (para. 48). By contrast, examples of material facts internal to an issuer could include an issuer's board of directors engaging financial advisers for the recapitalization of a company (Crawford Report, p. 143, fn. 290) or negotiating a material acquisition (Dey Remarks, at p. 2366; Fraiberg and Yalden, at pp. 109-10).

[56] The distinction between a material fact and a material change, and particularly the requirement that a material change be internal to the issuer, is "deliberate and policy-based" (*Kerr*, at para. 38). There are two main policy reasons for the distinction.

[57] First, the distinction balances the burdens that disclosure places on issuers with the need for investors to be informed on a timely basis of material developments in an issuer's affairs. The distinction "relieve[s] reporting issuers of the obligation to continually interpret external political, economic and social developments as they

2025 SCC 39 (CanLII)

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" (*Kerr*, at para. 38 (emphasis deleted), quoting Dey Remarks, at p. 2368; see also Crawford Report, at p. 143; Fraiberg and Yalden, at p. 110; R. Provencher et al., "Information continue", in *Jurisclasseur Québec — Collection Droit des affaires — Valeurs mobilières* (loose-leaf), fasc. 4, at No. 67).

[58] Second, the distinction between a material fact and a material change promotes the purpose of securities law to remedy informational asymmetry between issuers and investors. As Professor Sarro explains, there is generally no informational asymmetry between issuers and investors regarding external political, social, and economic developments (p. 22). External developments are usually in the public domain, and apart from situations such as in *Coventree* where investors have very limited knowledge about an opaque market (para. 641), the impact of external developments on an issuer's financial performance is "typically ascertainable by reviewing [an issuer's] existing disclosure record" (Sarro, at p. 3; see also Fraiberg and Yalden, at p. 110). On the other hand, there is often an informational asymmetry regarding internal developments in an issuer's business, operations, and capital. Internal developments are usually not in the public domain, and thus investors "cannot reasonably be expected to discover [them] on their own" (Sarro, at p. 3). Requiring timely disclosure of a material change thus helps level the informational playing field between issuers and investors.

2025 SCC 39 (CanLII)

(d) *A Material Change Generally Requires More Than Mere Negotiations or Internal Deliberations*

[59] Negotiations and internal deliberations, without more, will not usually amount to a change in the business, operations or capital of the issuer, even if they are material.

[60] For example, in *AiT Advanced Information Technologies Corporation* (2008), 31 OSCB 712, the Ontario Securities Commission ruled that a proposed merger transaction was not a material change unless there was a "substantial likelihood that the transaction would be completed" (para. 6; see also para. 224). The Commission stated that "where the proposed transaction is speculative, contingent and surrounded by uncertainties, a commitment from one party to proceed will not be sufficient to constitute a material change" (para. 223). Instead, there must be "sufficient commitment from both parties of the transaction to determine whether a 'decision to implement' the transaction has taken place" (para. 223). As Professor Sarro explains, this is justifiable from a policy perspective "because managers do not yet have reliable information about the likely outcomes of these processes that could be shared with investors" (p. 3). This again promotes the goal of effectively remedying informational asymmetry: any information held by management regarding negotiations or internal deliberations becomes much more useful to investors once "the information available to management provides a meaningful signal about outcomes" (p. 23).

2025 SCC 39 (CanLII)

[61] As a further example, in *Theratechnologies*, this Court ruled that routine correspondence with a regulator did not amount to a change in the issuer's affairs. The Court held that a drug company did not breach its obligation of timely disclosure by not immediately disclosing questions from the United States Food and Drug Administration ("FDA") during the drug approval process about a drug's potential side effects. The company had previously publicly disclosed the potential side effects and explained why they were not clinically significant. The FDA's questions, the Court stated, did "not constitute a departure from the normal FDA process" and were a "routine step", and thus could not involve any change in the company's business, operations or capital (para. 51).

[62] Similarly, in *Peters v. SNC-Lavalin Group Inc.*, 2023 ONCA 360, 166 O.R. (3d) 756, released with the decision under appeal, the Court of Appeal for Ontario ruled that a company did not have to make timely disclosure of a telephone call from federal prosecutors advising the company that it would not be invited to negotiate a remediation agreement to resolve a pending criminal prosecution. The company faced the prospect of prosecution before the call, and continued to face that prospect after the call. The company had publicly disclosed the risk of prosecution on many occasions and, even after the call, prosecutors agreed to receive further submissions on the company's request for a remediation agreement. As a result, the court held, the telephone call could not have resulted in a material change.

(3) The Motion Judge Erred in Interpreting "Material Change"

2025 SCC 39 (CanLII)

[63] In light of the above principles from the jurisprudence and scholarly commentary, in my respectful view, the motion judge erred in interpreting "material change" in three related respects. First, the motion judge interpreted the meaning of a "change" restrictively by relying on a dictionary definition, rather than interpreting the word in context and with recognition that the legislature intentionally left the term undefined for it to acquire meaning by being applied in specific factual circumstances. Second, the motion judge effectively incorporated statements from lower court cases requiring a change to be "important and substantial" into the definition of "change" itself, without grounding the interpretation in the purpose of securities legislation to address informational asymmetries between issuers and investors. Third, the motion judge interpreted "business, operations or capital" by proposing restrictive definitions of each of these undefined terms drawn from case law, even though the legislature intentionally left these terms undefined to preserve their ordinary commercial meaning and flexibility as required by specific factual circumstances.

(a) *A "Change" Should Not Be Interpreted Restrictively*

[64] I agree with the Court of Appeal's conclusion that the motion judge erred by relying on a dictionary definition of "change" as "a different position, course, or direction". The Court of Appeal stated that the motion judge provided "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*" (para. 59). The court added that "what

2025 SCC 39 (CanLII)

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" (para. 82). In my view, the inherent flexibility of what can be a "change" suggests that the ordinary meaning of this term should not be constrained by dictionary definitions. In that sense, the Court of Appeal was correct to say that "a change is a change" (para. 82). In this context, such simplicity promotes, rather than abdicates, the task of statutory interpretation. By contrast, as I will explain, several difficulties arise in relying solely on a dictionary definition of the undefined term "change" under the *Securities Act*.

[65] At the outset, I stress that it is not unusual or necessarily wrong to start the process of statutory interpretation with a dictionary definition. To understand the meaning of undefined words, judges and lawyers often look to dictionaries "as a starting point in the interpretive process" (*Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 67).

[66] At the same time, dictionary definitions cannot determine the meaning of legislation (see, e.g., *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15, at para. 43). There are several reasons why courts should be cautious when relying on them.

[67] First, the meaning of words "may differ significantly from one dictionary to the next", and "even minor differences in the way words are defined can make a difference in the outcome of a case" (R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 3:03[3]).

2025 SCC 39 (CanLII)

[68] Second, and more fundamentally, dictionary definitions focus on the typical usage of words, rather than on the full range of intended application of a word that the legislature expressly left undefined. To quote Professor Ruth Sullivan, "dictionary definitions . . . communicate the senses of a word rather than its range of possible reference — its connotation or intension rather than its denotation or extension" (§ 3:03[3]). As she explains:

> Connotative or inten[s]ional meaning focuses on the common or typical attributes found in the usage of a given sense of a word . . . . Denotative or extensive meaning refers to the things to which a word may correctly be applied. Since the denotation of words is unpredictable and indeterminate, it cannot be fully captured in a definition. [§ 3:03[3]]

[69] Third, dictionary definitions "can say very little about the meaning of a word as used in a particular context" (Sullivan, at § 3:02[4]; see also P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at para. 982, citing *R. v. Monney*, [1999] 1 S.C.R. 652, at para. 26). Under the modern principle, interpreting "a phrase in a statute does not simply involve transposing a dictionary definition of each word. The phrase has to be construed according to its context and the underlying purpose of the provision" (A. Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (2018), at pp. 6-7, quoting *An Informer v. A Chief Constable*, [2012] EWCA Civ 197, [2013] Q.B. 579, at para. 67).

[70] Care must therefore be taken in using dictionaries to give definitive meaning to terms that a legislature has intentionally left undefined. In the present context, the Ontario legislature's intentional decision to leave the word "change"

2025 SCC 39 (CanLII)

undefined and to use that term with a group of other undefined words has several consequences.

[71] First, the legislature intended the word "change" to retain its ordinary meaning. As the Court of Appeal noted, "a change is a change" (para. 82).

[72] Second, the legislature used the term "change" in the particular context of securities legislation, where the purpose of continuous disclosure obligations is to level the informational playing field between issuers and investors. The word "change" takes meaning from this context, the facts of each case, and the relevant industry norms, rather than from a strict legal formula.

[73] Third, by leaving the term "change" undefined, the legislature has maintained flexibility for the *Securities Act* to apply to widely varying factual scenarios. A rigid or technical definition of "change" could limit the effectiveness of the legislation across a broad range of industries or corporate structures.

[74] Finally, although the legislature left "change" undefined, regulators and courts have provided helpful interpretive guidance on what constitutes a "material change" in various policy documents and judicial decisions, which collectively help illustrate the meaning of the expression.

[75] In sum, substituting a dictionary definition for the intentionally undefined term "change" restricts the reach of the legislation, contrary to the legislature's purpose.

2025 SCC 39 (CanLII)

(b) *A Development Need Not Be "Important and Substantial" To Constitute a "Change"*

[76] The motion judge's second error was to couple the dictionary definition of "change" with statements from lower court decisions suggesting that a change in the issuer's business, operations or capital must be "substantial" or "important" to constitute a change (paras. 150-51, citing *Green* (Sup. Ct.) and *Mask*). The motion judge's assessment of these lower court decisions effectively meant that only developments that constitute a substantial or important "different position, course, or direction" in the affairs of the issuer would need to be evaluated for materiality (paras. 150-51). As the Court of Appeal correctly noted (at paras. 80-81), however, the motion judge's approach effectively imported a consideration of the magnitude or significance of a development in an issuer's affairs as a threshold for whether it constitutes a change, collapsing the two steps for a material change — "change in the business, operations or capital", and "materiality" — into one step.

[77] I agree with the Court of Appeal that the first step is qualitative, in that it involves evaluating the nature of the change. The second step considers its magnitude (paras. 80-81). As the court noted, "[m]ateriality is objectively determined from the perspective of a reasonable investor, and the applicable standard is defined in strictly economic terms" (para. 81, citing *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 Diamond Mining v. Ontario Securities Commission*, 2010 ONSC 3926 (Div. Ct.), at para. 6, and *Miller v. FSD Pharma, Inc.*, 2020 ONSC 4054, at para. 64;

2025 SCC 39 (CanLII)

see also S. Rousseau, "Étude du recours statutaire en responsabilité civile pour le marché secondaire des valeurs mobilières au Québec" (2009), 43 *R.J.T.* 709, at pp. 735-37 and 739). For this reason, it would be inappropriate to import qualifiers such as "core", "fundamental", or "key" into the undefined term "change". Whether a change is significant is a question of materiality.

[78] Contrary to the appellants' submission, this approach will not require issuers to evaluate whether every minor internal event within a company needs to be disclosed as a "material change" — the "materiality" requirement avoids this. Often, the materiality of a "change" will be obvious. Issuers are well-positioned to assess whether a "change" is material, given their industry knowledge and intimate familiarity with their business, operations, and capital.

[79] I also agree with Professor Sarro that two rival standards have developed in the jurisprudence. The first standard sticks closely to the relevant statutory language and holds that any development representing a "change in the business, operations or capital of the issuer" is a change and hence, if material, must be disclosed immediately (*Theratechnologies*, at para. 40, quoting *Securities Act* (Que.), s. 5.3). This broad disclosure standard is described as "investor-friendly, in that it encourages companies to err on the side of disclosing new developments sooner rather than later" (Sarro, at p. 2). The second "manager-friendly standard" is narrower and "gives the managers of public companies more scope to delay disclosure of new developments" (pp. 2-3). It provides that "a change does not need to be disclosed immediately unless it is not only

2025 SCC 39 (CanLII)

material but also ‘important and substantial,’ involving ‘significant disruption or interference’ to the company’s business — so significant, perhaps, that it threatens to render the issuer ‘no longer able to carry on its principal business’” (p. 2, quoting *Green* (Sup. Ct.), at para. 28, and *Mask* (Sup. Ct.), at paras. 57-58).

[80] In my view, the narrower disclosure standard is inconsistent with the text of the legislation, which, apart from the question of materiality, simply refers to a “change”, not an important, substantial, significant, core, key, or high-level change. Unlike subclause (a)(ii) of the material change definition, which deals with decisions to implement changes rather than the changes themselves, there is no reference to high-level corporate decision-making in subcl. (a)(i), and nothing in its language to indicate that a change must result from decisions taken by senior management. The narrower disclosure standard would also be legally indeterminate. It would provide no guidance for how important, substantial, significant, core, key, or high-level the change would have to be in order to qualify as a “change”. The meaning of all these terms would be in the eye of the beholder.

[81] As Professor Sarro correctly explains, the narrower disclosure standard, requiring that a development be “important and substantial” to result in a change, is also mistaken as a matter of doctrine and policy (see pp. 1-5 and 12-25). It is mistaken as a matter of doctrine, because this Court’s decisions in *Kerr* and *Theratechnologies* did not interpret a “material change” as requiring a change to be “important and substantial” or a “significant disruption and interference” regarding a company’s

2025 SCC 39 (CanLII)

affairs, nor did they require the issuer to "no longer [be] able to carry on its principal business" (Sarro, at p. 18, quoting *Green* (Sup. Ct.), at para. 28, and *Mask* (Sup. Ct.), at para. 57). Such developments may be sufficient to constitute a change, but they are not necessary.

[82] Further, the language of "important and substantial", which was adopted from the Superior Court's decision in *Green*, was clearly *obiter* in that case. It involved a passing reference in a 623-paragraph decision paraphrasing the elements of a material change where the main issue before the court was whether misrepresentation claims under the *Securities Act* were statute-barred. Neither the Court of Appeal for Ontario nor this Court in *Green* adopted the Superior Court's language.

[83] The language from the Superior Court's decision in *Green* was, however, then followed and elaborated upon by that court in *Mask*, as requiring "a significant disruption or interference in the ongoing operation of the business itself" or a threat to its ability "to carry on its principal business" (para. 57, quoting *Coventree*, at para. 583; see also paras. 56 and 58). It was then applied again by the Superior Court in *Coffin v. Atlantic Power Corp.*, 2015 ONSC 3686, 127 O.R. (3d) 199, at para. 107, where the court asked whether the issuer remained "able to carry on its principal business" despite the alleged material change.

[84] The narrower disclosure standard is also mistaken as a matter of policy. In the brief discussion of the material change standard in *Green*, the Superior Court stated that one rationale for limiting timely disclosure is that "[t]he sporadic disclosure of bits

2025 SCC 39 (CanLII)

and pieces of information that investors might find interesting could in fact be misleading or even harmful without the balance that is afforded by [other periodic disclosures]" (para. 28). As Professor Sarro explains, however, a broader disclosure standard would not "necessarily . . . mean flooding investors with low-quality, misleading information" (p. 20). There is also no reason to think that the broader standard — which already reflects the legal status quo arising from several judgments of this Court such as *Pezim*, *Kerr*, and *Theratechnologies* — would give rise to unmanageable liability concerns for issuers, directors and officers, much less to concerns justifying adoption of the narrower standard.

[85] By contrast, the broader disclosure standard is sound as a matter of policy because it promotes the fundamental purposes of the *Securities Act*. It is firmly rooted in a "core concern of securities law: the asymmetry of information that exists between issuers' managers and current and prospective investors in these issuers" (Sarro, at p. 21, citing Anand and Condon, at pp. 735-36, and Sale, at pp. 1045-46). To quote Professor Sarro again:

> Without disclosure requirements that mitigate this asymmetry, market participants are less well-placed to make informed decisions about whether to buy or sell an issuer's securities, rendering market prices less reflective of an issuer's future prospects. [Footnote omitted; pp. 21-22.]

[86] Relatedly, the Ontario Securities Commission has repeatedly advised that technical interpretations of the language of the legislation would not advance the purpose of promoting disclosure and protecting the investing public, and that in

2025 SCC 39 (CanLII)

borderline cases, an issuer should err on the side of disclosure (*Coventree*, at para. 146, and *Cornish*, at para. 48, both citing *YBM Magnex International Inc.* (2003), 26 OSCB 5285, at para. 518).

2025 SCC 39 (CanLII)

[87] In my view, therefore, the motion judge erred by applying the narrower disclosure standard for a material change, effectively requiring that a change be "important and substantial" before it is assessed for materiality.

(c) *The Phrase "Business, Operations or Capital" Should Not Be Interpreted Restrictively*

[88] Finally, the motion judge drew on case law to adopt restrictive definitions of the undefined terms appearing in the phrase "business, operations or capital". The motion judge defined "business" as "what the company does" (paras. 153-54, drawing on *Coventree*, at para. 76, and *Rex Diamond Mining Corporation* (2008), 31 OSCB 8337, at paras. 10-11 and 222); "operations" as "the activities conducted by the company to engage in its lines of 'business'" (para. 156; see also para. 155, drawing on *Rex Diamond* (Ont. Sec. Comm.), at paras. 8 and 11); and "capital" as a corporation's "share structure and rights of shareholders" (para. 158).

[89] There is nothing wrong in principle in drawing on case law to illustrate the meaning of the terms appearing in the phrase "business, operations or capital". With respect, however, the motion judge went beyond illustration by coupling his earlier

restrictive interpretation of "change" as "a different position, course, or direction", with restrictive definitions of the terms "business", "operations" and "capital".

[90] Not only are the terms "business", "operations", and "capital" not defined in the *Securities Act*, they are also not defined in the leading judicial decisions (see, e.g., *Pezim*; *Kerr* (SCC); *Theratechnologies*; *Green*); in the leading regulatory decisions (see, e.g., *YBM Magnex*; *AiT*; *Rex Diamond* (Ont. Sec. Comm.); *Coventree*); in the leading securities law textbooks (see, e.g., Johnston, Rockwell and Levine; Gillen; Nicholls; Rousseau (2023)); or in the key regulatory instruments or policy statements (see, e.g., NI 51-102; National Policy 51-201).

[91] There are several reasons why the legislature left the terms "business", "operations", and "capital" undefined.

[92] First, "business", "operations", and "capital" are widely understood commercial concepts. The *Securities Act* relies on the ordinary commercial meaning of these terms, rather than creating rigid statutory definitions.

[93] Second, securities legislation must be applied to a wide range of industries and financial structures. Leaving the terms undefined allows courts and regulators to apply the legislation broadly and flexibly as the context and circumstances require.

[94] Finally, in the context of continuous disclosure obligations, "change in the business, operations or capital" is a holistic standard for assessing corporate

2025 SCC 39 (CanLII)

developments that may require disclosure. That standard must be applied based on the purpose of disclosure requirements to level the informational asymmetry between issuers and investors, rather than by parsing each element separately.

[95] To conclude, importing regulatory or judicial definitions for the intentionally undefined terms "business, operations or capital" would ossify the *Securities Act* and would undermine the purpose of continuous disclosure obligations under securities legislation.

(4) Summary

[96] Material changes are dynamic, related to changes in the issuer's business, operations or capital, internal rather than external to the issuer, and usually involve more than mere negotiations or internal deliberations. They are distinct from the broader category of material facts. Like material facts, however, material changes must be reasonably expected to have a significant effect on the market price or value of securities.

[97] Whether there has been a material change in a given case is a highly contextual question of mixed fact and law (see *Cornish*, at paras. 51 and 53; *AiT*, at paras. 214-15). There is no bright line test and this determination is not a science, but rather a matter of judgment and common sense applied to the unique circumstances of each case (*YBM Magnex*, at paras. 90 and 518; *Coventree*, at paras. 159-60; *Cornish*, at paras. 48 and 53; *AiT*, at paras. 215 and 228). At the same time, disclosure decisions

2025 SCC 39 (CanLII)

are a matter of legal obligation, and thus are "not to be subordinated to the exercise of business judgment. . . . It is for the legislature and the courts, not business management, to set the legal disclosure requirements" (*Kerr* (SCC), at para. 55; see also *Coventree*, at paras. 162-63; *Cornish*, at para. 55; *AiT*, at para. 228; *Rex Diamond* (Ont. Sec. Comm.), at para. 238).

2025 SCC 39 (CanLII)

[98] The contextual exercise of identifying a material change is guided by the purpose of disclosure obligations to level informational asymmetry between issuers and investors, which serves to maintain the integrity of the securities system and protect the public interest (see *Theratechnologies*, at para. 25; *Branch*, at para. 77).

B. *The Test for Leave To Commence an Action Under the Securities Act*

[99] The second issue on this appeal concerns the test for leave under s. 138.8(1) of the *Securities Act*, which requires the court to be satisfied that "the action is being brought in good faith" and that "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff".

(1) Legislative and Policy Background

[100] This Court reviewed the background to the creation of a statutory cause of action for secondary market misrepresentation in both *Theratechnologies* and *Green*. Historically, investors in Canada had no statutory cause of action when they incurred losses as a result of breach of continuous disclosure obligations under securities

legislation. The remedies available under the common law tort of negligent misrepresentation and under the *Civil Code of Québec* were difficult to obtain because they required investors to prove that they had relied on a misrepresentation or omission to their detriment. This could be extremely hard to prove in the context of secondary market transactions (*Theratechnologies*, at paras. 27-28; *Green* (SCC), at paras. 64-65).

[101] After several high-profile disclosure scandals in the 1990s, the Toronto Stock Exchange created the Allen Committee to re-evaluate the secondary market disclosure regime. The Allen Committee concluded that the regulatory sanctions available at the time were "inadequate" and that common law remedies were "so difficult to pursue that they are, as a practical matter, largely hypothetical" (*Theratechnologies*, at para. 29, quoting Toronto Stock Exchange Committee on Corporate Disclosure, *Final Report — Responsible Corporate Disclosure: A Search for Balance* (1997, Thomas I. A. Allen, Q.C., chairman) ("Allen Report"), at p. 5; see also *Green* (SCC), at para. 64). To address these shortcomings, the Allen Committee recommended creating a statutory cause of action for breach of continuous disclosure obligations that would relieve investors of the requirement to prove detrimental reliance on the misrepresentation or omission (*Theratechnologies*, at para. 29; *Green* (SCC), at para. 65). The goal was "improved deterrence", with the expectation that "effective deterrence will logically reduce the need for investor compensation" (*Green* (SCC), at para. 65, quoting Allen Report, at p. vii).

2025 SCC 39 (CanLII)

[102] In 2000, the Canadian Securities Administrators, the umbrella organization for Canada's provincial and territorial securities regulators, adopted the Allen Committee's recommendation to create a statutory cause of action (*Theratechnologies*, at para. 30). At the same time, the Canadian Securities Administrators also recommended including a threshold "screening mechanism" requiring a plaintiff to obtain leave of a court to commence an action. This was seen as needed to deter U.S.-style entrepreneurial "strike suits", or meritless litigation brought to coerce unjust settlements. The goal was to "try to ensure that unmeritorious litigation, and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process" (para. 30 (emphasis deleted), quoting "Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of 'Material Fact' and 'Material Change'", CSA Notice 53-302, reproduced in (2000), 23 OSCB 7383, at p. 7390; see also *Green* (SCC), at paras. 65 and 68; *Amaya inc. v. Derome*, 2018 QCCA 120, at para. 89).

(2) Section 138.8(1) of the Ontario *Securities Act*

[103] In 2002, Ontario became the first province to adopt a statutory cause of action for breach of continuous disclosure obligations with a leave requirement. Ontario's leave requirement, under s. 138.8(1) of the *Securities Act*, imposes two statutory prerequisites. The plaintiff must show that (1) the action was instituted in good faith; and (2) there is a "reasonable possibility" that the action will be resolved at trial in favour of the plaintiff. Other provinces and territories have adopted similar

2025 SCC 39 (CanLII)

provisions (see *Securities Act* (B.C.), s. 140.8(1) and (2); *Securities Act* (Alta.), s. 211.08(1) and (2); *The Securities Act, 1988* (Sask.), s. 136.4(1) and (2); *The Securities Act* (Man.), s. 191(1) and (2); *Securities Act* (Que.), s. 225.4; *Securities Act* (N.B.), s. 161.41(1); *Securities Act* (N.S.), s. 146H(1); *Securities Act* (P.E.I.), s. 129(1) and (2); *Securities Act* (N.L.), s. 138.8(1) and (2); *Securities Act* (N.W.T.), s. 129(1) and (2); *Securities Act* (Yukon), s. 129(1) and (2); *Securities Act* (Nu.), s. 129(1) and (2)).

[104] Section 138.8(1) of the Ontario *Securities Act* provides:

> **138.8** (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where 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 at trial in favour of the plaintiff.

(3) Applying the Test for Leave

[105] In *Theratechnologies*, this Court interpreted the test for leave under s. 225.4 of the Quebec *Securities Act* (paras. 38-39). In *Green*, the Court confirmed that the same test applies under the identical wording of s. 138.8(1) of the Ontario *Securities Act* (at para. 122, per Côté J., at para. 147, per Cromwell J., and at para. 212, per Karakatsanis J.).

2025 SCC 39 (CanLII)

[106] A leave motion under s. 138.8(1) involves a "preliminary merits test" (*Theratechnologies*, at para. 36, quoting *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.* (2013), 44 C.P.C. (7th) 80 (Ont. S.C.J.), at para. 36). For an action to have a "reasonable possibility" of success under s. 138.8(1), there must be a "reasonable or realistic chance that [it] will succeed" (*Green* (SCC), at para. 121, quoting *Theratechnologies*, at para. 38). To meet this threshold, a plaintiff must "offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim" (para. 121, quoting *Theratechnologies*, at para. 39). This approach "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" (*Theratechnologies*, at para. 39).

(a) *Assessing Whether the Plaintiff Has Made Out a Reasonable Possibility of Success*

[107] In assessing whether the threshold for leave has been met, courts must "undertake a reasoned consideration of the evidence to ensure that the action has some merit" (*Theratechnologies*, at para. 38). At the same time, a leave motion "should not be treated as a mini-trial" (para. 39); what is required is sufficient credible evidence to show a reasonable possibility that the plaintiff will succeed at 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

2025 SCC 39 (CanLII)

> 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. [Underlining added; para. 39.]

2025 SCC 39 (CanLII)

[108] I would underscore several points on how courts should apply the test for leave and regarding the admonition against lapsing into a "mini-trial".

[109] First, because the standard on a leave motion under s. 138.8(1) involves a preliminary merits test, it is more stringent than the test for authorization or certification of a class action, which was not viewed as sufficiently safeguarding against unmeritorious actions regarding the disclosure obligations of securities issuers (*Theratechnologies*, at paras. 35-36; *Green* (SCC), at para. 76; *Goldsmith v. National Bank of Canada*, 2016 ONCA 22, 128 O.R. (3d) 481, at para. 31; see also *Nseir v. Barrick Gold Corporation*, 2022 QCCA 1718, at para. 40).

[110] Instead, s. 138.8(1) calls for a "qualitative evaluation of the proposed action" (*Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation*, 2024 ONCA 105, at para. 28). The action must have "more than a mere possibility of success" (*Theratechnologies*, at para. 4). There must be a "reasonable or realistic chance that the action will succeed" (*Theratechnologies*, at para. 38, quoted in *Green* (SCC), at para. 121). This is a "relatively low merits-based threshold" that does not require proof on the balance of probabilities that the action will succeed at trial (*Drywall Acoustic*, at para. 37, quoting *Mask* (C.A.), at para. 45; *Nseir*, at paras. 38-41).

[111] Second, the plaintiff's evidence on a leave motion must not only be "credible", but must also demonstrate a realistic or reasonable chance that the action will succeed at trial (*Theratechnologies*, at para. 39). In other words, the "evidence must be credible, but even credible evidence may not be sufficient to show that there is a realistic or reasonable chance that a claim will succeed" (*Drywall Acoustic*, at para. 30; see also *Rahimi v. SouthGobi Resources Ltd.*, 2017 ONCA 719, 137 O.R. (3d) 242, at para. 38).

[112] The requirement to "undertake a reasoned consideration of the evidence to ensure that the action has some merit" (*Theratechnologies*, at para. 38) inevitably requires a limited weighing of the evidence of both parties (*SouthGobi*, at para. 46; *Drywall Acoustic*, at para. 31; *Mask* (C.A.), at paras. 43-45; *Graaf v. SNC-Lavalin Group Inc.*, 2024 QCCA 303, at para. 12). Both the credibility and reliability of the evidence must be evaluated on the motion, as aided by any cross-examinations that may have been conducted on affidavits filed (*Drywall Acoustic*, at para. 32, citing *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901, at paras. 56 and 67; *Goldsmith*, at para. 33).

[113] The motion judge must also consider to some extent the comparative strength of the competing evidence tendered by the parties (*Drywall Acoustic*, at para. 33, citing *Nseir*, at para. 46; *Mask* (C.A.), at para. 43). At the same time, a motion judge improperly lapses into conducting a mini-trial if they attempt "to resolve realistic and contentious issues arising from [the] conflicting credible evidence" (*Drywall Acoustic*,

2025 SCC 39 (CanLII)

at para. 38; see also *SouthGobi*, at para. 75; *Badesha v. Cronos Group Inc.*, 2022 ONCA 663, 163 O.R. (3d) 481, at paras. 77-78; *Nseir* at paras. 45-50; *Amaya*, at paras. 98 and 105; *Graaf*, at para. 14).

[114] Third, a court must evaluate the evidence on the leave motion mindful that the motion will be decided before the plaintiff has had the benefit of documentary production or oral discovery. As a result, the court must, to some extent, consider evidence that is *not* before the court. Considering the evidentiary limitations at the leave stage is "important because they can work to the prejudice of plaintiffs who have potentially meritorious claims" (*SouthGobi*, at para. 48; see also *Drywall Acoustic*, at paras. 35 and 39; *Nseir*, at para. 43, quoting *Amaya*, at para. 108).

(b) *A Plausible Analysis of the Applicable Legislative Provisions Does Not Equate to a Plausible Interpretation of Those Provisions*

[115] Both the motion judge and the Court of Appeal read the requirement in *Theratechnologies* of a "plausible <u>analysis</u> of the applicable legislative provisions" as requiring a "plausible <u>interpretation</u>" of the legislative provisions (emphasis added). This suggested that statutory interpretation is conducted less stringently or in a more relaxed fashion on a motion for leave than at a trial on the merits. The motion judge referred to the need to show "a plausible <u>interpretation</u> of the *Securities Act*" (para. 217 (emphasis added)). The Court of Appeal similarly spoke of the plaintiff's need to show "a plausible <u>interpretation</u> of the *Securities Act*" (para. 4 (emphasis added); see also

2025 SCC 39 (CanLII)

paras. 7-8), and suggested that the terms “business”, “operations”, and “capital” “have not yet been definitively interpreted in the jurisprudence” (para. 7).

[116] I respectfully disagree with these approaches.

[117] Contrary to the Court of Appeal’s observation, the terms “business”, “operations”, and “capital” have been extensively interpreted in the jurisprudence. The issue is not the lack of definitive interpretation or novelty of the terms, but rather that these ordinary business terms acquire meaning by being applied in concrete factual circumstances in different industry contexts.

[118] In addition, statutory interpretation is not conducted less stringently on a motion for leave under s. 138.8(1). The interpretation of the provisions at issue must still be correct. Applying a less stringent standard to the interpretation of a statutory term at this stage of the proceedings would not promote the goal of preventing unmeritorious actions from proceeding to trial. Even the respondent acknowledged at the hearing before this Court that there is no room at this stage for “watered-down interpretation” (transcript, at p. 90).

[119] Instead, there must be a “plausible analysis”, or a plausible *application*, of the relevant legislative provisions, based on the limited evidence available at this early stage of the proceedings. A court must evaluate what might qualify as a “material change” on a leave motion — a factually suffused inquiry — with due recognition of

2025 SCC 39 (CanLII)

the reality that such motions are brought before there has been documentary production or oral discovery.

(4) Summary

[120] Section 138.8(1) of the *Securities Act* requires a plaintiff to show that "the action is being brought in good faith" and that there is "a reasonable possibility that the action will be resolved at trial in favour of the plaintiff". The leave motion involves a preliminary merits test, but does not require proof on a balance of probabilities that the action will succeed at trial. The plaintiff must establish a reasonable or realistic chance, and not merely a possibility, that the action will succeed at trial, based on a plausible analysis of the applicable legislative provisions and some credible evidence in support of the claim.

[121] A plausible analysis of the applicable legislative provisions is not simply a plausible interpretation of those provisions. Statutory interpretation is not conducted less stringently on a leave motion than at trial. Instead, the plaintiff must show a plausible application of the relevant legislative provisions, based on the limited evidence available at this early stage of the proceedings.

C. *Application to This Case*

[122] There was no dispute before this Court that Mr. Markowich's action was brought in good faith. Nor was there any dispute that, if Mr. Markowich could establish

2025 SCC 39 (CanLII)

a reasonable possibility that the pit wall instability or rockslide resulted in a "change" in Lundin's business, operations or capital, then there was also a reasonable possibility that any such change was material because it could reasonably be expected to have affected Lundin's stock price. The issue, then, is whether the motion judge erred in finding that there was no reasonable possibility that Mr. Markowich could establish a "change" in Lundin's "business, operations or capital".

[123] In my respectful view, the motion judge erred in law in his statutory interpretation of what constitutes a "change" in the "business, operations or capital" of an issuer. He restrictively interpreted the term "change" based on a dictionary definition and the terms "business, operations or capital" based on prior case law. He also erred by applying a line of cases requiring a development to be "important and substantial" to constitute a "change" before it must be assessed for materiality.

[124] Based on this erroneous interpretation of "change", the motion judge ruled that Mr. Markowich could not establish that the pit wall instability or rockslide resulted in a change in Lundin's affairs. He found that neither event resulted in a change because they "did not constitute a different position, course, or direction" (para. 179). He ruled that Lundin did not "lose the ability to conduct its business" and that the company's "economic viability" was never threatened (paras. 187-88). He further ruled that Lundin "engaged in the same operations at the Candelaria mine after the events", with some modifications, but that there was no evidence that either event "ever raised any concerns that Lundin could not carry out its operations at the Candelaria mine" (para.

2025 SCC 39 (CanLII)

189). Finally, the motion judge ruled that not every event that requires an additional expenditure "constitutes a material change to capital and requires a running commentary to investors" (para. 190). With respect, however, none of these elements is required to constitute a material change.

[125] I agree with the Court of Appeal that, had the motion judge correctly interpreted a change in business, operations or capital, and applied that interpretation to the evidence on the motion, he would have concluded that there was a reasonable possibility that Mr. Markowich could show that the pit wall instability and rockslide resulted in a change in Lundin's operations. The motion judge accepted that there was a reasonable possibility that these events could be shown to be material at trial. Although there was competing expert evidence about the duration and extent of the shutdown, the motion judge found that both expert reports were credible and noted that it was "not the role of the court on a leave motion to determine which expert evidence will be accepted at trial" (para. 205). Further, Lundin tendered no direct evidence of the impact of the duration or extent of the shutdown, including whether the remaining area of the open pit or underground mines was shut down as a result of the pit wall instability or whether the rockslide affected the other mining activities at the Candelaria mine. Such evidence, while absent on the motion, would presumably be available at a later stage of the action, after production and discovery. There was also uncontested evidence on the motion that the pit wall instability and rockslide impacted Lundin's operations by requiring Lundin to revise its production forecasts downward, to use lower grade ore for 2019, and to adjust the phasing of the open pit mine.

2025 SCC 39 (CanLII)

[126] Like the Court of Appeal, I therefore conclude that there was a reasonable possibility that Mr. Markowich could succeed at trial in showing that there were material changes that Lundin should have disclosed forthwith. As a result, Mr. Markowich should have been granted leave under s. 138.8(1) of the *Securities Act* to commence an action for the alleged breach of Lundin's timely disclosure obligations.

2025 SCC 39 (CanLII)

VII. Disposition

[127] I would dismiss the appeal with costs.

The following are the reasons delivered by

CÔTÉ J. —

TABLE OF CONTENTS

		Paragraph
I.	Overview	[128]
II.	Facts	[141]
III.	Judicial History	[149]
A.	*Ontario Superior Court of Justice, 2022 ONSC 81 (Glustein J.)*	[149]
B.	*Court of Appeal for Ontario, 2023 ONCA 359, 166 O.R. (3d) 732 (Favreau J.A., Simmons and Benotto JJ.A. Concurring)*	[168]
IV.	Issues	[180]
V.	Analysis	[181]
A.	*A "Material Change" Must Be a Change in the Core or High-Level Aspects of the Issuer's Business, Operations, or Capital*	[181]
	(1) Four Common Law Exclusions From the Ambit of "Change"	[187]
	(a) *External Developments*	[188]

(b) *Fluctuations in Revenue or Production* [195]

(c) *Uncertain Internal Developments* [201]

(d) *Maintenance of the Status Quo* [206]

(2) Statutory Interpretation of "Material Change" [210]

(a) *The Text of Section 1(1) Supports the Motion Judge's Interpretation* [212]

(b) *The Context and Purpose of the Act Support the Interpretation That a "Material Change" Must Be More Than a Mere Event Affecting an Issuer's Affairs* [226]

(i) The Deliberate Legislative Distinction Between "Material Fact" and "Material Change" Must Be Respected [227]

(ii) Overbroad Disclosure Obligations Run Contrary to the Act's Delicate Policy Balancing [244]

(c) *Conclusion on the Definition of "Material Change"* [257]

B. *The Definition of "Material Change" Must Be Consistent at all Stages of the Proceedings* [262]

C. *Application* [271]

VI. Conclusion [281]

I. Overview

[128] This appeal concerns a distinction at the heart of the securities disclosure regime shared throughout Canada: the difference between a "material fact" and a "material change". This distinction, as my colleague rightly notes, has caused and continues to cause "considerable uncertainty" and "considerable confusion" (para. 47). This appeal is an opportunity to bring much-needed certainty and clarity for securities issuers, investors, officers, directors, courts, and tribunals alike. Indeed, clear and predictable rules in securities law are needed to render Canada attractive for investors.

2025 SCC 39 (CanLII)

[129] However, the expansive interpretation of "material change" adopted by the Court of Appeal for Ontario and upheld by my colleague provides little clarity, conflates the careful distinction drawn by the legislature between "material fact" and "material change", and invites over-disclosure and premature disclosure from issuers seeking to inoculate themselves from increased liability. This approach serves neither issuers nor investors and undermines the core aims and objectives of securities regulation in Canada.

[130] Securities law has evolved significantly over the past half century in response to the growth of the economy, technological advances, the globalization of capital, the diversification of financial instruments, and the increased participation of a broader and more varied investor base (Rt. Hon. D. Johnston, K. D. Rockwell and L. Levine, *Canadian Securities Regulation* (6th. 2025), at ¶1.1). In Ontario, this evolution is reflected in the *Securities Act*, R.S.O. 1990, c. S.5 ("Act"), a detailed and carefully constructed legislative framework aimed at protecting investors while promoting the integrity and efficiency of capital markets in the province. Similar legislation has been adopted in each province and territory.

[131] An essential part of the Act is its disclosure regime, which creates both periodic and immediate disclosure obligations for issuers and a statutory cause of action against issuers and their officers and directors when investors suffer loss as a result of the issuer's failure to make proper disclosure. This regime is premised on the idea that timely and accurate information is the foundation of fair and efficient capital markets.

2025 SCC 39 (CanLII)

It serves to reduce information asymmetries between issuers and investors, which in turn promotes investor confidence, facilitates informed decision-making, and allows for efficient capital markets.

[132] Yet the disclosure obligations imposed by the Act are not without limits. Instead, they hinge on a carefully drawn distinction between a "material fact" and a "material change". Issuers are obliged to disclose the former periodically, and the latter forthwith or immediately. This distinction is not incidental; it reflects a considered legislative choice aimed at ensuring that disclosure obligations are meaningful, appropriately calibrated to the nature of the information and the context in which they arise, and proportionate — responsive to the informational needs of investors, without imposing undue burdens on issuers or disrupting market stability.

[133] The approach taken by the Court of Appeal — and now endorsed by my colleague — effectively conflates that legislative distinction. While my colleague acknowledges that "material fact" is defined more broadly than "material change", he adopts an interpretation that makes this a distinction without a difference, imposes a disclosure standard that is broader and more onerous than the one that the statute contemplates, and undermines the balance that the legislature struck between market transparency and regulatory burden. With respect, the generous and flexible approach of the Court of Appeal — which is adopted by my colleague — strips "material change" of any meaning that would distinguish it from "material fact".

2025 SCC 39 (CanLII)

[134] This conflation will have far-reaching impacts. Expanding the scope of immediate disclosure presents risks for investors, issuers, and directors and officers. Investors will be subject to over-disclosure or premature disclosure, which could flood the market with unnecessary or misleading information. Under my colleague's interpretation, issuers will now have to assess all events that affect them for materiality and potential immediate disclosure, resulting in greater compliance costs which will likely be passed on to investors. At the same time, directors and officers will face heightened liability risks. Not only may this deter people from stepping forward into these roles, but, as pointed out by the intervener the Insurance Bureau of Canada, it could also result in director and officer insurance being less available and more expensive. These greater compliance and insurance costs will ultimately be borne by shareholders and investors, whether through reduced returns, constrained market participation, or higher barriers to entry — all of which erode the very market efficiency and investor confidence that the Act is designed to protect.

[135] In my view, it is clear that in drawing the distinction it did between "material fact" and "material change", the legislature intended to oblige issuers to assess only changes that alter the nature of the issuer's business, operations, or capital, understood at a high level of generality, for materiality and potential disclosure. This accords with the motion judge's understanding that a "change" requires a change "in position, course or direction" and that the phrase "business, operations or capital" refers to "what the company does", "the activities conducted by the company to engage in its lines of 'business'", or the issuer's "share structure and rights of shareholders" (2022

2025 SCC 39 (CanLII)

ONSC 81, at paras. 153-58 and 169). This approach provides clarity and predictability for issuers and investors, and it provides guidance to courts and tribunals. It does so while maintaining the balance struck by the legislature between disclosure and regulatory burden, without sacrificing the flexibility needed to address the myriad circumstances that may arise in the securities industry.

[136] Using this approach, the motion judge concluded that there was no reasonable possibility that the respondent, Dov Markowich, could successfully show that the appellant Lundin Mining Corporation experienced material changes when it detected pit wall instability and then suffered a rock slide at one of its mines that delayed approximately 5 percent of its production for roughly a year. The motion judge therefore denied Mr. Markowich's motion for leave to bring an action against Lundin Mining for failing to immediately disclose those events.

[137] By contrast, the Court of Appeal held, and my colleague affirms, that a "change" to an issuer's business, operations, or capital that must be assessed for materiality, and potentially be immediately disclosed, is anything that is not an "external" fact or an "unexplained change in results" (2023 ONCA 359, 166 O.R. (3d) 732, at para. 82). As Favreau J.A. stated, writing for the court, and as my colleague supports: ". . . a change is a change . . ." (para. 82; Jamal J.'s reasons, at para. 64). This perhaps tautological understanding of "change" is being paired with a broad interpretation of "business, operations or capital" as undefined but "widely understood commercial concepts", leading to the conclusion that Mr. Markowich made a plausible

2025 SCC 39 (CanLII)

case that the pit wall instability and rock slide were material changes that Lundin Mining was required to immediately disclose (Jamal J.'s reasons, at para. 92).

[138] In rejecting the motion judge's approach, my colleague refers to what he says is the motion judge's "narro[w]" or "restrictive" interpretation of material change (paras. 26 and 88-89). I do not accept this characterization. On the contrary, the motion judge's interpretation is true to the meaning of the phrase "a change in the business, operations or capital of the issuer" (s. 1(1) "material change" of the Act) and better respects the legislature's policy choice not to require immediate disclosure of every event that could reasonably impact the issuer's share price. I find that the motion judge's interpretation is correct and provides valuable guidance in a fraught area of the law.

[139] This appeal also relates to the standard to be met for granting leave to a plaintiff who argues that an issuer has failed to immediately disclose a material change. In particular, it raises the question of whether the leave requirement modifies or lessens the burden to establish a "material change", as suggested by the Court of Appeal. On this point, for the reasons I outline below, I agree with my colleague that the definition of "material change" remains static at all stages of litigation.

[140] I would restore the motion judge's order denying Mr. Markowich's motion for leave to bring the action against Lundin Mining and its directors and officers.

II. Facts

2025 SCC 39 (CanLII)

[141] Lundin Mining is a multinational mining corporation incorporated in Canada. It is headquartered in Canada but has offices in multiple locations on several continents. It describes itself as a "diversified Canadian base metals mining company with operations in Chile, the USA, Portugal, and Sweden, primarily producing copper, nickel and zinc" (motion judge reasons, at para. 43).

2025 SCC 39 (CanLII)

[142] Lundin Mining jointly owns the Candelaria mining complex in Chile with Sumitomo Corporation. Lundin Mining owns 80 percent of Candelaria while Sumitomo owns 20 percent. Candelaria consists of an open pit mine and three underground mines, which provide copper ore to an on-site concentrator and a processing plant. The mining plan for Candelaria contemplated that the open pit would be mined in several phases over a 19-year lifespan. In 2017, there were five remaining phases (Phases 9-13). In October of 2017, Lundin Mining was scheduled to mine Phase 9 and parts of Phase 10.

[143] On or about October 25, 2017, Lundin Mining detected pit wall instability in a localized area of the Candelaria mine arising from a wedge of unstable waste material ("pit wall instability"). On or about October 31, 2017, the wedge failed and an estimated 600,000 to 700,000 tonnes of waste material from Phase 10 of the Candelaria mine moved downslope, restricting access to Phase 9 ("rock slide").

[144] The respondent, Mr. Markowich, is a Toronto-based businessman who purchased 10,000 shares of Lundin Mining between November 15, 2017 and November 27, 2017. He purchased those shares at an average price of $9.156 per share,

for a cost of $91,560, plus commissions. Mr. Markowich did not sell any of his securities during that period and continued to own them at the time the motion judge wrote his decision.

[145] On November 29, 2017, roughly a month after the above-described events, Lundin Mining issued a news release advising investors of the pit wall instability and the rock slide, in accordance with its usual practice of releasing operational updates in late November or early December each year. The news release also detailed revised expectations for production, cash costs, and capital expenditures, as well as a 10-year forecast for Candelaria.

[146] The day after Lundin Mining disclosed the pit wall instability and the rock slide, its shares on the Toronto Stock Exchange closed at $7.52, a decline of $1.44, or 16 percent from the closing price of $8.96 on November 29, 2017. This one-day drop represented a loss of over $1 billion of market capitalization.

[147] On the same day, pursuant to National Instrument 43-101, *Standards of Disclosure for Mineral Projects* (2001), 24 OSCB 304, Lundin Mining delivered a technical report in which its consultant reviewed the pit wall instability and the rock slide and discussed planned resequencing for the mining operations. Two days after the news release, on December 1, 2017, the CEO of Lundin Mining and the Candelaria mine's president and managing director hosted a joint conference call to update investors on the pit wall instability and rock slide.

2025 SCC 39 (CanLII)

[148] Following these events, Mr. Markowich, as a shareholder of Lundin Mining, sought leave under s. 138.8 of the Act to bring a statutory claim against Lundin Mining, and its officers and directors, for Lundin Mining's alleged failure to make timely disclosure of either the pit wall instability or the subsequent rockslide as a "material change" that had to be disclosed forthwith, that is, immediately. He also sought to certify the action as 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 Mining under the statutory cause of action and the common law of negligent misrepresentation. This latter matter is not before our Court, so I will focus only on the parts of the decisions below relevant to the matter before us.

III. Judicial History

A. *Ontario Superior Court of Justice, 2022 ONSC 81 (Glustein J.)*

[149] The motion judge dismissed Mr. Markowich's motion for leave to bring the statutory claim, finding that there was no reasonable possibility that he could succeed in establishing at trial that the pit wall instability or rock slide constituted a "change" to Lundin Mining's "business, operations or capital" as required by ss. 1(1) and 138.8 of the Act.

[150] In arriving at this conclusion, the motion judge considered the guidance of our Court in *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, and other jurisprudence of the Ontario Superior Court of Justice, which

2025 SCC 39 (CanLII)

detailed the principles and factors a motion judge ought to consider in these motions. These included the need to bear the following in mind: the relatively low threshold and limits of the record at the leave stage; what evidence is <u>not</u> before the court; and the importance of not engaging in a finely calibrated weighing process or resolving conflicts in expert evidence unless it could be established that there would be no reasonable possibility that an expert's opinion would be accepted by a trial judge.

[151] The motion judge confirmed that Lundin Mining was both a "reporting issuer" and a "responsible issuer" as defined in ss. 1(1) and 138.1 of the Act, meaning that it had a statutory obligation to make "timely disclosure" of "material changes" under s. 75(1) of the Act (paras. 129-30). He noted that, in the context of a statutory claim under s. 138.3, Lundin Mining and the individual appellants could be liable for a failure to make timely disclosure set out in s. 138.3(4).

[152] The motion judge then turned to the question of what constitutes a "material change". He noted that s. 1(1) of the Act is clear that there are two components to a material change — the first being the need for a *change* to occur in the issuer's "business, operations or capital", and the second being the materiality of that change. He also pointed out the absence of a statutory definition for "change", as well as for "business, operations or capital". In the absence of these key definitions, the motion judge engaged in an exercise of statutory interpretation.

[153] He reviewed the case law on "material change" and extracted applicable principles. First, he remarked that the distinction between a material change and a

2025 SCC 39 (CanLII)

material fact is "deliberate and policy-based", and, in his view, courts must not conflate the two concepts (para. 139). To support this conclusion, he drew on the discussion of Binnie J. on the same point in our Court's decision in *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331, and quoted the remarks of Strathy J. (as he then was) in *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225, and of Perell J. in *Peters v. SNC-Lavalin Group Inc.*, 2021 ONSC 5021. The motion judge concluded at para. 143:

> 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.

[154] Second, relying on *Peters* and the sources it cited, he noted that there is no bright line test for change. Instead, this assessment is a fact-specific inquiry that will depend on the circumstances and events of each given case.

[155] Third, again relying on *Peters*, the motion judge acknowledged that the market impact of an event, or its materiality, is not determinative of change. Such an understanding would be inconsistent with *Theratechnologies*' exhortation against reasoning backwards from a market impact to a material change. The motion judge made the point that while materiality and share value can be relevant to the question of whether a "change" has occurred, value volatility will not be determinative.

2025 SCC 39 (CanLII)

[156] In addition to these specific guideposts, the motion judge adopted a number of general principles from a decision of the Ontario Divisional Court (*Cornish v. Ontario Securities Commission*, 2013 ONSC 1310, 306 O.A.C. 107 (Div. Ct.)). At paragraph 161, he adopted the following principles:

> (i) "[A] supercritical interpretation of the meaning of material change does not support the goal of promoting disclosure or protecting the investing public": at para. 48;
>
> (ii) "[A] technical interpretation of the language of the [*Securities Act*] should not be relied upon to justify non-disclosure of material changes": at para. 48;
>
> (iii) "[I]f the decision is borderline, then the information should be considered material and disclosed": at para. 48;
>
> (iv) "No single factor will be determinative of whether a material change occurred": at para. 51;
>
> (v) Management's subjectively optimistic hopes or attempts to mitigate the issue do not alleviate the requirement for immediate disclosure of an otherwise objectively-determined material change: at para. 55;
>
> (vi) It is important "to recognize the dangers of hindsight in coming to this conclusion and to be careful not to look at the situation based on what subsequently happened": at para. 49; and
>
> (vii) If a "business managed to continue [its operations] in a lesser form, despite these changes" it "does not detract from" the reality that a "material change" still occurred: at para. 116. [Citations omitted.]

[157] In the absence of a statutory definition of "change", the motion judge turned to its grammatical definition. He held that "a change will occur in the context of s. 1(1) and the disclosure obligations under s. 75(1) upon [the issuer taking] 'a different position, course, or direction'" (para. 150, quoting the *Merriam-Webster Dictionary*

2025 SCC 39 (CanLII)

(online) definition of "change"). From his perspective, this definition maintained the distinction between a material change and a 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'" (para. 150, quoting *Green*, at para. 28). He also differentiated between events that *affect* the company, as opposed to events that drive a change in the company's business, operations, or capital.

[158] While some case law, such as *Green* and *Mask v. Silvercorp Metals Inc.*, 2015 ONSC 5348, aff'd 2016 ONCA 641, 132 O.R. (3d) 161, held that the "change" had to be "substantial" or "important", the motion judge did not expressly adopt that standard. Instead, he stated that "the key conclusion from both *Green* . . . 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" (para. 151).

[159] In the absence of a statutory definition of "business, operations or capital", the motion judge provided definitions of each word. Concerning the word "business", he noted that it has been described in case law as "the lines or activities in which the issuer engages to generate revenues" (para. 153). He summarized the term's meaning as "describ[ing] what the company does" (para. 154).

[160] As regards the term "operations", he considered a Commission decision that held that the meaning of operations was "where" the company conducted business, but he provided his own summary at para. 156:

2025 SCC 39 (CanLII)

> 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”.

2025 SCC 39 (CanLII)

[161] Regarding “capital”, the motion judge rejected a suggestion by Mr. Markowich that, because the statute formerly read “business, operations, assets or ownership of the issuer”, the meaning of capital should be defined to include both assets and ownership (para. 157). He found this “broad interpretation” to be “inconsistent with the ordinary meaning of the ‘capital’ of a corporation, which refers to its share structure and rights of shareholders” (para. 158).

[162] Applying these interpretations of the Act, the motion judge found that Mr. Markowich did not satisfy the court that he had a reasonable possibility of establishing at trial that a “change” had occurred to Lundin Mining’s “business, operations or capital” as a result of the pit wall instability or the rock slide, based on credible evidence and a plausible interpretation of the Act.

[163] The motion judge noted that there was no evidence that the events changed Lundin Mining’s “lines of business, how it conducted its operations, or its capital structure” (para. 29). Because he found that Lundin Mining had already, before the events took place, planned a resequencing of its mining operations that would have reduced its annual production, the “only effect” of the events was that 15,200 tonnes of copper mining would be deferred until 2020 or 2021. This, he found, represented a deferral of less than 5 percent of Lundin Mining’s annual production. In his view, this

did not constitute a change in its business, operations, or capital because Lundin Mining continued to engage in copper mining and "did not lose the ability to conduct its business" (para. 187). He further stated, at para. 174:

> There was no evidence that either the Pit Wall Instability or the Rock Slide raised any threat to Lundin [Mining]'s economic viability, as acknowledged by Thomas on cross-examination. At all times, Lundin [Mining] was able to continue its business, operations and capital as a worldwide mining corporation.

[164] The motion judge, on the evidence, could not ascertain whether or not a shutdown had occurred following the events. However, he found that even assuming that there was such a shutdown, it would "not assist the court in finding that there was a change to Lundin [Mining]'s operations" (para. 181).

[165] The motion judge also took note of the "inherent risks in open pit mining" (para. 179), including pit wall instability and rock slides. In his view, the evidence demonstrated that "Lundin [Mining] managed those risks with advanced ground radar technology and operated its business under those risks" (para. 179). He noted that "routine disclosure of the generic risk of pit wall instability or rock slides . . . [did] not inoculate Lundin [Mining] from disclosure" of a particular event if it constituted a material change, but, in his view, the realization of those inherent risks in this instance "may have been a material *fact* . . . but there is no evidence to support that either of the events was a material *change* to Lundin [Mining]'s business, operations, or capital. It did not constitute a different position, course, or direction" (paras. 179 and 186 (emphasis in original)).

2025 SCC 39 (CanLII)

[166] The motion judge further dismissed the argument advanced by Mr. Markowich that the increased costs incurred by Lundin Mining associated with the rock slide were a "capital" expenditure that should have been immediately disclosed because "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" (para. 190).

[167] However, the motion judge accepted expert evidence tendered by both parties that supported that there was a reasonable possibility that Mr. Markowich could establish that the pit wall instability and rock slide were "material" events, which would "reasonably be expected to have a significant effect on the market price or value" of the Lundin Mining shares (para. 33).

B. *Court of Appeal for Ontario, 2023 ONCA 359, 166 O.R. (3d) 732 (Favreau J.A., Simmons and Benotto JJ.A. Concurring)*

[168] Favreau J.A. concluded for the court that the motion judge erred in his application of the test for leave and in his interpretation of the words "change", "business", "operations", and "capital" by giving them an overly narrow interpretation, "especially in the context of a motion for leave" (paras. 7 and 38). She found that, at the leave stage, Mr. Markowich was required merely to demonstrate that he had a "reasonable possibility of success based on a plausible interpretation of the statute and the evidence" (para. 7). The motion judge was said to have further erred by applying

2025 SCC 39 (CanLII)

that restrictive interpretation of the words at issue to the limited evidence available at the leave stage of the proceedings.

[169] She concluded that, when "a more generous interpretation" of the words of the statute is adopted and applied to the available evidence, it is clear that the motion judge ought to have found that Mr. Markowich had put forward a plausible interpretation and sufficient evidence to support granting leave to proceed with the statutory cause of action (paras. 8 and 38).

[170] Concerning the motion judge's definition of "change" as being a "different position, course, or direction", Favreau J.A. found that it "[n]otably" derives from a definition of "change" in the online version of the *Merriam-Webster Dictionary* and that he did not refer to "any case law interpreting the definition of 'material change' in the *Securities Act*, nor [did] he provide any rationale for adopting this definition of 'change' in the context of the *Securities Act*" (para. 59).

[171] Favreau J.A. found the motion judge's interpretation of "change in the business, operations or capital of the issuer" to be inconsistent with existing case law and the purpose of the Act. She emphasized that on a motion for leave, when it comes 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" (para. 67, quoting *Theratechnologies*, at para. 39). By adopting a definitive interpretation of the terms, the motion judge erred. She further found that the motion judge's interpretation was inconsistent with other cases and "overly restrictive" (para. 72).

2025 SCC 39 (CanLII)

[172] Favreau J.A. also took issue with what she saw as the motion judge importing consideration of the magnitude of a change into the determination of what constitutes a "material change". To this, she stated that

> the distinction between material change and material fact does not focus on the magnitude of the change but, rather, on whether the change was *external* to the company as opposed to whether the change was *in the* business, operations or capital of the company. 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. [Emphasis in original; para. 68.]

[173] In her view, the motion judge's reliance on our Court's decision in *Kerr* did not properly account for the "primary constraint which *Kerr* imposed on the definition of 'change'", which was that "it could not be external to the corporation" (para. 72). She held that the motion judge erred in his reliance on *Rex Diamond Mining Corporation* (2008), 31 OSCB 8337, a decision of the Commission affirmed by the Divisional Court (*Rex Diamond Mining v. Ontario Securities Commission*, 2010 ONSC 3926 (Div. Ct.)), which held that a final notice to an issuer from the authorities in Sierra Leone that its diamond mine leases would be cancelled if it failed to comply with certain terms was a material change. Favreau J.A. stated that the motion judge erred in holding that *Rex Diamond* stands 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'" (para. 75, quoting motion judge reasons, at para. 187).

2025 SCC 39 (CanLII)

[174] Contrary to the motion judge's approach, Favreau J.A. preferred the "much more expansive definition of 'change'" (para. 77) provided by Perell J. in *Peters*. She drew on his emphasis that the distinction between a "material change" and a "material fact" rests on a desire to prevent issuers from being obliged to report on external developments:

> In that case, at paras. 151-152, 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". [para. 77]

[175] Favreau J.A. endorsed this "very expansive definition" of "change" (para. 78) as being more consistent with the wording of the provision and the guidance of our Court in *Kerr*. The definition provided by Perell J. is as follows:

> 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.
>
> (C.A. reasons, at paras. 78-79, quoting *Peters*, at para. 155.)

2025 SCC 39 (CanLII)

[176] She stated that she agreed with Perell J. in *Peters* that “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*” (para. 82).

2025 SCC 39 (CanLII)

[177] The case law, Favreau J.A. said, makes it clear that the definition of “change” was not intended to include consideration of the magnitude of an event, but rather its “qualitative nature” (para. 80). She noted that the case law indicates that “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” (para. 82).

[178] Favreau J.A. also rejected the motion judge’s interpretation of the word “operations”. She found his definition to be overly restrictive and stated that “operations” “does not refer only to the location of a business or what the business produces” (para. 83). Instead, 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” (para. 83).

[179] Applying her interpretation of “change” and “operations”, Favreau J.A. held that, had the motion judge applied the proper legal test, the available evidence would have led him to conclude there was a reasonable possibility that Mr. Markowich could demonstrate that the pit wall instability and rockslide constituted a change in Lundin Mining’s operations. She was of the view that there was some evidence that the

open pit mining operation shut down for a period of time, despite competing evidence on the length and extent of that shutdown. More importantly, there was uncontested evidence that as a result of the rockslide, Lundin Mining modified its mining schedule and decreased its expected production at Candelaria. Therefore, with the benefit of better evidence on the immediate aftermath of the events at trial, she concluded that there was a reasonable possibility that Mr. Markowich could establish that these were changes to Lundin Mining's operations. Given that materiality was not a live issue, she was of the view that the hurdle for leave was cleared.

IV. Issues

[180] The issues in this appeal are:

1. What is a "material change" for the purposes of the Act?

2. Should the leave requirement in s. 138.8 of the Act modify or lessen the burden to establish a "material change"?

V. Analysis

A. *A "Material Change" Must Be a Change in the Core or High-Level Aspects of the Issuer's Business, Operations, or Capital*

[181] Disclosure obligations are at the heart of securities law, but they are not without limits. Their scope and timing are bounded by concern over the regulatory

2025 SCC 39 (CanLII)

burden that such requirements impose on issuers. Under the Act, the balance between meaningful disclosure and regulatory burden is struck by the distinction between the periodic disclosure of "material facts" and the immediate disclosure of "material changes".

2025 SCC 39 (CanLII)

[182] The Act defines "material change" as "a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer" (s. 1(1)). By contrast, a "material fact" is defined more broadly, as simply "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities" (s. 1(1)). While these broad statutory definitions are provided, none of the key terms involved in this case — "change", "business", "operations", "capital", or "fact" — are defined.

[183] To date, courts and securities tribunals have articulated two rival standards for determining whether a "material change" has occurred, and therefore when that change must be immediately disclosed by an issuer. These standards are on display in the instant case. The motion judge interpreted "change" to mean a "different position, course, or direction" (para. 150, quoting the *Merriam-Webster Dictionary* (online) definition of "change") and "business, operations or capital" to refer to what I will call the high-level or core elements of an issuer. Favreau J.A. held — with the caveat that it cannot be external to the issuer — and my colleague affirms that "a change is a change, and it should be defined broadly" and "business", "operations", and "capital"

should be left judicially undefined (C.A. reasons, at para. 82). Stated otherwise, according to my colleague (at para. 79), the rival standards require an event to be assessed for materiality and potential immediate disclosure either if: (1) the event leads to a change in the position, course, or direction of an issuer's business, operations, or capital understood at a high level or at their core; or (2) the event relates to any aspect of an issuer's broadly defined business, operations, or capital.

[184] At the core of this appeal, then, is which of these two standards is correct. More specifically, when did the legislature intend an event affecting an issuer to be reviewed for materiality and potentially immediately disclosed? With respect for my colleague and the Court of Appeal, I find that a thorough exercise of statutory interpretation — in which I engage below — makes it clear that the motion judge's approach best accords with the text, context, and purpose of the Act.

[185] Even so, I agree with both of the courts below and with my colleague that it is not desirable to attempt to create a bright line test for material change. To decipher whether a "material change" has occurred, the inquiry will always be fact-specific. By rejecting overly stringent parameters, we preserve the flexibility that courts require to consider the unique facts of each case. But, flexibility need not devolve into ambiguity, uncertainty, or disregard for legislative choices — this benefits neither courts and tribunals nor issuers, investors, officers, or directors. As laid out below, when regard is had to the statutory text, context, and purpose, and when these are viewed alongside

2025 SCC 39 (CanLII)

the existing case law, a manageable set of principles emerges that improves consistency and predictability while ensuring that the legislature's choices are respected.

[186] Before turning to the statutory interpretation exercise, I want to first address four of those principles, which are in the form of "exclusions" that have emerged from the common law and that circumscribe the meaning of "material change".

(1) Four Common Law Exclusions From the Ambit of "Change"

[187] The existing case law can be read to create four "exclusions" for events affecting an issuer that do not come within the definition of "change". Because these exclusions apply regardless of the materiality of the event in question, they are very useful for circumscribing the meaning of "a change in the business, operations or capital of the issuer" such that, even if the event in question may reasonably be expected to have a significant effect on an issuer's share price, it does not require immediate disclosure. I do not view them as controversial, and I set them out here for analytical clarity.

(a) *External Developments*

[188] As both my colleague and Favreau J.A. note, courts have repeatedly adopted an exclusion to the scope of "change" for an "external" fact or change. This exclusion is primarily based on the statute's use of the phrase "in the business,

2025 SCC 39 (CanLII)

operations or capital of the issuer" as well as the internally focused words "business, operations or capital". Courts have held that external facts or changes beyond the control of an issuer that are of a political, economic, or social nature cannot constitute a material change within the meaning of the Act, unless they actually result in a change in an issuer's business, operations, or capital (Jamal J.'s reasons, at paras. 51-58).

[189] This exclusion was recognized by our Court in *Kerr*, which addressed whether a material change occurred when Danier Leather realized that unusually hot weather would result in reduced sales and the company lagging significantly behind its sales projections. In that case, our Court quoted former Commission Chair Peter J. Dey for the proposition that the definition of material change was, in part, meant to relieve issuers of the obligation to account for external factors when considering their disclosure responsibilities. He said the following, which our Court affirmed:

> 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 added; emphasis in original deleted.]
>
> (para. 38, quoting Ontario Securities Commission, "Consolidation of Remarks of Peter J. Dey Concerning Disclosure Under the *Securities Act* Made to Securities Lawyers in Calgary and Toronto on June 7 and 9" (1983), 6 *O.S.C. Bull.* 2361 ("Dey Remarks"), at p. 2368.)

[190] Emphasizing the distinction between external conditions and internal developments, our Court noted that Danier Leather's sales fluctuated in response to a

2025 SCC 39 (CanLII)

factor that was external to it — the weather. It concluded that such external factors do not constitute material changes and the resulting deterioration in intra-quarterly results was not itself a "change" to Danier Leather's "business, operations or capital".

[191] The Commission also addressed the exclusion of external facts from the material change analysis in *Coventree Inc.* (2011), 34 OSCB 10209. In that case, Coventree could no longer issue asset-backed commercial paper, which constituted 90 percent of its revenue, because of a lack of liquidity in the market related to the global economic crisis. The Commission held that a material change occurred because Coventree became unable to carry on this aspect of its business. Notably, the Commission emphasized that, although the global economic crisis was a public phenomenon discernible to shareholders, the asset-backed commercial paper "market was an opaque market about which public shareholders and investors had limited information" and they "would not have been able to fully assess the effects on, and consequences for, Coventree and its business of the events that were unfolding" (para. 641 (emphasis deleted)).

[192] While *Coventree* acknowledges the external facts exclusion, it differs from *Kerr* in two ways: first, the external phenomenon in *Coventree* was not readily cognizable to the public, unlike the weather pattern in *Kerr*; second, the external phenomenon in *Coventree* did not merely reduce sales but instead rendered the issuer unable to carry on its principle business. Both factual elements assisted in finding that a material change in the issuer had occurred based on external events.

2025 SCC 39 (CanLII)

[193] There are at least two policy rationales for the exclusion of external events. First, external events are not within the province of the issuer. When external events exist for all to see, investors included, issuers should not be required to continually assess whether they need to make specific disclosure for those facts alone, unless those facts lead to changes in their business, operations, or capital. Managers are often not at a significant advantage relative to investors in perceiving these developments or their likely implications for corporate performance. These developments are "in the public domain", and their likely impact is discernible to investors based on the issuer's existing disclosure record (J. D. Fraiberg and R. Yalden, "*Kerr v. Danier Leather Inc.*: Disclosure, Deference and the Duty to Update Forward-Looking Information" (2006), 43 *Can. Bus. L.J.* 106, at p. 110). However, as demonstrated in *Coventree*, this policy rationale for the exclusion for external events is undermined when the external developments are unknown to the investor. In such circumstances, reliance on this exclusion may be misplaced.

[194] Second, as alluded to in our Court's statement in *Kerr*, quoted above, reliance on external facts as constituting potential changes would place an unworkable and unnecessary burden on issuers. Issuers are constantly bombarded with political, economic, and social changes that could, sometimes, reasonably be expected to have a significant effect on the market price or value of their securities. Having to report on all such changes would place an undue burden on issuers and result in a largely unnecessary and even counterproductive flood of information. Limiting reporting to

2025 SCC 39 (CanLII)

those external events that actually result in a change in issuers' business, operations, or capital reduces this regulatory burden.

(b) *Fluctuations in Revenue or Production*

[195] The second type of change that is excluded from the scope of "material change" is simple fluctuations in revenue or production. In *Kerr*, our Court held not only that unusually hot weather leading to reduced sales of leather was not a material change, but also that the resulting reduction in sales below projections was not a material change. Simply put, the change in results did not emerge from any change in Danier Leather's business, operations, or capital.

[196] The Superior Court reached a similar conclusion in *Mask*, at para. 57, aff'd 2016 ONCA 641, 132 O.R. (3d) 161. In that case, Belobaba J. commented that "[t]he case law is clear that there must be a significant disruption or interference in the ongoing operation of the business" for it to be considered a "material change" (para. 57). For example, a change will occur if it becomes clear that the issuer is "no longer able 'to carry on its principal business'" (para. 57, quoting *Coventree*, at para. 583). Belobaba J. found that the mining issuer's "trend" of mining less profitably was not itself a material change, as it did not threaten the issuer's ability to carry on its principal business (paras. 57-58). It amounted to a change in revenue and production, not a material change to the business, operations, or capital of the issuer.

2025 SCC 39 (CanLII)

[197] Favreau J.A. recognized this distinction in part when she found that a change under s. 1(1) "cannot simply be an <u>unexplained</u> change in results; rather, it must be a change in the company's business, operations or capital" (para. 82 (emphasis added)). I do not disagree with Favreau J.A.'s statement; however, it is too narrow. Even *explained* changes in results that do not stem from alterations in an issuer's business, operations, or capital, such as the weather-based reduction in sales in *Kerr* or the downward trend in *Mask*, can fall outside the category of "material change".

[198] This exclusion accords with the statutory language, as neither production nor revenue fit neatly into the categories of "business", "operations", or "capital". Indeed, the term "capital" is in direct contrast with the concept of revenue.

[199] There are also strong policy reasons supporting the exclusion of shifts in revenue and production from the definition of "material change". All businesses constantly experience such fluctuations. Requiring issuers to assess whether they must immediately disclose such trends, which are known to dissipate or reverse, would be onerous, and the actual disclosure of such trends may often be misleading. In contrast with immediate disclosure, the periodic reporting process gives issuers a chance to assess what trends can be observed in their results and to understand why those results occurred, allowing for higher-quality disclosure (see J. J. Park, "Insider Trading and the Integrity of Mandatory Disclosure", [2018] *Wis. L. Rev.* 1133, at p. 1155). Thus, revenue and production trends and fluctuations, without something more, are precisely

2025 SCC 39 (CanLII)

the type of developments that properly fall within the category of "material facts", not "material changes".

[200] While my colleague does not frame it in quite the same way, he does take note of this dynamic at para. 52 of his reasons.

(c) *Uncertain Internal Developments*

[201] The third type of change that may be excluded from the scope of "material change" are uncertain developments in an issuer's business, operations or capital, as my colleague suggests when he states that a "material change generally requires more than mere negotiations or internal deliberations" (heading of para. 59; see also paras. 59-62).

[202] As the Mining Association of Canada points out, certain internal developments will fall into the category of material facts, rather than material changes — despite objectively involving changes that may reasonably be expected to significantly influence share price and value. These could include, for example, moving through interim stages of a merger negotiation, having new discussions relating to an acquisition, or responding to a take-over bid (I.F., Mining Association of Canada, at para. 13, citing Dey Remarks, at p. 2368). Across the various stages of a corporate transaction, the considerations relating to potential disclosure will change. For example,

2025 SCC 39 (CanLII)

> [a]t the conclusion of [the planning stage], the corporate officers will have a pretty good sense of whether the corporate action that is being planned will or will not be carried through and result in a material change in the affairs of the corporation.
>
> Late in the planning stage the issuer should consider disclosing the proposed material change on a confidential basis to the Chairman, Director or Deputy Director, Enforcement of the Commission. [pp. 2363-64]

[203] This reflects an understanding that, in addition to the "internality" requirement, there is also a "certainty" or "maturity" requirement. An internal development must in some sense crystalize before it is a "change" that must be assessed for materiality and potentially disclosed (I.F., Mining Association of Canada, at para. 13).

[204] The requirement for a sufficient degree of certainty is borne out in *AiT Advanced Information Technologies Corporation* (2008), 31 OSCB 712, where the Commission held that no material change had yet occurred when a smaller technology company was negotiating a merger or takeover by a much larger company. Specifically, there was not "sufficient evidence by which the board could have concluded that there was a sufficient commitment from the parties to proceed and a substantial likelihood that the transaction would be completed" (para. 6). Thus, the outcomes of the negotiations were "speculative, contingent and surrounded by uncertainties" (para. 223). In other words, the internal information and events had yet to solidify into an actual change in the business, operations, or capital of the issuer.

2025 SCC 39 (CanLII)

[205] The rationale for this exclusion is that requiring disclosure of nascent and uncertain internal developments would often be more misleading than it would be informative. Two principles serve as policy rationales for this exclusion. First, the "legitimate corporate interest in confidentiality should be recognized" to enable corporations to pursue transactions that may result in a material change "without requiring public disclosure of this pursuit until an appropriate point in time" (Dey Remarks, at p. 2362). Second, while regulators were traditionally concerned with announcements of material changes being made "too late", there is a growing acknowledgement that "the damage to the marketplace can be equally severe if the announcement of a material change is made prematurely, that is to say, before the change occurred" (p. 2363).

(d) *Maintenance of the Status Quo*

[206] The fourth excluded type of change, which is closely related to the uncertain developments exclusion, is the exclusion for events that only result in the maintenance of the status quo for the issuer's business, operations, or capital. Two cases, *Theratechnologies* and *Peters*, demonstrate this point.

[207] In *Theratechnologies*, at issue was whether the referral of questions by the American Food and Drug Administration ("FDA") to an expert advisory committee regarding potential side effects of the issuer's drug constituted a material change. The referred questions were posted on the FDA's public-facing website. Stock quotation enterprises issued press releases stating that use of the drug in question could cause

2025 SCC 39 (CanLII)

unwanted side effects, and the market reacted negatively. Abella J., writing for the Court, held that the FDA's question referral was not a material change because the potential side effects of the drug had already been disclosed and question referrals themselves are routine in the FDA approval process. The question referral did not disturb the status quo and, consequently, despite it being an event that resulted in a material effect on the value of the issuer's securities, there was no need for its immediate disclosure.

[208] Similarly, in *Peters*, Perell J. held, and the Court of Appeal for Ontario upheld, that SNC-Lavalin Group Inc.'s receipt of a message indicating that it would not be invited to participate in remediation negotiations regarding its alleged illegal conduct in Libya was not a material change. That decision was premised on findings that there was never any remediation opportunity extended to SNC before the message was sent, and SNC continued to lobby for remediation opportunities after it received the message. Thus, while the receipt of the message was a "change", broadly understood, the message also altered nothing of significance in SNC's business, operations, or capital; it simply maintained the status quo. Perell J. wrote the following at para. 161:

> 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 to maintain the *status quo* . . . . [Emphasis added.]

2025 SCC 39 (CanLII)

[209] I suggest that this exclusion for events that maintain the status quo of an issuer is uncontroversial, as evidenced by my colleague, who makes virtually the same point — although framed differently — with reference to the same two cases, at paras. 61-62 of his reasons. This exclusion is supported by the policy desire to avoid oversaturating investors with information that they already know and that has little impact on the fundamental circumstances of the issuer — even if it may result in fluctuations in the price or value of the issuer's securities.

(2) Statutory Interpretation of "Material Change"

[210] As my colleague Wagner C.J. recently stated in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 ("*CDPDJ*"), at para. 23:

> It is well settled that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *La Presse inc. v. Quebec*, 2023 SCC 22, at para. 22).

[211] In the present case, an ordinary reading of the text indicates, and the context and purpose strongly support, that only changes to high-level or core elements of an issuer constitute a change in its "business, operations or capital". Finding otherwise would ignore clear legislative intent, intrude on careful policy balancing, undermine

2025 SCC 39 (CanLII)

key purposes of the Act's disclosure regime, and potentially override the valuable judicially recognized exclusions noted above.

(a) *The Text of Section 1(1) Supports the Motion Judge's Interpretation*

[212] When engaging in statutory interpretation, the text of the provision is always the analytical starting point and anchor. As noted by Wagner C.J. in *CDPDJ* at para. 28, in "the absence of statutory definitions, what should be focused on is the grammatical and ordinary meaning of the text, that is, 'the natural meaning' that appears when the provision is simply read through as a whole (*Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735, quoted in R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 3.02[1]; see also *R. v. Audet*, [1996] 2 S.C.R. 171, at para. 34)". Additionally, when setting out to establish the ordinary meaning of a text, the constituents of immediate context can be relied upon. This immediate context includes "the section or subsection in which the words in question appear" (Sullivan, at § 3.02[2]).

[213] Turning to that text and immediate context, s. 1(1) of the Act defines "material change" as follows:

> "material change",
>
> (a) when used in relation to an issuer other than an investment fund, means,
>
> (i) <u>a change in the business, operations or capital of the issuer</u> that would reasonably be expected to have a significant

2025 SCC 39 (CanLII)

effect on the market price or value of any of the securities of the issuer, or

(ii) a decision to implement a change referred to in subclause (i) made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable . . . .

[214] As noted by the motion judge, this definition has two clear components: first, the event in question must be a "change" in the "business, operations or capital of the issuer"; second, that change must be material. While "material change" is defined, the statute does not further define what constitutes "a change in the business, operations or capital of the issuer" as used in subcl. (a)(i). However, reviewing the text of the provision, I find support for the motion judge's interpretation in both subcl. (a)(i) as well as subcl. (a)(ii).

[215] To begin, it is clear that the key terms "change", "business", "operations", and "capital" cannot be interpreted in isolation; their relationships to each other must be examined. The word "change" must be read alongside its surrounding text. What the legislature was concerned with was not simply any and all changes to an issuer, but "a change in the business, operations or capital of the issuer". Therefore, the meaning of "change" must be understood in relation to the terms it acts upon, namely, "business, operations or capital".

[216] These words, too, cannot be understood in isolation. I agree with the intervener the Canadian Chamber of Commerce when it suggests that the terms

2025 SCC 39 (CanLII)

"business, operations or capital" ought to be interpreted in accordance with the "associated words" rule of statutory interpretation. That rule provides that "a term or an expression should not be interpreted without taking the surrounding terms into account" (*Opitz v. Wrzesnewskyj*, 2012 SCC 55, [2012] 3 S.C.R. 76, at para. 40). In other words, "[t]he meaning of a term is revealed by its association with other terms: it is known by its associates" (*Opitz*, at para. 40 (emphasis deleted), quoting *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 195).

[217] Considered as a group, the words "in the business, operations or capital of the issuer" plainly signal an aspect of "internality". That is clear in the jurisprudence reviewed above and in the reasons of my colleague. But it would be an error to stop the analysis there. It must also be noted that the legislature chose to use the particular words "business, operations or capital" — words that all suggest a high level of generality — without any indication that alterations to the innumerable factors that might underlie those general terms but that might not themselves lead to changes in those general terms should be considered. The legislature did not indicate that changes to these lower-level factors should be considered, such as providing, for example, that operations include interruptions in production or changes in scheduling. Instead, it saw fit to use terms that speak to the nature of the issuer at a high level of generality. Put another way, the legislature used words that all relate to the core aspects of an issuer. The use of these terms accords with and signals an intention by the legislature to trigger a materiality review and potential immediate disclosure for changes to core or high-level aspects of the issuer's business, operations, or capital only.

2025 SCC 39 (CanLII)

[218] This textual emphasis on high-level alterations is also signalled in subcl. (a)(ii) of the definition of "material change". That subclause defines the term "material change" to also mean "a decision to implement a change referred to in subclause (i) made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer". By its emphasis on boards of directors, similarly placed individuals, or senior management, this statutory language points to the understanding that a "change" is concerned with the upper levels of corporate decision-making that alter the issuer's business, operations, or capital — not, for example, low-level operational decisions that may affect the scheduling of production at a single place of business in a multinational issuer. In doing so, this language sheds light on and reinforces the understanding that "a change in the business, operations or capital" in subcl. (a)(i) relates to the core aspects of the issuer.

[219] My colleague casts doubt on the interpretive value of the use of the word "change" in both subcls. (a)(i) and (a)(ii) (para. 80). In doing so, he overlooks the express statutory language linking the two subclauses. In particular, subcl. (a)(ii) explicitly states that it concerns "a change referred to in subclause (i)". Therefore, a "change" under subcl. (a)(i) is the same as a "change" under subcl. (a)(ii). Because of this, the fact that subcl. (a)(ii) concerns only decisions "to implement a change" made by a board of directors, persons acting in a similar capacity, or senior management with probable board approval strongly suggests that a "change" under both subclauses excludes minor alterations in the affairs of the issuer that are beneath the purview of these decision makers. Instead, a "change" under subcl. (a)(ii) involves high-level

2025 SCC 39 (CanLII)

decision makers and therefore concerns decisions that affect an issuer's business, operations, or capital at their core or at a high level. Finding that a "change" under subcl. (a)(i) lacks a similar focus on high-level or core elements of an issuer's business, operations, or capital would be an incongruous reading of the legislature's two definitions of "material change".

2025 SCC 39 (CanLII)

[220] This level of generality suggests that the change itself must be significant — but not in the sense that the change must be of a particular magnitude, degree, or materiality. Rather, the change must be of a particular kind: it must affect the business, operations, or capital of an issuer understood at the level of generality that the legislation speaks to.

[221] None of the interpretative analysis above conflicts with the motion judge's interpretation, and I accept his analysis of the ordinary meaning of the key terms at play. In the absence of statutory definitions, and in line with Wagner C.J.'s exhortation in *CDPDJ*, the motion judge interpreted the term "change" by adopting its ordinary and grammatical meaning. He began by referencing the dictionary definition of "change". He held that "change" signifies "a different position, course, or direction" (para. 150). In his view, a change that gives rise to an immediate disclosure obligation under the Act occurs when an event alters the trajectory of a company's business, operations, or capital (para. 151).

[222] As with "change", the motion judge provided his interpretations of "business", "operations", or "capital" in an effort to resolve the matter before him.

Drawing on case law, he defined “business” as “the lines or activities in which the issuer engages to generate revenues”; in other words, he said the term “is used to describe what the company does” (paras. 153-54). He defined “operations” as being “‘where’ the company conducted business”, saying that the term is also used “to refer to the activities conducted by the company to engage in its lines of ‘business’” (paras. 155-56). Concerning “capital”, he found that the ordinary meaning of the word refers to an issuer’s share structure and the rights of an issuer’s shareholders (paras. 153-59). These interpretations, too, accord with the legislature’s focus on understanding business, operations, and capital at a high level of generality, as evidenced by both the general words chosen and their association with other terms.

[223] In addition, I see nothing improper with the motion judge’s use of the dictionary definition of “change”. I take no issue with my colleague’s statement that dictionary definitions are not determinative in exercises of statutory interpretation and that they indeed must be approached with caution (paras. 66-69). Dictionary definitions cannot be relied on to the exclusion of the proper method for conducting statutory interpretation and the use of its principles.

[224] However, the motion judge did not improperly rely on the dictionary definition of “change”. Rather, the definition he found was tested against, and supported by, his assessment of the purpose of the statute and legislative intent. The motion judge’s brief subsection dealing with the interpretation of “change” follows, and was clearly informed by, his extensive discussion of the applicable statutory

2025 SCC 39 (CanLII)

framework and legislative intent (paras. 128-43). In his analysis of “change”, the motion judge laid out opposing definitions of “change” that emerged from the case law and from the parties (paras. 148-49). He referred back to his prior discussion, noting that the dictionary definition of “change” he found “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’” (para. 150).

[225] Read as a whole, the motion judge’s reasons disclose that he found a dictionary definition that usefully encapsulated the ordinary meaning of the term “change” as informed by the legislature’s intent, derived from the distinction between “material fact” and “material change”, and the jurisprudence on the disclosure requirements under the Act. The motion judge did not abrogate his duty to interpret the Act in favour of relying on a dictionary definition. Rather, in conducting his interpretation, he found that a particular dictionary definition provided a valuable articulation of legislative intent. I see no error there.

(b) *The Context and Purpose of the Act Support the Interpretation That a “Material Change” Must Be More Than a Mere Event Affecting an Issuer’s Affairs*

[226] The motion judge’s interpretation finds additional support in the broader context and purpose of the Act. In particular, his interpretation accords with the legislature’s deliberate distinction between “material change” and “material fact”, the various policy considerations underlying that distinction, and the purposes that underlie

2025 SCC 39 (CanLII)

the Act's disclosure regime. To find otherwise conflates the two terms, imposing a more onerous standard of immediate disclosure on issuers than the statute contemplates, undermining the careful balance the legislature has struck between market transparency and regulatory burden, and fostering further confusion around the disclosure obligations of issuers.

2025 SCC 39 (CanLII)

(i) The Deliberate Legislative Distinction Between "Material Fact" and "Material Change" Must Be Respected

[227] Although disclosure is vital for Canadian securities markets, law, and practice, disclosure obligations are not without limits. The questions of what must be disclosed, and when, involve delicate policy decisions and trade-offs. These different considerations and varied interests taken into account in crafting the Act's disclosure regime are evidenced in s. 1.1, which lists the Act's purposes as follows:

> (a) to provide protection to investors from unfair, improper or fraudulent practices;
>
> (b) to foster fair, efficient and competitive capital markets and confidence in capital markets;
>
> (b.1) to foster capital formation; and
>
> (c) to contribute to the stability of the financial system and the reduction of systemic risk.

[228] My colleague acknowledges these varied purposes (at para. 33) and the inherent policy trade off that the legislature crafted in balancing them (at para. 57), including the specific need to balance the information provided to investors with the

regulatory burden imposed on issuers. Yet he places a near singular focus on investor protection and the objective of remedying informational asymmetry (paras. 6, 36, 58, 60, 63, 72, 84, 95 and 99). However, investor protection and the remedying of informational asymmetry do not exclusively favour a low threshold for disclosure. One must not ignore that too much disclosure can also be prejudicial to investors. As the court in *Cornish* noted at para. 41, quoting the Supreme Court of the United States in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), "[s]ome information is of such dubious significance that insistence on its disclosure may accomplish more harm than good" (p. 448).

[229] Moreover, and with respect, investor protection, while important, does not override the other objectives of the Act. It is true that our Court has recognized that the Act is remedial in nature, but we have also recognized that securities regulation seeks to balance "the needs of the investor community against the burden imposed on issuers"; ultimately, the degree to which a bargain is struck between the two is a function, as Binnie J. wrote, of legislative policy and choice (*Kerr*, at para. 5; see also *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 589).

[230] The legislature chose to require periodic disclosure of "material facts" and immediate disclosure of "material changes". Our Court has previously recognized and distinguished between these two types of continuous disclosure obligations:

> Periodic disclosure must be made at regular intervals, typically through the regular provision of documents such as proxy circulars, financial statements and insider trading reports. In these regularly issued documents,

2025 SCC 39 (CanLII)

companies must disclose all material *facts* — that is, anything “that may reasonably be expected to have a significant effect on the market price or value of securities issued”: *Securities Act* (Quebec), s. 5 “material fact”.

Timely disclosure obligations, on the other hand, are imposed only when there has been a material *change* in the issuer’s affairs. Material changes, which arise from changes in the issuers’ business, operations or capital, must be disclosed at the time they occur: *Securities Act* (Quebec), s. 5.3; Mark R. Gillen, *Securities Regulation in Canada* (3rd ed. 2007), at p. 211; David Johnston, Kathleen Doyle Rockwell and Cristie Ford: *Canadian Securities Regulation* (5th ed. 2014), at p. 249. [Underlining added.]

(*Theratechnologies*, at paras. 23-24)

[231] Rather than focusing on addressing informational asymmetry alone, the legislature chose to impose balanced disclosure obligations on issuers using the distinction between “material fact” and “material change”. It chose to require periodic disclosure of “material facts” and immediate disclosure of “material changes”. In doing so, the legislature struck a balance between ensuring meaningful investor protection and avoiding undue burdens on issuers, thereby crafting a disclosure regime with limits (*Kerr*, at para. 5; *Theratechnologies*, at para. 55). In *Kerr*, our Court called that distinction “deliberate and policy-based” (para. 38).

[232] Broadly speaking, the distinction is clear. The legislature sought periodic disclosure of a broad array of information affecting an issuer, and immediate disclosure of a narrower subset of changes. This is evident in the two legislated definitions in question. Section 1(1) of the Act defines “material fact” as “a fact that would reasonably be expected to have a significant effect on the market price or value of the securities”. By contrast, material changes are defined only as those “changes” in an

2025 SCC 39 (CanLII)

issuer's "business, operations or capital" that are also material. In other words, a "material change" is not simply a "material fact"; a material change is more than just a new material fact. It is unquestionable that the legislature intended "material change" to have a different meaning than "material fact" (*Pezim*, at p. 597; *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; Johnston, Rockwell and Levine, at ¶¶ 6.7-6.8).

[233] The importance of this distinction has been repeatedly recognized. Writing for our Court in *Theratechnologies*, Abella J. rejected the suggestion that a list of "potentially 'material' information" provided in a policy document was dispositive of the characterization of material facts and "material changes" (para. 52). She found that the list only dealt "with the market impact of events, not whether they are best characterized as material facts or material changes". Therefore, she held that the list could not be adopted precisely because doing so would "collapse the distinction between material facts and material changes, significantly expanding timely disclosure obligations beyond what is required by statute" (para. 53). Moreover, as our Court noted in *Kerr* (at para. 38), the elimination of this distinction was considered and rejected in the Toronto Stock Exchange Committee on Corporate Disclosure's *Final Report: Responsible Corporate Disclosure: A Search for Balance* (1997, Thomas I. A. Allen, Q.C., Chair) and Ontario's *Five Year Review Committee Final Report — Reviewing the Securities Act (Ontario)* (2003, Purdy Crawford, Chair). It is not insignificant that the proposals to collapse the distinction were declined. This is particularly so because, on two occasions, the Court of Appeal for Ontario held that the

2025 SCC 39 (CanLII)

legislature's treatment of those two reports can be taken as persuasive evidence "of the legislature's intent to distinguish between material changes and material facts, and to impose on issuers a continuous disclosure obligation for the former but not for the latter" (*Kerr*, at paras. 119-20, aff'd 2007 SCC 44, [2007] 3 S.C.R. 331; see also *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corp.*, 2021 ONCA 104, at para. 62).

[234] Based on the foregoing, we must be guided by the statute and respect the legislature's choice. We must not "collapse the distinction" or "conflate the concepts" formed by the legislature. However, this is the result of the Court of Appeal and my colleague's use of overbroad understandings of the terms "change", "business", "operations", and "capital". Under their interpretation, almost every "event" that affects the affairs of an issuer will have to be reviewed for materiality and almost every analysis of "material change" will become a question of materiality alone. In effect, the words "business, operations or capital" are given no meaning, the clear legislated distinctions are collapsed, and the regulatory burden is increased in a manner that is not justified by the text, context, or purpose of the Act.

[235] These impacts can be shown by an assessment of the four exclusions noted above using the interpretations provided by the Court of Appeal and affirmed by my colleague. Their definition of "change" is paired with the understanding that the meanings of "business", "operations" or "capital" are less "restrictive" than the motion judge's proposed interpretations. Again, the motion judge's definitions of "business",

2025 SCC 39 (CanLII)

“operations”, and “capital” were: what the company does; the activities conducted by the company to engage in its lines of business; and the issuer’s share structure and rights of shareholders, respectively.

[236] It is unclear how the exclusions noted above, or the distinction between a material fact and a material change more broadly, can survive the expansive definitions adopted by the Court of Appeal and affirmed by my colleague. Consider the exclusion for external developments. While external facts and changes are generally excluded from disclosure, external political, social, and economic developments that actually result in a change in the business, operations, or capital of the issuer must be immediately disclosed. This is a sensible distinction that aligns with the text of the definition of “material change”, but my colleague’s interpretation may render it of little substance.

[237] Under my colleague’s interpretation, it is uncertain when a relevant external event would not be a change in the issuer’s business, operations, or capital that must be assessed for materiality. Consider the facts in *Kerr*, a very clear case where disclosure should not be required. In that case, unusually warm weather brought about a reduction in sales. The weather, an external event, caused an “alteration”, “reversal”, “modification”, or “contraction” in Danier Leather’s sales. The weather resulted in a “change” in the issuer. That change impacted Danier Leather’s ability to sell its products. If “business” is defined more broadly than “what the company does” or “the activities conducted by the company to engage in its lines of ‘business’”, it is unclear

2025 SCC 39 (CanLII)

on what basis the sales reversal or contraction in *Kerr* would not be a change in Danier Leather's business. Therefore, it would need to be immediately disclosed — assuming materiality.

[238] The substantive difference between events that merely affect an issuer's affairs and those that constitute or result in a change to an issuer's business, operations, or capital was alluded to by our Court in *Kerr*:

> 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 added; emphasis in original deleted.]
>
> (*Kerr*, at para. 38, quoting Dey Remarks.)

This excerpt supports the view that the external change exclusion is based on a distinction between "developments as they affect the affairs of the issuer" and developments resulting in changes in the "business, operations or capital of the issuer". Mere developments that *affect the affairs* of the issuer are lower-order changes that do not lead to *changes* to business, operations, or capital understood at a high level of generality that must be assessed for materiality. Instead, the change must relate to something more high-level: the issuer's business, operations, or capital understood at a high level of generality, not simply any of the affairs of the issuer.

2025 SCC 39 (CanLII)

[239] Similarly, under these broad definitions, fluctuations in revenue or production may also not be exempted from the need to conduct a materiality assessment and potential immediate disclosure. As noted in Perell J.'s definition, which was adopted by the Court of Appeal in the instant case, change includes an "expansion", "contraction", or "reversal" and, if the definition of operations as "the activities conducted by a company to engage in its lines of business" is too restrictive, then a change in results or progress from these activities could be characterized as a change in the issuer's operations. Even downward trends in production would have to be assessed for materiality and, if material, immediately disclosed, as the "discovery" of the trend would mean having knowledge of a "reversal", "contraction", or "difference" in operations. Thus, alterations in revenue or production would be changes in the "business, operations or capital of the issuer", and the question would once more devolve to a materiality assessment, again conflating material change and material fact.

[240] Uncertain developments may also constitute a "material change" under the expansive interpretation adopted by the Court of Appeal and my colleague. If a change includes a "development" or a "discovery", then the receipt of initial offers, advances or failures in negotiations, or the solidification of potential transactions could be understood as "developments" or "discoveries", that is, changes. If these developments go to a potential capital-changing transaction, it is unclear why disclosure would not be required even before a solidification of the potential transaction in question — assuming materiality. The result would be, once more, that the only question would become whether the development is material.

2025 SCC 39 (CanLII)

[241] Similarly, the exclusion for events that maintain the status quo would be unlikely to survive and serve its purpose of diminishing the regulatory burden on issuers. A message confirming that an issuer will not be invited to undertake remediation or a series of questions posted publicly by a regulator to the issuer could be characterized as a "development". According to my colleague's approach, these would therefore be changes, and they could affect business and operations and potentially require disclosure. Once more, the question of disclosure would collapse to one of materiality alone.

[242] The above consequences demonstrate the result of favouring an overbroad definition of "change", failing to provide any guidance concerning the terms "business", "operations", and "capital", and ignoring the legislature's focus on the high-level or core aspects of an issuer. Respectfully, relying on the notion that "a change is a change" and that the terms "business", "operations" and "capital" are broader than understood by the motion judge is unworkable and does not respect clear legislative intent.

[243] Instead, the words "business", "operations" and "capital" must be given sufficient definitional content to accord with the legislature's choice of specifying that changes must be in the "business, operations or capital of the issuer". These words do more than exclude external events from immediate disclosure requirements. They do more than require that "something" occurred to the issuer that must, if it is material, be disclosed immediately. Such meanings could easily have been achieved by the

2025 SCC 39 (CanLII)

legislature by leaving out the words "business, operations or capital" altogether. Therefore, these words must be given meaning. The motion judge's interpretation does just that. By linking "change" to "business, operations or capital", it properly focuses on the core aspects or high-level elements of an issuer while excluding consideration of external, production or revenue-oriented, uncertain, routine, or ordinary developments that do not rise to the level of "changes". This accords with the common law exclusions and with the legislature's emphasis on matters that go to the core of the issuer.

(ii) Overbroad Disclosure Obligations Run Contrary to the Act's Delicate Policy Balancing

[244] Conflating "material change" and "material fact" does more than risk obscuring legislated distinctions; it ignores some and may run contrary to others of the many purposes involved in crafting the Act's disclosure regime. Specifically, it may encourage over-disclosure or premature disclosure beyond what is required by the statute, carrying with it an increased regulatory burden and risks to the efficiency of capital markets. I see this approach leading to negative impacts on investors, issuers, and directors and officers that run contrary to the Act's additional purposes of fostering efficient and competitive capital markets and capital formation.

[245] Beginning with the impact on issuers, to accept the approach taken by the Court of Appeal — to essentially invite running materiality analyses for events affecting an issuer's affairs and a running commentary on an issuer's material

2025 SCC 39 (CanLII)

facts — may incentivize issuers to over-disclose or disclose prematurely to mitigate compliance and liability risk. This presents at least two concerns for investors.

[246] First, I agree with the intervener the Canadian Chamber of Commerce that this "market noise" may very well prevent investors from assessing the true character and activities of an issuer, valuing its securities, and making informed investment decisions (I.F., at para. 25). Over-disclosure or premature disclosure will result in increased costs in corporate transactions and in raising capital; therefore, capital markets will become more costly, less efficient, and less competitive. This not only runs counter to the Act's balanced disclosure regime, but also runs against its purposes of protecting investors, promoting fair, efficient, and competitive capital markets, and stimulating capital formation.

[247] Second, over-disclosure or premature disclosure may also frustrate the goal of directing capital to the most deserving issuers. As our Court recognized in *Kerr*, the Act's promotion of fair dealing and capital market efficiency "enhances the pool of capital available to entrepreneurs" (para. 32). My colleague acknowledges the relationship between disclosure and efficiency of capital markets (at para. 37), yet fails to engage with the ramifications of over-disclosure or premature disclosure. Requiring investors to wade through excessive disclosure from issuers seeking to reduce their risk of liability because of an overly broad interpretation of "material change" will not assist investors in identifying and directing that "pool of capital" to the most deserving

2025 SCC 39 (CanLII)

companies. This may stunt efficiency and the allocation of capital within the market, ultimately reducing overall returns for investors.

2025 SCC 39 (CanLII)

[248] Issuers will also be required to undertake internal changes that could prove costly to respond to the upholding of the Court of Appeal's broad interpretation. By suggesting that "a change is a change", the Court of Appeal effectively renders any event affecting an issuer's affairs a trigger for potential disclosure — leaving only materiality as the remaining threshold. I agree with the intervener the Mining Association of Canada that this interpretation will require "an issuer to marshal resources to deftly assess the materiality of every change, however minor, from an accident to equipment failure", which "is simply unreasonable and should be resisted as an absurd interpretation of the timely disclosure obligation" (I.F., at para. 20).

[249] My colleague discounts the appellant's warning that adopting the Court of Appeal's expansive interpretation will require issuers to assess every internal development for materiality, asserting that not "every minor internal event" will trigger disclosure as a "material change" (para. 78). He suggests that the materiality threshold will screen out trivial changes because "[o]ften, the materiality of a 'change' will be obvious" (para. 78). With respect, this assurance is unpersuasive. It fails to contend with the practical consequences of the expansive definition now endorsed — consequences that the Court of Appeal itself acknowledged, when it included the possibility that a simple scheduling change caused by equipment failure

or an accident could successfully trigger the immediate disclosure obligations required of a material change (see para. 83).

[250] Moreover, my colleague’s contention also ignores a further key issue. Not only will it be more likely that issuers will have to report on events whose disclosure does not conform with the balancing and purposes intended by the Act, but issuers will also be required to assess every event affecting their affairs for materiality, with the phrase “a change in the business, operations or capital” playing almost no part in constraining their potential disclosure requirements.

[251] Requiring an issuer’s senior management to assess the materiality of every event that affects their affairs and the potential need to immediately disclose each event is not practicable, nor is it just when civil liability may follow from a failure to disclose. It also undermines the purposes of the Act, because the added resource strain on issuers will result in greater compliance costs, diverting attention from substantive governance, discouraging participation in public markets, and ultimately impairing market efficiency and investor confidence.

[252] My colleague disagrees with this concern about the liability of issuers, officers, and directors. He argues that their liability is unaffected by his interpretation because it “reflects the legal status quo arising from several judgments of this Court such as *Pezim*, *Kerr*, and *Theratechnologies*” (para. 84). With respect, this is simply not the case. Neither *Pezim*, nor *Kerr*, nor *Theratechnologies* holds that my colleague’s interpretation applies. Instead, the case law is in conflict as to when an event constitutes

2025 SCC 39 (CanLII)

a “material change” and therefore when issuers, their officers, or their directors may be liable for failure to immediately disclose that event. Recognizing a broad and undefined standard for immediate disclosure will dramatically expand the disclosure requirement, and with it, potential liability for non-disclosure.

[253] Finally, directors and officers will be impacted by excessive disclosure obligations in at least two ways.

[254] First, as argued by the intervener the Insurance Bureau of Canada, adopting the Court of Appeal’s broad interpretation of “material change” will “elevate the risk profile for corporate Directors and Officers, thereby putting pressure on the availability, scope and cost of [Director and Officer] insurance in Canada” (I.F., at para. 5). Adopting this broad interpretation possibly opens the floodgates to litigation, running counter to the desire to reduce unmeritorious litigation in the form of the leave requirement contained within s. 138.8 of the Act, a desire that has also been underscored by our Court (*Theratechnologies*, at paras. 30 and 34). It also has the effect of increasing costs for directors and officers to defend themselves, which therefore places strain on insurers to provide director and officer insurance. The Insurance Bureau, at para. 22 of its factum, quotes from an article that offers a warning — one that remains salient — regarding the impact of the expansion of directors’ and officers’ liability on the supply of insurance:

> The statutory expansions of directors’ and officers’ liability could lead to a withdrawal of insurance supply if, in addition to expanding the need

2025 SCC 39 (CanLII)

> for liability insurance, they increase the uncertainty surrounding the liability standard and the application of that standard.
>
> (Quoting R. J. Daniels and S. M. Hutton, "The Capricious Cushion: The Implications of the Directors' and Officers' Insurance Liability Crisis on Canadian Corporate Governance" (1993), 22 *Can. Bus. L.J.* 182, at pp. 222 and 228.)

2025 SCC 39 (CanLII)

[255] Second, the heightened risks of litigation against directors and officers imperils the prospective recruitment of qualified individuals to serve in those critical positions. Civil liability attaches to failure to adhere to the disclosure regime (see s. 138.3 of the Act). By broadening the range of circumstances that may give rise to personal liability, the interpretation adopted below, and by my colleague, risks what the Insurance Bureau aptly describes as a "liability chill" (I.F., at para. 19, quoting Toronto Stock Exchange Committee on Corporate Governance in Canada, *"Where Were The Directors?": Guidelines For Improved Corporate Governance In Canada* (1994, Peter Dey, Q.C., Chair)). This chill could have significant consequences: it undermines the recruitment and service of skilled and talented directors and officers and, in doing so, runs counter to the Act's stated purposes of fostering capital formation, ensuring fair and efficient capital markets, and contributing to financial system stability. These objectives depend on the availability of capable individuals willing to serve as officers and directors without disproportionate exposure to legal risk. A narrowing of the pool of leadership talent would frustrate, rather than further, the purposes that the Act is intended to advance.

[256] While my colleague rightly points out that disclosure decisions are a matter of "legal obligation", he fails to engage with the significant liability concerns that his broad interpretation will engender for issuers, directors, and officers, as well as its impact on the availability and cost of directors' and officers' insurance (para. 97).

(c) *Conclusion on the Definition of "Material Change"*

[257] "Material change" has two components that must be kept distinct: whether a change in the business, operations, or capital of the issuer has occurred and whether it is material. A change occurs when an issuer's business, operations, or capital, understood at a high level of generality, is put in a different position, or on a different course, or in a different direction. It excludes external facts (unless they result in a change in the business, operations, or capital of the issuer), fluctuations in revenue and production, uncertain developments, events that maintain the status quo, and routine or ordinary occurrences, and instead the Act requires disclosure of developments that represent a change to the core aspects of the issuer's business, operations, or capital, taking into account all the circumstances of the case as part of the fact-specific inquiry. The motion judge's definition recognized these requirements. I see no error in his analysis.

[258] Moreover, I fail to see how the interpretation of the motion judge is either "restrictive" or prone to "ossif[y]" the statute or imposes a "strict legal formula" that runs counter to "ordinary meaning" (Jamal J.'s reasons, at paras. 6, 71-72 and 96). It is neither rigid, nor strict, nor technical. His definitions are sufficiently expansive and

2025 SCC 39 (CanLII)

emerge from the ordinary usage of the words and their placement beside one another. To reiterate, those definitions are as follows: "change" is "a different position, course, or direction"; "business" is "what the company does"; "operations" are the activities conducted by the company to engage in its lines of "business"; and "capital", is the issuer's "share structure and rights of shareholders". These definitions are sufficiently broad and flexible. They provide guidance to issuers, investors, and courts and tribunals. They provide greater certainty and predictability for issuers and investors alike.

2025 SCC 39 (CanLII)

[259] As a final note on the definition of "material change", I agree with my colleague that it is unnecessary to import the standard articulated in some Ontario case law that requires that a "change" be "important" or "substantial", but I disagree with his assertion that the motion judge effectively did so (paras. 76 and 87). In fact, the motion judge made a point of saying the following, after examining that line of cases:

> Whether or not the change is considered to be "substantial" or "important", the key conclusion from both *Green* . . . 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. [para. 151]

In my view, the motion judge does not adopt the higher standard from *Green* or *Mask* but rather adopts a definition of "change" that situates that word within qualitative parameters and ties it to the general terms "business", "operations" and "capital". This interpretation does not covertly raise the threshold for materiality beyond what is intended by the Act. By introducing the language of "different position, course, or

direction" and by elucidating the meaning of "business, operations or capital", the standard does not impose stringent requirements but rather gives courts and the securities industry guidance on whether a particular event results in a change in business, operations, or capital that must be considered for materiality and potential disclosure based on each unique factual matrix.

2025 SCC 39 (CanLII)

[260] In line with this, I disagree with the assertion of the Court of Appeal (at paras. 82 and 84) and my colleague (at paras. 76-78) that the motion judge's interpretation collapses the assessment of a "change" with the assessment of "materiality". Finding that changes to the issuer's business, operations, or capital must be understood at a high level of generality does nothing to diminish or collapse the requirement of materiality. Under the motion judge's interpretation, two distinct analyses must occur: first, the "change" must be to a high-level or core element of the issuer's business, operations, or capital; *then*, if it is, it must be assessed for materiality, i.e., to determine if it can "reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer". There is no collapse of the analysis. There are two steps, both of which provide meaningful screening mechanisms to ensure that issuers are not obliged to immediately disclose insignificant or routine events.

[261] As my colleague rightly notes (at para. 77), the materiality component must still consider the magnitude of the change's potential impact on the market price or value of the issuer's securities, and materiality is "objectively determined from the

perspective of a reasonable investor, and the applicable standard is defined in strictly economic terms" (C.A. reasons, at para. 81, citing *Kerr* (C.A.), at para. 53, aff'd 2007 SCC 44, [2007] 3 S.C.R. 331; *Cornish*, at paras. 55 and 65-66; *Rex Diamond* (Div. Ct.), at para. 6; *Miller v. FSD Pharma, Inc.*, 2020 ONSC 4054, at para. 64). None of these important legal requirements have been altered. And none indicate that the legislature did not intend for "a change in the business, operations or capital" to speak to changes in the core or high-level aspects of an issuer. They only speak to the fact that the impact of the potential change on the market price or value of the securities is considered at the second stage of the immediate disclosure analysis, after a "change" to the business, operations, or capital has been identified.

B. *The Definition of "Material Change" Must Be Consistent at all Stages of the Proceedings*

[262] My colleague is of the view that the definition of "material change" is not altered by virtue of the stage of the proceedings (para. 120). He writes: ". . . statutory interpretation is not conducted less stringently on a motion for leave under s. 138.8(1). The interpretation of the provisions at issue must still be correct" (para. 118). In other words, a more lenient definition of "material change" does not apply at the leave stage while a more constrained version would apply when the matter is heard on the merits. I agree.

2025 SCC 39 (CanLII)

[263] To bring a claim against an issuer for failing to disclose a material change as is required, the plaintiff must apply for leave under s. 138.8(1) of the Act, which states:

> **138.8** (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where 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 at trial in favour of the plaintiff.

[264] In *Theratechnologies*, our Court addressed the leave requirement found in Quebec's securities legislation, which is similar to that of Ontario and other provinces. In that case, Abella J., writing for the Court, explained that the statutory civil liability regime was intended to reduce the burden on investors seeking to bring their claims, but the addition of a leave requirement was intended to serve as a "robust screening mechanism" (para. 19) to ensure that "cases without merit are prevented from proceeding" and to prevent "strike suits and costly unmeritorious litigation" (paras. 38-39). The threshold is "more than a 'speed bump'" (para. 38). However, the screening mechanism is not intended to become a "mini-trial" (*Dyck v. Tahoe Resources Inc.*, 2021 ONSC 5712, at para. 92).

[265] In the present case, only s. 138.8(1)(b) — the requirement that there be "a reasonable possibility that the action will be resolved at trial in favour of the

2025 SCC 39 (CanLII)

plaintiff" — is implicated. In *Theratechnologies*, our Court provided the following interpretation of that provision, as requiring

> the claimant to offer both <u>a plausible analysis of the applicable legislative provisions</u>, and <u>some credible evidence in support of the claim</u>. 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. [Emphasis added; para. 39.]

[266] This excerpt makes it clear that our Court set out a two-part test to determine what constitutes "a reasonable possibility that the action will be resolved at trial in favour of the plaintiff". My colleague finds that the plaintiff must "offer <u>both</u> a plausible analysis of the applicable legislative provisions, <u>and</u> some credible evidence in support of the claim" (para. 106 (emphasis added)). I agree.

[267] The appellants ask our Court to clarify whether the leave requirement in s. 138.8 modifies or lessens the burden to establish a "material change". This comes after the Court of Appeal's comment that material change should be defined broadly, *especially* in the context of a motion for leave (paras. 7 and 82).

[268] In my view, the Court of Appeal erred in framing the test in this manner, which is inconsistent with *Theratechnologies*. In *Theratechnologies*, our Court used the language "plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim" (para. 39). At the Court of Appeal, this was morphed into the phrase "'plausible' interpretation":

2025 SCC 39 (CanLII)

> . . . 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. [para. 67]

2025 SCC 39 (CanLII)

[269] The Court of Appeal's language raises the question of whether plaintiffs need only present a "plausible interpretation" of the term "material change" or whether the statute's interpretation remains static at all stages of litigation. Of course, statutory interpretation does not change based on the stage of proceedings. On this point, I agree with my colleague (paras. 118-19). The language "plausible analysis" does not refer to the *interpretation* of the statute, which must be correct and not merely plausible. Instead, the phrase "plausible analysis" requires that the *application* of the statute to the available evidence be plausible. I also agree with the intervener Canadian Coalition for Good Governance that a consistent definition of "material change" "will increase certainty for both investors and issuers", thereby fulfilling the "objectives of fairness, investor protection, integrity, and efficiency that lie at the heart of Canadian securities legislation" (I.F., at para. 4).

[270] While a different evidentiary standard is employed at this stage, the definition of "material change" should not and does not differ based on the stage of the proceeding. Therefore, the motion judge was correct to apply his own interpretation of the term "material change" rather than leaving the interpretation open for the parties to settle at trial.

C. *Application*

[271] Having adopted the interpretation of "material change" advanced by the motion judge, I proceed on the basis that the Court of Appeal's role was to review his application of the operative legal standard for palpable and overriding error, as it was a question of mixed fact and law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36).

[272] I find that the Court of Appeal erred in concluding that Mr. Markowich could satisfy the leave requirement set out in s. 138.8 of the Act. To succeed, Mr. Markowich had to satisfy the court that he had a reasonable possibility of successfully establishing at trial that the pit wall instability or rock slide constituted a change in Lundin Mining's business, operations, or capital. I find that he would not be able to do that with the proper interpretation of "material change", and therefore the motion judge was correct to deny him leave.

[273] None of the four exclusions that circumscribe the meaning of change that I outlined earlier apply in this case. I must therefore consider the facts specific to this case, mindful that the Court of Appeal's role was to review the motion judge's finding on a standard of palpable of overriding error.

[274] The motion judge made a number of factual findings, to which the Court of Appeal owed deference. These include his description of the Candelaria mine plan as being completed in several phases, with Phases 9 through 13 left to be mined when the pit wall instability was found and the rock slide occurred. At that time, Lundin Mining was mining Phase 9 and parts of Phase 10 (motion judge reasons, at para. 48).

2025 SCC 39 (CanLII)

The motion judge also found as a fact that both the pit wall instability and rock slide were "localized", resulting in the evacuation of Lundin Mining personnel from the immediate area. He noted that there was no evidence concerning whether any other parts of the mine were shut down as a result (paras. 59 and 62-63).

[275] More substantively, the motion judge considered whether the facts of Lundin Mining's resequencing in response to the events were anything but routine or were out of the ordinary. He found that as a result of the events, Lundin Mining deferred less than 5 percent of its annual production and engaged in some resequencing in addition to the resequencing it had already planned. He found that these adjustments did not constitute "a change in the business, operations or capital of the issuer":

> 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. <u>The deferred copper represented less than 5% of Lundin [Mining]'s annual production, which was already scheduled to be reduced</u> (by a lower amount) due to previously planned resequencing.
>
> . . .
>
> . . . Changes to [a life of mine plan] to address resequencing are part of the <u>ordinary business</u> and operation of a copper mining company. <u>Such resequencing was already planned before the Pit Wall Instability and the Rock Slide. Some additional resequencing which is done to address the ordinary occurrence of pit wall instability and a rock slide does not transform resequencing into a material *change*.</u>
>
> . . .
>
> Unlike *Rex Diamond* or *Cornish*, there is no evidence that either the Pit Wall Instability or the Rock Slide <u>had any effect on Lundin [Mining]'s "line of business". Lundin [Mining] continued to engage in copper mining by making some additional changes to its resequencing plan.</u> Lundin

2025 SCC 39 (CanLII)

> [Mining] did not lose the ability to conduct its business. [Underlining added; paras. 173, 185 and 187.]

[276] Further, he considered and found that there are inherent risks to the industry in which Lundin Mining conducted its business, a factor which, as I outlined above, is appropriate to consider:

> The evidence is that the Pit Wall Instability and the Rock Slide were inherent risks in open pit mining operation, and that Lundin [Mining] 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 [Mining]'s shares, but there is no evidence to support that either of the events was a material *change* to Lundin [Mining]'s business, operations, or capital. It did not constitute a different position, course, or direction. [Emphasis in original; footnote omitted; para. 179.]

[277] Even so, he appropriately found that "routine disclosure" of the inherent risks of mining to shareholders did not "inoculate" Lundin Mining from disclosing a particular event if the impact of that event constituted a "material change" (motion judge reasons, at para. 186).

[278] Taking this all into account, the motion judge found that the pit wall instability and the rock slide themselves were not changes in Lundin Mining's business, operations, or capital.

[279] Unlike the Court of Appeal, I can see no error in his analysis. The events merely necessitated modestly adjusting already planned "resequencing". Pit wall

2025 SCC 39 (CanLII)

instability and rock slides are fairly routine occurrences in open pit mining. This is why these risks were previously disclosed and risk mitigation was put in place. The fact that the risks predicted materialized, in this particular case, on these particular facts, did not result in changes in the business, operations, or capital of Lundin Mining.

[280] Therefore, unlike the Court of Appeal, I would uphold the motion judge's decision and deny Mr. Markowich leave to proceed by way of s. 138.8 of the Act.

VI. Conclusion

[281] In sum, the interpretation of "material change" advanced by the motion judge properly reflects the text, context, and purpose of the Act. It preserves the legislature's careful distinction between "material facts", which are disclosed periodically, and "material changes", which require immediate disclosure. By construing a "change" as a shift in the issuer's core aspects — its business, operations, or capital — one that puts the issuer in a different position, or on a different course, or direction, the motion judge articulated definitions that are faithful to the statutory language and the Act's underlying policy objectives. This approach ensures that routine internal developments do not trigger unnecessary disclosure obligations, while events that genuinely merit providing prompt notice to the market are still captured.

[282] I agree with Lundin Mining that the standard as laid out by the Court of Appeal — and now adopted by my colleague — effectively conflates the question of whether a change has taken place with the question of its materiality, and, in doing so,

2025 SCC 39 (CanLII)

elides the distinction between a material fact and a material change. This interpretation blurs the Act's core distinction, disregards the legislature's careful balancing, and imposes a disclosure standard broader than what is statutorily required.

2025 SCC 39 (CanLII)

[283] This approach may have far-reaching impacts that strike at the heart of the Act's objectives to promote not only fair but also efficient and competitive markets and to foster capital formation. A disclosure standard that imposes excessive strain on issuers and muddies the informational landscape for investors ultimately undermines market integrity rather than strengthening it.

[284] For these reasons, I would allow the appeal, set aside the judgment of the Court of Appeal, and restore the motion judge's order dismissing the motion for leave to bring the action. In so doing, I endorse the interpretation of "material change" adopted by the motion judge, as I have outlined in these reasons.

APPENDIX

Relevant Statutory Provisions

Ontario *Securities Act*, R.S.O. 1990, c. S.5

Definitions

1 (1) In this Act,

. . .

"issuer" means a person or company who has outstanding, issues or proposes to issue, a security;

. . .

"material change",

(a) when used in relation to an issuer other than an investment fund, means,

(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, or

(ii) a decision to implement a change referred to in subclause (i) made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable, and

(b) when used in relation to an issuer that is an investment fund, means,

(i) a change in the business, operations or affairs of the issuer that would be considered important by a reasonable investor in determining whether to purchase or continue to hold securities of the issuer, or

(ii) a decision to implement a change referred to in subclause (i) made,

(A) by the board of directors of the issuer or the board of directors of the investment fund manager of the issuer or other persons acting in a similar capacity,

(B) by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable, or

(C) by senior management of the investment fund manager of the issuer who believe that confirmation of the decision by the board of directors of the investment fund manager of the issuer or such other persons acting in a similar capacity is probable;

"material fact", when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities;

. . .

"reporting issuer" means an issuer,

2025 SCC 39 (CanLII)

(a) that has issued voting securities on or after the 1st day of May, 1967 in respect of which a prospectus was filed and a receipt therefor obtained under a predecessor of this Act or in respect of which a securities exchange take-over bid circular was filed under a predecessor of this Act,

(b) that has filed a prospectus and for which the Director has issued a receipt under this Act,

(b.1) that has filed a securities exchange take-over bid circular under this Act before December 14, 1999,

(c) any of whose securities have been at any time since the 15th day of September, 1979 listed and posted for trading on any exchange in Ontario recognized by the Commission, regardless of when such listing and posting for trading commenced,

(d) to which the *Business Corporations Act* applies and which, for the purposes of that Act, is offering its securities to the public,

(e) that is the company whose existence continues following the exchange of securities of a company by or for the account of such company with another company or the holders of the securities of that other company in connection with,

(i) a statutory amalgamation or arrangement, or

(ii) a statutory procedure under which one company takes title to the assets of the other company that in turn loses its existence by operation of law, or under which the existing companies merge into a new company,

where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least twelve months, or

(f) that is designated as a reporting issuer in an order made under subsection 1 (11);

Publication of material change

75 (1) Subject to subsection (3), where a material change occurs in the affairs of a reporting issuer, it shall forthwith issue and file a news release authorized by a senior officer disclosing the nature and substance of the change.

Report of material change

2025 SCC 39 (CanLII)

(2) Subject to subsection (3), the reporting issuer shall 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.

Exception

(3) A reporting issuer may, instead of complying with subsection (1), promptly file with the Commission the report required under subsection (2), marked as confidential, and its written reasons for doing so if,

(a) the reporting issuer reasonably believes that a disclosure required under subsections (1) and (2) would be unduly detrimental to its interests; or

(b) the material change consists of a decision made by the senior management of the reporting issuer to implement a change and the senior management,

(i) believes that confirmation by the board of directors of the decision to implement the change is probable, and

(ii) has no reason to believe that any person or company with knowledge of the material change has purchased or sold the reporting issuer's securities or traded a related derivative.

Idem

(4) Where a report has been filed with the Commission under subsection (3), the reporting issuer shall advise the Commission in writing where it believes the report should continue to remain confidential within ten days of the date of filing of the initial report and every ten days thereafter until the material change is generally disclosed in the manner referred to in subsection (1) or, if the material change consists of a decision of the type referred to in clause (3) (b), until that decision has been rejected by the board of directors of the issuer.

Requirement to disclose subsequently

(5) A reporting issuer that has filed a report under subsection (3) shall promptly disclose the material change in the manner referred to in subsection (1) if the reporting issuer becomes aware or has reasonable grounds to believe that a person or company having knowledge of the material change is purchasing or selling securities of the reporting issuer or trading a related derivative.

Liability for secondary market disclosure

Documents released by responsible issuer

2025 SCC 39 (CanLII)

138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer;

(b) each director of the responsible issuer at the time the document was released;

(c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;

(d) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

Public oral statements by responsible issuer

(2) Where a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the public oral statement was made and the time when the misrepresentation contained in the public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

2025 SCC 39 (CanLII)

(a) the responsible issuer;

(b) the person who made the public oral statement;

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the making of the public oral statement;

(d) each influential person, and each director and officer of the influential person, who knowingly influenced,

  (i) the person who made the public oral statement to make the public oral statement, or

  (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and

(e) each expert where,

  (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

  (ii) the person making the public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

  (iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement.

Influential persons

(3) Where an influential person or a person or company with actual, implied or apparent authority to act or speak on behalf of the influential person releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released or the public oral statement was made and the time when the misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(a) the responsible issuer, if a director or officer of the responsible issuer, or where the responsible issuer is an investment fund, the investment fund manager, authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

2025 SCC 39 (CanLII)

(b) the person who made the public oral statement;

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

(d) the influential person;

(e) each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement; and

(f) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document or public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement.

Failure to make timely disclosure

(4) Where a responsible issuer fails to make a timely disclosure, 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 has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against,

(a) the responsible issuer;

(b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and

(c) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer in the failure to make timely disclosure, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

2025 SCC 39 (CanLII)

Multiple roles

(5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer.

Multiple misrepresentations

(6) In an action under this section,

(a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and

(b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure.

No implied or actual authority

(7) In an action under subsection (2) or (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation.

Leave to proceed

138.8 (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where 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 at trial in favour of the plaintiff.

Same

(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

Same

2025 SCC 39 (CanLII)

(3) The maker of such an affidavit may be examined on it in accordance with the rules of court.

Copies to be sent to the Commission

(4) A copy of the application for leave to proceed and any affidavits and factums filed with the court shall be sent to the Commission when filed.

Requirement to provide notice

(5) The plaintiff shall provide the Commission with notice in writing of the date on which the application for leave is scheduled to proceed, at the same time such notice is given to each defendant.

Same, appeal of leave decision

(6) If any party appeals the decision of the court with respect to whether leave to commence an action under section 138.3 is granted,

(a) each party to the appeal shall provide a copy of its factum to the Commission when it is filed; and

(b) the appellant shall provide the Commission with notice in writing of the date on which the appeal is scheduled to be heard, at the same time such notice is given to each respondent.

Appeal dimissed, CÔTÉ J. *dissenting*.

Solicitors for the appellants: Cassels Brock & Blackwell, Toronto.

Solicitors for the respondent: Groia & Company, Toronto; Strosberg Wingfield Sasso, Windsor.

Solicitors for the intervener Canadian Coalition for Good Governance: Torys, Toronto.

2025 SCC 39 (CanLII)

Solicitor for the intervener Ontario Securities Commission: Ontario Securities Commission, Toronto.

Solicitors for the intervener Mining Association of Canada: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the intervener CFA Societies Canada Inc.: Lenczner Slaght, Toronto.

Solicitors for the intervener LiUNA Pension Fund of Central and Eastern Canada: Koskie Minsky, Toronto.

Solicitors for the intervener Insurance Bureau of Canada: McCarthy Tétrault, Toronto.

Solicitors for the intervener Canadian Chamber of Commerce: McCarthy Tétrault, Toronto.

2025 SCC 39 (CanLII)