

Ontario Court Orders Nearly \$700,000 in Costs Following Securities Class Action Decision

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On January 6, 2022, in *Markowich v Lundin Mining Corporation*,¹ the Ontario Superior Court of Justice denied leave to commence a secondary market securities class action under Part XXIII.1 of the *Securities Act* (Ontario) and declined to certify common law negligent misrepresentation claims. That decision was discussed in a previous article.

On February 23, 2022, the Court ordered costs payable to the defendants in the amount of approximately \$700,000.² In so doing, the Court reiterated key principles relating to costs on leave/certification motions, provided guidance on classification of “novel” claims, and addressed allegations of allegedly excessive costs.

Background

At issue in *Markowich* was whether (i) a pit wall instability detected on October 25, 2017 and (ii) a subsequent rockslide of approximately 600,000 to 700,000 tonnes of waste material on October 31, 2017 at an open pit mine owned and operated by Lundin Mining were material changes requiring immediate disclosure under the *Securities Act*. The proposed representative plaintiff sought general and special damages against Lundin Mining and certain of its directors and officers in the amount of \$175 million and punitive damages in the amount of \$10 million.

In its decision on leave and certification, the Court held that there was no reasonable possibility that the plaintiff could establish that either the pit wall instability or the rock slide constituted a material change to Lundin Mining’s “business, operations or capital” within the meaning of the *Securities Act*.

The Decision

The plaintiff argued that the defendants’ claimed partial indemnity costs of \$694,032.64 were unreasonable and excessive, and argued that the Court should fix costs at \$450,000.00. In a decision dated February 23, 2022, the Court awarded the defendants costs in the amount of \$693,805.39.

The Court’s decision was premised on key principles relating to costs determinations, including that costs

must reflect what is fair and reasonable, that costs expectations of the parties can be determined by the amount of costs that an unsuccessful party could reasonably expect to pay, and that parties generally expect to devote significant resources (and therefore costs) to prosecuting and defending certification/leave motions. The Court noted that leave motions necessarily require a review of the merits of the proceedings and, as such, often involve voluminous motion records and expert reports.

The Court specifically rejected the plaintiff's assertion that the defendants' fees were excessive, noting that the plaintiff ought to have expected that a claim of this size would be vigorously contested – the defendants had every right to go into “full-battle mode” to ensure that the litigation would be brought to an end. The Court also found no basis to discount the defendants' costs pursuant to section 31(1) of the *Class Proceedings Act, 1992* (Ontario), finding that the plaintiff's claim was neither novel nor in the public interest such that section 31(1) would be engaged. In particular, the Court held that roughly the same substantive claim had been argued in another recently dismissed proposed class action and therefore that the proceeding did not involve a novel point of law.³

Looking Forward

This decision provides helpful commentary in terms of how courts will award costs in similar leave/certification motions, including the acceptance of significant amounts as reasonable for the reasons outlined above. Going forward, when litigating a leave/certification motion in a securities class action, parties should be aware of the quantum of costs that may be at issue, which should disincentivize plaintiffs from bringing less than clear-cut claims. Defendants should be reassured that significant costs can be recovered if they go into “full-battle mode” and succeed in ending the litigation at the motion stage.

A copy of the decision can be found [here](#).

¹ 2022 ONSC 81 (*Markowich*).

² *Markowich v Lundin Mining Corporation*, 2022 ONSC 1233.

³ See *Peters v SNC-Lavalin Group Inc*, 2021 ONSC 6161.