



**REASONS FOR JUDGMENT**

- [1] There were two motions before me within this class action.
- [2] The first motion was by defendant Foam Comfort Inc. (hereinafter called "Foam Comfort") by its agent being the lawyer for Federated Insurance Company of Canada, (hereinafter called "Federated Insurance") seeking to set aside the default order of noting pleadings closed and that Mr. Leavitt be permitted to act for his solely owned corporation, Foam Comfort Inc.
- [3] Foam Comfort had been served with the class action and Mr. Leavitt had provided it to his insurance company, Federated Insurance. During the time that Federated was considering its position as to coverage the pleadings were noted closed.
- [4] Federated Insurance denied coverage to Foam Comfort.
- [5] In support of this motion, Mr. Leavitt signed an affidavit indicating that even though his corporation has assets of approximately \$70,000.00 and has been profitable he wishes to represent his corporation.
- [6] The insurance company lawyer as agent prepared the motion and affidavit and attended with Mr. Leavitt on the cross-examination of Mr. Levitt's affidavit and attended on this motion. Mr. Leavitt did not attend.
- [7] At the cross-examination the Federated lawyer instructed Mr. Leavitt not to provide the insurance policy or the letter denying coverage despite my previous order that all defendants must provide their insurance policies.
- [8] The second motion was by the plaintiff requiring the defendant, Foam Comfort, to answer certain questions including providing the policy of insurance, to provide the letter denying coverage and advise as to whether Mr. Leavitt wished to act for himself or if he wanted his insurance company to act for him.
- [9] On the defendants' motion the plaintiffs consented to an order setting aside the noting of Foam Comfort's being in default. The issue whether Mr. Leavitt may act for himself was reserved.

- [10] Having regard to the plaintiff's motion, on consent it was ordered that Foam Comfort provide the policy of insurance, to provide the letter of denial of insurance company and advise if Mr. Leavitt wished to act for himself or he wished his insurance company to act for him no later than August 31, 2010.
- [11] I have examined the pleadings and I am satisfied that, at this incipient stage of the proceedings, and on the current state of the record, including the pleadings, and in the absence of any compelling evidence to the contrary, Federated Insurance has a duty to defend.
- [12] I am at a significant disadvantage as I have the pleadings only and not Federated Insurance's policy or letter denying coverage. I am informed that six insurance companies have responded to this class action but I acknowledge that the Federated policy is to be judged on its own merits.
- [13] Regarding the duty to defend, Justice Borins in *Halifax Insurance Co. of Canada v. Innopex Ltd.*, [2004] O.J. No. 4178, stated:

Invariably, such proceedings are decided by reading the claim or claims asserted in the statement of claim in the underlying action with the coverage provided by the insurance policy. If one or more of the claims in the underlying action fall within the coverage, the insurer has a duty to defend the action on behalf of the insured.

- [14] Justice Borins at paragraph 34 of the *Halifax* case quoted Justice Iacobucci at paragraphs 28, 29, 31, 33 and 34 from the Supreme Court of Canada case at *Monenco Ltd. v. Commonwealth Insurance Co.*, [2001] 2 S.C.R. 699:

[In] assessing whether an insurer's duty to defend has been triggered rests on the traditional "pleadings rule"... If the pleadings allege facts which, if true, would require the insurer to indemnify the insured for the claim, then the insurer is obliged to provide a defence. This remains so even though the actual facts may differ from the allegations pleaded.

- [15] Justice Borins then made reference to McLachlin J.'s (as she then was) decision in the *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, who indicated that:

...general principles regarding the construction of insurance contracts support the conclusion that the duty to defend arises

where the pleadings raise claims which would be payable under the agreement to indemnify in the insurance contract.

[16] McLachlin J. further noted:

...that it is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim falling within the policy may succeed will suffice. In this sense, the insurer's duty to defend is broader than the duty to indemnify (Nichols, supra, at p.810).

Further:

...the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy.

[17] Justice Borins in paragraph 37 stated:

Generally speaking, in this province the process adopted to decide a duty to defend issue is an application under rule 14.05(3)(d) or (h). This is a summary procedure well suited to determining a duty to defend issue which necessarily arises, as Iacobucci J. noted in *Monenco*, as a preliminary matter. To follow this procedure avoids a duty to defend application becoming "a trial within a trial" into the truth of the allegations in the underlying statement of claim...

[18] The certification hearing is scheduled for five days commencing January 17, 2011. A significant amount of time and effort by all concerned has gone into the preparation of this class action to be heard. It is not in the interest of the administration of justice that the certification hearing be delayed.

[19] Federated Insurance has not filed an application to determine whether they have a right to deny coverage.

[20] I therefore direct that Federated Insurance must defend this action on behalf of Foam Comfort. As previously noted by Justice McLachlin, "...the insurer's duty to defend is broader than the duty to indemnify".

[21] Pending further order of the Court, Federated Insurance is obligated to defend Foam Comfort with the Statement of Defence to be filed within 30 days of today's date.

[22] Costs are reserved to another day.



Terrence L.J. Patterson  
Justice

**Released:** September 1, 2010

**CITATION:** Cecile et al. v. Retrofoam of Canada Incorporated et al., 2010 ONSC 4740  
**COURT FILE NO.:** CV-09-12583 CM

**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., RETROFORAM 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

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**REASONS FOR JUDGMENT**

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Patterson J.

**Released:** September 1, 2010