

Kerr v. Danier Leather ups the ante for class action defendants

By David W. Kent,
Brad Hanna and Nicole Vaz

On May 16, 2005, the Ontario Superior Court of Justice rendered an unprecedented decision on legal costs that significantly “ups the ante” for class action defendants. The decision means that, in addition to being ordered to pay some or all of the successful plaintiffs’ legal fees, class action defendants may also be required to pay an additional “premium” — as a reward to the plaintiffs’ counsel for undertaking the risk of the action.

Kerr v. Danier Leather

Kerr v. Danier Leather [2005] O.J. No. 1972 is the costs decision of the first trial decision in Canada dealing with the statutory cause of action for misrepresentation in a prospectus (contained in s. 130 of the Ontario *Securities Act*). The plaintiff class purchased their

its costs of the action on a “substantial indemnity” basis. This is the highest end of the normal costs scale, and compensates a party for almost all of its legal costs calculated on an hourly rate basis. Because the judgment exceeded an earlier offer to settle the plaintiffs had made, the court awarded costs on a partial indemnity basis until the date of the offer, and costs on a substantial indemnity basis thereafter. The precise amount of costs remains to be assessed, but will likely be in the order of \$2 million.

Justice Sidney Lederman’s analysis of partial and substantial indemnity costs was neither novel nor surprising. What was unusual, however, was that the class also asked the court to order the defendants to pay an additional \$1.8 million “premium” — on the basis of the result achieved and the

premium. In *Windisman v. Toronto College Park Ltd.* [1996] O.J. No. 2897, the court concluded that requiring the defendant to pay a legal premium in an award of costs “would be out of keeping with the scheme created by the *Class Proceedings Act*” — which provides for a multiplier and contingency arrangements with reference only to the fees chargeable by the plaintiffs’ solicitor to the class. This earlier case held that contingency and premium arrangements are “strictly a matter between the plaintiff class and the solicitor” and in no way depend upon “holding the defendant liable for more than the usual measure of costs.”

Notwithstanding this earlier decision, Justice Lederman followed the non-class action cases where defendants were ordered to

• The judgment followed six years of proceedings, various interlocutory motions and appeals and over 40 trial days.

Finding present both features of risk and outstanding result, Justice Lederman accordingly ordered the defendants to pay a premium of \$1 million, on top of legal costs totalling approximately \$2 million that he ordered to be assessed.

What this means

The *Danier* decision substantially increases the potential exposure of class action defendants to higher costs awards being made against them. Almost every class action is taken by class counsel on a contingency fee basis. Every class action that goes to trial will be complex, lengthy, vigorously defended and risky for the class (not to mention the defendant). Many, if not most, will exhibit the characteristics that encouraged the *Danier* court to award a huge pre-

mium against the defendants. But the decision may be of limited application. In the first place, few class actions ever make it to trial. Secondly, *Danier* is appealing the decision. Class action counsel on both sides of the Bar will be eagerly awaiting the results of the appeal.

David Kent and Brad Hanna are partners and Nicole Vaz is an associate in the Toronto office of McMillan Binch Mendelsohn LLP. David is a member of the firm’s Litigation and Competition/Antitrust sections and chair of the firm’s Class Action Group. Brad is a member of the firm’s Litigation and Dispute Resolution Group. Nicole is a member of the firm’s Litigation and Dispute Resolution Group and has been involved in a variety of commercial matters, including class actions (defence).



David W. Kent



Brad Hanna



Nicole Vaz

shares in *Danier* pursuant to an initial public offering and later sued for inaccurate and misleading financial forecasts contained in the prospectus. Following an approximately two-month trial in May 2004, the court found that the defendants had misrepresented certain information. The court ordered *Danier* to compensate class members for their losses (on average, \$2.35 per share to the purchasers of the six million issued shares).

Legal costs

In April 2005, the class sought

financial risk undertaken by their counsel.

The “premium”

Justice Lederman began by observing that premiums had previously been awarded only in a handful of non-class action cases. These cases provide that a premium should be awarded “only rarely and only when both factors — risk and result — cry out for an award in excess of substantial indemnity costs.”

Prior to *Danier*, there had only been one other class action case that even dealt with the issue of a

pay premiums. In his view, there is no reason why the principles underlying the awarding of a premium (risk and result) should not apply to class actions. Justice Lederman noted that the case posed “significant challenges” for plaintiffs’ counsel:

• It was the first trial decision in Canada that dealt with the statutory case of action for prospectus misrepresentation;

• The defendants had considerable financial resources and were represented by experienced and competent counsel; and