

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)

ROBERT CECILE, MICHELLE CECILE,)
GERALD PATRICK DOYLE, STANLEY)
LAWTON, STANISLAO CALANDRA,)
BRUCE ANDREW MACLELLAN,)
JEFFREY MICHAEL SIMPSON, SIMONE)
MARISA CUPID, CINDY RUTH)
ARMSTRONG, JAIME BATISTA and)
SUSAN HUNTLEY)

Plaintiffs)

- and -)

RETROFOAM OF CANADA)
INCORPORATED, RETROFOAM)
HOLDINGS INC., RETROFOAM)
WINDSOR INC., RETROFOAM OF)
SOUTHERN ONTARIO INC.,)
RETROFOAM OF EASTERN ONTARIO)
LTD., POLYMASTER, INC., ENERLIV)
INC., PAUL JOHN WEIGEL,)
NORTHERN RETROFOAM, INC.,)
ENWISE POWER SOLUTIONS INC.,)
ENWISE BUILDING SCIENCE INC.,)
GARY ZAVAROS, 756882 ONTARIO)
LTD. c.o.b. as LAMBTON INSULATION)
LTD., THE ATTORNEY GENERAL OF)
CANADA, NATIONAL RESEARCH)
COUNCIL OF CANADA, ATTIE)
ENTERPRISES LTD., I-GEN ENERGY)
INC. and FOAM COMFORT INC.)

Defendants)

Harvey T. Strosberg, Q.C., for the Plaintiffs

Paul Vickery, for the Defendants National
Research Council of Canada and the
Attorney General of Canada

Ward Branch, for the Defendants RetroFoam
of Eastern Ontario Ltd. and I-Gen Energy
Inc.

PATTERSON J.

HEARD: June 7, 2010

REASONS FOR MOTION

- [1] This class action involves the installation of RetroFoam, a urea-formaldehyde foam product, in the homes of about 700 families. The certification motion is scheduled for the week of January 17, 2011.
- [2] The National Research Council of Canada ("NRCC") and the Attorney General of Canada ("AG"), also referred to as the Crown, requests that a Rule 21 motion be heard before the certification motion. It is conceded by all parties that the first order of business is the certification motion but the Crown argues that the Rule 21 motion will be dispositive of the liability of the Crown and therefore should be heard before the certification motion.
- [3] The plaintiffs argue that, in fact, the Rule 21 motion cannot entirely dispose of the class action because the pleadings, which are assumed to be true for this motion allege the Crown defendants' involvement in the creation and operation of a Retrofit Program and the NRCC through its directives permitted RetroFoam to be installed. Further, it is alleged that the actions of the NRCC accepted an application to evaluate RetroFoam despite being advised it contained formaldehyde.
- [4] Further, it is pleaded that the EcoEnergy RetroFit Initiative Homes Program, a program created and administered by the Ministry of Natural Resources Canada ("MNR") and acting through the Office of Energy efficiency of the Department of Natural Resources ("NRCAN"), involved the recommendation of energy advisors under the legislation who, on many occasions, recommended RetroFoam to the home owner, the cost of which would permit the home owner to claim a grant.
- [5] On February 3, 2009 Health Canada announced that RetroFoam was a urea-formaldehyde based insulation and prohibited for use in Canada. It was pleaded that since that time the homeowners have been unable to sell, mortgage and, in some cases, insure their homes.
- [6] The *Rules of Civil Procedure* under rule 1.04(1) require the rules to be liberally construed to secure the "just, most expeditious and least expensive determination of every civil proceeding."
- [7] As stated by Justice Winkler in *Baxter v. Canada*, [2005] O.J. No. 2165 (S.C.J.) at para. 9, "the certification motion should be heard promptly and normally be given priority over other motions."
- [8] Justice Nordheimer in *Moyes v. Fortune Financial*, [2001] O.J. No. 4455 (S.C.J.) at paras. 8 and 9 stated: "The time limits set out in section 2(3) would strongly suggest that the certification motion is intended to be the first procedural matter that is to be heard and determined."

- [9] The test under Rule 21 and section 5(1)(a) is the same and as noted by Justice Haines in *McNaughton Automotive Ltd. v. Co-Operators General Insurance Co.*, [2002] O.J. No. 2026 (Ont. S.C.J.) at para. 8 "...therefore, although there are a large number of motions, the factual underpinnings are similar and the legal issues identical. In my view, the best way to proceed is to hear all these motions together...."
- [10] Justice Strathy in *Cannon v. Funds of Canada Foundation*, [2010] O.J. No. 314 (S.C.J.) at para. 15, articulated the following relevant factors that a court may consider when deciding whether to hear a Rule 21 motion before the certification motion:
- a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;
 - b) the likelihood of delays and costs associated with the motion;
 - c) whether the outcome of the motion will promote settlement;
 - d) whether the motion will give rise to interlocutory appeals and delays that would affect certification;
 - e) the interest of economy and judicial efficiency; and
 - f) generally, whether scheduling the motion in advance of certification would promote the "fair and efficient determination" of the proceedings (s. 12).
- [11] It is argued by the defence that the Rule 21 motion in this matter cannot dispose of the entire RetroFoam action. It is argued that in the RetroFoam class action there are 18 defendants who are represented by eight law firms including the Crown. It is argued that even if the Rule 21 motion is successful, the scope of the RetroFoam action will not be narrowed. The role of the NRCAN's employees, what they said and did, it is alleged, is integral to the issues of negligence and conspiracy against the Crown defendants.
- [12] It is argued by the Crown that they will incur additional expenses if the Rule 21 motion cannot be heard before the certification motion but it is argued that at least some of defence counsel from Vancouver and Toronto will likely attend the Rule 21 motion and they will also have to come to Windsor for the certification motion. It is argued that in the event the Crown defendants are successful arguing the Rule 21 motion at the certification hearing they can be compensated by awarding costs. Further, as I have indicated, the issues on the Rule 21 motion and the provisions under the class action under section 5(1)(a) are the same. There will be no duplication of many of the arguments to be made with the Rule 21 motion being heard at the same time as the certification motion. It is not clear to me whether the outcome of the Rule 21 motion will promote settlement or not.
- [13] Of great concern to me is the multiple appeal routes that could be created if the Rule 21 motion is heard separately from the certification motion. In my opinion, this would result in unfortunate and inappropriate delay in having this matter heard.

- [14] There is no problem with the appeal route if the Rule 21 motion and certification motion are heard together as any motion for leave to appeal can be heard together or any appeals to the Divisional Court can be heard together if leave is granted or appeals can be combined in the Court of Appeal if the Rule 21 motion is successful and the certification motion is dismissed or allowed and leave to appeal is granted by Divisional Court. *CJA*, s.6(3). Further, in my opinion, this would prevent litigation by instalments which is cautioned against by Chief Justice McMurtry and endorsed by the Supreme Court of Canada as follows:

Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

Garland v. Consumers' Gas Co. (2001), 57 O.R. (3d) 127 (Ont. C.A.), aff'd 2004 SCC 25.

- [15] I am further of the opinion that the Rule 21 motion should be held with the certification motion in the interest of economy and judicial efficiency. As indicated by Justice Carthy in *Cannon v. Funds of Canada Foundation*, *supra*, the judicial efficiency would be achieved if the Rule 21 motion and certification motion were held together because:
- a) the issue could be dealt with at one time for all parties at the certification hearing as part of the section 5(1)(a) test; and
 - b) appeals from the Rule 21 motion and the certification motion can be heard together.
- [16] In my opinion the scheduling of the Rule 21 motion in advance of the certification motion would not promote the "fair and efficient determination" of the proceeding.
- [17] The pleadings indicate that there is a commonality of issues that will be heard in the certification hearing and the Rule 21 motion.
- [18] There are significant cost considerations for counsel from all parties who, in all likelihood, would have to attend both hearings if heard separately. There would be a potential for delay of the action as a whole because of potential multiple appeal routes.
- [19] It is clear to me that in this case, with multiple parties involved, the overall cost of all parties attending the Rule 21 motion and then all parties except for possibly the Crown again attending a certification hearing could be prohibitive compared to the Crown preparing for a certification in combination with the Rule 21 motion. If successful on the Rule 21 motion, the Crown is able to seek costs.
- [20] In my opinion, from the pleading it is unclear whether the Rule 21 motion would be dispositive of the legal issues.

[21] Considering judicial economy and efficiency, I am satisfied that the Rule 21 motion should be heard at the same time as the certification motion.

A large black rectangular redaction box covers the signature of Terrence Patterson. A small handwritten mark is visible above the box.

Terrence Patterson
Justice

Released: June 14, 2010

CITATION: Cecile et al. v. RetroFoam of Canada Incorporated et al., 2010 ONSC 3457

ONTARIO

SUPERIOR COURT OF JUSTICE

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Plaintiffs

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ONTARIO INC., RETROFORM OF EASTERN
ONTARIO LTD., POLYMASTER, INC., ENERLIV
INC., PAUL JOHN WEIGEL, NORTHERN
RETROFOAM, INC., ENWISE POWER SOLUTIONS
INC., ENWISE BUILDING SCIENCE INC., GARY
ZAVAROS, 756882 ONTARIO LTD. c.o.b. as
LAMBTON INSULATION LTD., THE ATTORNEY
GENERAL OF CANADA, NATIONAL RESEARCH
COUNCIL OF CANADA, ATTIE ENTERPRISES
LTD., I-GEN ENERGY INC. and FOAM COMFORT
INC.

Defendants

REASONS ON MOTION

Patterson J.

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