

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, ATTIE ENTERPRISES LTD.,  
I-GEN ENERGY LTD., and FOAM  
COMFORT INC.

Defendants

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

Paul Vickery, for the Defendant the Attorney  
General of Canada

Ian F. Leach, for the Defendant Polymaster,  
Inc.

Mike Eizenga, for the Defendants 756882  
Ontario Ltd., c.o.b. as Lambton Insulation  
Ltd. and Attie Enterprises Ltd.

HEARD: August 31, 2011


PATTERSON J.

**REASONS ON MOTION**

- [1] The Attorney General of Canada brought a motion under rule 21.01(3)(d) striking out from the most recent Amended Statement of Claim served on June 23, 2011 certain paragraphs in relation to the National Research Council of Canada and the Canadian Construction Materials Centre.
- [2] On January 6, 2011, I signed a consent order that the claim against the National Research Council be struck without prejudice and without costs and by the same order the plaintiffs were to deliver an Amended Statement of Claim expunging any existing interlineations and strikeouts and all allegations and references to the National Research Council and the Canadian Construction Materials Centre and its employees.
- [3] It is alleged by the applicant that certain paragraphs in the June 23, 2011 Amended Statement of Claim do not comply with the January 6, 2011 order concerning the National Research Council and the Canadian Construction Materials Centre.
- [4] The Attorney General of Canada further requests that there be no further amendments to the Statement of Claim without leave of the court.
- [5] Without going into great detail, the Attorney General in its submissions raise the issue of *res judicata*, issue estoppel, cause of action estoppel, abuse of process and that consent orders are final.
- [6] Further, the Attorney General of Canada takes the position that if the allegations and references are allowed to stand, the National Research Council will be required to actively participate in the defence of the action which will be contrary to the agreement of the parties. A further complication is that certain of the co-defendants have adopted the position of the plaintiffs in the June 23, 2011 Amended Statement of Claim and specifically the paragraphs that the Attorney General of Canada is asking to be struck.
- [7] The plaintiffs take the position that they have not offended the consent Order of January 6, 2011 concerning the National Research Council and the Canadian Construction Materials Centre.
- [8] It is the plaintiffs' position that reference to the National Research Council and the Canadian Construction Materials Centre in the June 23, 2011 Statement of Claim was to plead facts without making any allegations of liability against them.
- [9] It appears to me that so long as the pleadings include mention of the National Research Council or the Canadian Construction Materials Centre as for example, in order that certain e-mails that are relevant to the issue in dispute make sense, they may be mentioned so long as there is no allegation of liability.
- [10] I raised this with Mr. Vickery, lawyer for the Attorney General for Canada, and he indicated that his concern was in effect any possible interpretation that would imply

liability by the National Research Council or the Canadian Construction Materials Centre. On that basis I have examined the paragraphs the subject matter of this motion and order that the last sentence of paragraph 141 CC. and paragraph 142(xx) be struck. The intent is that there be no liability alleged or implied against the National Research Council or the Canadian Construction Materials Centre in the June 23, 2011 Amended Statement of Claim despite the fact that they are mentioned or referred to in certain paragraphs.

- [11] There was complaint by the Attorney General of Canada concerning that the various amendments were made to the Statement of Claim but as the Attorney General of Canada did not file a defence, leave of the court was and is not required.
- [12] In the event that my ruling on this motion affects any defendant or their counterclaim, appropriate additional time will be permitted to allow them to file an amended statement of defence and/or counterclaim.
- [13] I may be spoken to concerning costs if not resolved by the parties.



Terrence Patterson  
Justice

**Released:** September 15, 2011

**CITATION:** Cecile v. RetroFoam of Canada Incorporated, 2011 ONSC 5332

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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ROBERT CECILE, MICHELLE CECILE, GERALD  
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SIMONE MARISA CUPID, CINDY RUTH  
ARMSTRONG, JAIME BATISTA and SUSAN  
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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, ATTIE ENTERPRISES  
LTD., I-GEN ENERGY INC. and FOAM COMFORT  
INC.

Defendants

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**REASONS ON MOTION**

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Patterson J.

**Released:** September 15, 2011