Court of Queen's Bench of Alberta

Citation: Kwok v Canada (Natural Sciences and Engineering Research Council), 2013 ABQB 395

Date: 20130712
Docket: 1001 09082
Registry: Calgary

Between:

Daniel Y. Kwok

Plaintiff/Applicant

- and -

Natural Sciences and Engineering Research Council of Canada, Barbara Conway, Nyree St. Denis, Canwest Publishing Inc., National Post Inc., Margaret Munro, Jamie Komarnicki and John or Jane Doe

Defendants/Respondents

Reasons for Judgment

of the

Honourable Mr. Justice Bryan E. Mahoney

I. Overview

[1] The Plaintiff/Applicant, has sued the Defendants/Respondents alleging defamation and breach of contract. The Applicant seeks an order granting him leave to amend the Second Amended Statement of Claim, and directing the Defendants to answer certain questions, respond to some undertakings, and produce further records.

II. Facts

(A) Parties

[2] The Applicant, Dr. Daniel Kwok (“Dr. Kwok”) is an associate professor at the University of Calgary. He is a research scientist specializing in the field of nanotechnology and interfacial phenomena.

[3] There are eight Defendants. The National Sciences and Engineering Council of Canada ("NSERC") is a corporation and agent of the federal Crown which provides research grants to fund natural science and engineering projects. Ms. Barbara Conway ("Ms. Conway") is NSERC's Corporate Secretary. Ms. Nyree St. Denis ("Ms. St. Denis") is a communications advisor for NSERC. Collectively, NSERC, Ms. Conway, and Ms. St. Denis are the "NSERC Defendants".

[4] Ms. Jillian Buriak ("Ms. Buriak"), a former council member at NSERC, is also a Defendant. With respect to this Application, her counsel was present but made no submissions and took no positions.

[5] Canwest Publishing Inc. ("Canwest") and National Post Inc. ("National Post") own and operate newspapers. Ms. Margaret Munro ("Ms. Munro") and Ms. Jamie Komarnicki ("Ms. Komarnicki") are journalists employed by Canwest. Collectively, Canwest, the National Post, Ms. Munro and Ms. Komarnicki are the "Media Defendants".

(B) Background

[6] Between 2001 and 2005, the University of Alberta employed Dr. Kwok as an assistant professor.

[7] Since 2001, Dr. Kwok has received research grants from NSERC.

[8] In 2004, Dr. Kwok's Department Chair filed a complaint that Dr. Kwok had violated the University of Alberta's Research and Scholarship Integrity Policy (the "Policy") by improperly duplicating his publications in multiple journals. The University of Alberta investigated these allegations and, in 2005, concluded that Dr. Kwok had violated the Policy.

[9] In 2005, Dr. Kwok resigned from his position at the University of Alberta and started a new position at the University of Calgary. He continued to receive grant money from NSERC.

[10] After starting his new position, Dr. Kwok requested that the University of Alberta transfer some of his research equipment to the University of Calgary. This prompted the University of Alberta to investigate some of the purchases that Dr. Kwok had made using NSERC grant money.

[11] In 2006, the University of Alberta Campus Security Unit determined that Dr. Kwok had misappropriated some of this grant money.

[12] To resolve matters, Dr. Kwok and the University of Alberta reached a settlement, whereby Dr. Kwok agreed to pay funds to the University of Alberta. Afterwards, in late 2008, the University of Alberta provided its investigation reports confirming the duplication of publications and misappropriation of grant money complaints to NSERC.

[13] In 2009, NSERC terminated the grants it had awarded Dr. Kwok, and banned him from receiving further NSERC funding.

[14] Ms. Munro, an investigative journalist for Canwest, requested records from NSERC concerning cases of researcher misconduct pursuant to the *Access to Information Act*, RSC 1985, c A-1 (“ATIA”). In 2008 and 2009, NSERC provided documents relating to Dr. Kwok's termination to Ms. Munro. Ms. Munro then corresponded with NSERC and gleaned additional information.

[15] In 2010, Canwest and the National Post published articles written by Ms. Munro and Ms. Komarnicki that accused Dr. Kwok of plagiarism and misusing grant funds.

(C) Procedural History

[16] On June 17, 2010, Dr. Kwok filed a Statement of Claim. On January 11, 2011, Dr. Kwok filed an Amended Statement of Claim.

[17] Between January and November 2011, the parties participated in questioning. The Defendants produced over a thousand documents. Ms. St. Denis, Ms. Conway, and Ms. Munro were questioned.

[18] On February 23, 2012, Dr. Kwok filed a Second Amended Statement of Claim.

[19] On March 14, 2012, Dr. Kwok requested the Defendants' consent to his filing a proposed Third Amended Statement of Claim. All of the Defendants refused, save Ms. Buriak who did not respond.

III. Issues

[20] There are five issues in this Application:

1. Should Dr. Kwok be granted leave to amend the Second Amended Statement of Claim regarding:

   (A) The breach of contract claims against NSERC?
   (B) The defamation claims against the NSERC Defendants and Ms. Buriak?

2. Should Ms. Conway be directed to provide answers to the questions posed to her during her questioning between September 27 and 30, 2011?

3. Should Ms. Munro be directed to provide answers to the questions posed to her during her questioning between October 31 and November 2, 2011?

4. Should the Media Defendants be required to produce documents withheld on the basis of journalistic source privilege?

5. Should Ms. Conway and Ms. Munro be directed to provide undertakings posed to them during their questioning between September 27 and 30, 2011, and between October 31 and November 2, 2011, respectively?

IV. Analysis

(A) Interpreting the Alberta Rules of Court

[21] Before addressing each of the above issues individually, and since an interpretation of the *Alberta Rules of Court*, Alta Reg 124/2010 is required in this case, the theme that runs throughout this analysis is that the *Alberta Rules of Court* shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits: *1036122 Alberta Ltd (AML Construction) v Khurana*, 2012 ABCA 10, 519 AR 221 at para 17.

[22] Rule 1.2 of the Rules of Court states as follows:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> 1.2(2) In particular, these rules are intended to be used
>
> > (a) to identify the real issues in dispute,
> > (b) to facilitate the quickest means of resolving a claim at the least expense,
> > (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
> > (d) to oblige the parties to communicate honestly, openly and in a timely way, and
> > (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

[23] The purpose and use of Rule 1.2 was discussed by Justice Graesser in *C(L) v Alberta*, 2011 ABQB 12, 509 AR 43 at paras 74-79 and 94. At para. 75, he stated:

> Rule 1.2 is clearly intended to guide the interpretation of the New Rules and might be described as the New Rules' guiding principles. Any application for relief under a Rule may bring Rule 1.2 into play, which will influence any interpretation issues. Rule 1.2 may be described as the lens through which all Rules must be interpreted. I expect that where there are competing interpretations, the interpretation closest to the intentions expressed in Rule 1 will prevail.

[24] The objective of the reforms found in the new Rules is to encourage the parties toward conduct that can be summed up in five words: settlement, cooperation, simplicity, expediency and economy.

(B) Issue #1 - Should Dr. Kwok be Granted Leave to Amend the Second Amended Statement of Claim?

[25] Dr. Kwok submits that his original claims for breach of contract and defamation were based on incomplete and partial information disclosed largely in newspaper articles. Based on the significant amount of information garnered through the discovery process, he says that it is now necessary for him to amend his Second Statement of Claim. He wants to amend so he can further stipulate and expand his previous claims. This Court, submits Dr. Kwok, should use its discretion to approve the proposed Third Amended Statement of Claim because of the general rule for amending pleadings. The rule states that there is a strong legal presumption that amendments should be admitted and refused only in rare and extreme instances.

[26] The NSERC Defendants submit that the proposed amendments are hopeless because they do not raise triable issues and are not supported by the evidence. The NSERC Defendants claim that the proposed amendments are not valid and should be refused.

(1) Proposed Amendments Not Contested

[27] Dr. Kwok clarified that the phrase "and terminating Dr. Kwok's research grants", which is an added phrase in paragraphs 32, 33, 34, 36, 37, and 38 of the proposed Third Amended Statement of Claim, refers only to the three grants (the "NSERC Contracts") described in paragraph 13(b), (c), and (d) of Dr. Kwok's proposed Third Amended Statement of Claim. These are the Canada Research Chair grant, the Strategic Grant, and the Discovery grant, respectively. The NSERC Defendants consent to the addition of the phrase "and terminating Dr. Kwok's research grants" in proposed paragraphs 32, 33, 34, 36, 37, and 38. The addition of this phrase in proposed paragraphs 32, 33, 34, 36, 37, and 38, is allowed.

[28] Dr. Kwok claims that, during his cross-examination on July 3-4, 2012, counsel for the NSERC Defendants showed Dr. Kwok documentation which reflected errors in respect of quantification of amounts of the NSERC grants set out in paragraphs 11(b) and 13(c) of the proposed Third Amended Statement of Claim. Dr. Kwok asks that the Court amend the grant amount in proposed paragraph 11(b) from "147,000" to "122,500" and the grant amount in paragraph 13(c) from "505,200" to "474,400". The NSERC Defendants did not make submissions on this. I note that the proposed amendments are to the NSERC Defendants' favour. Therefore, these proposed amendments are allowed.

(2) Law

[29] In *Hunka v Degner*, 2012 ABQB 207 at paras 11-13, this Court set out the law for amendments to pleadings that do not add parties as follows:

> Rule 3.62 and 3.65 of the Alberta Rules of Court govern the amendment of pleadings. The relevant sections are as follows:

Amending Pleading

3.62(1) A party may amend the party's pleading, including an amendment to add, remove, substitute or correct the name of a party, as follows:

(a) before pleadings close, any number of times without the Court's permission;

(b) after pleadings close,

(i) for the addition, removal, substitution or correction of the name of a party, with the Court's prior permission in accordance with rule 3.74, or

(ii) for any other amendment, with the Court's prior permission in accordance with rule 3.65.

(c) despite clauses (a) and (b), whether or not pleadings have closed, with the agreement of the parties filed with the Court,

Permission of Court to amendment before or after close of pleadings

3.65(1) Subject to subrule (5), before or after close of pleadings, the Court may give permission to amend a pleading.

[30] The legal principles to be applied to amendments that do not add parties are referred to in *Manson Insulation Products Ltd v Crossroads C & I Distributors*, 2011 ABQB 51 at paras 42 - 46:

> Rule 3.65 gives no substantive guidelines on when amendments not adding parties should be granted. Apart from formal requirements, it simply states that "the Court may give permission to amend a pleading."
>
> The most analogous former provision is rule 132, which stated as follows:
>
> > The court may at any stage of the proceedings allow any party to alter or amend his pleadings or other proceedings in such manner and on such terms as may be *necessary* for the purpose of determining the real question in issue between the parties.

The reference to "purpose of determining the real question in issue between the parties" does not appear in rule 3.65. However, rule 1.2(2)(a) includes that purpose in the overall purpose and intention of the new *Alberta Rules of Court*. Thus, rule 3.65 cannot be seen as a change from the approach taken by the courts under the former rule 132.

The principles to be applied on amendment applications, established by the authorities under the formal rules, were recently summarized by Wittmann C.J.Q.B. as follows:

> [20] Generally, any pleading can be amended no matter how careless or late is the party seeking to amend: *Balm v. 3512061 Canada Ltd.*., 2003 ABCA 98, 327 A.R. 149 at para. 43. This is referred to in *Balm* as the "classic rule".
>
> [21] The classic rule is subject to four major exceptions: *Canadian Deposit Insurance Corp. v. Canadian Commercial Bank*, 2000 ABQB 440, 269 A.R. 49 at para. 11; *Foda v. Capital Health Region*, 2007 ABCA 207 at para. 10; see also *C.H.S. v. Alberta (Director of Child Welfare)*, 2006 ABQB 528, 403 A.R. 103 at para. 11, aff'd 2006 ABCA 355, 401 A.R. 215. Those exceptions are as follows:
>
> > 1. the amendment would cause serious prejudice to the opposing party, not compensable in costs;
> >
> > 2. the amendment requested is "hopeless" (an amendment that, if were in the original pleadings, would have been struck);
> >
> > 3. unless permitted by statute, the amendment seeks to add a new party or a new cause of action after the expiry of a limitation period; and
> >
> > 4. there is an element of bad faith associated with the failure to plead the amendment in the first instance.

Therefore, if no exception applies, the pleadings can generally be amended.

The principles summarized by Wittmann C.J.Q.B. were not premised on particular words in the old rules. Rather, they arose from the function of pleadings before our

contemporary common law courts. As stated by Bensler J. [in *Newel Post Developments Ltd. v. 1402801 Alberta Ltd.*, 2010 ABQB 660] at para. 18:

> [18] This discretion [to amend pleadings] exists because "pleadings are not a meaningless ritual incantation or medieval superstition; they fulfil the first rule of natural justice, knowledge of the case against one": *Waquan v. Canada*, 2002 ABCA 110, 303 A.R. 43, 2 Alta. L.R. (4th) 1 at para. 85. Furthermore, with the Court bound to decide a matter upon the issues pled before it, accurate pleadings are necessary for just decisions.

[31] In a similar case where the plaintiff was attempting to amend and add particulars, Justice Eidsvik in *869120 Alberta Ltd. v. B & G Energy Ltd.*, 2011 ABQB 209 summarized the appropriate approach at paras. 23 and 24:

> The former Rules, rules 132 and 133, although somewhat differently worded, were similarly broad. The parties agreed that these new rules do not materially alter the legal test and accordingly reliance can be made on the case law on point to date. Indeed, subsection 3 basically codifies the "classic rule" that "an amendment should be allowed no matter how careless or late, unless there is prejudice" as outlined by Justice Côté in *Balm v. 3512061 Canada Ltd.*, 2003 ABCA 98 at para. 43 and *Milfive Inv. v. Sefel* (1998) 216 A.R. 196.
>
> The other criteria that is generally accepted is that the amendment must raise a triable issue, or otherwise said, not be "hopeless" (*Stolk v. 382779 Alberta Inc.*, 2005 ABQB 440, *Marin v. Rask*, 2000 ABQB 931), there must be a "modest degree of evidence" if the amendment is beyond trivial or of a clarifying nature, unless the claim to be added is fraud, and there a "stiffer test" is to be used (*Balm* at paras. 29 and 63). Finally, if the claim against a person to be added, or the cause of action is outside of the limitation period then reference is to be made to section 6 of the *Limitation Act* R.S.A. 2000 c. L- 12 to determine if it should be allowed.

[32] Justice Tilleman added in *Kent v Postmedia Network Inc*, 2012 ABQB 559 at para 14:

> As it is written, rule 3.62 places the matter in the judge's hand and the evolving case law suggests a continued tilt in favour of a liberal amendment of pleadings. As long as there is some foundation and unless there is a significant prejudice or an injustice, the order to allow amendments should be freely given. I am not saying that every amendment should be automatically allowed, because factors such as bad faith, unreasonable delay, or questionable motive are always in play and may prove fatal to the Amendment request...

(3) Breach of Contract Claims against NSERC

[33] Dr. Kwok alleges that that NSERC's decision to terminate his grants and ban him from future funding constitutes a breach of contract because NSERC failed to follow its internal positions when it sanctioned him. He further claims that, since discovery, NSERC has produced a substantial number of documents and Ms. St. Denis and Ms. Conway have answered questions regarding NSERC's procedures for issuing sanctions. Given this, Dr. Kwok submits that his breach of contract claims as set out in paragraphs 25, 26, 30, 33, 34, and 35 of the proposed Third Amended Statement of Claim are valid and should be allowed.

[34] The NSERC Defendants answer that the proposed amendments related to Dr. Kwok's breach of contract claim do not raise triable issues and are not supported by evidence.

[35] Following from what I have already stated, and for the reasons that follow, I permit all of Dr. Kwok's proposed amendments with respect to his breach of contract claims against NSERC.

(a) Failing to Follow Procedures

[36] Paragraph 33 of the proposed Third Amended Statement of Claim states as follows:

> 33 Further, NSERC breached each of the NSRC Contracts by failing to follow its existing or appropriate procedures to ensure fairness to Dr. Kwok prior to repudiating the NSERC Contracts and terminating Dr. Kwok's research grants.

Parties' Positions

[37] The NSERC Defendants oppose proposed paragraph 33 for three reasons.

[38] First, the NSERC Defendants submit that Dr. Kwok has failed to plead that implied or express terms were breached by the Defendants in the proposed Third Amended Statement of Claim.

[39] Second, the NSERC Defendants allege that the proposed amendments concerning Dr. Kwok's alleged breach of contract will not raise a triable issue unless Dr. Kwok can identify a contractual provision in the NSERC Contracts to support his claim, which he has not done.

[40] Third, the NSERC Defendants submit that Dr. Kwok's breach of contract claim is a private law action and that public administrative law principles such as due process or procedural fairness have no application in this case. Therefore, the NSERC Defendants claim that NSERC's rights, duties, and liabilities will be determined by reference to the documents said to constitute the NSERC Contracts.

[41] Dr. Kwok provides three responses. First, Dr. Kwok submits that his breach of contract claim is based on a number of documents that both Dr. Kwok and NSERC agree constitute contracts between the two parties. Dr. Kwok claims that these documents create a number of express and implied obligations, and that for the Court to make a determination on whether the breach of contract claim is indeed hopeless would require a detailed analysis of the contracts, which is a matter properly decided by a trial judge.

[42] Second, Dr. Kwok alleges that the implied terms in the NSERC documents are: that NSERC was required to follow appropriate procedures; that NSERC was required to await the conclusion of the RCMP's investigation; and that NSERC was required to reverse its sanctions following the Crown's decisions not to lay charges.

[43] Third, Dr. Kwok claims that it is an implied term of the contracts that the parties are required to act fairly and in good faith. As an example, Dr. Kwok cites the Tri-Council Policy Statement on Integrity in Research and Scholarship, which he argues states that prior to issuing sanctions NSERC shall give an opportunity for the person involved to provide a response. Dr. Kwok submits that this is an acknowledgement by that parties that NSERC would act in fairness, accord due process, and provide natural justice before sanctioning a researcher accused of misconduct.

Analysis

[44] Regarding the first two points, I am satisfied that Dr. Kwok has met the NSERC Defendants' objections, and I permit proposed paragraph 33 on the basis that Dr. Kwok's claims satisfy the general rule. Regarding the third point, it seems to me that Dr. Kwok's argument that NSERC has a duty to act fairly and in good faith is based on contract rather than on NSERC's position as a corporation and agent of the federal Crown. Therefore, on this basis, I permit proposed paragraph 33 as it satisfies the general rule.

(b) Misspending of Research Grants - Paragraphs 25 and 26

[45] Paragraphs 25 and 26 of the proposed Third Amended Statement of Claim are as follows:

> 25 Further, NSERC issued the Duplication of Publication Ban notwithstanding the fact that the Canada Research Chairs Program Interdisciplinary Adjudication Committee (the "Interdisciplinary Adjudication Committee") - on which a number of NSERC representatives sit - previously investigated allegations that Dr. Kwok duplicated publications and found no wrongdoing. The Interdisciplinary Adjudication Committee investigated these allegations in connection with Dr. Kwok's application for funding under the Canada Research Chair Program. In a Recommendation dated February 5-6,

> 2006, the Interdisciplinary Adjudication Committee determined that the publications allegedly duplicated by Dr. Kwok "have different goals and are complementary." Accordingly, it is recommended that Dr. Kwok's application for funding be approved.
>
> 26 On February 22, 2006, the Interdisciplinary Adjudication Committee's Recommendation was approved by the Canada Research Chair Steering Committee (the "Steering Committee"). The President of NSERC is a member of the Steering Committee.

Parties' Positions

[46] The NSERC Defendants object to these proposed amendments because they are irrelevant and do not raise a triable issue. The NSERC Defendants claim that the publications referred to in these paragraphs are not the publications subject to the University of Alberta's Duplication of Publication Complaint and Investigation, and therefore not the basis of NSERC's decision that Dr. Kwok had violated the Policy. Rather, the Canada Research Chairs Program Interdisciplinary Adjudication Committee (the "CRC") reviewed the publications referred to in these paragraphs as part of Dr. Kwok's application for funding under the Canada Research Chair Program. Therefore, the NSERC Defendants submit, these paragraphs are irrelevant to Dr. Kwok's breach of contract claim.

[47] Dr. Kwok submits that the proposed paragraphs 25 and 26 refer to an investigation by the CRC into his alleged duplication of publications. Dr. Kwok claims that while the CRC's investigation involved different publications than those considered by NSERC, the evidence is that the CRC reviewed other publications than those that were the subject of its inquiry. Dr. Kwok alleges that these other articles include the publications that were the subject of NSERC's investigation.

Analysis

[48] I allow the amended pleadings to include the proposed paragraphs 25-26 on the basis that they satisfy the general rule and none of the exceptions apply.

(c) Internal Procedures and Criminal Investigation - Paragraphs 30, 33, 34, 35

[49] Paragraphs 30, 33, 34 and 35 of the proposed Third Amended Statement of Claim are as follows:

> 30 Further, NSERC issued the Misspending Ban notwithstanding the fact that it referred Dr. Kwok's alleged misspending of research grant funds to the RCMP and the Crown

> for investigation. NSERC did not await the conclusion of the RCMP and the Crown's investigation before issuing the Misspending Ban. Moreover, NSERC did not rescind the Misspending Ban after the Crown rejected prosecuting Dr. Kwok for allegedly misspending research grant funds.
>
> ...
>
> 33 Further, NSERC breached each of the NSRC Contracts by failing to follow its existing or appropriate procedures to ensure fairness to Dr. Kwok prior to repudiating the NSERC Contracts and terminating Dr. Kwok's research grants.
>
> 34 Further, NSERC breached each of the NSERC Contracts by failing to follow its internal procedure and "Treasury Board policy" which required it to refer Dr. Kwok's alleged misspending of research grants to the RCMP and the Crown and await a determination by the RCMP and the Crown to lay criminal charges against Dr. Kwok before repudiating the NSERC Contracts and terminating Dr. Kwok's research grants.
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> 35 Further, NSERC breached each of the NSERC Contracts by failing to rescind its repudiation of the NSERC Contracts and termination of Dr. Kwok's research grants following the Crown's investigation which gave rise to the criminal charges.

Parties' Positions

[50] The NSERC Defendants oppose the amendments to paragraphs 30, 33, 34, and 35 on the grounds that they do not raise a triable issue and are not supported by the evidence.

[51] The NSERC Defendants argue that in a breach of contract action, where a plaintiff seeks damages against a defendant for non-performance, the defendant's internal decision-making process is not relevant. Rather, only the defendant's non-performance need be made out. The NSERC Defendants submit that this process could be relevant if it was contractually obligated to following a certain process before terminating its performance; however, the NSERC Defendants allege that it has no such contractual obligation in the case at bar.

[52] The NSERC Defendants oppose the proposed amendments in paragraphs 30 and 35, alleging that Dr. Kwok has not plead that it is a term of the NSERC Contracts that NSERC could terminate his grants only after the RCMP investigated and only if the Crown proceeded with charges and a prosecution. The NSERC Defendants submit that the NSERC Contracts contain no such terms.

[53] The NSERC Defendants raise the following objections with respect to the proposed amendments in paragraph 33 and 34.

[54] First, the NSERC Defendants submit that the relevant contractual documents do not contain any term obligating NSERC to conduct its own investigation to verify the University of Alberta's findings that Dr. Kwok duplicated publications and misappropriated research grant funds. The NSERC Defendants claim that the evidence contradicts the basis for this proposed amendment, as the Tri-Council Policy Statement on Integrity and Research and Scholarship expressly states that: "Councils (i.e. NSERC) hold institutions (i.e. the University of Alberta) that administer Council funds responsible for...investigating possible instances of misconduct in research or scholarship...[and for] informing the appropriate Council(s) of conclusions reached and actions taken."

[55] Second, the NSERC Defendants submit that there is no contractual term obligating NSERC to wait for the RCMP to conclude its investigation and the Crown to prosecute, before terminating Dr. Kwok's existing NSERC grants. The NSERC Defendants claim that the evidence contradicts the basis for this proposed amendment. The NSERC Defendants argue that NSERC is subject to the Treasury Board Policy "Policy on Losses of Money and Offenses and Other Illegal Acts Against the Crown", that this is the Treasury Board policy referred to in paragraph 34, and that it expressly states: "...recoveries in civil proceedings and disciplinary action under labour law are separate from criminal proceedings...If all the relevant facts and circumstances are known, it is not necessary to wait for the results of any criminal investigation or proceedings". Further, the NSERC Defendants allege that the Tri-Policy Statement on Integrity in Research and Scholarship also contradicts the proposed amendment, as it states: "[a]s agencies of the Federal Government, the Councils (i.e. including NSERC) retain the right at anytime to bring a case to the attention of the appropriate legal authorities".

[56] Dr. Kwok submits that paragraph 33 alleges that NSERC breached its contracts by failing to follow its existing or appropriate procedures to ensure fairness to him. He alleges at paragraph 32 that NSERC breached its contracts for failing to undertake an investigation, and he further alleges that paragraph 33 does not make allegations with respect to investigations. Regardless, Dr. Kwok claims that a number of the documents require NSERC to undertake an investigation prior to sanctioning him.

[57] Dr. Kwok claims that paragraph 30, 34, and 35 pertain to allegations relating to NSERC's breach of contract regarding NSERC's usual policy when there is an RCMP investigation into a NSERC grant recipient. He submits that NSERC employees have stated on the record that NSERC would not take action until the RCMP had concluded its investigation. Therefore, Dr. Kwok alleges that this is a breach of an implied term of the NSERC Contracts.

Analysis

[58] I will permit proposed paragraphs 30, 33, 34, and 35 on the basis that they fall within the general rule. Regarding proposed paragraphs 30, 34, and 35, Dr. Kwok claims that he has evidence in the form of NSERC employees' statements made on the record. Regarding proposed paragraph 33, Dr. Kwok submits that he has documentary evidence. Obviously there is a dispute between the parties

here, but Dr. Kwok has some evidence, as modest as it may be, and the merit of this evidence should be weighed by the trial judge.

(4) Defamation Claims

[59] For the reasons that follow, I permit all of Dr. Kwok's proposed amendments with respect to his defamation claims against the NSERC Defendants and Ms. Buriak.

(a) Defamation Claims against the NSERC Defendants

[60] Dr. Kwok submits that, prior to discovery, his only information with respect to the defamatory statements was information disclosed in newspaper articles. He claims that, since then, a large amount of information pertaining to defamatory publications and disclosures of information was revealed through the Defendants' document production, and disclosed in the questioning of Ms. St. Denis, Ms. Conway, and Ms. Munro. These include details surrounding Ms. Munro's *ATIA* requests, the documents disclosed to Ms. Munro in 2008 and 2009, and communications among the NSERC Defendants and Ms. Buriak. Dr. Kwok submits that his defamation claims against the NSERC Defendants have consequently been further particularized and expanded in paragraphs 39-53 of the proposed Third Amended Statement of Claim.

(i) Amendments Referring to NSERC's Disclosure of Information Under the *ATIA*

Parties' Positions

[61] The NSERC Defendants submit that Dr. Kwok's amendments referring to NSERC's disclosure of information pursuant to its statutory duty under the *ATIA*, i.e. the 2008 NSERC Files and the 2009 NSERC Files, do not raise a triable issue, and should not be allowed.

[62] The NSERC Defendants submit that section 74 of the *ATIA* is a statutory bar to proceedings for any disclosures of information and for any consequences that flow from disclosure pursuant to the *ATIA* if the disclosure was done in good faith. The NSERC Defendants submit that Dr. Kwok has failed to plead any material facts that could give rise to a pleading of bad faith. They also note that Rule 13.6(3) of the Rules of Court requires sufficient facts to support allegations of bad faith. The NSERC Defendants also rely on case law concerning the ATIA to support their position.

[63] Dr. Kwok submits that the statutory bar in section 74 of the *ATIA* does not apply for three reasons. First, in proposed paragraph 52, Dr. Kwok alleges that NSERC's disclosure of records and communications with Ms. Munro violates section 19 of the *ATIA*, which prohibits a government institution from disclosing any records under the *ATIA* that contain personal information without first

obtaining the consent of the individual to whom the record relates. Dr. Kwok submits that NSERC disclosed a number of documents to Ms. Munro which, cumulatively, enabled Ms. Munro to identify Dr. Kwok. Second, Dr. Kwok claims that the statutory bar applies only if the disclosure was made in good faith. He challenges the defence of good faith by NSERC. Rather, Dr. Kwok alleges that the disclosure was made for political reasons and that no Defendants have filed evidence to the contrary. Third, Dr. Kwok submits that he is primarily relying on NSERC's communications to Ms. Munro following its disclosure of records to her pursuant to her *ATIA* request.

Law

[64] Section 74 of the *ATIA* provides:

> 74. Protection from civil proceeding or from prosecution
> Notwithstanding any other Act of Parliament, no civil or criminal proceedings lie against the head of any government institution, or against any person acting on behalf or under the direction of the head of a government institution, and no proceedings lie against the Crown or any government institution, for the disclosure in good faith of any record or any part of a record pursuant to this Act, for any consequences that flow from that disclosure, or for the failure to give any notice required under this Act if reasonable care is taken to give the required notice.

Analysis

[65] Whether the NSERC Defendants acted in good faith or not is critical for the applicability of section 74 of the *ATIA*. The facts alleged in the proposed Third Amended Statement of Claim I find are sufficient to make bad faith a triable issue. At trial, Dr. Kwok and the Defendants can present their evidence regarding Dr. Kwok's allegations of bad faith, and the trial judge can weigh the evidence and make a determination. I find that the statutory bar in s. 74 of the ATIA does not apply. Therefore, Dr. Kwok's proposed amendments are permitted.

(ii) All Other Amendments in Paragraphs 39-53

Parties' Positions

[66] Regarding Dr. Kwok's defamation claims, Dr. Kwok makes three arguments in favour of accepting the proposed amendments, while the NSERC Defendants make two general arguments, and then break down their objections by paragraph.

[67] First, Dr. Kwok submits that for a defamatory expression to be struck from a statement of claim on the grounds that it fails to identify the plaintiff, it must be plain and obvious that the expression is incapable of referring to the plaintiff. In paragraph 46(2) of the proposed Third Amended Statement of Claim, Dr. Kwok claims that NSERC identified Dr. Kwok in at least one communication with Ms. Munro. This proposed paragraph states:

> (s) Question [by Ms. Munro] "Is Dr. Daniel Kwok at the University of Calgary now receiving NSERC funding. And if so, how much."
>
> Answer [by Ms. Denis] "No."

[68] Dr. Kwok claims that a defamatory statement may identify the plaintiff by virtue of extrinsic circumstances. Paragraph 47 of the proposed Third Amended Statement of Claim alleges that a great deal of disclosure by NSERC to Ms. Munro was made while NSERC was aware that Ms. Munro knew Dr. Kwok's identity.

[69] Second, Dr. Kwok submits that NSERC's disclosures and communications to Ms. Munro are defamatory as they state, among other things, that Dr. Kwok had engaged in plagiarism and possible fraud, had been reported to the RCMP for investigation, had his grants terminated, and that he had been banned from receiving further funding in the future.

[70] Third, Dr. Kwok submits that all of the defamatory statements were made by NSERC representatives acting in their official capacity as employees of NSERC. Therefore, Dr. Kwok rightly treats these defamatory statements as originating with NSERC. Further, Dr. Kwok claims that all persons who aid or participate in the publication of defamatory statements in furtherance of a common design may be held liable as joint tortfeasers. Therefore, who made the statements at issue, whether it is Ms. Conway, Ms. St. Denis, or anyone else at NSERC, is immaterial.

[71] The NSERC Defendants oppose Dr. Kwok's remaining proposed amendments pertaining to breach of contract, generally, for two reasons.

[72] First, the NSERC Defendants allege that many of the proposed amendments do not establish a viable cause of action because Dr. Kwok must show that the defamatory statement is "of the plaintiff", refers to the plaintiff, or somehow identifies the plaintiff. The NSERC Defendants submit that all of the proposed amendments admit that information disclosed by NSERC to Ms. Munro does not name Dr. Kwok, but rather refers to an unnamed scientist. The NSERC Defendants claim that where the alleged

defamatory statements do not name the plaintiff, then the plaintiff is required to plead the particulars of any facts that they rely on to show that the statement refers to the plaintiff. The NSERC Defendants claim that Dr. Kwok has not pled any extrinsic circumstances to show that the impugned words establish his identity.

[73] Second, the NSERC Defendants argue that the proposed amendments are not pled with the particularity that is required for defamation claims. The NSERC Defendants submit that Dr. Kwok has neither identified the statements said to be defamatory nor the precise words that were published by the NSERC Defendants. The NSERC Defendants claim that many of the proposed amendments do not indicate which employee or NSERC Defendant made the disclosure, do not indicate that the alleged defamatory statements were "of the plaintiff" or refer to the plaintiff, do not plead the necessary facts on which they Dr. Kwok is relying to show that the statements refer to him, and do not indicate the time, place, or manner, of the publication, and sometimes fail to identify the publication's recipient.

[74] The NSERC Defendants submit that it is highly prejudicial to the Defendants as, without particulars, they are unable to provide a meaningful response or to even know the case they are to meet in terms of preparing their case and defense.

[75] More specifically, the NSERC Defendants' objections to the proposed paragraphs of Dr. Kwok's defamation claims are as follows.

Paragraph 39

[76] Paragraph 39 in the proposed Third Amended Statement of Claim states as follows:

> 39 Between 2008 and 2010, NSERC and its employees acting within the scope of their employment published and disclosed information to the media, including Canwest and Munro, with respect to an unnamed scientist accused of duplicating publications and misspending research grant funds, as hereinafter described. The cumulative effect of these publications and disclosures enabled the media to identify or alternatively confirm, the identity of the unnamed scientist as Dr. Kwok, and were meant and were understood to mean that Dr. Kwok was unethical, a cheat, and a thief who was guilty of research misconduct and who had defrauded taxpayers, all of which was untrue.

[77] The NSERC Defendants allege proposed paragraph 39 does not specifically identify which NSERC Defendant or employee made the alleged defamatory statements, specifically identify the recipient of the publications, indicate that the publications were "of the plaintiff", specify the date of the publications, or plead the precise words said to be defamatory. The NSERC Defendants highlight the use of the phrase "unnamed scientist".

Paragraphs 40 and 45

[78] Paragraph 40 and 45 in the proposed Third Amended Statement of Claim states as follows:

> 40 Specifically, in or around May of 2008, NSERC published and disclosed to Munro its files pertaining to an unnamed scientist's duplication of publications and alleged misspending of research grant funds (the "2008 NSERC Files"). Although Dr. Kwok's name was redacted in the 2008 NSERC Files, NSERC's publication and disclosure of the files was meant and was understood to mean that the unnamed scientist was unethical, a cheat, and a thief who was guilty of research misconduct and who had defrauded taxpayers, all of which was untrue.
>
> ...
>
> 45 In or around December of 2009, NSERC published and disclosed to Munro more of NSERC's files pertaining to the unnamed scientist's alleged duplication of publications, the unnamed scientist's alleged misspending of research grant funds, the Duplication of Publication Ban, and the Misspending Ban (the "2009 NSERC Files"). While Dr. Kwok's name was redacted in the 2009 NSERC Files, as stated above, NSERC was aware that Munro had expressed her apparent knowledge that the unnamed scientist was Dr. Kwok as early as May and June of 2008. Therefore, the publication and disclosure of the 2009 NSERC Files was made in circumstances where the ordinary sensible person would or could reasonably understand them as referring to Dr. Kwok or as confirmation that these referred to Dr. Kwok, and the publication and disclosure of these files was meant and was understood to mean that Dr. Kwok was unethical, a cheat, and a thief who was guilty of research misconduct and who had defrauded taxpayers, all of which was untrue.

[79] The NSERC Defendants make two submissions regarding proposed paragraph 40.

[80] First, the NSERC Defendants claim that Dr. Kwok has failed to plead with the required particularity the statement alleged to be defamatory. For example, the NSERC Defendants submit that proposed paragraph 40 does not specifically identify who made the alleged defamatory statements, specific the precise date of the publications, or plead the precise words said to be defamatory. The NSERC Defendants submit that proposed paragraph 45 does not specifically identify who made the alleged defamatory statements, specifically the precise date of publication, or plead the precise words said to be defamatory.

[81] Second, The NSERC Defendants argue that identification is not made out as these proposed amendments do not allege that the defamatory statements were "of the plaintiff", but, rather, refer to an unnamed scientist.

[82] The NSERC Defendants submit similar arguments with respect to proposed paragraph 45, i.e. that Dr. Kwok admits that his name was redacted. The NSERC Defendants submit that if Dr. Kwok is relying on the proposed amendments to show that the statements refers to him, then he needs to plead all of the facts that he is relying on to establish the plaintiff's identification.

Paragraph 41

[83] Paragraph 41 in the proposed Third Amended Statement of Claim states as follows:

> 41 Following NSERC's publication and disclosure of the 2008 NSERC Files, in or around May of 2008, NSERC's Manager of Public Affairs, acting within the scope of her employment with NSERC, exchanged a number of e-mails with Munro in which she answered a number of questions posed by Munro with respect to the unnamed scientist's alleged duplication of publication and alleged misspending of research grant funds (the "2008 NSERC E-Mails"). In the 2008 NSERC E-mails, NSERC's Manager of Public Affairs published and disclosed the following statements to Munro regarding the unnamed scientist, which were meant and were understood to mean that the unnamed scientist was unethical, a cheat, and a thief who was guilty of research misconduct and who had defrauded taxpayers, all of which was untrue:
>
> > a) "In the case of the researcher who was found to have misused funds in his equipment grant (called Research Tools and Instruments or RTI grant) to purchase home electronic devices and auto parts you inquired whether there remained any confusion with respect to the determination of the final amount of the funds that were misused. NSERC is satisfied that it has arrived at an accurate accounting with the institutions of all misused public [sic] to NSERC awards. The funds were reimbursed forthwith to NSERC accounts by the institution, and the file subsequently referred to the RCMP."
> >
> > b) "You asked whether we could disclosure the total amount of NSERC funds received by the researcher mentioned above who was found to have misused funds in his RTI grant, and who was required to reimburse $21.4K. While NSERC routinely publishes on its Web site the names and identities of all those who receive awards we must be careful in a case like this not to disclose precise data which would identify the researcher in this particular context. Our analysis indicates however that we can safety disclose ranges without identifying individuals. That being said, the researcher's most recent NSERC Discovery grant is a multi-year award in the $25-$35K per year range.

> The researcher has had four RTI awards in the last 5-6 years which totaled between $250 and $300K.

[84] The NSERC Defendants submit that email CAN.0479 contains the May 7, 2008 communications described in proposed paragraphs 41(a) and (b). The NSERC Defendants claim that the statements set out in proposed paragraphs 41(a) and (b) are the only statements said to be defamatory and that, on their face, these statements are not defamatory. The NSERC Defendants allege that paragraph 41 also lacks the required particularity indicating that the publications were "of the plaintiff" or specifying the precise date of the publications.

[85] The NSERC Defendants allege that the "2008 NSERC E-mails" include: CAN.0482, CAN.0485, CAN.0490, CAN.0492, CAN.0498, CAN.0515, CAN.0524, CAN.0526, and CPI001138, the latter being the e-mail alleged to have enabled Ms. Munro to identify Dr. Kwok. The NSERC Defendants claim that Dr. Kwok must identify what statements in all of these e-mails are defamatory, which he has not done. The NSERC Defendants submit that the content of CPI00138 is neither defamatory nor capable of identifying Dr. Kwok. The NSERC Defendants claim that CAN.0526 is neither defamatory nor capable of identifying Dr. Kwok. The NSERC Defendants allege that the information in CAN.0498 does not relate to Dr. Kwok's case, and neither defamatory nor capable of identifying Dr. Kwok. A similar argument is made with respect to CAN.0524.

Paragraphs 42, 43, and 44

[86] Paragraphs 42, 43, and 44 in the proposed Third Amended Statement of Claim state as follows:

> 42 In or around May and June of 2008, NSERC's Manager of Public Affairs had a number of telephone conversations with Munro in which Munro informed NSERC's Manager of Public Affairs of her apparent knowledge that the unnamed scientist identified in the 2008 NSERC Files and the 2008 NSERC E-mails was Dr. Kwok. NSERC's Manager of Public Affairs circulated e-mail summaries of these telephone conversations at NSERC to, among other people, NSERC's Research Ethics and Environmental Assessment Coordinator, NSERC's Access to Information and Privacy Co-ordinator, NSERC's Vice-President of External Relations and Communications, and Conway, NSERC's Corporate Secretary.
>
> 43 In or around June of 2008, NSERC's Research Ethics and Environmental Assessment Coordinator received a voice mail from a lawyer at the University of Alberta indicating, among other things, that Munro was aware of Dr. Kwok's identity as the unnamed scientist. NSERC's Research Ethics and Environmental Assessment Coordinator circulated an e-mail summary of this voicemail at NSERC to, among other

> people, NSERC's Manager of Public Affairs, NSERC's Executive Vice President, NSERC's Access to Information and Privacy Co-ordinator, and Conway, NSERC's Corporate Secretary.
>
> 44 In or around June of 2008, Conway circulated an e-mail entitled "HEADS UP!" at NSERC stating, among other things, that "[i]t appears that someone has provided the journalist with the name of the institution and the name of the researcher." This e-mail was sent to, among other people, NSERC's Director of Finance and Awards Administration Division and NSERC's Manager of Awards Administration and Financial Monitoring.

[87] The NSERC Defendants submit that Dr. Kwok identified the emails in these paragraphs as those produced in CAN.0522, CAN.0523, CAN.516, CAN.0380, CAN.0751, CN.0770 and CPI000759.

[88] The NSERC Defendants allege that the proposed paragraphs are improperly plead if their purpose is to enable Dr. Kwok to argue that NSERC had reason to believe that Ms. Munro had discovered Dr. Kwok's identity. The NSERC Defendants claim that these proposed amendments, in so far as they purport to assert a claim of defamation, fail to plead the alleged defamatory statements or the recipients of the publications.

Paragraph 46 and 47

[89] Paragraphs 46 and 47 in the proposed Third Amended Statement of Claim state as follows:

> 46 In January of 2010, St-Denis, acting within the scope of her employment with NSERC, exchanged a number of e-mails with Munro in which she answered a number of Munro's questions relating to the unnamed scientist's alleged duplication of publications, the unnamed scientist's falsely alleged misspending of research funds, the Duplication of Publication Ban, and the Misspending Ban (the "2010 NSERC E-Mails"). In the 2010 NSERC E-mails, St-Denis published and disclosed * the following statements to * Munro regarding the unnamed scientist, *which were meant and were understood to mean that the unnamed scientist was unethical, a cheat, and a thief who was guilty of research misconduct and who had defrauded taxpayers, all of which was untrue.
> (a)*
> (b)*
> (c) *
> (d) *
> (e) *

(f)*
(g) Question: "What was the outcome of the RCMP investigation? Was the scientist charged? If so, when and where?

Answer: "We have been told by the RCMP that the investigation is to be completed very soon."

(h) Question: "Has NSERC now taken sanctions against the researcher in question? If so, when and what where the sanctions? i.e. Has NSERC put a flag on his file regarding the history of misspending NSERC money, or banned him from future funding?

Is the researcher still receiving NSERC grants? If so, how much?"

Answer: "At the time of your initial inquiry in 2008, NSERC had responded that it would not proceed with a decision on the case involving misuse of grant funds until the RCMP investigation on possible fraud was complete. NSERC kept in regular communication with the RCMP and was advised that the investigation could be very lengthy. Therefore, NSERC proceeded with its own administrative process to review the misuse of funds.

Once NSERC received a detailed report from the university and confirmed misuse of funds and completed its own review, it was decided in September 2009 that the researcher involved would not longer be eligible to hold or receive funds from NSERC indefinitely. The research is also no longer eligible to participate in the peer review process."

(i) Question: "What was the outcome of the university process? Has NSERC sanctioned the researcher for plagiarism?"

Answer: "NSERC received a report from the university that confirmed research misconduct had occurred.

NSERC then completed its review and decided in September 2009 that the researcher would no longer be eligible to hold or receive funds from NSERC, or to participate in the peer review process, for a period of five years. The plagiarism case and the misuse of funds case were treated separately."

(j) Question: "Has NSERC taken steps to correct the scientific record regarding the plagiarism?

Answer: "NSERC has no authority or mandate to correct the research record. This is the individual researcher's and/or institution's responsibility, depending on their collective agreement and/or policies. NSERC has already identified the need to explore with institutions the feasibility of developing a formal process to rectify the research record following findings of misconduct. This is one issue we can plan to address as part of the revision and updating of the integrity policy and framework."

(k) Question: "I'd like to clarify the sanctions that NSERC has now taken against the researcher - Is he banned forever from NSERC funding and its peer review process, or for only five years?"

Answer: "The researcher is no longer eligible to hold or receive funds from NSERC or to participate in the peer review process indefinitely."

(l) Question: "What year did NSERC ask the RCMP to investigate the researcher's conduct: 2006, 2007, or 2008?

Answer: "NSERC referred the case to the RCMP in December 2006."

(m) Question: "You say the decision to sanction the researcher and stop funding him was made in September 2009. When did NSERC funding actually end. October 1, December 31?"

Answer: "NSERC grants were terminated on September 9, 2009."

(n) Question: "Can you tell me how much funding the scientist received through NSERC programs over the years and how much he received in 2008-2009? Dore Dunne said in 2008 the researcher was still receiving Discovery grants worth between $25K-35K as well as receiving major RTI grants. Did he also receive Canada research chair funding through NSERC?"

Answer: "We regret we cannot provide more details on this case in order to comply with the Privacy Act."

(o) Question: "Documents released under ATI show the university where the misconduct occurred completed its investigation in 2006, and returned more than $20,000 in funding to NSERC. Were there more reports from the university on the case that prompted NSERC's sanctions in September 2009? If so, did they relate to more misconduct?"

Answer: "For both the financial case and the research integrity case, NSERC received final reports from the university in August 2008."

(p) Question: "The documents show the researcher left the university where the misconduct occurred in 2005. He then moved to another Canadian university where he applied for and received more NSERC grants. Did the council not feel an obligation to notify the new university and NSERC's own funding committed about the scientist's financial misconduct?"

Answer: "Once the case was resolved, the new university was informed of NSERC's decision. Since the researcher is ineligible to hold or receive NSERC funds, an application for funding would not be accepted and would therefore, not reach committee level."

(q) Question: "As I understand the timeline, the misconduct (both financial and scientific) occurred at the first university, which the scientist left in 2005, according to the documents released under ATI. Is this correct? Or, was there also misconduct at the second university?"

Answer: "Yes, the misconduct occurred at the first institution and the researcher did leave the institution in 2005. NSERC has not received any allegations or reports from the second institution."

(r) Question: "Does NSERC have any idea when the RCMP will wrap up it's [sic] investigation. Three years seems like an awfully long time."

Answer: "We have been told by the RCMP that the investigation is to be completed very soon."
(s) Question: "Is Daniel Dr. Kwok at the University of Calgary now receiving NSERC funding. And if so, how much."

Answer: "No."

47As stated above, NSERC was aware that Munro had expressed her apparent knowledge that the unnamed scientist was Dr. Kwok as early as May and June of 2008. Therefore, St-Denis and NSERC's publication and disclosure of the 2010 NSERC E-mails was made * in circumstances where the ordinary sensible person would or could reasonably understand them as referring to Dr. Kwok, and the publication and disclosure of those files was meant and was understood to mean that

> Dr. Kwok was unethical, a cheat, and a thief who was guilty of research misconduct and who had defrauded taxpayers, all of which was untrue.

[90] The NSERC Defendants submit that in these proposed amendments Dr. Kwok identifies other emails produced in CAN.0308, CAN.0751, and CAN.0770 which he alleges are part of the "2010 NSERC E-mails". The NSERC Defendants argue that Dr. Kwok has not pled with the required particularity with respect to these other e-mails. The NSERC Defendants claim that the content of these other emails is neither defamatory nor capable of identifying the plaintiff.

[91] The NSERC Defendants allege that Dr. Kwok has failed to plead with the required particularity that the information published and disclosed to the media by Ms. St.Denis in the 2010 NSERC E-mails was defamatory. Therefore, they submit that the proposed amendments should not be permitted because they are embarrassing and prejudicial.

Paragraph 48

[92] Paragraph 48 in the proposed Third Amended Statement of Claim states as follows:

> 48 In the alternative, the cumulative effect of the publication and disclosure of the 2008 NSERC Files, the 2008 NSERC E-mails, the 2009 NSERC Files, and the 2010 NSERC E-mails allowed Munro to identify, or alternatively confirm, the identity of Dr. Kwok and was such that the ordinary sensible person would or could reasonably understand them as referring to Dr. Kwok, and St-Denis, NSERC's Manager of Public Affairs, and NSERC knew or ought to have known that Dr. Kwok would be identified or his identify confirmed based on these *publications and disclosures.

[93] The NSERC Defendants claim that Dr. Kwok has not pled any of the extrinsic circumstances which he claims allowed Ms. Munro to identify him, nor does he pled the information that would lead the ordinary person to see that the information referred to in all these various documents referred to him.

Paragraph 52

[94] Paragraph 52 in the proposed Third Amended Statement of Claim states as follows:

> 52 In addition, the publication and disclosure of the 2008 NSERC Files, 2008 NSERC E-mails, 2009 NSERC Files, and 2010 NSERC E-mails violated Article 19 of the Access to Information Act.

[95] The NSERC Defendants claim that the proposed amendment is deficient given the lack of particulars.

Paragraph 55

[96] Paragraph 55 in the proposed Third Amended Statement of Claim states as follows:

> 55. This email was subsequently provided to the media by NSERC in the 2009 NSERC Files, in the circumstances where the ordinary sensible person would or could reasonably understand that email as referring to Dr. Kwok. In the alternative, Buriak and NSERC knew or ought to have known that Dr. Kwok would be identified based on this email, or that Dr. Kwok's identity would be confirmed by this email.

[97] The NSERC Defendants submit that this proposed amendment does not raise a triable issue because the statutory bar to proceedings in section 74 of the ATIA applies. I addressed the ATIA issues earlier in this judgment.

Law

[98] The legal basis for an action in defamation is summarized in Raymond Brown, *The Law of Defamation in Canada*, 2d ed (Toronto: Carswell, 2010) vol 1 at 1-43 - 1-45. The tort of defamation has three elements. There must be a statement that is defamatory; a reference to the plaintiff; and the publication to at least one other party: *Jensen v Alberta*, 2002 ABQB 788 at para 55, 323 AR 164.

[99] In *Cooper v Hennan*, 2005 ABQB 709 at paras 14-16, 23-26, 393 AR 146, the issue before this Court was whether the plaintiffs had provided sufficient particulars of their claim to the defendants, such that the defendants knew the case they had to meet and could file a Statement of Defense.

> The purpose of pleadings is to narrow the issues between the parties and limit the scope of the trial and examinations for discovery. Pleadings in a defamation action are in a somewhat special category and must be prepared with great care and scrutiny [*Lougheed v. Canadian Broadcasting Corp.* (1979), 98 D.L.R. (3d) 264 (Alta. C.A.), at 273 (A.D.)].
>
> The Statement of Claim generally must set out verbatim the precise words published by the defendant of which the plaintiff complains [*Chopra v. T. Eaton Co.*, 240 A.R. 201, 1999 ABQB 201 (Alta. Q.B.) at paras. 202-206]. It is not sufficient for the Statement of Claim to allege that the defendant or defendants published certain words to an "effect". As Fruman J. (as she was then) held in *Rosen v. Alberta Motor Assn. Insurance Co.* (1993), 146 A.R. 219 (Alta. Q.B.) at para. 11:

> The defamatory statements are said to be words to the effect that the Plaintiffs are liars, arsonists, have committed perjury, have committed arson, have attempted to defraud, are poor risks...It is defamatory words which are to be pleaded. The inferences from the words are to be made as conclusions by the trier of fact.

However, the courts in both Ontario and Saskatchewan have recognized limited circumstances that permit a plaintiff to proceed with a defamation action in spite of an inability to state with certainty, at the pleading stage, the precise words published by the defendant. To come under this exception the plaintiff must show:

> (1) that he has pleaded all of the particulars available to him with the exercise of reasonable diligence;
>
> (2) that he is proceeding in good faith with a prima facie case and is not on a "fishing expedition"; normally this will require at least the pleading of a coherent body of fact surrounding the incident such as time, place, speaker and audience;
>
> (3) that the coherent body of fact of which he does have knowledge shows not only that there was an utterance or a writing emanating from the defendant, but also that the emanation contained defamatory material of a defined character of and concerning the plaintiff; and
>
> (4) that the exact words are not in his knowledge, but are known to the defendant and will become available to be pleaded by discovery of the defendant, production of a document or by other defined means, pending which the plaintiff has pleaded words consistent with the information then at his disposal.
>
> [*Magnotta Winery Ltd. v. Ziraldo* (1995), 25 O.R. (3d) 575 (Ont. Gen. Div.), at 583-584; *Duke v. Puts* (1997), [1998] 6 W.W.R. 510 (Sask. Q.B.)]
>
> ...

In some circumstances, the courts have allowed a plaintiff to plead an entire document by attaching it to the Statement of Claim. Conflict arises, however, where a plaintiff resists confining his or her claim to specific words, phrases, or other elements in the publication.

Supporting the claim that the document as a whole is sufficient and that specific words need not be pleaded, is the frequently cited principle expressed in *Churchill Forest Industries Ltd. v. Finkel* (1970), [1971] 1 W.W.R. 745 (Man. C.A.) at page 749:

> The plaintiff says "Here is the whole matter alleged to be defamatory. Read as a whole, and not out of context, I aver that it is defamatory of me. Look at the three schedules. You published them. I didn't. It does not lie in your mouth to ask me to pin myself down to some little point and to exclude the rest." I cannot see where the defendant is taken by surprise, or can pretend to be taken by surprise.

However, court decisions which have not allowed a plaintiff to plead an entire document as defamatory but instead have struck the claim, or required the plaintiff to deliver particulars (or to amend) frequently rely on the principles expressed by Lord Denning in *D.D.S.A. Pharmaceuticals Ltd. v. Times Newspapers Ltd*., [1972] 3 All E.R. 417 (Eng. C.A.), at 419, cited with approval by Lieberman J.A. in *Lougheed,* supra at para. 29:

> ..the pleading is defective because it throws - and I use that word deliberately - on to the defendant a long article without picking out the parts said to be defamatory. Some of the article is not defamatory of anyone at all. It describes only the method of importing drugs. Other parts of the article are defamatory of some unnamed chemists, but not of the plaintiffs at all. Yet other parts may be defamatory of the plaintiffs. To throw an article of that kind at the defendants and indeed at the court - without picking out the particular passages, is highly embarrassing.

These two cases have often been reconciled on the basis that each represents an end of a spectrum. At one end, where the publication is long, where much of it does not relate to the plaintiff, and none of it is defamatory to the plaintiff, defendants have been successful in receiving an order for particulars, having the claim struck, or having the Statement of Claim amended [*Fletcher-Gordon v. Southam Inc.*, [1995] B.C.J. No. 253 (B.C. Master) at para. 19]. At the other end of the spectrum, no particulars will be necessary where the publication is short, clear, and obviously defamatory of the plaintiff alone [*London College v. Sun Media*, [1999] O.J. No. 3133 (Ont. Master) at para. 11]. In cases that fall between the two foregoing extremes, a decision must be made as to which side of the line the case falls. There is no absolute rule that resolves the conflict, each case must be decided on its own facts [*Bank of British Columbia v. Canadian Broadcasting Corp.* (1986), 5 B.C.L.R. (2d) 131 (B.C. S.C.), at 140, leave to appeal

refused *Bank of British Columbia v. Canadian Broadcasting Corp.* (1986), 6 B.C.L.R. (2d) 215 (B.C. C.A.)].

Analysis

[100] Therefore, I find that in limited circumstances Dr. Kwok does not have to set out the allegedly defamatory words verbatim. Words verbatim are pled at proposed paragraphs 41 and 46. However, the remaining proposed paragraphs rely on reference to the 2008 NSERC Files, the 2009 NSERC Files, and the 2010 NSERC E-mails, which are exhibits, without reference to specific statements within these documents. Dr. Kwok at proposed paragraph 50 paraphrases an allegedly defamatory statement contained within a letter.

[101] I note that Dr. Kwok's argument is that the cumulative effect of these documents leads to a finding of defamation. Given this argument, it may well be that it is not possible for Dr. Kwok to supply the Defendants with quotes verbatim, but must rely on reference to groups of documents.

[102] I must weigh this against the NSERC Defendants' right to know the case against them.

[103] I will permit Dr. Kwok's proposed amendments in paragraphs 39-52. I accept Dr. Kwok's claim that he is unable to plead with greater particularly, and is relying on the documents referenced for their cumulative value. As stated above, it will be for the trial judge to weigh the evidence and decide whether the test for defamation is met.

(b) Defamation Claims Against Ms. Buriak

[104] Dr. Kwok claims that, through questioning of Ms. Munro, he learned that Ms. Buriak may have made further defamatory statements, giving rise to additional claims for defamation. Dr. Kwok submits that his defamation claims against Ms. Buriak are set out in paragraphs 54-56 of the proposed Third Amended Statement of Claim.

[105] Since Ms. Buriak did not object to these proposed amendments and given my analysis regarding the applicability of *ATIA* discussed above, I permit the proposed amendments concerning Dr. Kwok's defamation claims against Ms. Buriak.

(C) Issue #2 - Should Ms. Conway be directed to provide answers to the questions posed to her during her questioning between September 27 and 30, 2011?

[106] Dr. Kwok submits that Ms. Conway objected to 116 relevant and material questions. Dr. Kwok seeks an order directing her to re-attend at questioning and answer the following questions,

which were originally objected to, and further answer any other questions properly flowing from the future answers to these questions and topics.

[107] The questions initially objected to as follows:

(i) Breach of Contract Claims

(a) #180, 181, 183, 185, 197, 238, 239, 240, 241, 244, 245, 250, 264, 265, 273, 276, 277, 278, 279, 281, 282, 283, 284, 285, 286, 287 , 311, 312, 343, 347, 358, 360, 361, 366, 377, 378, 379, 380, 381, 382, 485, 575, 576, 861, 862, 963, 1301, and 1370 (the "NSERC Procedure Questions")

(b) #401, 402, 403, 404, 405, 406, 1804, 1811, 1815, 1820, 1823, 1825, 1826, 1827, 1854, 1855, 1857, 1865, 1866, 1867, 1868, 1884, and 2053 (the "RCMP Investigation Questions")

(ii) Defamation Claims

(c) #440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 458, 465, 466, 467, 468, 469, 471, 472, 473, 474, 476, 477, 1887, 1888, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1904, 1905, 1906, 1908, 1909, 1910, 1912, 1913, 1914, 1915, 1916, a non-numbered question following #1916, 2119, 2120, 2127, 2129, 2135, 2139, 2140, 2143, 2145, and 2150 (the "Media Request Questions")

[108] The NSERC Defendants claim that these questions were properly objected to because they are not relevant or material to the issues raised in Dr. Kwok's January 11, 2011 Amended Statement of Claim, which was in effect during questioning. The NSERC Defendants claim that the relevancy and materiality of the questions must be assessed by reference to that pleading in effect at the time the questions were asked.

(1) Law

[109] There are two issues: what is meant by 'pleadings' and what is meant by 'material and relevant'.

(a) Pleadings

[110] As noted in *Dow v Ottawa Hospital-Civic Campus*, [2005] O.J. No. 963 (S.C.) at para 6:

> ...in *Freeman v. Parker*, [1956] O.W.N. 561 (Ont. H.C.). There, Justice Gale (as he then was) held that the amendment of a pleading re-opened the pleadings for all purposes, including the delivery of a jury notice, unless some limitation in purpose was otherwise indicated. That principle has been followed and cited with approval by subsequent courts, including those decisions referred to by the Plaintiffs; namely, *Nardo v. Fluet* (1993), 13 O.R. (3d) 220 (Ont. Gen. Div.) and *Ampadu v. Novopharm Ltd.* (1998), 27 C.P.C. (4th) 64 (Ont. Gen. Div.). In *Graham v. Smith* (1982), 38 O.R. (2d) 404 (Ont. H.C.), Master Sandler modified the statement of Justice Gale but in *Iona Corp. v. Rooney* (1987), 62 O.R. (2d) 179 (Ont. H.C.), Justice Henry reviewed the case law and the *Graham* decision and held at p.188:
>
> > In my opinion, this case (*Graham*) stands for the proposition that a party ought not to be permitted to obtain leave to make a perfunctory or pro forma amendment to pleadings in order to have them reopened for the purpose of enabling him to serve a jury notice that would be otherwise out of time; this is to be regarded as an improper purpose of the rule; that purpose ought, in such circumstances, to be accomplished by applying for an extension of time.
> >
> > Justice Henry reaffirmed the basic principle in *Freeman v. Parker*; that amendments to a pleading reopen them for all purposes unless some limitation in purpose is otherwise indicated.

[111] I find that the pleadings refer to all of the pleadings, not just to the version of the pleadings in effect at the time that a question was asked. Logically, this makes sense as the trial judge receives the entire record of proceedings, not just the more recent amended Statement of Claim. Also, to hold otherwise would require Dr. Kwok to take an additional and unnecessary step once the amendments were approved and make an additional application for further questioning.

(b) Relevant and Material

[112] The parties generally agree as to the law regarding relevance and materiality.

[113] During questioning, a person is required to answer only relevant and material questions: *Rules of Court, Rule 5.25(1)(a).* A question, record or information is relevant and material only if the answer could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings, or ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings: *Rules of Court, Rule 5.2(1).*

[114] The parties' pleadings are the starting point for determining relevancy and materiality: *Mustard v*

Brache, 2006 ABCA 265 at para 10, 397 AR 361. Discovery of records or information includes eliciting facts of primary relevance, i.e., facts that are directly in issue, or of secondary relevance, i.e., facts from which the existence of the primary facts may be directly inferred. Both primary and secondary relevance are determined by reference to the issues raised by the pleadings: *Mustard* at para 11.

[115] To be sure, this type of questioning is a cross-examination in the truest sense. Within reasonable limits, counsel ought to be given wide latitude in posing questions.

[116] *Rule* 5.25(2) states that a party or a witness being questioned may object to an oral or written question during questioning but only for one or more of the following reasons:

(a) privilege;
(b) the question is not relevant and material;
(c) the question is unreasonable or unnecessary;
(d) any other ground recognized at law.

Cross-examination questions need not be directly linked to a pleading. An examining lawyer can approach a subject indirectly and the questioning may go beyond the pleadings themselves if the question reasonably relates to the matter. In *Cominco Ltd. v. Westinghouse Canada Ltd*. (1979), 11 BCLR 143 (CA) the Court said:

> One is not restricted to asking in terms of the statement of claim. It is evidence that is being sought. A question to be proper need not be focused directly on a matter in question in the action but need only relate to such a matter.

[117] The Court in *Cominco* quoted other authorities at para. 9:

> No doubt some of the questions propounded and refused to be answered soon at first sight to be somewhat remote from the matter in hand, but I think it is impossible to say that the answers may not be relevant to the issues, and such being the case they are within the right given the cross-examining party...

And:

> It is also obvious that useful or effective cross-examination would be impossible if counsel could only ask such questions as plainly revealed their purpose, and it is needless to labour the proposition that in many cases much preliminary skirmishing is necessary to make possible a successful assault upon the citadel, especially where the adversary is the chief repository of the information required.

[118] And the court added:

> It does not follow that there ought to be a fine scrutiny of the pleadings.

[119] Are the questions reasonably related to a matter in the action? When interpreting the Rules under Part 5 Subdivision 3, there ought to be a generous approach to relevance. For an objection on grounds of irrelevancy to be sustained, it must be plain that the question objected to could not provide an answer that would, in a pragmatic sense, be relevant.

[120] The test for materiality requires that the questions or records must be reasonably expected to significantly help determine one or more of the issues raised in the pleadings: *NAC Constructors Ltd v Alberta (Capital Region Wastewater Commission)*, 2006 ABCA 246, 412 AR 272 at para 13. The materiality of evidence refers to its pertinency or weight in relation to the issue it is adduced to prove: *NAC* at para 13.

[121] At an interlocutory stage of proceedings, the Court should not measure counsels' proposed line of argument too finely; if counsel can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient: *Weatherill Estate v Weatherill*, 2003 ABQB 69 at para 16, 337 AR 180. Again it must be remembered that the purpose of the Rule is to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate lines of inquiry: *Weatherill* at para 16.

(2) Questions relating to Dr. Kwok's Breach of Contract Claim

(a) NSERC Procedure Questions

Parties' Positions

[122] Dr. Kwok claims that Ms. Conway provided a general overview of NSERC's standard procedures when determining whether to sanction a researcher for misconduct. Dr. Kwok submits that Ms. Conway admitted during questioning that these procedures are not formalized in writing. Dr. Kwok alleges that Ms. Conway's characterization of these procedures is at least in part contradicted by a number of documents on the record.

[123] Dr. Kwok submits that, given this, he needs to know what procedures NSERC has followed in other cases where researchers have been accused of scientific or financial misconduct in order to determine whether the procedures NSERC followed in the case were appropriate. Dr. Kwok claims that this information is relevant to his claim that NSERC committed breaches of contract by failing to follow existing or appropriate procedures.

[124] The NSERC Defendants allege that Ms. Conway provided answers to questions concerning the process that NSERC used in Dr. Kwok's case, and to questions pertaining to the normal procedure that NSERC used at the time of Dr. Kwok's case, and that NSERC counsel did not object to these questions.

[125] The NSERC Defendants claim that procedures followed by NSERC in other cases is neither relevant nor material to the procedures that NSERC followed in Dr. Kwok's case, having regard to the fact that this is a breach of contract claim. The NSERC Defendants submit that how NSERC dealt with others is irrelevant; the party's obligations are properly determined by reference to their contract. The NSERC Defendants also objected to some questions on the grounds that the question was repetitive and had already been answered.

Analysis

[126] Dealing first with the Questions on the subject of NSERC Procedures. Dr. Kwok is entitled to know what standard procedures NSERC has followed in other cases where researchers have been accused of scientific or financial misconduct. The answers to these questions are relevant in order to determine whether the procedures NSERC followed in his case were appropriate when compared to the standard used in similar cases.

[127] Although NSERC is required to answer questions of the standard procedures followed in cases with similar allegations as those made against Dr. Kwok, it is not required to answer questions dealing with the particulars of specific cases. Standard procedures NSERC followed in other similar cases are relevant but questions asking for particulars of the outcome of the application of those procedures applied in similar case are irrelevant and collateral. Such questions would needlessly expand the inquiry beyond the reasonable boundaries of this lawsuit.

[128] Furthermore, a witness cannot be asked questions of law as in questions 381, 382. Nor can a witness be compelled to give an opinion as in question 1370.

[129] The use of repetitive questions, used sparingly, may be part of a cross-examination strategy but repeating a question can never be oppressive or amount to a form of intimidation.

[130] Based on the above comments, my rulings on questions put to Ms. Conway as to what procedures NSERC has followed in other cases are as follows:

> Questions Ms. Conway will answer are: 180, 181, 183, 185, 197, 238, 239, 240, 241, 244, 245, 250, 264, 265, 273, 276, 277, 278, 279, 281, 282, 283, 284, 285, 286, 287, 311, 312 (after clarifying the question by defining “investigated”) 343, 347, 358, 360, 361, 366, 485, 575, 576, 861, 862, 963, 1301.

Questions Ms. Conway is not required to answer are: 377, 378, 379, 380, 381, 382, 1370.

(b) RCMP Investigation Questions

Parties' Positions

[131] Dr. Kwok submits that there are a number of documents on the record that suggest it was NSERC's standard procedure to refer cases where a researcher was accused of misconduct to the RCMP for investigation and to await determination by the RCMP prior to terminating a researcher's grant. Dr. Kwok claims that Ms. Conway confirmed this during questioning.

[132] Dr. Kwok alleges that Ms. Conway conceded in her questioning that NSERC's standard procedures were not followed in Dr. Kwok's case. Dr. Kwok submits that when his counsel inquired as to why this occurred, Ms. Conway's counsel objected on the grounds that the questions were irrelevant and immaterial. Dr. Kwok alleges that Ms. Conway's counsel also objected to questions asked regarding whether NSERC's standard procedure had been consistently applied in other cases, regarding whether the Crown's decision not to prosecute Dr. Kwok, and regarding what NSERC did after it received this information, on the grounds that the questions were irrelevant and immaterial.

Analysis

[133] As already stated, questions reasonably related to a matter in the action are relevant. When interpreting whether questions are relevant and material, there is a generous approach to relevance. For an objection on grounds of irrelevancy to be sustained, it must be plain that the question objected to could not provide an answer that would, pragmatically speaking, be relevant; *Weatherill* at para. 18.

[134] Dr. Kwok alleges that it was NSERC's standard procedure to refer cases, where a researcher was accused of misconduct, to the RCMP for investigation. NSERC would then await determination by the RCMP prior to deciding if it would terminate a researcher's grant. Dr. Kwok claims that Ms. Conway confirmed this during questioning.

[135] Therefore, it cannot be maintained that further questions dealing with the procedure regarding RCMP investigations are plainly irrelevant. This is all the more so, given my rulings in allowing the amendments to the Second Amended Statement of Claim.

[136] My rulings as to questions concerning the RCMP Investigations are as follows:

Questions Ms. Conway will answer are: 401, 402, 403, 404, 405 406, 1811, 1815, 1820, 1823, 1825, 1826, 1827, 1854 (as what it meant to her), 1855, 1857, 1865, 1866,1867,1868, 1884, 2053.

Undertaking Ms. Conway will comply with: 1804 (at 477:13-21;O@ 475:23 – 478:25)

(3) Questions Relating to Dr. Kwok's Defamation Claims Against NSERC

Parties' Positions

[137] Dr. Kwok submits that these questions relate to the procedures that NSERC followed prior to disclosing information to Ms. Munro, and relate to Dr. Kwok's allegation that NSERC was aware that Ms. Munro knew Dr. Kwok's identity when it disclosed records to her in 2009 and communicated with her in 2010.

[138] Dr. Kwok alleges that the disclosure relating to the procedures that NSERC followed prior to disclosing information to Ms. Munro is relevant as it relates to whether NSERC disclosed records to Ms. Munro in good faith, and relates to NSERC's position that the defamation claims are statute barred by the ATIA. To this end, Dr. Kwok submits that he needs to know what procedures NSERC follows when making a determination of whether to disclose information to the media, what measures it takes to protect the identity of the individuals to whom these disclosures relate, and similar questions.

[139] Dr. Kwok claims that the disclosures in 2009 and the 2010 communications are relevant as Dr. Kwok asserts that these disclosures and communications were made in circumstances where the ordinary sensible person would or could reasonably understand them as referring to Dr. Kwok.

[140] The NSERC Defendants submit that questions concerning these disclosures and communications as irrelevant and immaterial.

Analysis

[141] Citing *Mustard*, I have already stated that the parties' pleadings are the starting point for determining relevancy and materiality. To repeat, discovery of records or information includes eliciting facts of primary relevance, i.e., facts that are directly in issue, or of secondary relevance, i.e., facts from which the existence of the primary facts may be directly inferred. Both primary and secondary relevance are determined by reference to the issues raised by the pleadings. Counsel are given wide latitude in posing questions so long as they are reasonably relevant and material. As cited in *Cominco*, questions need not be directly linked to a pleading. An examining lawyer can approach a subject indirectly and, the questioning may go beyond the pleadings themselves if the question reasonably relates to the matter.

[142] Questions as to Dr. Kwok's defamation claims against NSERC are relevant as they relate to whether NSERC disclosed records to Ms. Munro through an ATIA request. It also relates to NSERC's position that the defamation claims are statute-barred by the ATIA. It is relevant to know what procedures NSERC follows when making a determination of whether to disclose information to the media and what measures it takes to protect the identity of the individuals to whom these disclosures relate, and similar questions.

[143] Based on this analysis, my rulings relating to Dr. Kwok's defamation claims against NSERC are as follows:

> Questions Ms. Munro will answer are: 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 458, 465, 466, 468, 469, 471, 472, 473, 474, 476, 477, 1887, 1888, 1890, 1891, 1892, 1893, 1894 , 1895, 1896, 1897, 1898, 1899, 1900, 1904, 1905, 1906, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916 (including unnumbered question following 1916), 2119, 2120, 2127, 2129, 2135, 2139, 2140, 2143,2145, 2150.
>
> Question Ms. Munro is not required to answer: 467
>
> Undertakings Ms. Munro will comply with: Nos. 3 and 4 (Pages 579:25 to 582:9)

(D) Issue #3 Should Ms. Munro be directed to provide answers to the questions posed to her during her questioning between October 31 and November 2, 2011?

[144] During the questioning of Ms. Munro, her counsel objected to several questions on the grounds of "journalistic source privilege". Dr. Kwok now seeks to compel Ms. Munro to answer those questions.

[145] The parties are largely in agreement as to the law on journalistic source privilege. Applying that law to the facts here is where they diverge.

[146] Both sides agree that the use of confidential sources is an important part of the news-gathering function. Counsel for Canwest cited the case of *British Steel Corporation v Granada Television Ltd.,* [1980] 3 WLR 774 (HL), in which Lord Denning, in his usual colourful style, said this at p. 1129:

> ...the newspapers should not in general be compelled to disclose their sources of information. Neither by means of discovery before trial. Nor by questions or cross-examination at the trial. Nor by subpoena. The reason is because, if they were

> compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoings would not be disclosed. Charlatans would not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known.
>
> Investigative journalism has proved itself as a valuable adjunct of the freedom of the press.

[147] It is clear, however, that the privilege allowing a journalist to refuse to disclose a confidential source is not absolute. In *R v McClure*, [2001] 1 SCR 445 the Supreme Court was concerned primarily with solicitor-client privilege. It also briefly addressed journalist-source communications. It held that these communications must be evaluated on a case-by-case basis. In order to be protected, such communications must meet the four "Wigmore criteria":

> (a) The communications must originate in a confidence that they will not be disclosed.
> (b) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> (c) The relation must be one which, in the opinion of the community, ought to be sedulously fostered.
> (d) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

[148] Dr. Kwok argues that, unless all four of these criteria are satisfied, there is a presumption that the evidence is compellable and admissible.

[149] Though it acknowledges that the determination is case-by-case, Canwest takes the position that, generally speaking, communications between a journalist and a confidential source will meet the first three Wigmore criteria. It asserts that the first criterion is met when a source discloses confidential information to a journalist with the expectation that the source's identity will not be further disclosed. It argues that the second criterion is met because confidentiality permits candid disclosure of information. Finally, it asserts that the journalist-source relationship is a "socially legitimate and valuable relation" that satisfies the third Wigmore criterion.

[150] The fourth Wigmore criterion was discussed by the Supreme Court of Canada in the case of *R v National Post*, 2010 SCC 16, 1 SCR 477, cited by both parties. In that case, the Court held that satisfying the fourth criterion requires balancing various factors. These include:

- the probative value of the evidence sought;
- the centrality of the issues to the dispute;

- the stage of the proceedings;
- the status of the journalist in the proceedings;
- alternative sources of information;
- the importance of the journalist's story;
- whether part or all of the story or information has been published;
- the public interest in protecting the particular journalist-source relationship at issue; and
- the nature of the information sought.

[151] Canwest points to the Supreme Court of Canada's decision in *Globe and Mail v Canada (Attorney General),* 2010 SCC 41 for the proposition that a party seeking information about a journalist's confidential source must show that the information is relevant. The Court held at para. 60 that even if the information is relevant, it may be "...so peripheral to the actual legal and factual dispute between the parties that the journalist ought not to be required to disclose the source's identity."

[152] All of this, as noted above, is largely common ground. The contentious aspect is the application of these principles to the facts of this case.

[153] First, Dr. Kwok argues that neither communications between Ms. Munro and Ms. Buriak nor communications between Ms. Munro and Dr. Brindley are privileged because the identities of both Ms. Buriak and Dr. Brindley are known to both sides. Canwest counters by saying that knowledge of a source's identity is not incompatible with an assertion of privilege. Canwest's position is that the privilege protects the content of the discussions between the journalist and the source.

[154] Dr. Kwok argues that the first Wigmore criterion is not satisfied because there is no evidence that the communications between Ms. Munro and Ms. Buriak and between Ms. Munro and Dr. Brindley originated in confidence that the identities of Ms. Buriak and Dr. Brindley would not be disclosed. Further, he argues that the second Wigmore criterion is not met because there is no evidence that confidence was essential to the relationships between Ms. Munro and Ms. Buriak and between Ms. Munro and Dr. Brindley. Canwest, however, points out that Ms. Munro, in her affidavit sworn October 11, 2012, swore that she promised each of her sources that any information shared with her would be confidential. Moreover, it asserts that Ms. Munro is a professional investigative journalist who relies on information from sources for whom confidentiality is a "necessary protection."

[155] With respect to the third Wigmore criterion, Canwest again points to the Supreme Court of Canada's decision in *National Post* and takes the position that Dr. Kwok has provided no evidence to demonstrate why the journalist-source communications in this case should not be protected.

[156] Finally, both parties placed great weight on the balancing of interests required by the fourth Wigmore criterion. Dr. Kwok asserts that the communications between Ms. Munro and Ms. Buriak are

central to his defamation claims against Ms. Buriak and the Media Defendants. He says that he cannot advance these claims without knowing the precise content of the communications. He also argues that the content of the communications is central to the defences advanced by the Media Defendants.

[157] Similarly, Dr. Kwok's position is that the content of the communications between Ms. Munro and Dr. Brindley is crucial both to his defamation claims against the Media Defendants and to the defences against those claims.

[158] For its part, Canwest argues that the balancing of interests favours upholding the privilege. It argues that there is here no public interest sufficient to outweigh the privilege and contrasts this case to the criminal investigation at issue in *National Post*.

[159] Canwest points out that Dr. Kwok has not questioned Ms. Buriak, though he is entitled to do so. Canwest appears to argue that the information Dr. Kwok seeks to obtain by disregarding the privilege could be obtained directly by questioning Ms. Buriak.

[160] Finally, Canwest asserts the questions with respect to the communications between Ms. Munro and Dr. Brindley are neither relevant nor material.

Analysis

[161] Notwithstanding that Dr. Kwok is aware of the identities of Ms. Buriak and Dr. Brindley, I find that this alone is not sufficient to overcome the privilege attaching to the content of their communications with Ms. Munro. I note that the Supreme Court of Canada stated at para. 56 of *National Post* that "Wigmore was concerned with the confidentiality of the **contents** of the communication itself". (Emphasis in original.)

[162] I am satisfied that the first three Wigmore criteria are met in this case. Ms. Munro has provided sworn evidence that she promised to maintain confidentiality in respect of her communications with her sources and there is no contradictory evidence before me. Further, I agree with Canwest that such confidentiality was essential to the candid communication Ms. Munro was seeking. Finally, I find that the relationship between Ms. Munro and her sources is one that ought to be fostered by the community. It must be remembered that NSERC is a public body and that the funding it provides comes from public funds. Public funds must be properly accounted for and used for their intended purpose. Such appears to me to be the intent of Ms. Munro's story. As said recently in *1654776 Ontario Limited v. Stewart,* 2013 ONCA 184, 114 OR (3d) 745 at para 145:

> In the final weighing up I would conclude that the greater public interest is served by upholding the respondents' claim of privilege. The public interest in free expression must always be weighed heavily in the balance.

[163] I am also mindful of the Supreme Court of Canada's comments at para. 57 of *National Post:*

> ...in general the relationship between professional journalists and their secret sources is a relationship that ought to be "sedulously" fostered and no persuasive reason has been offered to discount the value to the public of the relationship between Mr. McIntosh and his source(s) in this particular case.

[164] This case also involves a professional journalist and Dr. Kwok has given this Court no persuasive reason to treat it differently.

[165] Thus, the matter is to be decided on the basis of the fourth Wigmore factor. In my view, the balancing required by this factor must be done on a question-by-question basis. While some of the factors to be considered, such as the status of the journalist and the stage of the proceedings, may be the same for all questions at issue, other factors, such as the probative value of the evidence sought and the availability of alternative sources of information, may vary depending on the particular question.

[166] The questions for which Dr. Kwok seeks to compel answers from Ms. Munro concerning her communications with Ms. Buriak are set out at Schedule B of Dr. Kwok's brief filed October 5, 2012. They are also set out at exhibit 39 to Dr. Kwok's March 28, 2012 affidavit. The questions for which Dr. Kwok seeks to compel answers from Ms. Munro concerning her communications with Dr. David Brindley are found at exhibit 40 of Dr. Kwok's March 28, 2012 affidavit.

[167] I find that the questions to Ms. Munro at exhibit 39 and exhibit 40 mentioned in the previous paragraph do not have to be answered because they are protected by the journalistic source privilege discussed already. Neither do they demonstrate a public interest that would warrant overriding the privilege. It is also relevant that Dr. Kwok has not questioned Ms. Buriak. If the information he seeks is relevant, it may be available through that route, thus providing an alternative source as contemplated in *National Post*. Therefore, Dr. Kwok's application to compel answers to these questions is denied.

(E) Issue #4 Should the Media Defendants be required to produce documents potentially withheld on the basis of journalistic source privilege?
(F) Issue #5 Should Ms. Conway and Ms. Munro be directed to provide undertakings posed to them during their questioning between September 27 and 30, 2011, and between October 31 and November 2, 2011, respectively?

[168] At oral argument the court was advised that the fourth and the fifth applications need not be addressed since Ms. Munro had supplied responses to her undertakings. And as far as the documents over which Ms. Conway has claimed solicitor/client privilege, the parties agree that those documents should be submitted to the Court for its review so determination can be made whether they should be

produced. Issues #4 and #5 need not be addressed.

COSTS

[169] Counsel can contact the Court within 30 days to fix a date to speak to costs.

Heard on the 21st day of November, 2012.
Dated at the City of Calgary, Alberta this 12th day of July, 2013.

Bryan E. Mahoney
J.C.Q.B.A.

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