Date: 20080418

Docket: T-1336-06

Citation: 2008 FC 493

Ottawa, Ontario, April 18, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

CANADIAN FEDERATION OF STUDENTS

Applicant

and

NATURAL SCIENCES AND ENGINEERING RESEARCH COUNCIL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of a decision of the Natural Sciences and Engineering Research Council of Canada (NSERC or the respondent) dated June 15, 2006, confirming a decision dated December 13, 2005 that NSERC would take no further action with respect to a research misconduct complaint

filed by the Canadian Federation of Students (the applicant) against the University of Toronto (the University).

[2] The applicant requested the following:

1. An order:

(a) quashing or setting aside NSERC's decision, communicated in its letter dated June 15, 2006, refusing to request that the University carry out an enquiry and inform NSERC of the outcome; and

(b) referring the decision back to NSERC for reconsideration in accordance with such directions as this Court considers appropriate;

2. An order in the nature of *mandamus* requiring NSERC to request that the University:

(a) carry out an enquiry into the applicant's complaint and inform NSERC of the outcome; and

(b) carry out such enquiry in a manner consistent with the "Procedures for Processing Allegations" identified in the Council's *Framework for Tri-Council Review of Institutional Policies Dealing with Integrity in Research* (the Integrity Framework) and

3. An order for the costs of this application.

Background

[3] For background purposes, the Canadian Federation of Students is an organization whose mandate is to lobby for high quality, publicly funded, and accessible post-secondary education in

Canada and for academic freedom. The Natural Sciences and Engineering Research Council of Canada is a federal agency responsible for funding research in Canada and for ensuring that research funds administered by it are used with integrity, accountability and responsibility. The research at issue in this application is the "Wiarton Water Distribution System Monitoring Study" (the Wiarton study), a study conducted from June 19 to August 28, 2000 by a number of university professors, including two from the University of Toronto. In general, NSERC issues research funds to the University of Toronto pursuant to a Memorandum of Understanding, which incorporates by reference a number of policy statements. Of particular relevance to this case, is the Tri-Council Policy Statement: Integrity in Research and Scholarship Schedule (the Tri-Council Policy Statement) which, when triggered, requires that NSERC, upon receiving a complaint of research misconduct, request that the university in question make an enquiry and forward a copy of the report from the enquiry back to NSERC.

[4] In a letter to NSERC dated July 14, 2004, Christopher Radziminski, filed a formal grievance against the University of Toronto in regards to among other issues, questionable research conducted at the University of Toronto during the Wiarton study. Specifically, Mr. Radziminski alleged that the Wiarton study's researchers had in their conclusions published in the *Journal of Environmental Engineering and Science* reported that "no customer taste and odor complaints were reported during the study period", when in fact they had. In his letter, Mr. Radziminski requested that NSERC conduct a full, prompt investigation into the allegations of academic misconduct during the Wiarton study.

[5] NSERC responded to Mr. Radziminski's grievance in a letter dated August 9, 2004, within which NSERC provided that they were "unable to determine that the items triggered the Tri-Council Policy Statement. Mr. Radziminski then wrote a letter dated August 27, 2004 to NSERC requesting clarification of the response. In a reply letter dated September 22, 2004, NSERC clarified that their response was that they had reviewed the matters as requested by Mr. Radziminski and found that they did not fall under the purview of the Tri-Council Policy Statement.

[6] It appears that at this point, Mr. Radziminski approached the Canadian Federation of Students with the issue. In a letter to NSERC dated July 19, 2005, Angela Regnier, the National Deputy Chairperson of the applicant organization, requested that NSERC communicate to the University the specific allegations of research misconduct arising from the Wiarton study and require the University to conduct an enquiry into the matters. On August 10, 2005, NSERC wrote to the University requesting a response to the applicant's allegations, but did not request that the University conduct an enquiry. On October 18, 2005, the applicant made further submissions to NSERC and requested a substantive response to the applicant's letter dated July 19, 2005. On November 8, 2005, NSERC requested once again a response from the University. On November 21, 2005, the University provided their response to NSERC and the applicant.

[7] On December 2, 2005, the applicant wrote to NSERC indicating that it would be addressing the findings of the University and the University's continuing failure to address the applicant's specific concerns. In a reply dated December 13, 2005, NSERC informed the applicant that the University's response had appropriately addressed all the issues and concerns raised by the

applicant. The applicant then followed up with NSERC in a letter dated January 11, 2006, a meeting held on April 11, 2006 and a letter dated April 11, 2006. On June 15, 2006, NSERC advised the applicant by letter, that it had nothing to add to the previous replies given to the applicant. On July 26, 2006, the applicant launched the within application for judicial review.

Reasons for Decision

[8] The entirety of NSERC's decision is found in a letter dated June 15, 2006 from NSERC to the applicant which reads as follows:

> Dear Ms. Regnier:
>
> Dr. Fortier has asked me to reply to your letter of April 11, 2006. I apologize for the delay in my reply.
>
> NSERC notes that your recent letter raises issues presented to NSERC in your previous correspondence and to which NSERC has provided responses.
>
> After reviewing your recent letter in light of the entire file on this matter, NSERC wishes to advise you that we have nothing to add to the previous replies given to you.
>
> Thank you for writing.
>
> Sincerely,
>
> Martine Dupré
> Corporate Secretary

[9] The above reference to "previous replies given" includes two letters of particular importance in the case at bar.

[10] The first letter is one from NSERC's to Mr. Raziminski dated September 22, 2004 wherein NSERC found that the allegations of research misconduct raised by Mr. Radziminski in relation to the Wiarton study did not fall under the purview of the Tri-Council Policy Statement, and also that there was no apparent role for NSERC to play in addressing these issues.

[11] The second letter is one from NSERC to the applicant dated December 13, 2005 wherein NSERC found:

- that the process followed in investigating the allegations of misconduct complied with the expectations set out in the Tri-Council Policy Statement, the Memorandum of Understanding and the Integrity Framework;
- that for the most part the University's policy on ethics entitled *Faculty of Applied Sciences and Engineering, Framework on Ethics*, met the requirements of the Tri-Council Policy Statement, the Memorandum of Understanding and the Integrity Framework; and
- that the Research Ethics Board's assessment and approval were actions consistent with the responsibilities of the institution outlined in the Memorandum of Understanding.

[12] NSERC concluded that "in light of the foregoing, NSERC is satisfied that the University has appropriately addressed all issues and concerns raised in your correspondence with NSERC".

Issues

[13] The applicant submitted the following issues for the Court's consideration:

1. Breach of Legal Obligation

a. Did NSERC err in law in refusing to require the University to conduct an enquiry into specific allegations of research misconduct?

b. Did NSERC commit a reviewable error in deciding to dismiss the applicant's complaint?

2. Procedural Fairness

a. Did NSERC violate the rules of procedural fairness in failing to advise the applicant of the factual or legal basis of its decision?

b. Did NSERC violate the rules of procedural fairness in the conduct of its investigation into the applicant's complaint?

c. Did NSERC address the complaint in a manner that gives rise to a reasonable apprehension of bias?

[14] The respondent submitted the following preliminary issues for the Court's consideration:

1. Does the applicant have standing to bring this application?

2. If so, should portions of the applicant's supporting affidavit be struck out as irrelevant, immaterial or otherwise improper?

[15] I would rephrase the issues as follows:

1. Preliminary issues:

a. Does the applicant have standing to bring this application?

b. If so, should portions of the applicant's supporting affidavit be struck out?

2. Reviewable errors:

a. What is the appropriate standard of review?

b. Did NSERC commit a reviewable error in refusing to require the University to conduct an enquiry into specific allegations of research misconduct?

c. If NSERC's obligations under the Tri-Council Policy Statement were not triggered, was NSERC's consideration of the complaint nonetheless reasonable?

3. Procedural fairness:

a. What are the requirements of procedural fairness in the present case?

b. Did NSERC breach procedural fairness in failing to advise the applicant of the factual or legal basis for its decision?

c. Did NSERC breach procedural fairness in failing to advise the applicant of the procedures it intended to follow in addressing the applicant's complaint?

d. Did NSERC address the complaint in a manner that gives rise to a reasonable apprehension of bias?

Applicant's Submissions

[16] The applicant began submissions by addressing whether NSERC erred in law in taking no further action after receipt of the University's report. The applicant submitted that the appropriate standard of review for this question is correctness. The applicant submitted that this question goes to the scope of the NSERC's jurisdiction in respect of allegations of academic misconduct, and that

questions of jurisdiction are ordinarily questions of law (*Murdoch* v. *Canada (Royal Mounted Police)*, 2005 FC 420 at paragraph 14).

[17] The applicant then provided submissions on the relationship between NSERC and the University. The applicant submitted that under the Memorandum of Understanding between the University and NSERC, both parties are obliged to adhere to the Tri-Council Policy Statement. This statement sets out obligations and responsibilities for both parties. Specifically, the University must promote integrity in research and scholarship and investigate all possible instances of misconduct, while NSERC is obliged to ensure that their research funds are used with a high degree of integrity, accountability and responsibility, and to request an institution identified as involved in an allegation of research misconduct carry out an enquiry and inform the Council of the outcome. The applicant also submitted that the Tri-Council Policy Statement defines misconduct as any action that is inconsistent with integrity. The applicant submitted that this statement provides that NSERC play a fundamental and central role in receiving allegations of research misconduct. The applicant submitted that a complaint triggers NSERC's role only where the research funding comes from NSERC. The applicant submitted that the burden of proof required to trigger NSERC's role is low as it requires only "evidence of misconduct". The applicant submitted that where this low threshold is met, NSERC must request that the institution involved carry out an enquiry informing the Council of the outcome and such an enquiry must be consistent with NSERC's procedural requirements for investigating allegations of research misconduct.

[18] The applicant submitted that the complaint filed in the July 19, 2005 letter fell within the scope of the Tri-Council Policy Statement. The applicant submitted that the technology at the core of the research misconduct issues was the basis for NSERC's 2003 grant of $25,000 to the University. The applicant submitted that NSERC erred in failing to require the University to conduct an enquiry into the substance of the allegations and instead requesting that the University provide NSERC with a response addressing the broader issues and concerns raised by the applicant. As such, NSERC erred in disposing of the applicant's allegations as though they lay entirely outside of NSERC's jurisdiction.

[19] The applicant then addressed the submission that NSERC committed a reviewable error in deciding to dismiss the applicant's complaint. The applicant submitted that the appropriate standard of review is reasonableness. NSERC's enabling statute contains no privative clause and no statutory right of appeal. The question at issue is a factual question that requires no particular expertise. The issues raised are quasi-legal and not policy based and finally, the determination of the question will have precedential value.

[20] The applicant submitted that NSERC's decision to dismiss the applicant's allegations was not open to NSERC as it had overwhelming evidence before it of deliberate mischaracterization of the public response to the Wiarton study within the academic literature. The applicant also submitted that the context and seriousness of the applicant's allegations demanded thorough and careful analysis from NSERC. The applicant submitted that instead, NSERC responded with indifference towards an important Canadian public health issue, and a questionable approach to

oversight of taxpayer funds administered through its research grants and awards. The applicant submitted that NSERC's response was simply unreasonable and not supported by the evidence before it.

[21] The applicant also raised three issues of procedural fairness. The applicant submitted that the circumstances of this case require a high degree of procedural fairness as NSERC's decision to take no further action on an allegation of academic misconduct effectively extinguishes the complainant's claim (*Herbert* v. *Canada (Human Rights Commission)* (1998), 156 D.L.R. (4th) 539 (F.C.A.)). Furthermore, the process is adversarial in nature and as such, requires a high standard of procedural fairness (*Downing* v. *Graydon et al.* (1978), 92 D.L.R. (3d) 355 at 370, 374, 377 (Ont. C.A.)).

[22] Firstly, the applicant submitted that NSERC violated the rules of procedural fairness in failing to advise the applicant of the factual or legal basis for its decision. NSERC denied the applicant the opportunity to comment on evidence tendered by the University, despite being informed that the applicant intended to so do. The applicant also submitted that NSERC representatives were unfamiliar with the allegations and unprepared for a meeting between the parties and the University held on April 11, 2006. The applicant submitted that a complainant is entitled to be advised of and given the opportunity to respond to the factual and legal basis of a decision disposing of his or her complaint (*Selvarajan* v. *Race Relations Board*, [1976] 1 All E.R. 12 at 19 (C.A.), cited in *Irvine* v. *Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181 at paragraph 54). The applicant also submitted that NSERC failed to address the specific

allegations in its decision, instead finding that the Wiarton study lacked the necessary pre-requisites to engage the oversight functions mandated by the Tri-Council Policy Statement.

[23] The applicant's second submission on procedural fairness was that NSERC violated the rules of procedural fairness in conducting its investigation into the applicant's complaint. The applicant submitted that at no point did NSERC advise the applicant of the procedures it intended to follow in addressing the allegations of research misconduct. The applicant submitted that the Tri-Council Policy Statement prescribes the appropriate procedure and that when NSERC deviated from this procedure, it failed to offer guidance to any of the interested parties on how it would proceed. The applicant submitted that "a complainant is entitled to know both *the rules of the game* and the substance of the evidence before the Commission" (*Mercier* v. *Canada (Human Rights Commission),* [1994] 3 F.C. 3 at paragraph 16 (C.A.)).

[24] Thirdly, the applicant submitted that the rules of natural justice were breached as the applicant had the right to a hearing before a disinterested tribunal. The applicant submitted that they had the right to enjoy a decision maker free of bias at both the investigative and adjudicative stages of the procedure. The applicant submitted that the appropriate test for bias at the investigative stage is open-mindedness, that is, has the issue been pre-determined (*Reimer* v. *Saskatchewan (Human Rights Commission),* [1992] S.J. No. 547 at 8 (Sask. C.A.). The applicant submitted that NSERC's record discloses no independent investigation of the allegations and instead appears to have down-loaded the responsibility onto the University. NSERC merely accepted the conclusions of the University without hesitation. Furthermore, the applicant submitted that NSERC was rushed in

dismissing the allegations and was unprepared in its dealings with the applicant on the issues. The applicant submitted that these facts disclose a startling degree of close-mindedness and give rise to a reasonable apprehension of bias. As for bias at the adjudicative stage, the applicant submitted that the appropriate test is whether the conduct of the decision maker gives rise to a reasonable apprehension of bias (*Newfoundland Telephone Co.* v. *Newfoundland (Board of Commissioners of Public Utilities* (1992), 4 Admin L.R. (2d) 121 at 134 (S.C.C.)). The applicant submitted that NSERC deferred their decision and reasons to the University's Dean's Committee enquiry and that that committee's composition, motivation, and actions gave rise to a reasonable apprehension of bias. Specifically, the applicant noted that the Dean's Committee was struck at the request of one of the professor's alleged to have committed the misconduct, and consisted of only two individuals, neither with expertise in the subject area and both within the Faculty of Applied Science and Engineering.

Respondent's Submissions

[25] The respondent submitted that the applicant lacks standing to bring this application under section 18.1 of the *Federal Courts Act*, above and therefore must rely on the discretion of the Court to grant it public interest standing (*Sierra Club of Canada* v. *Canada*, [1999] 2 F.C. 211 at paragraph 22 (T.D.)). The test for public interest standing is (1) whether the litigation raises a serious or justiciable issue, (2) whether the applicant has a genuine interest in the outcome of subject matter of the litigation, and (3) whether there are persons other than the applicant who are more directly affected and who can reasonably be expected to litigate the issues. The respondent

submitted that mere questions of administrative interpretation do not satisfy the requirements of a "serious issue" (*Harris* v. *Canada*, [2000] F.C.J. No. 729 at paragraphs 51 to 52 (C.A.)). The respondent submitted that the requirements of a "genuine interest" requires consideration of (1) whether the applicant's interest in the legal issues is intimately linked to its corporate objectives, and (2) whether the applicant possesses the necessary "expertise, understanding and insights" to make a constructive contribution or a "track record of general interest" in the issues (*Sierra Club of Canada*, above at paragraphs 58, 66). The respondent submitted that the applicant's corporate objectives are not linked to drinking water testing, but yet to advancing students' interests. Moreover, the respondent submitted that the applicant has no track record of general interest in water quality. And finally, the respondent submitted that there are numerous environmental, municipal, industry and technical organizations with a more direct interest in the issues at hand that could be reasonably expected to litigate the issues.

[26] The respondent submitted that if standing is granted, a substantial portion of the applicant's supporting affidavit (the Regnier affidavit), should be struck as it includes documents that are not part of the certified tribunal record. The respondent submitted that paragraphs of the Regnier affidavit that are based on the contents of those documents should also be struck. The respondent submitted that further portions of the Regnier affidavit should be struck as they contain hearsay evidence. Specifically, the respondent identified paragraphs 14 to 22 which provided background on Mr. Radziminski's academic career, research and thesis, and paragraphs 26 to 43 and 45 to 53 which provided information on Mr. Radziminski's initial complaint to the University of Toronto and complaint to Indiana University. The respondent submitted that contrary to paragraph 21 of the

Regnier affidavit, there was ample opportunity for Mr. Radziminski to provide an affidavit upon which meaningful cross-examinations could have occurred. The respondent also submitted that paragraphs 10 to 12, 64 and 67 of the Regnier affidavit refer to irrelevant or extraneous matters and should be struck. Finally, the respondent submitted that paragraphs 19, 20, 21, 58, 59, 74, 80, 81, and 82 should also be struck as they contain opinions and assertions requiring expertise in drinking water disinfection, water safety systems, chlorination, and the chemical properties and health effects of chlorine. The respondent submitted that Ms. Regnier has no expertise in these areas.

[27] With regards to the appropriate standard of review, the respondent submitted that the *Natural Sciences and Engineering Research Council Act,* R.S.C. 1985, c. N-21 (NSERC's enabling act) provides no express statutory right to appeal and no privative clause. NSERC is a specialist funding agency and has experience dealing with academic institutions, and their procedures. The respondent submitted that the purpose of NSERC's enabling act is to establish an administrative body to promote and assist research in natural sciences and engineering and that in achieving this purpose, NSEC must provide effective fiscal control, while being careful not to constrain the independence of the research process. And finally, the respondent submitted that whether NSERC exercised its discretion properly is a question of fact and reviewable on a standard of patent unreasonableness. The respondent submitted that whether NSERC's finding that the Wiarton complaint did not trigger the applicable policies is a question of mixed law and fact reviewable on a standard of reasonableness.

[28] The respondent submitted that NSERC made no reviewable error in taking no further action. The respondent submitted that the applicant misreads NSERC's requirements under the Tri-Council Policy Statement. The respondent submitted that NSERC's responsibility under the policy is to forward the complaint to the university in question, review the university's report and consider sanctions where misconduct is found. The respondent submitted that in any event, the applicant's complaint did not trigger the applicable policy. The respondent submitted that the authority of NSERC to insist that an academic institution carry out an investigation into alleged misconduct is grounded in its funding role and in the case at bar NSERC did not provide funding to the Wiarton study. The respondent also submitted that the applicant's complaint did not allege "research misconduct" as defined by the University. The respondent submitted that an alleged failure to refer in certain publications to purportedly conflicting evidence is not of the same nature as the kind of "deliberate falsification", "plagiarism", "breach of confidentiality", or "fraud" which constitutes "misconduct". Finally, the respondent submitted that "research integrity" allegations do not require action by NSERC.

[29] On the issue of the contents of procedural fairness, the respondent made the following submissions. With regards to how closely the process resembles that of a judicial process, the respondent submitted that NSERC is not tasked with making any final decision concerning a complaint, but is a conduit through which a complaint flows to the academic institution for report. As the process is not adjudicative, a lower standard of fairness is appropriate. With regards to the nature of the statutory scheme, the silence on the availability of an appeal suggests that these are administrative, rather than judicial powers and therefore are subject to a lesser requirement of

fairness. The respondent also submitted that the within application is not central to the mandate or expertise of the applicant, and the interest affected is indirect. The respondent noted that there was no basis for an expectation that NSERC would afford further procedural rights to the applicant. And finally, the respondent submitted that NSERC's enabling statute does not set out a specific procedure for the Council to follow when determining whether to accept, reject or seek further information in relation to a complaint or a report received from an academic institution and as such, deference should be given. The respondent submitted that these considerations indicate that a lower level of procedural fairness is required.

[30] With regards to the applicant's allegation that NSERC failed to provide them with the factual and legal basis for their decision, the respondent submitted in light of NSERC's limited role and the *Baker* factors, the procedure followed satisfied the requirements of fairness. The respondent submitted that the complainant was aware of the issues, and was kept apprised of the steps taken by NSERC. The respondent submitted that the University's response was provided to the applicant. The respondent submitted that NSERC's decision did not shield the researchers from meaningful scrutiny as it was not NSERC's role to dismiss the complaint, but yet to forward it to the academic institution for review and collect the report. The respondent submitted that in any case, the academic institution itself is not shielded from scrutiny as an affected party could bring a judicial review of its decision, or otherwise institute civil proceedings against it.

[31] With regards to the alleged failure to inform the applicant of the procedures taken, the respondent submitted that the Memorandum of Understanding provides guidelines which are

flexible and require that complaints of misconduct be forwarded to the academic institution, a report be made, and that report be considered by NSERC. In the case at bar, this procedure was followed and no breach of procedural fairness occurred.

[32] The respondent submitted that there is no basis for the alleged reasonable apprehension of bias. The test for a reasonable apprehension of bias is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude (*Canada (Attorney General)* v. *Fetherston*, 2005 FCA 111 at paragraph 34). The respondent submitted that this test is a flexible one and must be adapted to the nature of the decision maker. The respondent submitted that the allegation that no independent investigation was done misconceives NSERC's role. With regards to the allegations that NSERC rushed to dismiss the complaint and was unprepared for a meeting with the applicant, the respondent submitted that the applicant had failed to signal in advance its desire to discuss the substance of its complaint at the meeting and in any case, NSERC considered the letter in rendering the decision under review.

Analysis and Decison

[33] **1. Preliminary Issues**

a. Does the applicant have standing to bring this application?

The respondent submitted that the applicant lacks standing under subsection 18.1(1) of the *Federal Courts Act*, above to bring this application and does not qualify for a grant of public interest standing. Subsection 18.1(1) of the Act reads as follows:

18.1(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1(1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

[34] The respondent submitted that the applicant does not contend that the decision in question "directly affects" its private legal rights or those of its members, and as such, must convince the Court to use its discretion to grant the applicant public interest standing. I agree. The applicant's submissions are to the affect that NSERC did not follow the procedure it is required to follow in addressing the complaint. The applicant's submissions are not to the effect that it or its members' legal rights are being directly affected, nor is the applicant claiming that "special damages" are being inflicted. As such, the applicant bears the onus of convincing the Court that a grant of public interest standing is warranted (*Sierra Club of* Canada, above at paragraph 24).

[35] It is well established that the test for public interest standing is threefold: (1) a serious or justiciable issue is raised, (2) the applicant has shown a genuine interest in the subject matter of the litigation, and (3) there is no other reasonable and effective manner to litigate the issues (*Thorson* v. *Canada (Attorney General),* [1975] 1 S.C.R. 138, *Canada (Minister of Justice)* v. *Borowski,* [1981] 2 S.C.R. 575, *Canadian Council of Churches* v. *Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 236, *Sierra Club of Canada,* above). Analysis of the first requirement, a serious or justiciable issue, involves a consideration of "both the importance of the issues and the likelihood of their being resolved in favour of the applicant" (*Sierra Club of Canada,*

above at paragraph 38). The respondent submitted that according to the authority in *Harris*, above a mere question of administrative interpretation does not qualify as a serious or justiciable issue. While I agree with the legal principle, I disagree that it applies to the case at bar. In my opinion, the issues raised by the applicant are not questions of administrative interpretation, but questions as to NSERC's statutory authority to investigate claims. The applicant is arguing that the necessary pre-requisites were present to trigger NSERC's responsibility under the Tri-Council Policy Statement to require the University to conduct an investigation. In my opinion, this is a question of NSERC's statutory authority and not merely a question of administrative interpretation. The issues are serious. With regards to the likelihood of a favourable outcome for the applicant, having reviewed the materials, I am convinced that there is some likelihood of success on the part of the applicant.

[36] As to the second requirement, that of a genuine interest in the outcome of the litigation, the factors to consider are (1) whether the applicant's interest in the issues are intimately linked to its corporate objectives, and (2) whether the applicant possesses an expertise or track record of general interest in the area of question (*Sierra Club of Canada*, above at paragraph 66). After consideration of these factors, I am satisfied that the applicant has met this requirement. The applicant's corporate objectives include advancing students' interests and the applicant has demonstrated that its members' interests include ensuring the integrity of academic institutions, and protecting those who speak out against research misconduct. Furthermore, the applicant has demonstrated a past record of active involvement in these issues. As stated in the applicant's supporting affidavit of Ms. Regnier, the applicant organization has in the past publicly supported researchers who have spoke out in defence of research integrity, lobbied for legislation and policies to protect whistleblowers and

supported publicly funded research. In my opinion, the organization has demonstrated a sufficient degree of involvement in the issues such that it is an appropriate body to institute this proceeding.

[37] The third and final requirement of the public interest test is whether or not there is a more appropriate applicant. This condition requires the Court to consider if there "are other individuals who are more directly affected than the applicant, and are reasonably likely to institute proceedings to challenge the administrative action in question" (*Sierra Club of Canada*, above at paragraph 69). The respondent submitted the names of a number of environmental and municipal organizations that they claim have a more directly affected interest. While I acknowledge that these organizations and their members have an interest in determining if research misconduct occurred in the Wiarton study, their interest is comparable in importance to that of the applicant who seeks to ensure integrity in academic research. There is no indication from the respondent that these organizations have commenced legal proceedings on the issue. As such, I find that the applicant has met the condition and public interest standing should be granted.

[38] b. <u>If so, should portions of the applicant's supporting affidavit be struck out?</u>

The respondent made three separate requests for striking out of affidavit evidence. Firstly, the respondent submitted that the applicant attempted to rely on documents that were not before NSERC when the decision was made and as such, these documents and references to them in Ms. Regnier's affidavit should be struck. The respondent submitted that the documents were introduced on the merits and not in respect of the applicant's procedural argument.

[39] I have reviewed the documents listed in Appendix A of the respondent's memorandum of fact and law and with the exception of a couple of documents that I have found to be in the tribunal record, I agree that the remaining documents did not form part of the tribunal record. Specifically, I have identified the following documents listed in Appendix A to be part of the tribunal record:

Description in Appendix A	**Location within the Certified Tribunal Record**
#20: Letter dated January 31, 2003 from C. Radziminski providing his consent Qs: 176-177	Tab 1
#28: Joint Statement of Defence Q. 187	Tab 2
#51: Residents' letter dated August, 2000 to the Mayor and Town Council	Tab 1
#51: Letters to the editor published in the Wiarton Echo	Tab 1
#72: A 2003 U of T publication, "University of Toronto Engineering Experts Available to Comment on National Engineering week (NEW), March 1-9, 2003"	Tab 1

[40] Recently in *Vennat* v. *Canada (Attorney General)*, [2006] F.C.J. No. 1251 at paragraphs 43 to 45, this Court considered the issue of striking evidence that was not before the decision maker when the decision was rendered:

> 43 Generally, at the judicial review stage, only evidence relied on in the decision under review must be considered (see *Smith* v. *Canada*, [2001] F.C.J. No. 450, 2001 FCA 86). Such is the case because the purpose of the application for judicial review "is not to determine whether or not the decision of the Tribunal in question was correct in absolute terms but rather to determine whether the Tribunal was correct based on the record before it" (*Chopra* v. *Canada (Treasury Board)*, [1999] F.C.J. No. 835, at paragraph 5).
>
> 44 Exceptionally, the Court may receive documents that did not exist at the time of the application for judicial review, when issues of procedural fairness or jurisdiction are involved (*McFadyen* v. *Canada (Attorney General)*, [2005] F.C.J. No. 1817, 2005 FCA 360,

> at paragraphs 14 and 15; *Ontario Association of Architects* v. *Association of Architectural Technologists of Ontario*, [2003] 1 F.C. 331, at paragraph 30 (F.C.A.)). Issues of that nature are involved in this case.
>
> 45 However, to be admitted on an exceptional basis, the evidence that was not available to the decision-maker must serve to establish that there was a breach of procedural fairness, and not that the applicant was correct on the merits. If this rule is not observed, the applicant could indirectly introduce new evidence on the merits, thereby making the application for judicial review a hearing de novo. In other words, it would be sufficient to raise procedural fairness to transform an application for judicial review into a hearing *de novo*.

[41] In my opinion, this is what the applicant has essentially done in the case at bar. This case is not one of those exceptional circumstances where an exception to the general rule is warranted. As such, I would allow the respondent's request and strike all the identified documents, except those I have found to be a part of the certified tribunal record outlined in the table above. I would also strike the following paragraphs of Ms. Regnier's affidavit to the extent that they rely directly on documents which were not before the tribunal:

> Paragraphs: 5, 8, 11-20, 23-25, 36, 38-43, 46-53, 56, 59-61, 64-68, 70, 72-83, 88-92, 103-108, 111 and 112.

[42] The respondent's second request is to the effect that a number of paragraphs in Ms. Regnier's affidavit are hearsay evidence. The respondent submitted that the applicant has failed to meet the exception for hearsay evidence in affidavits, and as such the paragraphs should be struck. Specifically, the respondent takes issue with the paragraphs dealing with Mr. Radziminski's academic career, research and thesis (paragraphs 14-22), Mr. Radziminski's initial complaint to the

University of Toronto (paragraphs 26-43 and 45-53), and assertions of fact from Mr. Radziminski concerning the Wiarton study (paragraphs 46-64).

[43] I feel it necessary to note the seriousness of the remedy requested by the applicant. The jurisprudence indicates that striking out certain paragraphs of the affidavit is a remedy that should be exercised sparingly and only where it is in the interests of justice to do so (*Armstrong* v. *Canada (Attorney General)*, [2005] F.C.J. No. 1270 at paragraph 40). Background information may help a presiding judge and should not be struck unless prejudice to the respondent arises (*Armstrong*, above).

[44] Section 81 of the *Federal Courts Rules*, SOR/98-106 states that "affidavits shall be confined to facts within the personal knowledge of the deponent, except on motions in which statements as to the deponent's belief, with the grounds therefore, may be included." However, the Federal Court of Appeal in *Ethier* v. *Canada (Royal Canadian Mounted Police Commissioner)*, [1993] 2 F.C. 659 (F.C.A.) held that a principled approach must be taken and the governing principles to be considered are the reliability of the evidence and its necessity. The respondent submitted that the identified hearsay evidence in Ms. Regnier's affidavit is information supplied by Mr. Radziminski, and that there was time for himself to provide an affidavit between June and October 18, 2006, before his departure for Africa. Ms. Regnier's affidavit indicates at paragraph 21 that Mr. Radziminski himself is "unavailable to provide an affidavit to present this information to the court as he is finalizing preparations to work in Africa for the balance of 2006 and much of 2007." I accept the applicant's submission that Mr. Radziminski was unavailable. Moreover, I am of the

opinion that the applicant has sufficiently demonstrated that the evidence provided is somewhat reliable as it came from Mr. Radziminski himself, someone with a certain degree of expertise in the field and who is not uninvolved in the circumstances of this case. Indeed, I do acknowledge the respondent's submission that this information may not respect the "best evidence rule", but this goes to the weight of the evidence and not its admissibility (*Lumonics Research Ltd.* v. *Gould*, [1983] 2 F.C. 360 (C.A.)).

[45] The respondent's third submission regarding Ms. Regnier's affidavit is that certain paragraphs refer to irrelevant or extraneous matters (paragraphs 10-12, 64 and 67) and others contain opinions and assertions requiring expertise that the affiant does not have (paragraphs 19-21, 58-59, 74 and 80-82). While I acknowledge the respondent's submission, I believe that allowing the evidence will not prejudice the respondent. The issue of lack of expertise of the affiant will go the weight given to the evidence. Once again in light of the seriousness of the remedy requested, I would dismiss the respondent's request.

[46] **2. Reviewable errors:**

a. What is the appropriate standard of review?

The applicant submitted that the question of whether NSERC's obligations under the Tri-Council Policy Statement were triggered is reviewable on a standard of correctness. The applicant submitted that if NSERC's obligations were not triggered, its consideration of the complaint must nonetheless be reasonable. The respondent submitted that the appropriate standards of review are

patent unreasonableness, and reasonableness, respectively. Applying the standard of review analysis to the facts of this case, I note the following:

- NSERC's enabling act contains no privative clause, nor does it expressly provide for an appeal. This is a neutral factor.
- NSERC's expertise includes dealing with academic institutions, and their policies and procedures. Moreover, NSERC is also an expert in administering public research funds and ensuring that they are used with integrity, accountability and responsibility. These factors warrant greater deference.
- The purpose of NSERC's enabling act is to administer public funds for research in the natural sciences and engineering fields. This mandate requires NSERC to balance the interests of the public, academic institutions, and researchers. This polycentric nature indicates that greater deference is owed.
- With regards to whether NSERC's obligations were triggered, this is a question of mixed law and fact as it requires NSERC to apply its policies to the set of facts before it. I note that the obligations are found in a policy and not law.
- With regards to whether NSERC's consideration of the complaint was reasonable, this is a question of mixed law and fact.

[47] In conclusion, I am of the opinion that both issues raised are reviewable on a standard of reasonableness.

[48] b. Did the NSERC commit a reviewable error in finding that the applicant's complaint did not trigger NSERC's obligations under the Tri-Council Policy Statement?

The relationship between the University and NSERC is governed by the memorandum of understanding. Section 5.4 of this document, entitled "Integrity in Research and Scholarship", provides that:

> The Institution and the Agencies are committed to the highest standards of integrity in research and scholarship. While the primary responsibility for maintaining high standards of integrity, accountability and responsibility rests with the researchers, the Institutions and the Agencies have a role in providing an environment that is conducive to achieving these goals. The Parties therefore agree to adhere to the guidelines set out in Schedule 4.

Schedule 4 provides:

> As a condition of eligibility to receive Agency funds, Institutions must have in place an integrity policy that is consistent with the *Tri-Council Policy Statement*.

[49] The portion of the Tri-Council Policy Statement at issue in this case is the responsibilities of research funding councils. Specifically, the responsibility to order a University to conduct an enquiry into alleged misconduct. The Tri-Council Policy Statement provides:

> In the event that a Council, or one of its peer review committees, identifies evidence of misconduct as part of the peer review processes, the Council will request the institution(s) involved to carry out an enquiry and to inform the Council of the outcome.
>
> The Councils [*sic*] request that institutions which have carried out enquiries of alleged misconduct in research or scholarship involving projects funded by the Councils provide the appropriate Council(s) with the report of their findings. The Council(s) will consider the report and may request clarification or additional information.

[50] The parties submitted, and I agree, that NSERC's responsibility to "request the institution(s) involved to carry out an enquiry and to inform the Council of the outcome" is only triggered where (1) the alleged misconduct involves research projects funded by NSERC, and (2) NSERC (or one of its peer review committees) identifies evidence of misconduct.

[51] The parties disagree on whether the pre-requisite of research funded by NSERC is satisfied in the case at bar. The applicant submitted that the technology at the core of the research misconduct issue was the basis for NSERC's 2003 $25,000 Synergy Award for Innovation to the University of Toronto and ERCO Worldwide. The respondent on the other hand, has submitted an affidavit from Mr. Serge Villemure, who is the Director of the Chemistry, Engineering and Mathematical Sciences Division in the Research Grants and Scholarships Directorate at NSERC, which provides:

> I have reviewed the relevant files in NSERC's possession which relate to funding provided by NSERC to Drs. Andres, Karney and Gagnon in the time period in question. That project is not mentioned as a basis for the requests for funding, in the subsequent reports on matters funded, or in other documentation which refers to activities in question at the relevant times. Drinking water related projects in other locations or dealing with other related subjects were supported by NSERC, but not the project at Wiarton described by Ms. Regnier. Based upon the information available to NSERC, there is no evidence that NSERC grant funding was used to support these projects.

[52] With regards to the applicant's submission, while the technology providing the foundation for the research project might have been funded by NSERC, this does not necessarily mean that the research project itself was. In my opinion, this observation is supported by Mr. Villemure's affidavit. Given Mr. Villemure's position as Director of the relevant research division in the

Research and Grants and Scholarship Directorate of NSERC, I accord his evidence great weight. In conclusion, I am of the opinion that the funding pre-requisite was not met, and thus NSERC's responsibility to request the University to make an enquiry was not triggered. Consequently, I find that NSERC's finding that the Wiarton study did not fall under the purview of the Tri-Council Policy Statement was reasonable.

[53] c. <u>If NSERC's obligations under the Tri-Council Policy Statement were not triggered, was NSERC's consideration of the complaint nonetheless reasonable?</u>

The applicant submitted that even if NSERC's obligations under the Tri-Council Policy Statement were not triggered, NSERC, having accepted the complaint, was obliged to treat it in a reasonable manner. Essentially, the applicant submitted that NSERC's decision to take no further action regarding the complaint was unreasonable. The respondent for their part submitted that there is no requirement that NSERC engage in their own investigation of the complaint and in any event, NSERC's decision to take no further action in the complaint was reasonable.

[54] Having reviewed NSERC's enabling act and the relevant policies, I agree with the respondent that there is no requirement on NSERC to conduct their own investigation of the complaint. The spirit of the Tri-Council Policy Statement is that NSERC transmits complaints to institutions; only where pre-requisites are met is an enquiry necessary. While the applicant argues that NSERC's role of promoting integrity in research demands that they investigate the complaint, I do not agree. There is no language in the policy to support such an assertion.

[55] In any event, I find that NSERC treated the applicant's complaint reasonably. They forwarded the complaint to the University and asked for general comments and a response. Upon receipt of the report, NSERC was satisfied that the University had properly addressed the issues and concluded that they would take no further action. This decision was reasonable, and I see no reason to interfere with it.

[56] **3. Procedural fairness:**

a. What are the requirements of procedural fairness in the present case?

As articulated by the Supreme Court of Canada in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 21 to 28, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case." In applying the factors enumerated in *Baker*, above I note the following considerations.

[57] The process articulated in the Tri-Council Policy Statement is far from that of a judicial process. Under the Tri-Council Policy Statement it is clear that NSERC is responsible for transmitting complaints from their source to the institution involved and requesting that institution complete an enquiry and provide a copy of the report from that enquiry to NSERC. The actual investigation and final decision on academic misconduct rests with the institution. This is supported by the fact that the memorandum of understanding between the parties requires the institution to have an investigation process that conforms to the standards set out in the Tri-Council Policy Statement. It is true that NSERC can impose sanctions where misconduct is found, but the ultimate decision as to misconduct is up to the institution. NSERC is not involved in weighing evidence or

even assessing the merits of each party's submissions. The process is not judicial, nor is it quasi-judicial.

[58] With regards to statutory scheme, section 4 of NSERC's enabling act provides that NSERC's powers are to "promote and assist research in the natural sciences and engineering other than the health sciences" and to "advise the Minister in respect of such matters relating to such research as the Minister may refer to the Council for its consideration." NSERC's enabling act is silent on the specific process and procedures that NSERC must take in exercising its powers; these are found in the guidelines, policies and memorandums of understanding entered into by NSERC.

[59] As to the importance of the decision to the individual affected, I understand that the applicant has an interest in ensuring academic integrity, but such an interest is not unlike that of the general public. In my opinion, the applicant's rights and personal interests are not directly affected.

[60] The Tri-Council Policy Statement gives people in the position of the applicant a legitimate expectation that their complaint will be forwarded to the appropriate institution for investigation. In my opinion, there is no basis for a legitimate expectation that NSERC will investigate and make its own determination on the issue of alleged misconduct.

[61] With regards to the procedure, Parliament granted NSERC the discretion to choose its own procedures in dealing with complaints of academic misconduct. In conclusion, I am of the opinion that these factors point the lower end of the spectrum of procedural fairness.

[62] b. Did NSERC breach procedural fairness in failing to advise the applicant of the factual or legal basis for its decision?

The applicant submitted that NSERC breached procedure fairness in failing to provide them with the opportunity to respond to the University's report before they rendered their decision. The respondent submitted that the applicant's argument is based on a misunderstanding of NSERC's role.

[63] NSERC was clear in its decision that the Wiarton complaint did not trigger NSERC's responsibilities under the Tri-Council Policy Statement. In my opinion, NSERC's act in forwarding the complaint to the University was an action not directed by the Tri-Council Policy Statement. However, I do not accept the applicant's submission that by accepting the complaint and forwarding it to the University, NSERC then had to provide the applicant with all the procedural rights involved in an adjudicative process. In my opinion, the only requirement on NSERC was that upon receiving a response from the University, they forward it to the applicant and provide a reason as to why NSERC's obligations under the Tri-Council Policy Statement were not triggered. This is exactly what NSERC did. Given that I have already determined that the procedural requirements in these circumstances are at the lower end of the spectrum, I believe that there was no violation of procedural fairness. I would not allow the judicial review on this ground.

[64] c. Did NSERC breach procedural fairness in failing to advise the applicant of the procedures it intended to follow in addressing the applicant's complaint?

The applicant submitted that NSERC breached procedural fairness when it departed from its "normal procedure" and failed to inform the applicant of the new procedure taken to deal with the complaint. In my opinion, there is no merit to the applicant's argument. The procedure that was followed was almost identical to that prescribed by the Tri-Council Policy Statement with the exception that NSERC did not order the University to do an enquiry; instead, it requested a response from the University. The applicant was made aware that the complaint had been forwarded to the University and that a response had been requested. Furthermore, when the University's response was not received on time, NSERC informed the applicant that once received it would be forwarded to the applicant. The applicant was kept informed of what was happening. Given the minimal requirements for procedural fairness in the case at bar, I am of the opinion that procedural fairness was not breached.

[65] d. Did NSERC address the complaint in a manner that gives rise to a reasonable apprehension of bias?

The applicant alleged that the University's enquiry panel gave rise to a reasonable apprehension of bias and that as NSERC simply accepted the University's finding, NSERC's decision also gave rise to a reasonable apprehension of bias. The applicant also submitted that NSERC's handling of the complaint gave rise to a reasonable apprehension of bias as NSERC was made aware that the applicant intended to reply to the University's findings.

[66] With regards to the applicant's submission of bias at the investigative stage, the applicant has confused the role of NSERC. Under the Tri-Council Policy Statement, the question as to

whether academic research misconduct occurred is for the University to determine. Once no misconduct is found, there is no further role for NSERC to play. NSERC's only decision was whether or not its responsibilities under the Tri-Council Policy Statement were triggered. In this case, NSERC's decision, which I have found above to be reasonable, was that their responsibilities had not been triggered. In my opinion, the applicant would like this Court to accept that NSERC had a role in approving or rejecting the University's finding of no misconduct. This is simply not the case. As such, I do not accept the applicant's submission that NSERC simply deferred their decision to the University's finding of no misconduct.

[67] As to the applicant's submission that NSERC's behaviour gave rise to a reasonable apprehension of bias at the adjudicative stage, I also disagree. Given my previous finding that the minimal procedural fairness requirements in this case did not guarantee a reply to the applicant, I do not find that their actions gave rise to a reasonable apprehension of bias.

[68] The application for judicial review is therefore dismissed, with costs to the respondent.

JUDGMENT

[69] **IT IS ORDERED that** the application for judicial review is dismissed, with costs to the respondent.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Federal Courts Act*, R.S.C. 1985, c. F-7:

18.1(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1(1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

The *Federal Courts Rules*, SOR/98-106:

81.(1) Affidavits shall be confined to facts within the personal knowledge of the deponent, except on motions in which statements as to the deponent's belief, with the grounds therefor, may be included.	81.(1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête, auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.
(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.	(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

The *Natural Sciences and Engineering Research Council Act*, R.S.C. 1985, c. N-21:

4.(1) The functions of the Council are to	4.(1) Le Conseil a pour mission:
(a) promote and assist research in the natural sciences and engineering, other than the health sciences; and	a) de promouvoir et de soutenir la recherche dans le domaine des sciences naturelles et du génie, à l'exclusion des sciences de la santé;
(b) advise the Minister in respect of such matters relating to such research as the Minister may refer to the Council for its consideration.	b) de conseiller le ministre, en matière de recherche, sur les questions que celui-ci a soumises à son examen.
(2) The Council, in carrying out its functions under subsection (1), may	(2) Dans l'exécution de sa mission, le Conseil peut:
(a) expend, for the purposes of this Act, any money appropriated by Parliament for the work of the Council or received by the Council through the conduct of its operations; and	a) utiliser, dans le cadre de la présente loi, les crédits qui lui sont affectés par le Parlement et les recettes provenant de ses activités;
(b) publish and sell or otherwise distribute such scholarly, scientific and technical information relating to the work of the Council as the Council considers necessary.	b) à son appréciation, publier, vendre et diffuser par tout autre moyen des données scientifiques, techniques ou d'érudition relatives à ses travaux.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1336-06
STYLE OF CAUSE:	CANADIAN FEDERATION OF STUDENTS - and - NATURAL SCIENCES AND ENGINEERING RESEARCH COUNCIL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 30, 2007
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	April 18, 2008

APPEARANCES:

David Fewer	FOR THE APPLICANT
John S. Tyhurst	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fewer & Company Ottawa, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT