



Cost Awards in Class Actions

by Scott Maidment

As many U.S. defense lawyers already know, Canadian litigation essentially operates on a “loser pays” basis when it comes to legal fees. In Ontario, for example, this means that in almost all civil cases the losing party must pay a significant portion of the legal fees and disbursements incurred by the winners. The winner’s fees are typically calculated using a scale of hourly rates prescribed by regulation and, theoretically, the loser can be ordered to pay up to 100 percent of the actual fees and disbursements incurred by the winning party. In complex class action litigation, therefore, a defendant might face a “cost award” for millions of dollars in legal fees incurred by the plaintiffs, on top of the damage award itself.

As if this were not enough for defendants to contend with, an Ontario Judge has now raised the stakes even further. In the recent judgment in *Kerr v. Danier Leather* [2005] O.J. No. 2704, Justice Cumming of the Ontario Superior Court ruled that successful class counsel can also recover from



Scott Maidment is a Litigation Partner with McMillan Binch Mendelsohn LLP in Toronto. A member of DRI and its International Law, Products Liability, Trucking Law and Commercial Litigation Committees, he is currently defending a number of product liability class actions in Ontario and other Canadian provinces.

the defendant a “premium” fee on top of the normal cost award based on the prescribed scale. In *Kerr*, Justice Cumming fixed the premium at \$1,000,000.00 over and above the substantial cost award to be allowed under the prescribed scale. The cost award under the prescribed scale has not yet been determined by the court, but is estimated at between \$2,000,000 and \$3,000,000.

Kerr breaks new ground as the first class action decision in which the court has awarded a “premium” fee against a losing defendant. It also reverses the position taken by the same court almost a decade ago in *Windisman v. Toronto College Park* [1996] O.J. No. 2897, where the court ruled that a premium was not appropriate in the class action context. Justice Cumming chose not to follow *Windisman*, however, citing a number of recent decisions outside of the class action context in which the court had ordered the losing party to pay a “premium” to the successful counsel.

In class action litigation, the successful plaintiffs’ counsel typically receives a substantial monetary reward from the class members pursuant to its retainer agreement. In that context, the award of a further “premium” to be paid by the defendant will be viewed by many as excessive. The principles applied in *Kerr* require that certain conditions be met before the court may award a “premium,” but the application of those principles in the class action context suggests that a “premium” may prove to be a common reward for plaintiffs who successfully pursue class actions through trial.

In granting the premium, Justice Cumming relied primarily upon the decision of the Ontario Court of Appeal in *Walker v. Ritchie* [2005] O.J. No. 1600 (not a class action), where that court ruled that a premium was appropriate only where it was justified by the risk undertaken by counsel and the results achieved. In particular, the court stated that a premium is only appropriate where the following conditions are met:

- the plaintiff lacked the resources

to fund lengthy and complex litigation;

- plaintiffs’ counsel financed the litigation;
- the defendant contested liability;
- plaintiffs’ counsel assumed the risk of delayed and possible non-payment of fees; and,
- plaintiffs’ counsel achieved an outstanding result.

The first four of these conditions for a premium will commonly be met, particularly where the plaintiffs are successful only following a trial. Very rarely will the representative plaintiff have the means to finance a complex class action, and commonly the plaintiffs’ attorneys make the investment and take the risk of non-payment. Accordingly, following a successful trial in a class action, it is likely that the only real issue in terms of counsel’s entitlement to a premium will be the fifth condition: whether the plaintiffs’ counsel achieved an “outstanding result.” What can be fairly described as an outstanding result may be, like beauty, in the eye of the beholder. In *Kerr*, however, the court had no difficulty in finding that this last condition had been met. *Kerr* was the first case in Canada to deal with the relatively new statutory cause of action for prospectus misrepresentation. Following a successful certification motion and 40 days of trial, the defendants were found to have misrepresented certain information in Danier’s prospectus offering and were ordered to pay damages of roughly \$14,000,000 to the shareholder class. Justice Cumming was satisfied that the results for the class were outstanding.

In terms of what the *Kerr* decision means for class action defendants, the answer is relatively clear. If a defendant is unsuccessful after a class action trial, there is a good chance that a “premium” award will follow unless the plaintiffs’ “success” for the class is shown to be limited. Over time, the courts will likely provide some guidance as to what constitutes an “outstanding” result for the class. In the meantime, expect to see more frequent demands for a “premium.”