




REASONS ON MOTION

- [1] The Attorney General of Canada (“the Attorney General”) seeks an order under rule 25.11 striking out allegations (Schedule “A” attached) in the most recent Amended Statement of Claim dated October 19, 2011 (“the Amended Statement of Claim”) as they relate to UFFI historical events (“UFFI historical events”) from the 1970s and 1980s.
- [2] In the alternative the Attorney General seeks an order pursuant to rule 25.10 that the plaintiffs provide particulars set out in the Demand for Particulars (Schedule “B” attached) served on the plaintiffs’ counsel on October 20, 2011. It is the position of the Attorney General that the UFFI historical events fail to meet the minimum level of disclosure of material facts mandated by rule 25.06(1) and that the prejudicial effect of the allegations outweigh any probative value they may have. Further that providing the information of UFFI historical events offends the rule of proportionality.
- [3] Even if the minimum level of disclosure of material facts is made out, the Attorney General states that they fail to provide sufficient details so as to allow the government to be able to plead to the plaintiffs’ allegations regarding the UFFI historical events.
- [4] This action was certified on consent as a class action save and except the outstanding allegation of negligence against of the Attorney General in relation to the installation of RetroFoam. RetroFoam is a urea formaldehyde foam insulation (“UFFI”) product prohibited in Canada pursuant to the *Hazardous Products Act* R.S.C. 1985, c. H-3. The Attorney General is alleged to be liable for Natural Resources Canada (“NRCan”) which it is alleged owed a duty of care to the plaintiffs regarding its administration of the ecoEnergy Retrofit homes program which included the use of RetroFoam.
- [5] The installation of the RetroFoam occurred in about 969 Ontario properties with the owners of these properties being the class members.
- [6] In addition to the allegations as noted in Schedule “A” is paragraph 67(e) of the Amended Statement of Claim namely “the class members expected that NRCan and MNR had learned about the problems associated with urea formaldehyde based insulation and UFFI from the Canadian Home Insulation Program in 1976.”
- [7] In the 1970s and 1980s UFFI insulation was approved by the federal government and approximately 100,000 property owners were affected and suffered damages to their property and health. The issue of health is not before the court in the RetroFoam action in which the damages being claimed are essentially are based on the cost of remediation or, in the alternative, the alleged diminution of the value of the class members’ homes.
- [8] The federal government in 1976 gave grants to homeowners to install UFFI and other insulation products under the Canadian Home Insulation Program.
- [9] Subsequently the federal government, without any admission of liability, provided grants of up to \$5,000.00 to remove the UFFI. It is alleged in the Amended Statement of Claim

that the Attorney General did not learn from the circumstances that arose in the 1970s and 1980s regarding the use of UFFI as an insulation product and the allegation is, in effect, history has repeated itself regarding the approval to use RetroFoam and its subsequent ban as a UFFI product. The same legislation was used to ban UFFI in the 1970s and 1980s and to ban the use of RetroFoam.

- [10] In the 1970s and 1980s in excess of 3000 lawsuits were brought against the federal government involving UFFI but it appears as though all were resolved without any admission of liability by the federal government. It does not appear that the federal government acknowledged any legal liability for the use of UFFI as an insulating product but that the government, for humanitarian purposes, gave a grant to have the UFFI removed.
- [11] I was provided various government reports that were generated in the 1980s which included an examination of lessons learned from the UFFI incidents of the 1970s and 1980s.
- [12] It appears to me that the circumstances surrounding the UFFI incidents of the 1970s and 1980s and the lessons learned as evidenced by the government reports are relevant and material to the allegations contained in the Amended Statement of Claim.
- [13] This is not a matter of the RetroFoam action being overtaken by the issue of liability for the UFFI incidents of the 1970s and 1980s but in my opinion the trial judge will need those details to do a similar fact analysis as outlined in *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908. *Handy* is a criminal case but, in my opinion, certain aspects of the analysis done in *Handy* may assist the trier as to the admissibility of the evidence concerning UFFI from the 1970s and 1980s and which may possibly assist in determining liability in the current lawsuit.
- [14] It therefore appears to me that the Amended Statement of Claim alleges triable issues. Whether or not it involved an historical tort and a duty of care based on foreseeability or proximity or whether there was a failure to learn from what has been described as a mistake made in the 1970s and 1980s will be for the trial judge to determine.
- [15] The plaintiff provided three government reports: 1) a 1984 report for the National Research Council by Crawford and Shirliffe - problems with urea formaldehyde foam insulation; 2) a 1983 evaluation of the Canadian Home Insulation Chip Program by the Programs Evaluation Branch Department of Energy, Mines and Resources (now the Ministry of Natural Resources); and 3) a 1985 three volume report being a Management Review of the UFFI Assistance Program prepared by Consumer and Corporate Affairs Canada and specifically the UFFI Centre within that Ministry. These reports, especially the last one, contain an analysis of what was learned from the UFFI incidents of the 1970s and 1980s and specific recommendations on a go-forward basis. This report (perhaps there are others) in my opinion support the argument that the allegations made in the Amended Statement of Claim raise triable issues concerning the UFFI issues of the 1970s and 1980s relevant to the RetroFoam action.

- [16] In my opinion, the federal government has sufficient information from the pleadings to file their Statement of Defence and to provide disclosure as requested by the plaintiffs concerning the UFFI incidents of the 1970s and 1980s. This includes the steps taken by the federal government subsequent to UFFI being banned in 1980. To ask the plaintiffs to provide greater details in order that the government can answer the allegations in my opinion is inappropriate and misguided. This is information they alone have. I recognize that the documentation to be supplied by the federal government concerning the 1970s and 1980s will be significant but in my opinion it is material, relevant and necessary.
- [17] I do not view the information to be supplied by the federal government regarding the 1970s and 1980s UFFI incidents and their follow-up by the government as being a situation that prejudice will outweigh the probative value or that it offends the rule of proportionality.
- [18] The Attorney General argues that the fulfilling of the disclosure regarding the incidents in the 1970s and 1980s is disproportionate to the issues raised in the RetroFoam file. I disagree. I repeat in my opinion this information is material, relevant and necessary.
- [19] Plaintiffs' counsel, in response to my questioning, indicated that information concerning health hazard that was part of the issues raised in the UFFI incidents of the 1970s and 1980s is not relevant to the RetroFoam claim as no claim for compensation is being made for damages to health.
- [20] The Amended Statement of Claim speaks for itself. I am now aware, as a result of this motion, that the federal government commissioned and has in its possession the UFFI Management Review, the chip evaluation and the problems with UFFI report. It is obvious to me that these documents provide the federal government with details concerning the historical UFFI events of the 1970s and 1980s.
- [21] As a result the Attorney General is able to plead to the plaintiffs' allegations. The time is past due for the Attorney General to file its Statement of Defence and to file its affidavit of documents concerning the UFFI historical events.
- [22] The parties may obtain from the trial coordinator a conference call with me to set timelines for compliance with this order.
- [23] Therefore, the Attorney General's motion is dismissed with costs to the plaintiffs. In the event that the parties are unable to settle the issue of costs, I may be spoken to by way of a conference call.



Terrence Patterson  
Justice

**References to the UFFI Historical Events in the Amended Amended Amended Amended  
Amended Second Further Fresh Statement of Claim of October 19, 2011**

<b>Paragraph</b>	<b>Allegation</b>
10	In 1976, the Federal Government instituted the Canadian Home Insulation Program to give grants to homeowners of up to \$500. The Federal Government knew that insulation was contaminated with UFFI and about 100,000 property owners were affected and suffered damages to their property and health.
11	Thirty years later, the Federal Government repeated the same tort in the EcoEnergy Program. MNR and NRCAN owed a duty of care to the Class Members based on the foreseeability and proximity:
(a)	because they knew or ought to have known about the composition of RetroFoam and UFFI;
(e)	because of their past experiences, they had to check the composition of RetroFoam because it was approved for the EcoEnergy Program; ...
12	Because of the historical involvement of the Federal Government with installation of UFFI, there was a historical tort...
142	NRCAN, MNR and their employees and agents failed to meet the standard of care required in all the circumstances and breached its duties in that:
(v)	in or about 1976 and thereafter, the Federal Government approved, under the Canadian Home Insulation Program, a federal scheme for up to \$500 in grants for the insulation of homes containing UFFI foam insulation;
(w)	in or about 1976 and thereafter, the Federal Government knew or ought to have known that UFFI foam insulation caused health hazards because of the Canadian Home Insulation Program;
(x)	in or about 1976 and thereafter, the Federal Government and/or the courts recognized that the Federal Government owed a duty of care to persons who insulated their homes with UFFI foam insulation;
(y)	the Federal Government made grants to remove insulation and UFFI for up to \$5,000;
(z)	they knew or ought to have known about insulation foam, RetroFoam, and UFFI because of their experience with the Canadian Home Insulation Program;
(aa)	they failed to learn from this historical mistake in the Canadian Home Insulation Program and they repeated the same mistake about UFFI in the EcoEnergy program;
(rr)	they did not appreciate that the EcoEnergy Program was a repeat of the 1976 Canadian Home Insulation Program problem involving UFFI and they did not do any due diligence about RetroFoam and UFFI;
151	NRCAN and its employees knew or ought to have known about testing insulation for UFFI because it had experience with the Canadian Home Insulation Program. NRCAN knew it was sued in 1976 because of the Canadian Home Insulation Program, a similar program to the EcoEnergy Program. NRCAN and the MNR did not learn from this history about insulation and UFFI and repeated the same mistake.

**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**

*Proceeding under the Class Proceedings Act, 1992*

**Demand for Particulars Pursuant to Rule 25.10**

**TAKE NOTICE** that the Attorney General of Canada demands that the Plaintiffs provide further and better particulars of the Amended Amended Amended Amended Amended Second Further Fresh Statement of Claim filed October 18, 2011 ("Statement of Claim"), as follows:

1. In respect of paragraph 10, provide particulars as to the knowledge of the Federal government as referred to therein, and in particular, who within the Federal government knew that insulation was contaminated with UFFI and who within the Federal government knew that 100,000 property owners were affected and suffered damages to their property and health, as well as in what circumstances this conclusion was reached.
2. In respect of paragraph 11, provide particulars of the tort alleged to have been committed by the Federal government in or about 1976, and in particular, the date of the alleged tort referred to therein, by whom it was committed, the circumstances in which the tort was allegedly committed, and any other identifying features of such tortious act and/or conduct.

3. In respect of paragraph 11(e), provide details of the alleged past experiences, what these experiences were, when they took place, and name(s) of individuals within the Federal government involved, and any other identifying features of the past experience as referred to therein.
4. In respect of paragraph 12, provide details of the historical tort referred to therein, in particular the date of the alleged committal of the tort referred to therein, by whom it was committed and the circumstances in which the tort was allegedly committed, and any identifying features surrounding the committal of the tort as alleged.
5. In respect of paragraph 142(w), provide names of the person(s) within the Federal government who, as the Plaintiffs allege, knew or ought to have known that UFFI foam insulation caused health hazards because of the Canadian Home Insulation Program, when they knew or ought to have known it, and the circumstances giving rise to such knowledge.
6. In respect of paragraph 142(x), provide names of the person(s) in the federal government who, as the Plaintiffs allege, recognized that the Federal government owed a duty of care to persons who insulated their homes with UFFI foam insulation, the date on which such a recognition occurred and the circumstances in which such a recognition occurred, the format/form of any such recognition, as well as any other identifying features of such recognition, as referred to therein.
7. Also in respect of paragraph 142(x), provide particulars of the court's or the courts' decision(s) which ruled that the Federal government owed a duty of care to persons who insulated their homes with UFFI foam insulation, including dates of any court decisions recognizing such a duty, with full citations, and if the decisions were unreported, court file number(s).
8. In respect of paragraph 142(aa), provide details of the alleged historical mistake, dates on which it occurred and the names of the persons within the Federal government who are alleged to have failed to learn from the alleged mistake as referred to therein.
9. In respect of paragraph 151, provide particulars as to the "testing insulation for UFFI" referred to therein, the circumstances and purpose of testing, and who performed the testing as referred to therein.
10. Also in respect of paragraph 151, provide details regarding the alleged mistake, what it consisted of, when it was made, by whom and provide any other identifying features of the mistake as referred to therein.
11. Also in respect of paragraph 151, identify the action in which NRCan was sued in 1976 because of the Canadian Home Insulation Program and provide particulars as to the disposition of the action.

Dated at Ottawa, this 20<sup>th</sup> day of October, 2011

[Redacted signature]

Paul Vickery

[Redacted signature]

Monika Lozinska

Counsel for the Defendant, the Attorney General of Canada

**THE ATTORNEY GENERAL OF CANADA**

Department of Justice  
Bank of Canada Building, East Tower  
234 Wellington Street  
Ottawa, ON, K1A 0H8

**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 INC. and FOAM COMFORT  
INC.

Defendants

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**REASONS ON MOTION**

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Patterson J.