

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: Amyotrophic Lateral Sclerosis Society of Essex County et al, and Belle River District Minor Hockey Association Inc. et al, Appellants

AND:

The Corporation of the City of Windsor and Town of Tecumseh, Respondents

BEFORE: Reilly, Aston, Ray JJ.

COUNSEL: *Peter Kryworuk and John Nicholson*, for the Appellants

Scott Hutchison and Brendan Van Niejenhuis, for the Respondents

HEARD: April 23 and 25, 2012

COSTS ENDORSEMENT

[1] We have now received and considered the costs submissions.

[2] The plaintiffs were successful in having the decision of the Motions Judge set aside but unsuccessful in obtaining an order certifying the class proceeding. That issue was remitted to the Motions Judge and the outcome on the original certification motion remains uncertain.

[3] In those circumstances, costs of the appeal and motion for leave to appeal should either be conditional on the plaintiffs' success on the reconsideration or, alternatively, costs should be remitted to the Motions Judge to be considered as a component of the overall costs of the certification motion.

[4] In our view, the latter course is more appropriate for these reasons:

- (i) This procedure almost certainly forecloses the possibility that the costs issue might follow a different appeal route from the certification motion itself;
- (ii) The Motions Judge is in a better position to understand the reasonableness of the very substantial costs that are claimed because of his close familiarity with the case from case managing the matter;
- (iii) If, at the end of the day, the only impact of this appeal is that the original order is not changed in any substantial way, or simply granted for different reasons, or the

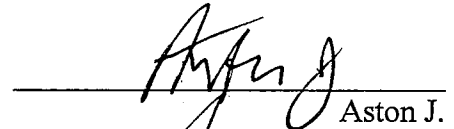
certification motion fails altogether, it may be that neither side should be awarded costs, or that the plaintiffs ought to pay costs;

- (iv) In these circumstances, the appeal and motion to leave for appeal, are a component of the costs of the certification motion and not capable of being fairly resolved in a discrete or isolated fashion;
- (v) Patterson J. originally decided that the costs of certification ought to be reserved to trial. He gave no reasons for that conclusion but it ought to be left open to him to make the same order on the reconsideration. A separate order for costs by this panel would undermine his discretion.

[5] We therefore order that the costs of the appeal and motion for leave to appeal be remitted to the Motions Judge, to be determined as a component part of the overall costs of the certification motion.



Beilly J.



Aston J.



Ray J.

August 23.
Date: ~~July~~, 2012