

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nu Fibre Inc. v. Ishkanian*,
2013 BCSC 1255

Date: 20130715
Docket: S094533
Registry: Vancouver

Between:

Nu Fibre Inc.

Plaintiff

And:

**Chris Ishkanian and Thermal Insulation Association of
Canada/Association Canadienne de l'Isolation Thermique**

Defendants

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Plaintiff:

Andrew G. Sandilands
Jennifer Chew

Counsel for the Defendants:

Christopher D. Martin
Jonathon Fung

Place and Date of Trial:

Vancouver, B.C.
October 29 - November 2, 2012

Place and Date of Judgment:

Vancouver, B.C.
July 15, 2013

INTRODUCTION

[1] Nu Fibre is the manufacturer and distributor of fibreglass pipe insulation that is manufactured in China and distributed in Canada as Nu Fibre Tek Pipe. The product consists of the base fibreglass insulation and an “All Service Jacket” (ASJ) facing. As one would expect, it comes in a cylindrical shape to fit around pipes, and is surrounded by the ASJ which is made of aluminum and kraft paper. The ASJ keeps the insulation together, and acts as a vapour barrier.

[2] In this action, Nu Fibre alleges that the defendants Chris Ishkanian and Thermal Insulation Association of Canada (“TIAC”) defamed its Tek Pipe product by suggesting, in essence, that it was defective (particularly in relation to its ASJ’s moisture resistance quality) and failed to meet North American standards.

[3] Mr. Ishkanian was at the material time the president of TIAC, an industry association, and a director of the B.C. Insulation Contractors Association (“BCICA”), an association of insulation contractors that also acted as the negotiating arm for its unionized members. In addition, Mr. Ishkanian was active in the business of distributing mechanical insulation including pipe insulation, through a company called Burnaby Insulation Supplies Ltd. (“Burnaby Insulation”). In connection with the matters at issue, then, he wore three hats.

[4] Nu Fibre originally named two additional defendants: Donald Proctor and Reed Construction Data Inc. doing business as the Journal of Commerce, alleging that an article written by Mr. Proctor and published by the Journal of Commerce was similarly defamatory of its product. Mr. Proctor was never served, however, and the plaintiff reached a settlement with Reed Construction Data Inc./Journal of Commerce, against whom it then discontinued this action. Consequently only Mr. Ishkanian and TIAC participated in this trial.

[5] Mr. Ishkanian and TIAC rely upon the defences of justification, qualified privilege, fair comment on a matter of public interest, and responsible communication.

BACKGROUND

[6] Nu Fibre Tek Pipe has been widely used in Western Canada since 2005. It is sold in British Columbia through a wholesale distributor, Frost Insulation Supplies Inc., which company is related to Nu Fibre. Also related to Nu Fibre is Aarc-West Mechanical Insulation Inc., a commercial pipe insulation installer/contractor. Nu Fibre distributes directly to Aarc-West, while Frost distributes to other installers. These related companies thus cover the manufacture, importation, distribution and installation of Nu Fibre Tek Pipe. The corporate link is the principal of the companies, Mr. Chris Ceraldi.

[7] Originally an insulation contractor, Mr. Ceraldi developed these businesses to fill a gap in the market after a fire in 2004 at a Johns Manville plant reduced the availability of pipe insulation in North America. He purchased a Canadian company, Nu Fibre, that owned the rights to import a pipe insulation product, Tek Pipe, from China. This obliged him to import more pipe insulation than he could use as a contractor, and so he got into the distribution business. When the Chinese factory that produced the pipe insulation shut down, he joined with its former general manager to open a new manufacturing facility in China.

[8] Beginning in approximately 2007, some North American manufacturers voiced concerns, legitimately or otherwise I cannot say, about whether Tek Pipe and other similar products manufactured offshore and distributed in North America met North American product and performance standards. As someone involved in industry associations, Mr. Ishkanian was interested in industry standards and became involved in this discussion. He collected samples of the products from three different offshore manufacturers with which Burnaby Insulation dealt (Taita, G.C. and E insulation) and forwarded them to a representative of an American manufacturer, Industrial Insulation Group LLC. He could not be sure, but thought that he also forwarded a couple of samples brought in by one or two BCICA members.

[9] On May 29, 2008, the North American Insulation Manufacturers Association (“NAIMA”) of Alexandria, Virginia, distributed the following letter:

To Whom It May Concern:

The North American Insulation Manufacturers Association (NAIMA) is committed to maintaining and advancing the quality and health and safety performance of insulation products impacting the North American marketplace. As part of that commitment, NAIMA and its members have been seeking all information regarding the claims of imported fiber glass and mineral wool pipe insulation products. Specifically we are looking for information about the products offered under the brand names Nu Fibre Tek Pipe, PoIR 1000, E Insulation, G.C. and Taita.

Although versions of these products have been brought to market in various regions of North America during the past 3 or 4 years, accurate data substantiating product claims has been elusive and/or inconsistent. Concern about the performance of products has led the NAIMA Commercial and Industrial Committee to conduct a preliminary investigation involving testing for chemical composition, fire safety, mold resistance and other performance characteristics. The initial testing has confirmed that there may be cause for concern regarding various claims and potential product efficiencies. NAIMA is also looking for credible documentation for these materials, including test reports that support product claims and material safety data sheets.

This letter is to request your assistance in gathering further information about these products and the companies that import and distribute them so that NAIMA can assess to what degree further action is required. Test data, samples, documentation, information regarding actual installations and contact information regarding the importers themselves will all be useful.

Your co-operation is appreciated. Please recognize that this situation requires urgent attention. If you would like further information or clarification, please contact me at [phone number].

Sincerely,

(signed)

Charles C. Cottrell
Vice President, Technical Services

[10] As part of this investigation, NAIMA commissioned and obtained for internal purposes a report from Gordon H. Hart, P.E., a consulting engineer with Artek Engineering LLC, dated July 24, 2008, entitled “FOREIGN PIPE INSULATION TESTING PROGRAM FOR THE NORTH AMERICAN INSULATION MANUFACTURERS’ ASSOCIATION”. That report provided in part:

Summary: Fiber glass pipe insulation samples, manufactured in China and Taiwan, were tested for certain mechanical and chemical properties. The

fiber glass samples, all with ASJ facing, came from five different manufacturers/importers. Tests were conducted on both the insulation material and the ASJ facing. All of the samples tested were first sent to Artek Engineering for receipt/inspection and documentation. All samples received by Artek Engineering displayed no signs of damage and were in good condition. (NOTE: this report does not contain the names of manufacturers/importers or the product names. The five manufacturers/importers are referred to as manufacturers A through E. When this report refers to sample A, it is an insulation sample made by manufacturer A, and sample B is made by manufacturer B etc.)

...

The facings were tested for four of the requirements listed in ASTM C1136, the industry standard for a vapor retarders: vapour permeance, microbial growth, puncture resistance, and tensile strength. Three of the five sample failed the vapour permeance requirement, two of the samples failed the requirement for microbial growth, and one sample failed both the puncture resistance and tensile strength requirements.

...

Comments on the Test Results

The Product Data Sheets (PDSs) published by the manufacturers of the pipe insulations were reviewed and compared to the test results, where applicable. In a test for alkalinity, the sample from manufacturer E failed to meet the stated pH range.

Of the ASJ facings, only that on the samples from manufacturers B and D met all four of the requirements of ASTM C1136 evaluated, C1136 being the standard for vapor retarders. The samples from manufacturers A and C that were tested had particularly high values of water vapor permeance (and much greater than the maximum allowable value of 0.02 Perm) but the facing on manufacturer E's sample fails this requirement as well, just not by as great a margin as the other two. The ASJ facings on the samples from manufacturers B and D met the Water Vapor Permeance requirement.

The ASJ facings on the insulation samples from manufacturers C and E failed to meet the ASTM C1136 requirements for microbial growth. The ASJ facing on manufacturer C's product failed to meet the minimum requirements for puncture resistance and for tensile strength.

Conclusions and Recommendations:

...

Tests on the ASJ facings revealed that three of the five ASJ facing materials failed to meet the requirements of ASTM C1136, the standard for vapor retarder facing. The ASJ facings on the pipe insulations samples from manufacturers C and E [*sic - presumably should be A and C*] failed the water vapor permeance test by a significant margin. An effective vapor retarder is necessary for thermal insulation to perform on below ambient systems. In my expert opinion the high vapor permeance of the ASJ materials on these products can lead to failure in cold pipe applications.

[11] Much later, it was revealed that sample C in Mr. Hart's report was from Nu Fibre. The Nu Fibre sample had been obtained by Artek Engineering from third party sources - not from Nu Fibre or any of its authorized distributors.

[12] Mr. Ishkanian first became aware of the NAIMA letter and the Hart report between July 24 and 28, 2008, when he received copies. On July 28, 2008, in his capacity as a representative of BCICA, he met with a Senior Policy Adviser, Energy Efficiency Codes and Standards, in the B.C. Ministry of Energy, Mines and Petroleum Resources. The purpose of the meeting was to discuss how BCICA could assist in enhancing energy efficiency goals, and the NAIMA letter and Hart report were part of the discussion. The building code did not require the certification of mechanical insulation, and Mr. Ishkanian raised the point of how standards could be used to ensure the more effective and efficient use of mechanical insulation. The matter of code requirements was, however, outside of the Ministry's jurisdiction, and Mr. Ishkanian failed to excite any interest in the subject.

[13] The NAIMA letter and the Hart report were first brought to Mr. Gerald's attention in the mid to late summer of 2008. He did not then know whether the samples tested by Mr. Hart included one from Nu Fibre. But then, in the fall of 2008, as he described it, "the floodgates opened". He received phone calls from his customers, from engineering firms, from a reporter for The Province, and from others, raising concerns about his product. This, he alleges, was due to a series of defamatory emails published by Mr. Ishkanian. Mr. Ishkanian, as we have seen, was then not only employed by a distribution competitor, BIS, but was also actively involved in both TIAC and BCICA.

NU FIBRE CERTIFICATION

[14] Beginning in 2005, Nu Fibre retained Intertek Testing Services NA Ltd., a division of Warnock Hersey and an accredited tester, to test its Tek Pipe product and certify its compliance with applicable ASTM (American Society for Testing and Materials) standards. Such certification was not required by the Building Code or any other applicable regulation, but was sought voluntarily. The procedures involved

factory inspections, quality control audits, and the testing of random production line samples “in good condition” from the factory, tested at Intertek’s facility in Coquitlam.

[15] Of relevance to this case, Intertek certified that the tested Tek Pipe specimens conformed to the criteria for thermal conductivity, water vapour sorption and water vapour transmission set by standard ASTM C 547. As I understand it, standard ASTM C 547 is an omnibus standard for thermal fibre insulation that includes the requirements of ASTM 1136 referred to in the Hart report. The evidence did not disclose any other applicable industrial standard of any relevance to the issues in this case.

[16] Effective January 1, 2008, Nu Fibre changed the source for the paper facings of its ASJ from a Chinese manufacturer to a North American manufacturer. This was represented as an improvement, but made no difference to the certification. Tek Pipe received its C 547 certification both before and after this change.

[17] On the evidence, the standard testing protocol for certification to ASTM standards provides for testing the product in the condition in which it comes off the factory production line, not in whatever condition it may be by the time it has passed through the hands of third parties outside of the manufacturer’s control. The former process, “certification testing”, when successfully completed, permits the product to display certification marks on its packaging. It is the latter process, “marketplace testing”, however, that was used by Mr. Hart of Artek Engineering in producing his report. Mr. Ceraldi observed that photographs disclosed much later showed that the carton of Tek Pipe received by Mr. Hart had sustained some damage on its way to Artek. There were no photographs of the samples themselves.

[18] It follows that in accordance with industry standards, a product’s failure to meet ASTM standards in marketplace testing, which cannot rule out post-manufacture damage to the product, does not equate to a failure to meet the certification standards established by ASTM.

THE ALLEGED DEFAMATION

1. The Importance of Pleadings

[19] The plaintiff alleges that the defendants defamed it in several publications, consisting of five emails and two articles.

[20] In considering the allegations, it is important to remember that defamation proceedings are technical in nature and pleading-dependent. A plaintiff must be precise in respect of the alleged defamatory words and their publication, just as a defendant must be precise as to the facts which he alleges justify his words in support of a plea of justification. See, for instance, *Meyer v. Chouhan*, 2001 BCSC 1446, *Fraser v. Central Ready-Mix Ltd.*, 1999 CanLII 2066, [1999] B.C.J. No. 2061 (S.C.), and *Farallon Mining v. St. Eloi*, 2012 BCSC 609.

[21] In this case, the plaintiff pleads that, by way of innuendo, words set out in the five emails, when taken together with the NAIMA letter and the Hart report that accompanied all of them as attachments, meant and were intended to mean that the plaintiff's Tek Pipe products were: "inferior and likely to allow ingress of water and eventually lead to mould and other construction deficiencies, and to sick building syndrome".

[22] The words of which the plaintiff complains are specified in the Amended Notice of Civil Claim, but the pleading does not distinguish which set of words appeared in which emails. Although the emails were all similar, they were not identical in content. Because the sting of the alleged defamation is alleged to arise by way of innuendo, I will set out the emails in full, highlighting those portions that are alleged to be defamatory.

[23] Before doing so, I observe that, as Professor R. E. Brown notes in his well-known text, *Brown on Defamation*, looseleaf (2013 release), 2nd ed. (Toronto: Carswell 1999) at 5-193, "There is considerable confusion on the proper use of innuendos".

[24] An innuendo arises where the plaintiff offers a particular meaning of the words that are alleged to be defamatory other than their literal meaning. It will be either an innuendo supported by the language itself; that is, an implication or inference reasonably arising from the natural and ordinary meaning of the words taken in context, or an innuendo that can be supported only by reference to some facts or circumstances extrinsic to the language of the publication (*Brown* at 5-194). The latter is described as a “true” or “legal” innuendo, whereas the former is sometimes described as a “popular” or “false” innuendo. If the plaintiff relies upon a true innuendo, then the specific extrinsic circumstances or facts known to the recipients that allegedly give rise to the defamatory meaning must be particularized.

[25] Although the Amended Notice of Civil Claim does not specify the type of innuendo upon which the plaintiff relies, it does plead the existence of facts “widely known in the industry” concerning the use of Nu Fibre Tek Pipe products in particular projects named in two of the emails. With respect to those emails, then, the plaintiff appears to be relying on true innuendo.

[26] No such particulars are pleaded in relation to the two articles. Accordingly, in relation to them, I take the plaintiff to be relying on false innuendo.

2. The Publications

[27] When Mr. Ishkanian’s discussion about standards with the Ministry of Energy, Mines and Petroleum Resources’ senior policy adviser proved unproductive, it occurred to him that the topic would be an appropriate subject for an article in the TIAC Times, a magazine published for TIAC by PointOne Media Inc. under contract. Mr. Ishkanian raised the matter with TIAC’s board, whose members were regularly canvassed for themes for publication. Mr. Ishkanian was then contacted by the former defendant Donald Proctor about writing an article, in which endeavour Mr. Ishkanian happily agreed to assist. He sent the following email to Mr. Proctor:

From: Chris Ishkanian
Sent: Friday, September 26, 2008 3:16 PM
To: dpro1@rogers.com

Cc: Jessica Krippendorf; beverly.dalys@ontario.ca
Subject: TIAC Times
Attachments: NAIMA report.pdf

Don: Further to our conversation this afternoon I am forwarding a copy of the NAIMA report that outlines some testing that was done on offshore products. I think this would make a good follow-up story (or another story for the same issue) highlighting the problem of non-compliant insulation materials entering the market. The non-compliant products eventually fall into the efficiency topic to some degree. The NAIMA report highlights a key failure during the testing and that is with water/vapour permeance. When the vapour barrier fails in a below ambient or high humidity application condensation is formed. This moisture will saturate the insulation and once the insulation gets wet it does not provide ANY insulating value, therefore there is no energy efficiency. The more serious issue is the presence of moisture will promote mold growth. When you consider that the majority of the insulation work is concealed in walls and ceilings this mold may be forming for months, or years, before anyone notices a problem. Sick building syndrome comes to mind. The NAIMA testing contradicts the claims being made by the offshore suppliers and at some point this has to come to a head. It is our belief that most of the offshore material being installed is being done without the knowledge of the design engineer but that is only our speculation. More research should be done on this topic.

Note: This version of the NAIMA report does not name the products that failed but NAIMA will release a copy of the report naming names to government officials. Because I am in the competitive market NAIMA will not release the names to me. I can tell you that three of the five products that were tested don't use North American paper as a vapour barrier and two of the tested products do use North American paper as a vapour barrier. It is my guess that it is no coincidence that three products failed the test and two passed. I will get back to you next week with a report from Ontario.

Best regards

Chris Ishkanian
Burnaby Insulation Supplies Ltd.

[28] Following this contact, Mr. Ishkanian sent emails to three engineers at major mechanical consulting firms, whose names he obtained from a colleague at Burnaby Insulation. The first was to Scott McEachern, an engineering consultant with Stantec Inc., a global consulting firm that had been involved in many projects supplied by Mr. Ceraldi's companies:

From: Chris Ishkanian
Sent: Tuesday, September 30, 2008 5:05 PM
To: scott.mceachern@stantec.com

Subject: Insulation update
Attachments: NAIMA.pdf

Good afternoon Scott. My name is Chris Ishkanian and I work for Burnaby Insulation Supplies. Steve Duzek from our office mentioned to me that you wanted to be kept up to date on any changes or situations that occur in the mechanical insulation field. Based on this assumption, I wanted to let you know that there is a fibreglass pipe insulation produced offshore (G.C. Insulation) that has been sold in the lower mainland market for a few years now on the basis of their claim to have completed some ASTM testing at Intertek in Coquitlam. Their data sheet and their cartons bear the Intertek/Warnock Hersey mark yet when I went to Intertek's website I could not find the company or their product listed. I contacted Intertek and they confirmed to me this afternoon that G.C. Insulation does not have any listings with Intertek. I wanted to let you know that based on this information G.C. Insulation does not seem to have any current North American testing information yet this product continues to be installed as if it did. Their data sheet and carton identification seem to be a bit misleading.

On another matter, I am forwarding a copy of a test report conducted by NAIMA with respect to claims being made by offshore fibreglass pipe insulation manufacturers. As stated in the report, three of the five offshore products tested failed the water sorption test and yet these products are promoted as being compliant to North American standards. This is a critical test as the failure of the vapour barrier will create condensation in high humidity or below ambient applications. This moisture will become a breeding [sic] ground for mold and in applications where the insulation is concealed behind a wall or ceiling the mold could become a serious health issue long before the source of the problem is identified.

Of the five products tested, four have been sold in the lower mainland and Vancouver Island over the past few years and more recently three of them have taken over the majority of the work in this area. It is our estimate that 70 percent of the fibreglass pipe insulation being installed in commercial and institutional buildings in the lower mainland and Vancouver Island is coming from offshore and all three of the locally stocked offshore pipe insulation products are on the list of products NAIMA tested. While I can't tell you which of the three tested products failed, some large, high profile government buildings such as the Abottsford [sic] Hospital, Trade and Convention Center, Richmond Speed Skating Oval and the Olympic Residences on False Creek are a few of the jobs that have been insulated with an offshore fibreglass pipe insulation that was part of the NAIMA test. While NAIMA is not prepared to offer a copy of the test report that names the products that failed to our company, it is our understanding that NAIMA will send a copy of the complete report to certain government officials. If you know of anyone that may be interested in this information I can help to arrange for a copy to be sent directly from NAIMA. I would think that in light of the potential risk of a vapour barrier failure that someone would want to do some further research into this matter.

If you have any questions on either subject, or wish to discuss these issues further, please do not hesitate to call.

Best regards

Chris Ishkanian
Burnaby Insulation Supplies Ltd.

[29] The second, essentially a cut-and-paste of the first with an added last paragraph, was sent to Scott Bruskiwich, a senior engineer with MCW Consultants, for whom Arc-West had installed Nu Fibre insulation on a project.

From: Chris Ishkanian
Sent: Tuesday, September 30, 2008 5:10 PM
To: sbruskiewich@mcw.com
Subject: Mechanical insulation
Attachments: NAIMA.pdf

Good afternoon Steve.

My name is Chris Ishkanian and I work for Burnaby Insulation Supplies. Steve Duzek from our office mentioned to me that you wanted to be kept up to date on any changes or situations that occur in the mechanical insulation field. Based on this assumption I wanted to let you know that there is a fibreglass pipe insulation produced offshore (G.C. Insulation) that has been sold in the lower mainland market for a few years now on the basis of their claim to have completed some ASTM testing at Intertek in Coquitlam. Their data sheet and their cartons bear the Intertek/Warnock Hersey mark yet when I went to Intertek's website I could not find the company or their product listed. I contacted Intertek and they confirmed to me this afternoon that G.C. Insulation does not have any listings with Intertek. I wanted to let you know that based on this information G.C. Insulation does not seem to have any current North American testing information yet this product continues to be installed as if it did. Their data sheet and carton identification seem to be a bit misleading.

On another matter, I am forwarding a copy of a test report conducted by NAIMA with respect to claims being made by offshore fibreglass pipe insulation manufacturers. As stated in the report, three of the five offshore products tested failed the water sorption test and yet these products are promoted as being compliant to North American standards. This is a critical test as the failure of the vapour barrier will create condensation in high humidity or below ambient applications. This moisture will become a breeding [sic] ground for mold and in applications where the insulation is concealed behind a wall or ceiling the mold could become a serious health issue long before the source of the problem is identified.

Of the five products tested, four have been sold in the lower mainland and Vancouver Island over the past few years and more recently three of them have taken over the majority of the work in this area. It is our estimate that 70 percent of the fibreglass pipe insulation being installed in commercial and institutional buildings in the lower mainland and Vancouver Island is coming

from offshore and all three of the locally stocked offshore pipe insulation products are on the list of products NAIMA tested. While I can't tell you which of the three tested products failed, some large, high profile government buildings such as the Abottsford [sic] Hospital, Trade and Convention Center, Richmond Speed Skating Oval and the Olympic Residences on False Creek are a few of the jobs that have been insulated with an offshore fibreglass pipe insulation that was part of the NAIMA test. While NAIMA is not prepared to offer a copy of the test report that names the products that failed to our company, it is our understanding that NAIMA will send a copy of the complete report to certain government officials. If you know of anyone that may be interested in this information I can help to arrange for a copy to be sent directly from NAIMA. I would think that in light of the potential risk of a vapour barrier failure that someone would want to do some further research into this matter.

Further to this, I am on the board of directors of the BC Insulation Contractors Association and would welcome the opportunity to meet with you to discuss some exciting programs we are working on. Your feedback would be beneficial to as we are developing a quality assurance program that we believe is long overdue. If this is of interest to you please do not hesitate to call.

Best regards

Chris Ishkanian
Burnaby Insulation Supplies Ltd.

[30] The third was to Mike Kirstiuk, an engineer with Earth Tech, a large engineering consulting firm. Although the Amended Notice of Civil Claim includes this email among the defamatory documents that Mr. Ishkanian is alleged to have published, it contains none of the words pleaded as being defamatory. Accordingly, I set it out for completeness, but I will not refer to it further:

From: Chris Ishkanian
Sent: Thursday, November 13, 2008 5:26 PM
To: Mike.Kirstiuk@earthtech.ca
Subject: Imported fibreglass pipe insulation
Attachments: NAIMA.pdf

Mike: I was given your contact information from Steve Duzek in our office. Steve suggested that I contact you in order to update you on some developments [sic] in the mechanical insulation industry. In the past few years we have experienced a dramatic increase in offshore fibreglass pipe insulation being installed in the lower mainland. As an industry we have questioned the acceptance of these products on the basis that some of these products have not conducted proper ASTM testing to confirm their compliance to North American standards. Quite often we see an importer of offshore products send in a sample of pipe insulation to Intertek in Coquitlam

for a simple flame and smoke test but that is a very small part of the certification process.

The North American Insulation Manufacturers Association (NAIMA) conducted some independent testing of five offshore products that are currently in the market. Of these five, the Taita brand is no longer being imported into Canada. I am forwarding a copy of the test results issued by NAIMA for your reference. As the report states, three of the five products failed the water permeance test which is a critical element in below ambient or high humidity applications. Unfortunately, we cannot access a copy of this report that actually names the products that failed, but NAIMA has indicated that they would provide this information to government officials. At this point, I cannot tell you which products failed but I can tell you that three of the five products tested are being used extensively in the lower mainland. One thing the report does bring to light is the fact that third party testing seems to have shown different performance results than the manufacturers' data sheets are claiming. Further testing may be required to confirm other compliance issues such as thermal conductivity and flame and smoke tests.

If you wish to discuss how this matter may impact your projects I would be pleased to discuss this with you further. If you have any questions, please do not hesitate to call.

Best regards

Chris Ishkanian
Burnaby Insulation Supplies Ltd.

[31] In the meantime, Mr. Ishkanian also attempted to awaken interest in the press, with the following email to a reporter at *The Province*:

From: Chris Ishkanian
Sent: Monday, November 10, 2008 4:20 PM
To: dinwood@theprovince.com
Subject: Insulation testing
Attachments: NAIMA report.pdf; Intertek RE Listing Directory.htm; gc-submittalsheet.pdf; Picture 002.jpg

Here is a copy of the NAIMA test report as we discussed, which is followed by two pages taken from the building code that reference pipe insulation. There are two things to note in the building code: 1) The insulation should not promote mold growth. 2) The insulation must meet certain flame spread and smoke developed standards. There is not much else under the building code to prevent untested materials from being used. One area of misinformation is the difference between testing and certification. Anyone can have Intertek perform tests on a sample of pipe insulation without verifying where it came from. Intertek will run the test and produce a report of their findings but that does not mean the product is certified. Nor does it ensure that any future product sold under that brand will meet the criteria of the tested sample because no one knows where the sample came from. The other important issue is follow up testing after the report is done. In order for

a product to be certified random testing is done to confirm the product meets the criteria of the original test sample. A licencing agreement is made between the manufacturer and the issuing testing agency and the manufacturer can use the licenced mark on their products. In the case of a simple test report, no licencing agreement is in place and no follow up inspections are required. Yet, the test results are reported on a product data sheet and the product is represented in the market as having proper testing done when in fact that is only part of the story. Testing is different than certification.

Three of the five products tested by NAIMA are currently being installed in the lower mainland on a wide variety of projects. The Taita brand is no longer being imported to this market and PolR is mainly sold in Eastern Canada. One of the products, G.C. Insulation, is being used extensively in town yet they have no current Intertek listings even though they print the Intertek mark on their data sheets and product cartons. I am including an email I received from Intertek as a result of my research into what type of tests Intertek had performed on behalf of G.C. and as you can see all listings were pulled. NuFibre is another one of the five products and the manufacturing plant in China closed down a few months ago. If this insulation was one of the ones that failed, who is going to stand behind the product? FYI, NuFibre was used exclusively at the Abbotsford Hospital, Richmond Speed Skating Oval and the Trade and Convention Centre to name a few. I would think that someone should be asking questions and verify that the NuFibre product that is installed in these buildings did not fail the test. Random samples of installed product should be performed to ensure there are no potential problems. The Olympic Village is a smorgasboard [*sic*] of insulation products in that there are a number of different contractors on site, all using different insulation materials. Some are North American made and some are from offshore. As a representative of this industry, my concern is if there is a vapour barrier failure on this site will ALL fibreglass insulation materials with a vapour barrier jacket get painted with the same brush? The North American manufacturers have spent years testing their products to ensure they meet the ASTM standards and continue to perform random tests throughout the year. The same can't be said for some of the offshore materials that are currently being installed. After you have had a chance to review this information, give me a call and we can discuss this further.

Best regards

Chris Ishkanian
Burnaby Insulation Supplies Ltd.

[32] Although this email contains passages that are similar to the words complained of, it does not in fact contain those words as pleaded. It cannot, therefore, form part of the claim for defamation; I include it for completeness, and as evidence of Mr. Ishkanian's state of mind.

[33] As noted, the plaintiff pleads in relation to these emails the existence of extrinsic facts:

It was widely known in the industry that Nu Fibre Tek Pipe products were one of three products which were at that time being installed in a wide variety of projects, and Tek Pipe products were installed in Abbotsford Hospital, the Trade and Convention Centre, Richmond Speed Skating Oval and the Olympic Residences on False Creek.

[34] That pleading is, however, relevant only to the emails to Mr. McEachern and Mr. Bruskiwich. The email to Mr. Proctor did not refer to those projects, and the other two emails, to Mr. Kirstiuk and Mr. Inwood at The Province, did not contain words that were particularized as defamatory.

[35] Mr. Ishkanian received no response to any of these emails (other than the one to Mr. Proctor), but Mr. Ceraldi did. Mr. Bruskiwich, for instance, called to enquire whether the Nu Fibre insulation he had used in a recent project was going to be a big problem.

[36] Finally, we come to the article written by the former defendant Don Proctor. It was published in two slightly different forms, first in the Journal of Commerce, and shortly after in the TIAC Times.

[37] Mr. Ishkanian provided information to Mr. Proctor for inclusion in the article, and reviewed and edited Mr. Proctor's draft in preparation for publication in the TIAC Times. Mr. Proctor asked him if he could submit it for publication in the Journal of Commerce. Mr. Ishkanian agreed, so long as his edits were included. What Mr. Proctor did not appreciate, and Mr. Ishkanian overlooked, was that Mr. Ishkanian contacted PointOne Media around that same time to make some a last minute edit to the TIAC Times version of which Mr. Proctor was unaware. This edit consisted of removing the names of the five manufacturers whose products had been tested: Nu Fibre Tek Pipe, PolR 1000, E Insulation, G.C. and Taita. Consequently, the article as published in the Journal of Commerce on January 21, 2009, read as follows, with the words complained of underlined:

Some foreign insulation failing to meet North American standards

Don Proctor
Correspondent

A number of high-profile Canadian construction projects are using fibreglass and mineral wool pipe insulation products made in China and Taiwan that may not meet all of the required insulation tests.

Some industry experts fear that the deficiencies could result in moisture problems causing mold.

In tests commissioned by the North American Insulation Manufacturers Association (NAIMA) on five offshore installation products, three failed ASTM C1136 tests for vapor permeance and microbial growth, said Chris Ishkanian, president of the Thermal Insulation Association of Canada (TIAC).

In a nutshell, the products absorbed moisture, thereby losing insulation value and potentially becoming a breeding ground for mold.

The tests were conducted by a certified third-party lab.

The results contradict compliance statements being made on some of the offshore manufacturers' data sheets and could bring into question the validity of other compliance statements.

Making matters worse, NAIMA won't release the names of the insulation manufacturers that failed ASTM C1136, Ishkanian pointed out.

"It's a puzzling decision by NAIMA, but they are doing the industry a great injustice by sitting on the information," he said.

Ishkanian added that no organisation or government agency is pressuring the offshore manufacturers to be accountable for their deficiencies.

"So who's going to have to pay for mold remediation?" He asked.

Charles Cottrell, vice-president of technical services of NAIMA, declined to discuss the issue.

The five products tested by NAIMA were Nu Fibre Tek Pipe, PoIR 1000, E Insulation, G.C. and Taita.

In a letter dated May 28, 2008, sent to engineers, TIAC and various other building trade associations, Cottrell wrote that NAIMA is looking for credible documentation, including test reports supporting product claims and material safety data sheets on the five products.

"Although versions of these products have been brought to market in various regions of North America over the past three or four years, accurate data substantiating product claims has been elusive and/or inconsistent," Cottrell wrote.

Ishkanian said it is the owner's or the engineering consultant's responsibility for specifying the right product.

But, many design/engineering consultants accept insulation products based on "single-test results" from accredited third party labs, rather than insisting on third-party certification that involves a comprehensive list of tests that meet the ASTM C547 standard.

Third-party labs include ULC or Intertek/Warnock Hersey.

A further concern is that some offshore manufacturers claim their products meet Canadian insulation standards, even though they don't have an ASTM C-547 stab of approval.

"We're finding that in some regions the CAN/ULC A102-03 flame and smoke tests are the only tests that have been done," he said.

That may be good enough to get the nod of approval from some engineering consultants, but should it be?

Critical tests not conducted by single-test manufacturers include compatibility with stainless steel, material shrinkage, vapor permeance and thermal performance.

"As an industry, we need to enforce all the components of ASTM C-547 as the minimum national requirement," said Ishkanian.

The industry is powerless to stop buildings from being constructed with inferior insulation products, he added. This makes it all the more important for engineering consultants to only use third-party certified products.

Even then, policing won't be easy.

"Right now there is very little site enforcement and very little understanding of what to look for," he said.

The TIAC president said that collecting samples for testing should be done at the production facilities.

The testing should include a full audit of the raw materials, a review of the manufacturing process and comprehensive testing of random samplings of products on the production line up to four times annually.

Products passing muster would receive a stamp of approval (a certifier's label) from the testing lab and a licensing agreement would be signed.

The agreement would allow the manufacturer to continue to use the approved stab, as long as it maintains the manufacturing process and Ron materials used to produce the test samples.

[38] I pause to observe that the recommended testing process described in the last four paragraphs is precisely the process that Nu Fibre Tek Pipe underwent with Intertek to obtain its C 547 certification. It was not the process employed by Mr. Hart mentioned in the third paragraph.

[39] The plaintiff pleads that in their natural and ordinary meanings, these words meant and were understood to mean:

- (a) that the products tested did not meet ASTM C-1136 or ASTM C-547 standards;

- (b) that the products were not certified by ULC or Intertek/Warnock Hersey;
- (c) that the products did not meet ASTM C-1136 tests for vapour permeance and microbial growth;
- (d) that the products were not compatible with stainless steel, were subject to material shrinkage and did not meet thermal requirements;
- (e) that Nu Fibre Tek Pipe was one of the products which failed to meet ASTM C-547 standards, and
- (f) that Nu Fibre Tek Pipe was an inferior and unacceptable product.

[40] Alternatively, the plaintiff pleads that by innuendo (presumably false innuendo), the words were meant and understood to mean that Nu Fibre Tek Pipe was an inferior product that should not have been used, that using the products risked moisture problems causing mould, and that others would have to pay for mould remediation.

[41] The TIAC Times version was published a few days later, on January 27, 2009, both in print and online:

SOME INSULATION DOESN'T MAKE THE CUT

by Don Procter

Some major projects in Canada are using fibreglass and mineral wool pipe insulation products made in China and Taiwan that may not meet some of the ASTM insulation testing standards, leading some industry experts to fear that deficiencies could cause serious problems like mould.

In tests commissioned by the North American Insulation Manufacturers Association (NAIMA) on five offshore insulation products, all of which had claimed to meet Canadian standards, three failed ASTM C1136 tests for vapour permeance and microbial growth, says Chris Ishkanian, TIAC's president. In essence, the products absorbed moisture, thereby losing insulation value and potentially becoming a breeding ground for mould.

"Unfortunately, a lot of the insulated piping is within the walls and mould growth could become severe without anyone seeing it," says Ishkanian. The tests were conducted by a certified third party lab.

The problem is that no organization or government agency is pressuring the offshore manufacturers to be accountable for their deficiencies. "So who's going to have to pay for mould remediation?"

The results in the NAIMA report contradict the compliance statements being made on some of the offshore manufacturer's data sheets and could bring into question the validity of other compliance statements. Making matters worse, NAIMA won't release the names of the insulation manufacturers that failed ASTM C1136, Ishkanian points out. "It's a puzzling decision by NAIMA, but they are doing the industry a great injustice by sitting on the information."

Charles Cottrell, vice-president of technical services for NAIMA, did not return calls from the TIAC Times about the issue, however, he sent an email stating that he was unable to comment on the tests now. "I will contact you as soon as I am able to do so," said the email.

In a letter dated May 28, 2008, sent to engineers, TIAC and various other building trade associations, Cottrell wrote that NAIMA is looking for "credible documentation," including test reports supporting product claims and material safety data sheets on the five products. "Although versions of these products have been brought to market in various regions of North America over the past three or four years, accurate data substantiating product claims has been elusive and/or inconsistent."

There are a number of public structures that have been insulated with products that were tested by NAIMA. "Should we not try to confirm whether or not these public structures will have a mould problem in the future?" asks Ishkanian.

Ishkanian says not to blame the contractor for using non-compliant insulation products; it is the owner's or the engineering consultant's responsibility for specifying the right product. But many design/engineering consultants accept insulation products based on "single-test results" from accredited third party labs, rather than insisting on third party certification that involves "a comprehensive list of tests" that meet the ASTM C547 standard. Third party labs include ULC or Intertek/Warnock Hersey.

Worrisome is the fact that some of the offshore manufacturers claim their products meet Canadian insulation standards even though they don't have an ASTM C547 stamp of approval. "We're finding that in some regions the CAN/ULC A102-03 flame and smoke tests are the only tests that have been done." That is good enough for some engineering consultants, but should it be? Critical tests not conducted by "single-test manufacturers" include compatibility with stainless steel, material shrinkage, vapour permeance, and thermal performance. "As an industry we need to enforce all the components of ASTM C-547 as the minimum national requirement," says Ishkanian.

The industry is powerless to stop buildings from being constructed with inferior insulation products, he adds, making it all the more important for engineering consultants to only use third party certified products. Even then, policing won't be easy. "Right now there is very little site enforcement and very little understanding of what to look for."

The TIAC president says that samples being submitted for testing can't be retrieved from warehouse storage facilities, as has been the case with some products in the past. Collecting samples for testing should be done at the production facilities and should include a full audit of the raw materials, a review of the manufacturing process, and comprehensive testing of random

samplings of products on the production line – up to four times annually is the best manner to ensure compliance. Under such rules, products that pass muster would receive a stamp of approval (a certifier's label) from the testing lab and a licensing agreement would be signed. This agreement would allow the manufacturer to continue to use the approved stamp as long as they maintain the manufacturing process and raw materials used to produce the test samples.

Ishkanian says ultimately the association would like both the National Building Code of Canada and consulting engineers to recognize C-547 as the minimum standard for insulation. The association is pushing for a reference to its best practices manual on insulation standards in the 2010 NBC. "In that manual if we can establish minimum testing criteria, then we have something to fall back on." The association's proposal to the NBC is straightforward enough. It calls for a "one-line inclusion" in Section Six of the NBC referring readers to TIAC's manual on national standards for mechanical insulation, explains Steve Clayman, a consultant retained by TIAC to help get the addition approved. Clayman is optimistic that the thermal association will make it into the new code.

[42] Once again, I observe that the recommended testing process described in the penultimate paragraph is precisely the process that Nu Fibre Tek Pipe underwent with Intertek to obtain its C 547 certification.

DISCUSSION

1. The Elements of Defamation

[43] In order to establish a claim for defamation, the plaintiff must show three things: that the words complained of referred to the plaintiff in the sense that they would be understood to have been published "of and concerning" the plaintiff; that they were published to someone other than the plaintiff; and that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person: see, for instance, *Hunter v. Chandler*, 2010 BCSC 729, and *Wang v. British Columbia Medical Association*, 2013 BCSC 394.

[44] If the plaintiff successfully establishes defamation in this way, falsity, malice and damage are presumed: *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 at para. 28. The onus then shifts to the defendants to establish any defences upon which they rely.

[45] The defence of justification (i.e., that the words were true), if established, will rebut the *presumption* of falsity, and is a complete defence.

[46] The defences of qualified privilege and fair comment on a matter of public interest, if established, will rebut the *presumption* of malice. Those defences can nevertheless be overcome by a finding that the defendants were actuated by *actual* or *express* malice. The onus shifts back to the plaintiff to prove such actual malice on a balance of probabilities: see *Wang* at para. 30.

[47] The defence of responsible communication, also rebuts the *presumption* of malice. Because its success requires the defendant to establish the element of diligence (responsibility), malice does not enter the equation as a separate consideration. It is a media-centred defence.

[48] I will now consider the elements of defamation in turn.

2. Did the Words Refer to the Plaintiff?

[49] The defendants argue that the words of which the plaintiff complains reflect on a body or class of persons generally, being offshore insulation manufacturers, and cannot be taken as referring to the plaintiff in any defamatory sense. Thus words concerning offshore manufacturers of insulation in general cannot be taken as pointing to Nu Fibre in particular: *Hyprescon Inc. v. Ipex Inc.*, [2007] O.J. No. 1327, 2007 CanLII 11316 (Sup. Ct. J.) at paras. 29-34.

[50] Statements that do not refer to a plaintiff by name may nonetheless meet the “of and concerning” requirement if they may reasonably be found to refer to the plaintiff in the light of surrounding circumstances: see *Mainstream Canada v. Staniford*, 2012 BCSC 1433 at para. 125, and *Butler v. Southam Inc.*, 2001 NSCA 121 at para. 39.

[51] There is also the potential for “group defamation” where, in some circumstances, defamatory statements about a group may be defamatory of the group’s members individually even though they are not otherwise identified: see

Bou Malhab v. Diffusion Métromédia CMR. Inc., 2011 SCC 9, [2011] 1 S.C.R. 213. As this basis for establishing the element of identification was neither pleaded nor argued, however, I will not consider it.

[52] Turning to the three relevant emails, I note that while none of them mentioned Nu Fibre by name, all were accompanied by the NAIMA letter, which did. They were also accompanied by the Hart report. Mr. Ishkanian conceded in cross-examination that he assumed, and that it would be reasonable for others to assume, that the five products tested in the Hart report were the same five products (including Nu Fibre) named in the NAIMA letter. Turning to the email to Mr. Proctor, I conclude that when Mr. Ishkanian wrote, “The NAIMA report highlights a key failure during the testing...”, a reasonable person in the position of Mr. Proctor would conclude that Nu Fibre’s product was among those being discussed.

[53] The emails to Mr. McEachern and Mr. Bruskiwich also make reference to the use of the offshore products in some “large, high profile government buildings such as the Abottsford [sic] Hospital, Trade and Convention Center, Richmond Speed Skating Oval and the Olympic Residences on False Creek”. On the evidence, the engineers to whom these emails were published, and others in their field, would have known, as did Mr. Ishkanian, that the pipe insulation product used in those “high profile government buildings” was Nu Fibre Tek Pipe. Accordingly, I am satisfied that a reasonable person in the position of Mr. McEachern or Mr. Bruskiwich would have understood that the words complained of were of and concerning Nu Fibre.

[54] The Journal of Commerce article specifically mentions Nu Fibre and so passes the “of and concerning” test. The TIAC Times article does not mention Nu Fibre. Given, however, that it is a publication for the insulation industry and refers to the NAIMA letter, I am satisfied that a reasonable members of the Association would understand the article to be of and concerning the products of Nu Fibre, among others.

[55] It follows that the plaintiff has established this element of the tort of defamation with respect to the emails to Mr. Proctor, Mr. McEachern and Mr. Bruskiwich, and with respect to the articles published in the Journal of Commerce and the TIAC Times.

3. Did the Defendants Publish Them?

[56] The defendants concede that they published the emails and the TIAC Times article. But, they submit, Proctor and the Journal of Commerce are solely responsible for the publication of the Journal of Commerce article, which the defendants neither authorized nor approved.

[57] On the evidence, I am unable to agree with this submission. Legal responsibility for publication may arise from, among other things, encouraging the primary author, and authorizing his publication: see *Wang* at para. 267 *et seq.*

[58] Mr. Ishkanian personally reviewed and edited Mr. Proctor's draft of the article, and specifically authorized him to submit it to the Journal of Commerce. The only condition was that Mr. Proctor maintains the edits that Mr. Ishkanian had made. Mr. Proctor did so. The fact that Mr. Ishkanian subsequently made a further edit that did not in any way involve Mr. Proctor does not relieve him of responsibility for the publication that he expressly authorized.

[59] Mr. Ishkanian's relationship with Mr. Proctor arose in the context of the preparation of an article for publication in the TIAC Times. Accordingly, I find that Mr. Ishkanian was acting in his capacity as president and director of TIAC when he authorized Mr. Proctor to submit his article to the Journal of Commerce. It follows that Mr. Ishkanian and TIAC are jointly responsible with Mr. Proctor and the Journal of Commerce (Reed Construction Data Inc.) for the publication of that article.

4. Did the Words Defame the Plaintiff?

[60] In considering the defamatory meaning of words, it is necessary to take into consideration all of the circumstances of the case, including any reasonable implications the words may bear, the context in which they are used, and the

audience to whom they were published: *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at para. 62. I should bear in mind neither what the unusually suspicious person might think nor what the unusually naive person might miss. It is the meaning that would be placed upon the words by persons in between these two extremes that is relevant: *Lewis v. Daily Telegraph Ltd.*, [1964] A.C. 234 at 258 (H.L.).

[61] The basic thrust of the defendants' position is that none of the words complained of identified Nu Fibre's product as having failed the tests that were discussed. Rather, the publications noted no more than that five products, including Nu Fibre, were tested, and that three, none of which was identified, failed. That is correct. The question comes down to what reasonable inferences arise from the words used, particularly given the audience to whom they were directed, and the extrinsic circumstances pleaded in relation to the emails.

[62] I turn first to the Proctor email. The words complained of relate to the test results in the Hart report, and what concerns arise from them. Viewing the words complained of in the context of the email as a whole, and the attachments that accompanied it, I am unable to find that Nu Fibre's reputation would have been lowered in the mind of any reasonable person in the position of Mr. Proctor, receiving this email. The connection to Nu Fibre is too tenuous. The focus of the email is very general and the words complained of focus on the testing and what flows from it, rather than the significance of the products that were tested.

[63] The McEachern and Bruskiwich emails, however, are different. The words complained of in these emails focus more on the significance of the products that were tested. They note that four of the five products tested were sold and used in the lower mainland with three of them taking over the majority of the work in the area. Although Mr. Ishkanian then indicates that he cannot say which of the three tested products failed, he then refers to three major projects where, the recipients would have known, Nu Fibre's product was used before raising the spectre of the potential of vapour barrier failure.

[64] I conclude that the words complained of in these two emails are, in law, capable of defaming Nu Fibre, and would, in fact, tend to lower Nu Fibre's reputation in the eyes of a reasonable person within the industry. Such a person would, in my view, reasonably infer from Mr. Ishkanian's association of the problems attributable to offshore manufacture with the projects that involved the installation of Nu Fibre Tek Pipe, that Nu Fibre's product was in all probability an inferior one that should be avoided by those wishing to minimize the risk of the problems discussed. That was certainly the concern Mr. Bruskiwich raised with Mr. Ceraldi.

[65] I come to a similar conclusion with respect to the two articles. In essence, as a matter of a reasonable inference, both associated the plaintiff's product with a risk of failure not shared by products manufactured in North America. Both further associated the plaintiff's product with the suggestion that offshore products' statements of compliance and certification are open to doubt. It is particularly ironic to note both that, as Mr. Ishkanian knew or ought to have known, Nu Fibre's product had in fact earned the certification for which he was advocating, and that the testing process he described as appropriate was not in fact the one used in the tests that were the focus of the articles and emails.

[66] Michael Storey, who distributes Nu Fibre's products in Alberta, testified that several customers brought the Journal of Commerce article to his attention, raising concerns about Nu Fibre Tek Pipe and describing it in less than complimentary terms. Once again, I conclude that the articles, in law, were capable of defaming Nu Fibre, and, in fact, would tend to lower its reputation among reasonable persons likely to read the two articles.

[67] I conclude that the plaintiff has established that the emails of September 30, 2008, to Mr. McEachern and Mr. Bruskiwich, together with the Journal of Commerce and TIAC Times articles, were defamatory. I turn next to consider the defences that have been raised.

5. Were the Words Justified?

[68] This defence must be analysed in the context of the defamatory meaning I have found. With respect to the emails, that meaning was the inference by true innuendo that Nu Fibre's product was in all probability an inferior one that should be avoided by those wishing to minimize the risk of the problems discussed.

[69] The defendants argue that this statement is true. This is because the plaintiff's product failed the testing administered by Mr. Hart. In that sense, the defendants assert, the product is inferior to those that passed the tests, or that failed with better results.

[70] While it is true that the plaintiff's product performed poorly on the tests administered by Mr. Hart, the fact remains that in the context we are discussing, that cannot reasonably be taken to be evidence of inferiority. Mr. Ishkanian himself pointed out (as quoted in the Journal of Commerce article) that the kind of testing upon which quality should be assessed is what I have described as "certification testing", not "marketplace testing" of the sort that in fact took place. There is no evidence that North American products subjected to the same sort of testing that Mr. Hart performed, based not on a random sample from the production line, but on what some third party submitted, would have performed any better. The entire discussion, in that sense, was illogical, however well-meaning the concern may have been.

[71] The same reasoning applies to the two articles. There is nothing in the evidence that could justify associating Nu Fibre Tek Pipe with products that were inferior in terms of their risk of failure, and whose certification or test compliance results were dubious. There was nothing dubious about Nu Fibre Tek Pipe's certification, and as discussed above, the testing discussed in the articles was irrelevant to the point that the author was attempting to make.

[72] The defendants submit that the fact remains that the plaintiff's product failed the tests, and that NAIMA was attempting to conduct field tests, not certification. That is not, however, the gist of what was being reported. The gist of all of the

communications was that the offshore products were not properly certified, as evidenced by the failure of several of them to pass the tests administered by Mr. Hart, and were, therefore, presumably inferior to properly certified North American products. But that cannot be taken from the test results. Field tests are irrelevant to certification, and in the absence of the testing of North American products under identical conditions, the premise of the communication collapses.

[73] Accordingly, the defence of justification fails.

6. Were The Words Published on an Occasion of Privilege?

[74] The defence of qualified privilege protects those who, acting in good faith, communicate defamatory words on an occasion that is privileged. It attaches to the occasion upon which the communication is made, not to the communication itself.

[75] For an occasion to be privileged, the person making the communication must have an interest or a duty, legal, social or moral, to make it to the person(s) to whom it is made, and the person(s) to whom it is made must have a corresponding interest or duty to receive it. That element of reciprocity is essential: *Adam v. Ward*, [1917] A.C. 309 at 394 (H.L.); *Reaburn v. Langen*, 2008 BCSC 1342 at para. 42 (aff'd 2009 BCCA 465), and calls for a contextual analysis: *Wang* at para. 280.

[76] It was not argued in relation to the two articles that the privilege was exceeded by too wide a publication. It seems to me unlikely that such an argument could succeed in relation to the TIAC Times article given that the segment of the population that would be likely to receive it or find it on the website would be quite limited. It could not be considered "publication to the world". The Journal of Commerce, "Western Canada's Construction Newspaper" would, I expect, have a wider circulation, but no evidence was adduced from which I could find that it was so wide as to exceed the limits of qualified privilege (taking it into the realm of responsible communication).

[77] The plaintiff submits that Mr. Ishkanian could have had no duty or interest in sending an email to Mr. Bruskiwich, or in publishing comments about products not

meeting Canadian standards when he knew or ought to have known that Nu Fibre did meet the standard for which he was advocating. In my view, this submission focuses too narrowly on particular parts of the communications and ignores their wider context. Moreover, the latter point is more relevant to the defences of fair comment and responsible publication than it is to the issue of whether the occasion of publication was one of privilege.

[78] I am satisfied that Mr. Ishkanian had a professional interest in communicating his concerns about offshore insulation and certification to other persons in the industry, including Mr. McEachern, Mr. Bruskiwich and the readers of the two journals, which were both industry-focused.

[79] The key question, then, is whether there was a reciprocal interest in those who received the communications.

[80] The two emails begin with the proposition that Mr. Ishkanian understood that the recipients desired “to be kept up to date on any changes or situations that occur in the mechanical insulation field”. There is no evidence that either Mr. McEachern or Mr. Bruskiwich ever expressed such an interest, and neither of them saw fit to reply to the emails. I am satisfied that Mr. Ishkanian was simply trying to get a verbal foot into the electronic door.

[81] But that does not mean that there was no reciprocal interest. On the contrary, the evidence of Mr. Ceraldi and Mr. Storey about the responses they received after the emails were sent and the articles published indicates a considerable interest in the subject on the part of the audience to whom of those emails and journal articles were addressed. Indeed, it makes perfect sense that engineers and consultants involved in the mechanical insulation field, as well as insulation contractors, distributors, builders, designers and engineers likely to receive the Journal of Commerce and the TIAC Times, would share Mr. Ishkanian’s professional interest. See, for instance, the discussion in this regard in *Mann v. International Association of Machinists and Aerospace Workers*, 2012 BCSC 181 at para. 84-93.

[82] Accordingly, I find that the necessary reciprocity of interest is established, and that all of the publications at issue were published on an occasion of privilege.

7. Were the Defendants Motivated by Express Malice?

[83] My finding that the defamatory words were published on an occasion of privilege provides the defendants with a complete defence to the plaintiff's claim unless the plaintiff proves on a balance of probabilities that in publishing the words in question, the defendants were motivated by malice. In this regard, it is the defendants' primary or predominant motive in publishing the defamatory words that is determinative: *Brown* at 16-46; *Mainstream*; *Wang* at para. 291.

[84] The elements of malice were set out by Kirkpatrick J.A. for the court in *Smith v. Cross*, 2009 BCCA 529, 99 B.C.L.R. (4th) 457:

30. The defence of qualified privilege can be defeated by a finding of malice on the part of the defendant or by a finding that the limits of the privilege were exceeded. Malice in this sense is also called "express malice" or "malice in fact" to differentiate it from the legal malice assumed by the very publication of defamatory comments [citation omitted].

31. The defence of fair comment is also defeated by malice, and malice "for the purpose of defeating the defence of qualified privilege is the same as malice for the purpose of defeating the defence of fair comment." (*Creative Salmon Company Ltd. v. Staniford*, 2009 BCCA 61, 307 D.L.R. (4th) 518 [*Creative Salmon*] at para. 32).

32. The term "malice" is more expansive than the everyday meaning of a desire to harm another. [Brown, *The Law of Defamation in Canada*, looseleaf, 2nd ed. (Toronto: Carswell 1999) at 16.3(2) suggests the alternate language of "bad faith". This Court summarized the definition in *Creative Salmon* at para. 37:

In *Botiuk* at para. 79, malice was defined to include "ill will" and "any indirect motive which conflicts with the sense of duty created by the occasion [in the case of qualified privilege]". The definition of malice stated by Mr. Justice Dickson in *Cherneskey*, [1979] 1 S.C.R. 1067, at 1099, and adopted by Mr. Justice LeBel in *WIC Radio*, [2008] 2 S.C.R. 420, at para. 102, includes "spite or ill will" and "any indirect motive or ulterior purpose".

33. The Supreme Court of Canada summarized the law of malice and qualified privilege in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 at para. 145:

Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes..."any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. ... Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth [citations omitted].

34. In *Canadian Libel and Slander Actions* (Toronto: Irwin Law, 2004) at 299, R. D. McConchie and D. A. Potts reduce this statement to a helpful framework for the categories under which a finding of malice can be made. A defendant is actuated by malice if he or she publishes the comment:

- i) Knowing it was false; *or*
- ii) With reckless indifference whether it is true or false; *or*
- iii) For the dominant purpose of injuring the plaintiff because of spite or animosity; *or*
- iv) For some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

More than one finding can be present in a given case.

[85] The position of the plaintiff is that Mr. Ishkanian's predominant purpose in sending the emails and publishing the articles with the inferences they contained concerning Nu Fibre was to eliminate Nu Fibre as a competitor in the business of supplying pipe insulation, and to continue a running feud between TIAC and Nu Fibre.

[86] The plaintiff points to a number of factors that arise from the evidence, including these:

- (a) as a distributor of pipe insulation products other than Nu Fibre, Burnaby Insulation was a competitor of Nu Fibre and its associated companies;
- (b) throughout the relevant time, Burnaby Insulation continued to stock and sell pipe insulation manufactured by G.C., one of the offshore manufacturers discussed in the NAIMA letter and

tested in the Hart report. This suggests, the plaintiff submits, that Mr. Ishkanian did not have a real concern about the use of these products since he was selling one of them and did not withdraw it;

- (c) on a number of occasions, Nu Fibre and/or its associated companies, attempted to become members of TIAC and publish advertisements in the TIAC Times, and were rebuffed;
- (d) Mr. Ishkanian knew or ought to have known that Nu Fibre Tek Pipe was certified to the C 547 standard by Intertek, yet published communications that suggested otherwise; and
- (e) Mr. Ishkanian knew or ought to have known that the marketplace form of testing conducted by Mr. Hart for NAIMA was not relevant to certification and did not provide an appropriate basis for comparing insulation manufactured offshore with insulation manufactured in North America; the words he published, however, suggested otherwise.

[87] As noted in *Brown* at 16-23, malice is essentially a state of mind, and relates to the state of mind of the defendant at the time of the publications in question. Mr. Ishkanian was cross examined at length. I am unable to find that he acted maliciously in any proper sense of that word. He may have been careless to some degree, and guilty of tunnel vision. But the evidence does not establish that his primary or predominant motive in publishing the defamatory words was anything other than communicating what I find were genuine concerns about the potential for harm arising from lack of appropriate standards and certification, especially in relation to products manufactured offshore. As someone who had been involved in the industry for many years, and was active in industry associations, such concerns would come naturally to him. His discussion with the government led him to conclude that any changes would have to be industry-driven, rather than government-driven; hence his emails and articles.

[88] Undoubtedly Mr. Ishkanian could have pursued these concerns in a manner that did not give rise to defamatory inferences concerning the products of Nu Fibre. But it must be remembered that these were inferences. Nowhere did he state explicitly that Nu Fibre's product was inferior, or that it lacked proper certification. Moreover, he did not select Nu Fibre as a subject of concern; that was done by NAIMA.

[89] There is no doubt that Mr. Ishkanian knew, and expressly stated (as quoted in the articles) that the proper form of testing for certification to the C 547 standard involved collecting samples for testing at the production facilities, which was not the sort of testing carried out by Mr. Hart. But that is not to say that the result of Mr. Hart's testing is could not properly give rise to concern. Consequently, while I am able to find a lack of clear thinking on Mr. Ishkanian's part, I do not find this to be evidence of a predominant motive that would qualify as malice. Indeed, if he truly had been motivated by malice, one might expect that he would have left that part out, and would not have deleted the manufacturers' names from the TIAC Times article.

[90] I reject the contention that his concerns are shown to have been hollow by the fact that Burnaby Insulation continued to sell G.C. products. Mr. Ishkanian was consistent in pursuing those concerns from at least 2007 and was personally responsible for sending a sample of G.C.'s product for testing by NAIMA. Moreover, as he pointed out to the senior policy adviser at the Ministry of Energy, Mines and Petroleum Resources, no code or regulation required pipe insulation to be certified to any particular standard in order to be sold in British Columbia.

[91] With respect to the differences between the parties concerning advertising in the TIAC Times and membership in TIAC, there were two sides to that story, and the evidence does not support the contention that any ill feeling arising from or leading to those differences motivated Mr. Ishkanian in taking the steps he did that led to the publication of the defamatory words.

[92] It follows that the plaintiff has not satisfied the burden on it of establishing that the defendants were actuated by express malice in publishing the words of which it complains. The defendants are accordingly entitled to the benefit of the defence of qualified privilege, and the action must be dismissed.

[93] It is therefore unnecessary for me to consider the defences of fair comment and responsible communication, or whether the plaintiff's settlement of its claim against the former defendant Reed Construction Data Inc. doing business as the Journal of Commerce effectively released Mr. Ishkanian and TIAC as joint tortfeasors in relation to the publication of the Journal of Commerce article.

[94] Now that the parties have the advantage of the findings I have made, it would seem to me proper that any continuing publication of the TIAC Times article on that journal's website or elsewhere should be terminated immediately. This is not a direction; but I observe that the failure to do so in view of my findings would suggest bad faith.

CONCLUSION

[95] The plaintiff was defamed in two emails sent by the defendant Ishkanian and in two articles, published in the Journal of Commerce and the TIAC Times, for the publication of which the defendants are responsible.

[96] Although the defendants failed to justify the defamatory meaning of the words of which the plaintiff complains, they did establish that the emails and the two articles were published on an occasion of privilege.

[97] As the plaintiff has failed to prove that the defendants were motivated primarily by malice, the finding that the words were published on an occasion of privilege provides a complete defence to the claim.

[98] The claim is accordingly dismissed. I am minded, however, to deprive the defendants of the costs to which they would otherwise be entitled, and to make no award of costs. *Upton v. Better Business Bureau of Mainland British Columbia*

(1980), 23 B.C.L.R. 228, was a case where the defendant also succeeded on the basis of qualified privilege, though the words were defamatory and the defence of justification failed. Mr. Justice Gould stated at p. 234:

As the [defendant] has escaped the consequences of publishing a defamatory statement, by the defence of qualified privilege, in the particular circumstances of this case I see no reason why it should be rewarded with costs.

[99] It seems to me that the circumstances of the present case lead to the same conclusion. Those circumstances include not only the finding of defamation and the failure of the defence of justification, but also the refusal of TIAC to accept advertising from the plaintiff or its associated companies that would have mitigated the consequences of the defamatory innuendo arising from the article. While I accepted that such refusal was not indicative of predominantly malicious motivation, I consider it relevant in this context.

[100] I am mindful, however, that the parties have not had an opportunity to make submissions concerning costs in the light of the findings I have made. If the guidance I have endeavoured to provide does not create a sufficient foundation for an agreement as to costs, the parties are at liberty to apply within 60 days.

“GRAUER, J.”