



**Superior Court of Justice**  
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### FAX COVER SHEET

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**FROM:** Justice L. C. Leitch

**PAGES:** 7 (including cover page)

**DATE:** July 15, 2011

**RE:** **Amyotrophic v. Belle River, Court File No. CV-08-12004 & Belle River District Minor Hockey Association Inc. v. The Corporation of the Town of Tecumseh, Court File No. CV-08-12005**

**MESSAGE:** Please see attached Reasons for Judgment of Justice L. C. Leitch dated July 15, 2011. Thank you.

**ORIGINAL TO FOLLOW BY MAIL:** Yes ( ) No(x)

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**CITATION:** Amyotrophic v. Belle River, 2011 ONSC 4327  
**COURT FILE NO.:** CV-08-12004  
**DATE:** 2011/07/15

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
AMYOTROPHIC LATERAL SCLEROSIS	)	
SOCIETY OF ESSEX COUNTY and	)	Earl Cherniak, Peter W. Kryworuk, John
COMMUNITY GAMING &	)	Nicholson, Michael Peerless, Sabrina
ENTERTAINMENT GROUP LP	)	Lombardi for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
THE CORPORATION OF THE CITY OF	)	Scott Hutchison & Paul Saguil for the
WINDSOR	)	Defendant
	)	
Defendant	)	

**COURT FILE NO.:** CV-08-12005  
**DATE:** 2011/07/15

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
BELLE RIVER DISTRICT MINOR	)	Earl Cherniak, Peter W. Kryworuk, John
HOCKEY ASSOCIATION INC., ESSEX	)	Nicholson, Michael Peerless, Sabrina
COUNTY DANCERS INCORPORATED,	)	Lombardi for the Plaintiffs
and COMMUNITY GAMING &	)	
ENTERTAINMENT GROUP LP	)	
	)	
Plaintiffs	)	
	)	
-and-	)	
	)	
THE CORPORATION OF THE TOWN OF	)	Scott Hutchison & Paul Saguil for the
TECUMSEH	)	Defendant
	)	
Defendant	)	
	)	<b>HEARD:</b> May 12, 2011 at Windsor, Ont.

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**LEITCH J.:**

[1] The plaintiffs seek leave to appeal from the Order of Patterson J. dated January 20, 2011 pursuant to which these actions were certified as class proceedings. The defendants had agreed that the actions should be certified as a class proceeding but there were many issues in contention including the definition of the class.

[2] In these actions, the plaintiffs seek to recover from the defendant fees collected by the defendant, which the plaintiffs submit greatly exceeded the defendant's expenditures to regulate charitable gaming. There was no legislative provision granting the municipality authority to impose such a tax and as a result the fees offend s. 53 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 and are *ultra vires* and subject to restitution. In *Kingstreet Investments v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3 the Supreme Court of Canada held, for the first time, that the claim for restitution of unconstitutional taxation was a distinct cause of action.

[3] For the reasons that follow, I have concluded that leave ought to be granted pursuant to Rule 62.02(4)(b). With respect to the certification judge, I have found that there is good reason to doubt the correctness of the order in question and I am satisfied that the proposed appeal involves matters of such importance that leave should be granted. These actions engage a developing cause of action and the appeal raises the question of when a limitation issue should be determined in a class proceeding. The order in question impacts those who have claims prior to 2006. That is, in my view, the certification judge determined the merits of the claims for those who are not included in the class definition.

[4] It was agreed that if leave was granted in relation to the definition of the class then it followed that leave had to be granted on the question of the common issues. Similarly, I

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am satisfied that the orders respecting costs (including the costs of notice) should be revisited.

[5] I am indebted to counsel for the excellent materials filed on this leave application and their helpful and extensive submissions at the hearing. Despite the volume of the material presented and the length of the hearing, it is appropriate that these reasons for leave be brief.

[6] The certification judge's definition of the class was restricted by his decision to limit the claims to the two-year limitation period prior to the commencement of the action (that is, October 24, 2006 to October 24, 2008) and the period preserved by the transition provisions of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (October 24, 2004 to December 31, 2003).

[7] I agree with the plaintiffs that the certification judge concluded that claimants outside the limitation period could not proceed because their claims were outside the prescribed limitation period.

[8] It is significant that the certification judge made this finding pursuant to the s. 5(1)(a) inquiry on the certification motion – do the pleadings disclose a cause of action? With respect to this 5(1)(a) requirement on certification, the test in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at para. 33 is applicable. That is, the appropriate question is whether, assuming the facts as stated in the statement of claim can be proved, is it plain and obvious that the plaintiffs' statement of claim discloses no reasonable cause of action:

...if there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat.' Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. ...

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[9] It is important to note that the plaintiffs are correct in their assertion that the evidence on cross-examination respecting the discoverability of the claim is admissible only in connection with the inquiries respecting the common issue inquiry under s. 5(1)(c) and the preferential procedure inquiry under s. 5(1)(d).

[10] The defendant submits that there was no merits determination and no fact finding undertaken by the certification judge. Rather, they submit that in these circumstances discoverability is incapable of proof because the plaintiffs have to overcome the sworn evidence of their own lawyer. The defendant points to Mr. Nicholson's affidavit in which he deposes that reading the City of Windsor's 2005 operating budget as a whole, it is apparent that the net revenue generated from the lottery licensing was being treated as revenue for general municipal purposes and that this practice continued throughout 2006, 2007 and 2008.

[11] However, I agree with the plaintiffs that this evidence could not be considered on the s. 5(1)(a) inquiry and in any event his affidavit does not constitute any type of admission by class counsel.

[12] I am of the view that *Kingstreet, supra*, did not make it plain and obvious that the 2 year limitation period applies. It is significant that discoverability was not in issue in *Kingstreet* because from the outset, the plaintiffs had paid the alleged illegal taxes under protest.

[13] Discoverability is in issue in these actions and I cannot accept the defendant's submission that the issue of discoverability is implausible to the point of being incapable of proof.

[14] It may be that the certification judge responded to the defendant's concerns about the unwieldy result from "marrying the ancient claims and current claims". The defendant submits that such a result would "condemn current claims to a nightmarish

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common issues trial". Nevertheless the s. 5(1)(a) inquiry is a limited and restricted one. It is a question of law and not a matter of discretion.

[15] For the foregoing reasons leave to appeal is granted. If necessary counsel may make brief submissions on the issue costs within 45 days.

"Justice L. C. Leitch"

Justice L. C. Leitch

**Released:** July 15, 2011

**CITATION:** Amyotrophic v. Belle River, 2011 ONSC 4327  
**COURT FILE NO.:** CV-08-12004  
**DATE:** 2011/07/15

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

AMYOTROPHIC LATERAL SCLEROSIS SOCIETY  
OF ESSEX COUNTY and COMMUNITY GAMING &  
ENTERTAINMENT GROUP LP

Plaintiffs

- and -

THE CORPORATION OF THE CITY OF WINDSOR

Defendant

**COURT FILE NO.:** CV-08-12005  
**DATE:** 2011/07/15

**BETWEEN:**

BELLE RIVER DISTRICT MINOR HOCKEY  
ASSOCIATION INC., ESSEX COUNTY DANCERS  
INCORPORATED, and COMMUNITY GAMING &  
ENTERTAINMENT GROUP LP

Plaintiffs

-and-

THE CORPORATION OF THE TOWN OF  
TECUMSEH

Defendant

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**REASONS FOR JUDGMENT**

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Justice L. C. Leitch