

# Ethical and Legal Strategies for Protecting Confidential Research Information

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## A Challenge to Research Confidentiality

From 1992 through 1994, Russel Ogden, an MA student in Criminology at Simon Fraser University (SFU), conducted interviews with people who had attended the suicides and euthanasia of persons with AIDS. The University Ethics Committee had approved Ogden's research protocol, including his pledge to maintain "absolute confidentiality" regarding the identity of his research participants.

In 1994 after the *Vancouver Sun* ran an article reporting the death of an "unknown female," the Vancouver Coroner subpoenaed Ogden to appear at an inquest into the cause of her death. Ogden agreed to testify about his research findings, but refused to divulge the identity of any of his research participants. He then became the first and only researcher in Canada we know of to be threatened with a charge of contempt for refusing to share confidential research information with a court.<sup>2</sup>

When Ogden was subpoenaed, the SFU administration declined to provide legal counsel, did not attend the inquest, provided only \$2000 on "compassionate grounds" toward legal fees that eventually totalled more than \$11,000, and wrote a letter of "support" that was so tepid and

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<sup>2</sup> In a 1998 article in the Canadian Association of University Teachers (CAUT) *Bulletin*, the Association's monthly newspaper, we requested information about any cases members might know about. See J. Lowman & T. Palys, "When Research Ethics and Law Conflict" *CAUT Bulletin ACPPU* (June 1998) 6. Not one was forthcoming. If any readers of the current article know of such a case, we would appreciate hearing about it.

misleading Ogden's lawyers decided not to submit it as evidence.<sup>3</sup> Ogden's lawyers employed the common law “Wigmore test” to assert that his communications with research participants were privileged. Ogden won the case, and then sued the University to recover his legal costs. Judge Steinberg presided. He concluded that, as a matter of law, the university was not obliged to pay Ogden’s legal fees. But his written decision included an *obiter dictum* that lambasted the University for its “hollow and timid” defense of academic freedom. Recognizing that ethics and law do not always lead to the same conclusions, Judge Steinberg urged the administration to reconsider its ethical stand on the payment of Ogden’s legal fees.<sup>4</sup>

In the two years that elapsed between the trial and the decision, and after concerted pressure by SFU’s School of Criminology for the University to support Ogden, a new President convened an internal inquiry into the university’s handling of the case. The review was released in October 1998,<sup>5</sup> two months after Judge Steinberg’s decision. It, too, pilloried the University for its failure to protect Ogden’s research participants and recommended that the university apologize to Ogden, reimburse his legal fees, and undertake to support graduate researchers should they encounter similar problems in the future. President Jack Blaney accepted all three recommendations.

In retrospect, given the position on ethics and law articulated in the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*<sup>6</sup> released in August 1998, the University may have had little choice. When judged by the principles laid out in the *Policy Statement* it was clear that Russel Ogden had acted ethically, but the university had not.

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<sup>3</sup> For commentary on the Ogden case and SFU’s reaction to it, see J. Lowman & T. Palys, “A Law Unto Itself?” *Simon Fraser News* (27 November 1997) 5; T. Palys & J. Lowman, “Abandoning ‘the Highest Ethical Standards’: Research Ethics at SFU” *The Bulletin* (April 1998) 5; Lowman & Palys, *supra* note 2; J. Lowman & T. Palys, “The Liability of Ethics” *Simon Fraser News* (16 July 1998) 5; J. Lowman & T. Palys, “Ethics/Law Conflict Revisited” *CAUT Bulletin ACPPU* (September 1998) 2; J. Lowman & T. Palys, *The History of Limited Confidentiality at SFU* (1998), online: T. Palys Homepage <<http://www.sfu.ca/~palys/History.html>> (date accessed: 14 June 2000) [hereinafter *The History of Limited Confidentiality at SFU*].

<sup>4</sup> *Ogden v. Simon Fraser University* (19 June 1998), Burnaby Registry No.26780 (B.C. Prov. Ct.), online: T. Palys Homepage <http://www.sfu.ca/~palys/steinbrg.htm> (date accessed: 14 June 2000).

<sup>5</sup> British Columbia, *Russel Ogden Decision Review: A report to the President of Simon Fraser University* (British Columbia: Simon Fraser University, 1998) (Co-chairs: N. Blomley & S. Davis).

<sup>6</sup> Ottawa, Department of Supply and Services, 1998, online: Social Sciences and Humanities Research Council Homepage <http://www.sshrc.ca/english/programinfo/policies/Index.htm> (date accessed: 14 June 2000) [hereinafter *Policy Statement*].

### **The *Policy Statement* and the Researcher's Ethical Obligation to Protect Confidentiality**

The *Policy Statement* was generated through the collaboration of Canada's three federal research-funding councils.<sup>7</sup> The three councils require all council-funded research to comply with the *Policy Statement*, thus making it something of a national standard for Canadian universities. Like every code of human research ethics we have seen, it makes the protection of the rights and interests of research participants its objective, and identifies the provision, respect and maintenance of confidentiality among its fundamental ethical principles:

**Respect for Privacy and Confidentiality:** Respect for human dignity ... implies the principles of respect for privacy and confidentiality. In many cultures, privacy and confidentiality are considered fundamental to human dignity. Thus, standards of privacy and confidentiality protect the access, control and dissemination of personal information. In doing so, such standards help to protect mental or psychological integrity. They are thus consonant with values underlying privacy, confidentiality and anonymity respected.<sup>8</sup>

Confidentiality is a fiduciary relation requiring the utmost degree of trust. It covers situations where persons share information with the expectation that it will go no further. Although all citizens enjoy a right to privacy, researchers have a special ethical obligation to protect the privacy of research participants.

If there is an increased risk to research participants because of their participation, it is because the researcher has walked into their lives and asked them to share information about themselves, for little or no reward, that will help the researcher and, hopefully, society in general. Taking information from people for the broader social good without ensuring they are protected from harm would be exploitative and unethical.

Of course, safeguarding the *identity* of participants is the researcher's primary concern. The *information* research participants provide is not usually "confidential" — the whole purpose of gathering information is to write about it in a public forum. The ethical obligation is for the researcher to ensure that research participants cannot be identified on the basis of the information presented and to prevent

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<sup>7</sup> The Medical Research Council (MRC), the National Science and Engineering Research Council (NSERC) and the Social Science and Humanities Research Council (SSHRC).

<sup>8</sup> *Supra* note 6 at i-5.

information being linked to them, unless specific arrangements to the contrary have been made.

While the Ogden case apparently is unique in Canada, an examination of US cases offers some hints as to what sorts of research scenarios, if any, might find their way into Canadian courts. The US experience shows that, although challenges to research confidentiality via subpoena are relatively rare<sup>9</sup> they have touched a broad range of disciplines. Reported cases<sup>10</sup> appear in the realms of medicine, pharmacology, anthropology, criminology, sociology, business administration, kinesiology, women's studies, psychology and economics.

A typical scenario occurs when two parties are engaged in high stakes litigation, and one cites and the other wishes to challenge the work of an independent researcher who has information relevant to the issues at law.<sup>11</sup> Often, the identity of particular research participants or acquisition of uniquely identifiable information is not an issue, although in some cases, that is exactly what has been sought.<sup>12</sup> In other cases, assertive grand juries have subpoenaed researchers in the hope their field notes might yield relevant evidence.<sup>13</sup> In one unreported case, the researcher was subpoenaed as part of a criminal trial; the researcher had observed a police interrogation (the police were his research participants) and thus was a material witness. The lawyer for an accused subpoenaed the researcher to provide evidence about an interrogation.<sup>14</sup>

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<sup>9</sup> A 1996 volume of *Law and Contemporary Problems*, 59:3, devoted to court-ordered disclosure of academic research identified about twenty relevant cases out of probably hundreds of thousands of research studies conducted during the thirty year period they refer to. For a description of these cases, see J. Lowman & T. Palys, "Informed Consent, Confidentiality and the Law" (1999), online: T. Palys Homepage <http://www.sfu.ca/~palys/Conf&Law.html> (date accessed: 14 June 2000).

<sup>10</sup> Although cases discussed in the secondary literature probably do not include all such cases, they nevertheless give a good idea of the range of research affected and how US courts have balanced competing interests in those situations.

<sup>11</sup> See e.g. *Dow Chemical v. Allen*, 672 F.2d 1262, 1274-77 (7<sup>th</sup> Cir. 1982), and *Deitchman v. Squibb*, 740 F.2d 556 (7<sup>th</sup> Cir. 1984). In both cases, the courts agreed that any identifying information should be protected.

<sup>12</sup> An early example is *Richards of Rockford v. Pacific Gas & Elec.*, 71 F.R.D. 388 (N.D. Cal. 1976). The most recent example is *In re: Cusumano & Yoffie [United States v. Microsoft]*, No. 98-2133 (1st Cir. 1998) [hereinafter *Microsoft*]. In both cases, the courts agreed that any identifying information should be protected.

<sup>13</sup> See M. Brajuha & L. Hallowell, "Legal intrusion and the politics of field work: The impact of the Brajuha case" (1986) 14 Urb. Life 454; and R. Scarce "(No) Trial (But) Tribulations: When Courts and Ethnography Conflict" (1994) 23:2 J. Contemp. Ethnol. 123. In neither case were promised confidences violated, although Scarce spent 159 days in jail for contempt in order to maintain them. Of course, grand juries do not exist in Canada.

<sup>14</sup> See R. Leo, "Trial and Tribulations: Courts, Ethnography, and the Need for an Evidentiary Privilege for Academic Researchers" (1995) 26:1 Amer. Soc. 113. The case is unusual to the extent that the research participants apparently did not object to

The traditional stance of social scientists to a subpoena that threatens research participants is to resist such intrusions at every turn.<sup>15</sup> The struggle of U.S. academics to protect research information from grand juries and high stakes litigants stands as testimony to the fundamental value attached to academic freedom, i.e. when it comes to confidential research, ethics should not be subordinated to law.<sup>16</sup>

The *Policy Statement* codifies that approach by making defence of confidentiality to the full extent possible within law its *minimum* ethical standard:

The researcher is honour-bound to protect the confidentiality that was undertaken in the free and informed consent process, to the extent possible within the law. The institution should normally support the researcher in this regard, in part because it needs to protect the integrity of its own REB. If the third party attempts to secure the research data by subpoena, it is legitimate for the researcher and the institution to argue the issue in court. The records of the REB and of the consent might be useful as part of this counter-argument, or may be requested by those seeking access. However, if the court issues a subpoena, legal appeals will probably be the only legal option open to the researcher to protect the confidentiality of the records.<sup>17</sup>

Many social science disciplinary research codes enjoin researchers to do the same thing, i.e., defend research confidentiality against third party attempts to use law to acquire confidential research information. But none of these codes explains *how* that can or should be done.

Researchers can maximise protection of confidentiality in two main ways:

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the researcher testifying; they thought his testimony would help their cause. Given that research participants have the right to waive privilege, law and ethics may *not* have been in conflict in this instance.

<sup>15</sup> For the social sciences generally, see L. Kidder, *Research Methods in Social Relations*, 4<sup>th</sup> ed., (New York: Holt Rinehart & Winston, 1981); for our discipline, criminology, see M. Wolfgang, "Criminology: Confidentiality in Criminological Research and Other Ethical Issues" (1981) 72:1 *J. Criminal Law and Criminology* 345.

<sup>16</sup> See generally P. Nejelski, ed., *Social Research in Conflict with Law and Ethics* (Cambridge, Mass.: Ballinger, 1976); R.F. Boruch & J. Cecil, eds., *Solutions to Ethical and Legal Problems in Social Research* (New York: Academic Press, 1983); and J. Cecil & G.T. Wetherington, eds., "Court-Ordered Disclosure of Academic Research: A Clash of Values of Science and Law" (1996) 59:3 *Law and Contemporary Problems*.

<sup>17</sup> *Supra* note 6 at 3.2.

- 1) By taking *methodological* precautions to protect research participants from third party intervention by making it impossible to identify individual respondents, even if one wanted to. For example, in some types of research, one need never ask for or know participants' names in the first place; when we must obtain that information, any records (e.g. data files, interview transcripts, field notes) should be anonymised at the earliest opportunity. Clearly, methodological protections should be implemented wherever possible.
- 2) In some cases, researchers cannot help but know the identity of participants.<sup>18</sup> In this type of research, researchers need to anticipate the *legal strategy* to be used to assert evidentiary privilege, and design research in a way that maximises their chances of success. The design of Russel Ogden's research on assisted suicide exemplified this approach.

Regarding methodological precautions, researchers can consult a variety of methodology texts for advice, which will not be reviewed here.<sup>19</sup> The current paper focuses on the second alternative: exploring how researchers in Canada can maximise legal protection of research participant identities and/or information that can be linked to them.

The discussion below begins with an outline of some legal and ethical principles that frame researchers' choices, and then reviews the common law on privilege in Canada and the U.S. to show how researchers can design their research to maximise the legal protection of confidential information. This is followed by discussion of ethical principles that should be considered in the unlikely event that a Canadian court orders disclosure of confidential information that could harm a research participant. We conclude by proposing that universities and the three granting councils begin a campaign for statutory protection of research participants along the lines of the confidentiality certificates that are currently available in the United States for research on sensitive topics such as drug use, criminal activities, sexual behaviour, and genetic information.

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<sup>18</sup> The more inductive and qualitative research becomes, the more likely it is that researchers know the identities of their participants. Also, in longitudinal research, such as the National Longitudinal Study of Children and Youth conducted by Statistics Canada, it is necessary to know participant identities in order to track them over time.

<sup>19</sup> See e.g. B.L. Berg, *Qualitative Research Methods for the Social Sciences* (Boston: Allyn & Bacon, 1989); J. Lofland & L.H. Lofland, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis*, 3rd ed., (Belmont, CA: Wadsworth, 1995); T. Palys, *Research Decisions: Qualitative and Quantitative Perspectives*, 2nd ed., (Toronto: Harcourt Brace, 1997).

## The Legal Context

### *The Right of Every Citizen to Privacy*

The supreme law of Canada is the *Charter of Rights and Freedoms*.<sup>20</sup> The *Policy Statement* alludes to its provisions regarding privacy when it notes: “REBs [Research Ethics Boards] should respect the spirit of the Canadian *Charter of Rights and Freedoms*, particularly the sections dealing with life, liberty and security of the person as well as those involving equality and discrimination.”<sup>21</sup> Although “privacy” as such is not mentioned in the *Charter*, the Supreme Court of Canada has taken section 7 regarding “life, liberty and security of the person” and section 8, which protects the citizen from “unreasonable search or seizure,” to mean that privacy is a fundamental right of all citizens in a democratic society. In *Dyment* the Supreme Court declared that “privacy is at the heart of liberty in a modern state,” and a value that, “is essential for the well-being of the individual.” In a recent legal opinion on these issues, Jackson and MacCrimmon note:

In its jurisprudence the Supreme Court views privacy as a personal right of the individual, based on autonomy, dignity, liberty and security interests. In *Dyment*, Mr. Justice La Forest, in identifying those situations where we should be most alert to privacy considerations, adopted the concept of «zones of privacy,» and identified three such zones: territorial, personal and informational. ... Informational privacy ...

... “derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit.” In modern society, especially, retention of information about one’s self is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, that situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.<sup>22</sup>

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<sup>20</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>21</sup> *Supra* note 6 at i-8.

<sup>22</sup> M. Jackson & M. MacCrimmon, *Research Confidentiality and Academic Privilege: A Legal Opinion* (1999). Commissioned by Simon Fraser University (SFU) Research Ethics Policy Revision Task Force, online: SFU President's Homepage <<http://www.sfu.ca/pres/researchconfidentiality.htm>> at 16ff (date accessed: 14 June

In the later decision of *Plant*, the Supreme Court explored further the zone of informational privacy:

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that section 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.<sup>23</sup>

It is precisely these "intimate details of the lifestyle and personal choices of the individual" that are most in need of protection in research.

#### ***Other Statutory Obligations to Protect Privacy***

Although we have not conducted a review of federal and provincial freedom of information and protection of privacy acts, researchers should be aware that this legislation may apply to the teaching and research materials of employees of post-secondary institutions. In our home province, British Columbia, these materials are currently exempt from the *Freedom of Information and Protection of Privacy Act*<sup>24</sup>. However, the Special Committee that reviewed the *Privacy Act* in 1999, recommended that it be amended to apply its privacy provisions to teaching and research information of academics, while maintaining their exemption from the access provisions of the *Act*.<sup>25</sup>

#### ***The Legal Obligation to Provide All Relevant Information to a Court***

While Sections 7 and 8 of the *Charter* reveal areas in which research ethics and law lead to similar conclusions, others hold the potential for conflict. For example, the *Charter* also guarantees rights of due process, part of which implies that all citizens involved in court action should have a right of "full answer and defence" for any actions, criminal or civil, in which they are involved.<sup>26</sup> When researchers hold information

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2000) [hereinafter Jackson & MacCrimmon]. The quotation by La Forest J. can be found at *R. v. Dymont*, [1988] 2 S.C.R. 417 at 429-30 [hereinafter *Dymont*].

<sup>23</sup> *R. v. Plant*, [1993] 3 S.R.C. 281 at 293 [hereinafter *Plant*].

<sup>24</sup> R.S.B.C. 1996, c. 165 [hereinafter *Privacy Act*].

<sup>25</sup> British Columbia, *Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act*, (British Columbia: Queen's Printer, 1999).

<sup>26</sup> See e.g. J. Sopinka, S.N. Lederman, & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) [hereinafter *The Law of Evidence in Canada*].



that is relevant to a matter being adjudicated, they can be subpoenaed to provide that information.

If the right to full answer and defence were absolute then all citizens, including researchers, would be required to testify in all circumstances. However, the right to full answer and defence is not absolute and must be balanced with other rights, such as the right to privacy and confidentiality. As Madame Justice McLachlin explained in her minority decision in *O'Connor*: “The *Canadian Charter of Right and Freedom* guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair: [...] What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process...”<sup>27</sup> These “lawful interests of others” are defined in both statutory and common law.

### **Privilege in Canadian Law**

The notion of “privilege” pertains to rules of evidence and arises at trial with respect to a witness:

When information is privileged a witness may not be compelled to testify about the information and may not be compelled to disclose documents or other materials which contain the information. Under the privilege rules, relevant information is excluded in order to further social values external to the trial process such as fostering confidential relationships.<sup>28</sup>

Privilege is granted in the interest of public policy and the good order of society. Because privilege can interfere with the court's search for truth and may conflict with a defendant's or litigant's right to make full answer and defence, courts and legislatures grant privileges sparingly.

### ***Statutory Privileges***

There are a few statutory privileges in Canada. Some of these are detailed in the *Canada Evidence Act*,<sup>29</sup> which demarcates, for example, privileges for “communications during marriage” (s.4.3), and the Queen's Privy Council and Ministerial privilege (s.37-39).

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<sup>27</sup> *R. v. O'Connor* [1995] 4 S.C.R. 411 at 517 [hereinafter *O'Connor*].

<sup>28</sup> Jackson & MacCrimmon, *supra* note 22 at 33.

<sup>29</sup> *Canada Evidence Act*, R.S.C. 1985, c. C-5 [hereinafter *Evidence Act*].

A statutory privilege not mentioned in the *Evidence Act*, but that is of particular interest to the current discussion, was created by the *Statistics Act*<sup>30</sup>. Statistics Canada researchers are required to take an oath of secrecy. Section 17b of the *Statistics Act* makes it an offence to violate that oath by releasing information that would identify any individual who participates in Statistics Canada research. Section 18 protects Statistics Canada research from court ordered disclosure:

Information is privileged

18. (1) Except for the purposes of a prosecution under this *Act*, any return made to Statistics Canada pursuant to this *Act* and any copy of the return in the possession of the respondent is privileged and shall not be used as evidence in any proceedings whatever.

Idem

(2) No person sworn under section 6 shall by an order of any court, tribunal or other body be required in any proceedings whatever to give oral testimony or to produce any return, document or record with respect to any information obtained in the course of administering this *Act*.

The logic of this privilege originates in the mandatory participation requirement of the census; Canadians are liable for fine and/or imprisonment if they do not participate. However, the same privilege pertains to Statistics Canada surveys that do not involve mandatory participation.

The legislative protection of the *Statistics Act* is a strong affirmation of the importance Parliament attaches to research confidentiality, at least at Statistics Canada. However, although Statistics Canada researchers routinely use it as the basis to guarantee unlimited confidentiality to research participants — a confidence that, as far as we know, has never been breached — technically it is not “absolute”. Any blanket assertion that one set of rights can *prima facie* supersede all others is contrary to Supreme Court jurisprudence that requires the balancing of conflicting *Charter* rights.<sup>31</sup> As with any other legislation, the *Statistics Act* is subject to *Charter* challenge and would be balanced against whatever other *Charter* rights were being advanced in the case at hand. It is also unclear whether the *Statistics Act* would trump provincial mandatory reporting laws relating to child and elder abuse, which represent a problem for all researchers.

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<sup>30</sup> R.S.C. 1985, c. S-19 [hereinafter *Statistic Act*].

<sup>31</sup> See *e.g. R. v. Mills*, [1999] 3 S.C.R. 668 [hereinafter *Mills*].

Although the ethical obligations of Statistics Canada and academic researchers are much the same, there is no comparable statutory protection of academic research participants. Academic and other researchers must assert privilege using common law.

### *Privilege in Common Law*

There are two types of common law privilege — class and case-by-case — which are distinguished by the location of the onus of proof. With class privilege, the onus is on the parties seeking information to demonstrate why it should be divulged. When privilege is asserted on a case-by-case basis, the onus is upon the person claiming the privilege to establish why it should be recognised.

#### *Class Privilege*

The privilege attached to the lawyer-client relationship is the clearest example of a class privilege. As Cory J. stated for the majority in *Smith*:

The solicitor-client privilege has long been regarded as fundamentally important to our judicial system. ...

The privilege is essential if sound legal advice is to be given in every field. ... Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients. ... It is because of the fundamental importance of the privilege that the onus properly rests upon those seeking to set aside the privilege to justify taking such a significant step.<sup>32</sup> ...

The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitor-client privilege.<sup>33</sup>

Class privilege is not absolute and, indeed, in *Smith*, was set aside, owing to a “public safety exception” which, in the opinion of the Supreme Court, made it permissible to violate the confidence. In that case, an accused person revealed a plan to murder street prostitutes.<sup>34</sup>

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<sup>32</sup> *Smith v. Jones*, [1999] 1 S.C.R. 455 at 474- 75 [hereinafter *Smith*].

<sup>33</sup> *Ibid.* at 477.

<sup>34</sup> The reason why the court clarified this was because the prospective harm was serious (involving death), imminent (Jones had already mobilised the plan), and directed toward a clearly identified target (prostitutes on a specific Vancouver stroll).

The Court's decision in this instance is relevant because it viewed solicitor-client privilege as the, "...highest privilege recognised by the courts. By necessary implication, if a public safety exception applies to solicitor-client privilege, it applies to all classifications of privileges and duties of confidentiality."<sup>35</sup>

There is currently no class privilege for the researcher-participant relationship. One reason is that the circumstances in which it would be awarded or denied have never arisen. The only case where research-participant privilege was invoked was the Ogden case, and that was in Coroner's Court, which technically is not a court of law. Although Jackson and MacCrimmon believe the Ogden judgement would have withstood judicial review, they also believe it unlikely that the researcher-participant relationship will be granted class privilege, because, "The Supreme Court has suggested that new class privileges will only be created for relationships and communications which are inextricably linked with the justice system in the way that solicitor-client communications are."<sup>36</sup>

However, in *Gruenke*<sup>37</sup> a minority were willing to grant a class privilege to the priest-penitent relation even though it did not meet this criterion. Instead, the minority's rationale was that throwing priests in jail for observing what they perceive to be a sacred obligation would place the system of justice in disrepute.<sup>38</sup> We wonder if a similar argument would hold for a researcher making an ethical decision to protect a volunteer research participant. The researcher-participant relationship offers a unique and compelling case that may justify a rethinking of the criteria used to establish a class privilege.

#### *Case-by-Case Privilege*

In lieu of statutory protection or class privilege for research participants, Canadian researchers must assert privilege on a case-by-case basis. The Supreme Court of Canada has recognised the Wigmore criteria as the appropriate test for examining any case-by-case claim to privilege, and stated that the door to establishing class privileges through common law is still open. Sopinka noted that, "The utilization of Wigmore's criteria was again mentioned by Laskin C.J.C in *Canada v. Ontario*, where he

<sup>35</sup> *Smith, supra* note 32 at 474.

<sup>36</sup> Jackson & MacCrimmon, *supra* note 22 at 119.

<sup>37</sup> *R. v. Gruenke*, [1991] 3 S.C.R. 263 [hereinafter *Gruenke*].

<sup>38</sup> *Ibid.* at 303-04. Justices L'Heureux-Dubé and Gonthier stated: "[O]ther authors express the view that it would be impractical and futile to attempt to force the clergy to testify, because often the cleric would refuse. ... Compelling disclosure, or charging a cleric in contempt, it is further argued, places the presiding judge in the position of having either to force the breach of a confidence, or to imprison the cleric, both of which may arguably bring disrepute to the system of justice."

stated that the *Slavutych* case had established that the categories of privilege are not closed and that the Wigmore criteria are a satisfactory guide for the recognition of a claim of privilege.<sup>39</sup> More recently, in *Mills*, Justices MacLachlin and Iacobucci reaffirmed that view:

Confidential relationships have a long history of being protected through the common law doctrine of privilege. The “Wigmore test” sets out the generally accepted criteria for determining whether, in a particular case, the communications at issue should be privileged and therefore excluded as evidence at trial.<sup>40</sup>

At this time, the Wigmore test is thus the appropriate mechanism to protect the identity of research participants in court. Maximizing the legal protections available to research participants thus means designing one's research protocols in anticipation of a Wigmore defence.

### Designing Research in Anticipation of a Wigmore Defence

The Wigmore test lays out criteria to establish, “a privilege against disclosure of communications between persons standing in a given relation,”<sup>41</sup> and thereby recognise an exemption from the obligation all citizens normally have to testify. The criteria require that:

- (1) The communications must originate in a *confidence* that they will not be disclosed;
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.<sup>42</sup>

The Wigmore criteria are always considered in the context of a “given relation[ship]”, *e.g.* lawyer-client, doctor/therapist/counsellor-

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<sup>39</sup> *Supra* note 26 at 631.

<sup>40</sup> *Supra* note 31 at 723.

<sup>41</sup> J. H. Wigmore, *A Treatise on the System of Evidence in Trials at Common Law, Including the Statutes and Judicial Decisions of All Jurisdictions of the United States, England, and Canada* (Boston: Little, Brown 1905).

<sup>42</sup> *Ibid.* at 3185 [italics in original].

patient, police officer-informant or, in this case, researcher-participant. The basis on which privilege is recognised lies less in the content of the communication than in the need to maintain the integrity of a socially valued relationship. Legal commentary on the Wigmore test indicates there needs to be clear evidence on each criterion in order for communications in a given relation to be recognised as privileged.<sup>43</sup> Accordingly, we now consider each of the four Wigmore criteria in the context of the researcher-participant relationship, and the evidentiary requirements that might satisfy each.

### *1. The communications must originate in confidence*

The first criterion asserts that the people involved in the relationship must share the understanding that the communication in question was uttered in confidence. As Wigmore notes, “The moment confidence ceases, privilege ceases.”<sup>44</sup> The Supreme Court of Canada set a high standard for “an expectation of confidentiality” in its adjudication of the claim for priest-penitent privilege in *Gruenke*. In that case, the Court concluded that the mere fact the statements at issue were made to a counsellor and pastor — persons with whom one might normally expect to have confidential communications — was not in itself enough to satisfy the first criterion of the Wigmore test. The Court wanted clear evidence that *this* communication (a confession) was uttered with a clear and shared expectation of confidentiality.

However, as Jones observes,<sup>45</sup> the *Ryan* case introduced a new nuance to the law regarding privilege, particularly with respect to what it takes to meet the first Wigmore criterion. The case involved a 17-year old girl, “M”, who was indecently assaulted by her psychiatrist, Dr. Ryan. After the assault, M went to a second psychiatrist, Dr. Kathleen Parfitt, for treatment. Dr. Parfitt explicitly discussed the possibility that a court might, at some point, order disclosure of her therapy records. M made it clear that confidentiality was very important to her, and that she did not want the records revealed at any point to anyone, including a

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<sup>43</sup> See B. Daisley, “Clear evidence needed to invoke Wigmore rules” *The Lawyer's Weekly* (9 December 1994) 28; M. Marshall, “When is a secret not a secret?” *Cook Duke Cox Newsletter* 1992) ; Jackson & MacCrimmon, *supra* note 22; *Gruenke*, *supra* note 37; *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157 [hereinafter *Ryan*].

<sup>44</sup> Lord Eldon, from an 1819 decision in *Parkhurst v. Lowten*, cited by Wigmore, *supra* note 41 at 3233.

<sup>45</sup> P. Jones, *A Legal Opinion Regarding Research-Participant Privilege* (February 15, 1999) at par. iii, as reproduced in J. Lowman & T. Palys, *Going the Distance: Lessons for Researchers from Jurisprudence on Privilege*, (1999) in App. A, online: T. Palys Homepage <<http://www.sfu.ca/~palys/Distance.html>> (date accessed: 14 June 2000). Jones is legal advisor to CAUT. The opinion was provided at the request of the SFU Faculty Association.

court. Dr. Parfitt stated that she would do “everything possible” to ensure no information was disclosed. The girl subsequently sued Dr. Ryan for damages, at which time Dr. Parfitt's records, but not her personal notes, were subpoenaed. At issue was whether the defendant's right to secure records potentially relevant to testing the plaintiff's case against him outweighed the plaintiff's expectation that communications with her psychiatrist would be kept in confidence.

A British Columbia trial court decided against M and Dr. Parfitt on the ground that their discussions about the possibility of a court order to disclose implied recognition that confidentiality was limited, and hence not privileged. However, the B.C. Court of Appeal and the Supreme Court both argued that mere consideration of the possibility of court-ordered disclosure did not, in itself, undermine the expectation of confidentiality. Writing for the majority of the Supreme Court, McLachlin J. stated:

The communications were made in confidence. The appellant stipulated that they should remain confidential and Dr. Parfitt agreed that she would do everything possible to keep them confidential. The possibility that a court might order them disclosed at some future date over their objections does not change the fact that the communications were made in confidence. ... If the apprehended possibility of disclosure negated privilege, privilege seldom if ever would be found.<sup>46</sup>

#### *Avoiding Waivers of Privilege*

Notwithstanding the Supreme Court's recognition that one can discuss legal limitations to confidentiality without foregoing an “expectation of confidentiality,” care should be taken in the process of informing research participants of such possibilities. The Supreme Court uses the concept of a *waiver of privilege* in several rulings. For example, in *Ryan*, the B.C. Court of Appeal disagreed with the trial court's reasons for rejecting privilege, but substituted its own: that M did not assert the claim immediately. The Supreme Court disagreed: “...the appellant's alleged failure to assert privilege in the records before the Master does not deprive her of the right to claim it. ... If the appellant had privilege in the documents, it could be lost only by waiver. The appellant's conduct does not support a finding of waiver.”<sup>47</sup>

Part of maximising legal protections of research confidentiality thus involves ensuring that no aspect of one's informed consent statement can be construed as a waiver of privilege. This is consistent with the ethical

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<sup>46</sup> *Ryan*, *supra* note 43 at 173.

<sup>47</sup> *Ibid.* at 168.

affirmation by Canada's three granting councils that, "the consent of the participants shall not be conditional upon, or include any statement to the effect that, by consenting, subjects waive any legal rights."<sup>48</sup> Just as solicitor-client privilege lies *not* with the solicitor but with the client,<sup>49</sup> so researchers are the guardians of the privilege, not its holder. A research participant can volunteer a waiver, but the researcher cannot make a waiver a pre-condition of participation in the research.

This cautionary note is essential because, following the *Policy Statement's* assertion that research participants should be warned about "the extent of the confidentiality that can be promised,"<sup>50</sup> researchers should ensure that their informed consent statement can not be interpreted — by them or anyone else — as a waiver of privilege. This is precisely what happened in *Atlantic Sugar*.<sup>51</sup> Corporate respondents to an International Trade Commission questionnaire were told that the information would not be disclosed "except as required by law." Noticing this, the trial judge stated that the law (in the form of the US Customs Court) now "required" it, and, because that was precisely the eventuality for which confidentiality had been limited, the information was no longer considered confidential.

The *Policy Statement's* requirement that confidentiality be maintained to "the extent possible within the law"<sup>52</sup> suggests that court-ordered disclosure should be fought all the way to the Supreme Court of Canada if necessary, or to the highest court possible if the Supreme Court refuses to hear the case. Of course, that still leaves open the question about one's response should the court order the disclosure of research participant identities, an issue to which we return at the end of our discussion of the Wigmore criteria.

### *Evidentiary Requirements*

In anticipation of satisfying the evidentiary requirements of criterion one, researchers should make it clear to research participants that their interactions are strictly confidential, and create evidence of the pledge that will satisfy a court. In particular:

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<sup>48</sup> *Supra* note 6 at 2.6.

<sup>49</sup> See *The Law of Evidence in Canada*, *supra* note 26.

<sup>50</sup> *Supra* note 6 at 3.2.

<sup>51</sup> *Atlantic Sugar v. United States*, 85 Cust. Ct. 128 (1980) [hereinafter *Atlantic Sugar*]. The case is discussed in M. Traynor "Countering the excessive subpoena for scholarly research" (1996) 59:3 *Law & Contemporary Problems* 119 at 122, and is all the more provocative because it goes against the grain of many other US court decisions that protect confidentiality. We thank Mr. Traynor for supplying us with a copy of the decision.

<sup>52</sup> *Supra* note 6 at 3.2.



- (1) The proposal should declare unambiguously the researcher's intention to do "everything possible" to maintain confidentiality;
- (2) Researchers' actions should be consistent with that pledge (*e.g.* they should implement whatever methodological strategies are possible and appropriate to ensure that risks to confidentiality are minimised);
- (3) One's informed consent statement should clarify that the participant's interactions with the researcher will be held in strict confidence; and
- (4) A record should be kept<sup>53</sup> of one's pledge of confidentiality and the participant's agreement to it in every applicable interview transcript, even when the transcript is anonymised, or in field notes.<sup>54</sup>

## ***2. Confidentiality must be essential to the relationship***

The object of granting privilege is "to protect the perfect working of a special relation, wherever confidence is a necessary feature of that perfect working."<sup>55</sup> The second criterion requires evidence that confidentiality is demonstrably a "necessary feature" of the relationship for which privilege is claimed.

In many kinds of research, the provision of confidentiality is essential to the researcher-participant relationship. A clear example is criminological research on law enforcement and law breaking, especially when it concerns undetected or unreported law violations. What offender would talk openly and freely about undetected offences to a researcher if they thought the researcher might divulge that information to a court or anyone else? Conversely, how could any ethical researcher solicit sensitive information from a volunteer participant knowing that s/he would turn that very information over to a court? The same can be said for many other sensitive research areas where release of the information would create negative consequences for the participant (*e.g.* stigmatisation, financial loss, embarrassment, loss of reputation, loss of employment, etc.).

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<sup>53</sup> This is *not* a recommendation for using signed informed consent statements, since the very existence of the statement may compromise confidentiality.

<sup>54</sup> Mario Brajuha's participant-observer research on the "sociology of the American restaurant" illustrates the problem. A grand jury subpoenaed Brajuha, and asked to see his field notes. Although Brajuha had guaranteed confidentiality to "many" of his research participants, he had not kept a record of those guarantees. This raised for the court the problem of establishing to whom he had guaranteed confidentiality, and hence identifying which parts of his field notes were privileged. See R. M. O'Neil "A researcher's privilege: Does any hope remain?" in J. Cecil & G.T. Wetherington, *supra* note 16 at 41.

<sup>55</sup> Wigmore, *supra* note 41 at 3211.

*Evidentiary Requirements*

Three types of evidence would be of use in court regarding criterion two, all of which were a part of Russel Ogden's defence of researcher-participant privilege in Coroner's Court: (a) the communication is part of a research project; (b) confidentiality is essential in research on sensitive topics; and (c) confidentiality is essential to the specific study.

- *The Communication is Part of a Research Project*

To establish that the communication is part of a research project, a proposal should receive formal ethics review. The identification of one's activity as "research" is a prerequisite to the claim and recognition of privilege. In one U.S. case,<sup>56</sup> a sociologist's claim of privilege appears to have been viewed suspiciously because the research had not undergone university ethics review, and the research participant for whom he claimed privilege also happened to be a friend. One observer suggested that the courts, which were thoroughly unreceptive to the claim, might have seen it as a matter of convenience rather than ethical principle.<sup>57</sup> The case highlights the difficulties that can befall researchers who occupy multiple roles in the lives of participants (*e.g.* teacher and researcher, counsellor and researcher, friend and researcher) because of the appearance of conflict of interest involved.<sup>58</sup>

- *The Importance of Confidentiality in Research on Sensitive Topics*

The second type of evidence concerns the argument that, in many kinds of research on sensitive topics, confidentiality is essential for maintaining the researcher-participant relationship. In Ogden's case, Dr. Richard Ericson, an eminent criminologist, appeared as an expert witness and testified about the importance of confidentiality to conducting valid and reliable criminological research. Authors of textbooks on research methodology and ethics agree. The more clearly anonymous or confidential the data, the greater their probable validity, particularly when the topic under discussion is sensitive and where there can be negative repercussions for the participant (*e.g.* consequences at work, in his/her social group, possible incarceration, etc.).<sup>59</sup>

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<sup>56</sup> Scarce, *supra* note 13.

<sup>57</sup> O'Neil, *supra* note 41.

<sup>58</sup> See *Policy Statement*, *supra* note 6 at 4.0.

<sup>59</sup> See *e.g.* Kidder, *supra* note 15 ; S. Sudman & N. Bradburn, *Asking Questions* (San Francisco: Jossey Bass, 1982).

Further evidence regarding the general importance of confidentiality to the researcher-participant relationship can be adduced from various research ethics codes. For example, the *Policy Statement* asserts:

Information that is disclosed in the context of a professional or research relationship must be held confidential. Thus, when a research subject confides personal information to a researcher, the researcher has a duty not to share the information with others without the subject's free and informed consent. Breaches of confidentiality may cause harm: to the trust relationship between the researcher and the research subject; to other individuals or groups; and/or to the reputation of the research community.<sup>60</sup>

• *The Importance of Confidentiality to the Specific Study*

General affirmations of the importance of confidentiality to research are unlikely to be sufficient in court, however, particularly in the context of a case-by-case application of the Wigmore principles. Traynor advises that, when they design their research, researchers should consider whether confidentiality is crucial and, if it is, to, “document the reasons requiring confidentiality. ... The researcher who prepares a written memorandum at the inception of the research setting forth the reasons for confidentiality will be well-prepared to persuade a court that the project could not have proceeded without the assurance of confidentiality.”<sup>61</sup>

Evidence on the importance of confidentiality to Ogden's research came from three sources. The first was at the proposal stage, when Ogden explained to the ethics committee why an unqualified guarantee of confidentiality was essential to his research. This in itself showed the court that the provision of confidentiality was part of a considered research plan and not a *post hoc* justification.

The second emerged from the research itself. There were two parts to his research. One part involved asking people to report their attitudes regarding assisted suicide among persons with HIV/AIDS. The other involved interviews with people who had attended an assisted suicide. In Coroner's court, Ogden reported that the first group was roughly evenly divided as to whether the provision of confidentiality was essential to their participation. However, the second group stated they would not have participated if Ogden did not guarantee to maintain their anonymity. Again, this showed that confidentiality was essential to the

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<sup>60</sup> *Supra* note 6 at 3.1.

<sup>61</sup> Traynor, *supra* note 51 at 121.

research and that the information the Coroner eventually sought would not have existed without that unqualified pledge.<sup>62</sup>

The third source came from expert testimony of a community health nurse who specialised in caring for AIDS patients. The nurse explained why the preservation of confidentiality was particularly crucial to AIDS patients:

It has taken us ten years to get to a place where we can provide a sense of trust in the relationship between client [with AIDS] and professional, whether it's a physician, a nurse, a social worker, or whatever. But we have worked extremely hard to develop that sense of trust. The way that we would develop that trust was by guaranteeing and providing confidentiality in our relationship with that person, in the research that we do, in the way that we record and document our interactions with people. . . .  
So, it's not just an issue of death and dying. It's an issue that we deal with in every aspect of a person's life. HIV, the disclosure of that kind of diagnosis, could result in someone losing their home, their job, their insurance, their health insurance, their life insurance. A whole number of losses can result from disclosure. Confidentiality is key to the relationship that we have with people that we are caring for.<sup>63</sup>

Jackson & MacCrimmon believe that Ogden's evidence for the second criterion was compelling and would have withstood judicial review.<sup>64</sup>

### ***3. The relation must be one the community believes is socially valuable and should be fostered***

The third criterion asks whether "the community" believes the researcher-participant relationship is one that should be sedulously

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<sup>62</sup> In some cases, this information can be gathered after the fact. In *Farnsworth v. Proctor & Gamble*, 758 F.2d 1545, 1546-47 (11<sup>th</sup> Cir. 1985) [hereinafter *Proctor & Gamble*] for example, when the Center for Disease Control (CDC) was subpoenaed to produce information they had gathered regarding toxic shock syndrome (which included sexual histories), the CDC contacted all participants, told them of the subpoena, and asked whether they would consent to their names and data being passed on to Proctor & Gamble. Had they said "yes," the researcher's ethical problem would be resolved because the participants would have waived privilege. However, in this case, the answer was a resounding "no," which gave concrete evidence that confidentiality of identity was crucial to participation in the research. The court protected the identity of respondents in that case, even though CDC had not given an express guarantee of confidentiality at the outset.

<sup>63</sup> Transcript of Coroner's *Inquest re: "Unknown Female"* (1 June 1994, Case 91-240-0838) at 33-35.

<sup>64</sup> *Supra* note 22.

fostered. A number of “communities” should be considered. In Ogden’s case, there were at least three: (1) the research community; (2) practitioner and participant communities connected to the research; and (3) the broader community of Canadians.

### *The Research Community*

Clearly, the research community believes its relation with research participants is worth fostering. As the three granting councils state, “Research subjects contribute enormously to the progress and promise of research in advancing the human condition.”<sup>65</sup> Further evidence that confidentiality is a core ethical research principle comes from disciplinary ethics codes. For example:

**Canadian Sociology and Anthropology Association Code of Ethics (s.5.1)**

[R]esearchers must respect the rights of citizens to privacy, confidentiality and anonymity, and not to be studied. Researchers should make every effort to determine whether those providing information wish to remain anonymous or to receive recognition and then respect their wishes.

**American Sociological Association Code of Ethics (s.11)**

[C]onfidential information provided by research participants must be treated as such by sociologists, even when this information enjoys no legal protection or privilege.

**American Anthropological Association Statements on Ethics (s.1-c)**

[I]nformants have a right to remain anonymous. This right should be respected both where it has been promised explicitly and where no clear understanding to the contrary has been reached.

**American Political Science Association Code of Ethics (s.6.2)**

[S]cholars also have a professional duty not to divulge the identity of confidential sources of information or data developed in the course of research, whether to governmental or non-governmental officials or bodies, even though in the present state of American law they run the risk of suffering an applicable penalty.

**American Society of Criminology Draft Code (s.19)**

[C]onfidential information provided by research participants must be treated as such by criminologists, even when this information enjoys no legal protection or privilege and legal force is applied.

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<sup>65</sup> *Policy Statement*, *supra* note 6 at i.7.

Note that none of these codes forecloses the possibility of refusing to comply with a court order as a matter of professional principle. We return to this point later in a discussion of problems associated with *a priori* limitations of confidentiality.

*Practitioner and Participant Communities Involved in the Research*

Evidence pertaining to practitioner and participant communities is project-specific. On reviewing Ogden's evidence on the third criterion, Jackson and MacCrimmon describe how it demonstrated the value policy makers, medical practitioners and persons afflicted with AIDS attached to Ogden's research:

As to the community of institutions faced with responding to issues of euthanasia and assisted suicide it was argued that unless governmental and social institutions had reliable first-hand information provided by research like that of Mr. Ogden, they would be faced with developing strategies and policies to allow a principled and humane approach to the difficult ethical issues raised by assisted suicide and euthanasia in a vacuum. Again, not surprisingly, a number of health care institutions, government bodies and organizations had shown tremendous interest in Mr. Ogden's research.

As to the third community of interest, the argument was that persons with terminal illnesses and their friends, families and care givers are faced with difficult and painful decisions. At present, they are forced to make these decisions on their own without guidance or support. Russel Ogden's research clearly would have been of great interest and importance to this community. [The community health nurse's] evidence had specifically pointed to the isolation in which this community was forced to function, and that Mr. Ogden's research had provided a safe context for people to tell their stories so that lessons can be learned about this experience from those who are living it.<sup>66</sup>

Again, an important element of this evidence is that it goes beyond generic pronouncements to demonstrate the point with respect to the case at hand.

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<sup>66</sup> *Supra* note 22 at 114-15.

*The Broader Canadian Community*

Regarding the broader community, there is abundant evidence again of the value that is placed on social science research. In regard to Ogden's research:

[A]ddressing the interest of the community at large, Mr. Ogden's counsel argued that the moral and ethical issues involved in euthanasia and assisted suicide were of great importance to Canadians generally. The debate surrounding the Sue Rodriguez case was but one example of the very broad public interest surrounding this issue. Furthermore, the public attention following the publication of Mr. Ogden's thesis, both nationally and internationally, was evidence that the thesis raised significant interests of public policy.<sup>67</sup>

The academic role involves critically questioning and analysing *all* aspects of society, including asking questions about why social arrangements, including law, are the way they are, and looking at the borders between pathological and normal, criminal and non-criminal, and stigmatised versus socially accepted. It is only by preserving and fostering the researcher-participant relationship that we can hope to provide understanding and knowledge the broader community needs on controversial and other socially relevant issues for its own long-term benefit. We have no right to ask some persons to pay the price for others' benefit; it is unethical to treat people simply as means to ends, as the three councils affirm: "Part of our core moral objection would concern using another human solely as a means toward even legitimate ends."<sup>68</sup>

The value attached to protecting research participants by maintaining confidentiality is also evident in the one place in Canada where research-participant privilege has been codified in law, i.e. the *Statistics Act*. Although university researchers have not been afforded the same statutory protection, their ethical obligations to research participants are the same.

The hundreds of millions of dollars that granting and contracting agencies spend annually on research is another indicator of the importance attached to the research enterprise, and the researcher-participant relationship on which much of it is based.

In sum, the preponderance of evidence suggests that confidentiality is essential to the "perfect working" of the researcher-participant

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<sup>67</sup> *Ibid.*

<sup>68</sup> *Policy Statement*, *supra* note 6 at i-4.

relationship. Confidentiality may not be essential to every type of research with human participants, such as social surveys regarding innocuous topics or where the respondent prefers or is shown respect by being named. However, when it comes to sensitive research involving the collection of information that could cause participants anything from embarrassment to serious harm, methodologists, field researchers, and federal legislation affirm that such research cannot be done without a guarantee of strict confidentiality.

***4. Balancing potential injury to the researcher-participant relationship with the benefit to be gained by disclosing the confidential information for the specific case at hand***

The first three criteria can be viewed as eligibility criteria for an assertion of privilege, which the researcher-participant relation appears capable of passing comfortably. The essence of the Wigmore test lies in criterion four, however, which calls for a balancing of two competing social considerations. In this regard, the court must balance:

- The adverse impact on the relationship if confidentiality were to be violated; with
- The deleterious impact that non-disclosure would have on the particular trial in which the privilege is at issue.

*The Adverse Impact of Violating Confidentiality*

In the U.S., the research most likely to arouse the interest of a third party is that relating to corporations or business, even if only tangentially. Typically, two adversaries involved in high stakes litigation refer to or hear about research that might be relevant to the dispute. When one litigant cites the research, the other subpoenas the researcher in order to challenge his or her methodology and findings. Occasionally, litigants have sought the identities of research participants or information that would tie identified research participants to particular information.

Much of the U.S. literature regarding research privilege is misleading when it refers to the resulting claim as a matter of “academic privilege.” The more appropriate term is “research-participant privilege” because: (a) it correctly identifies the privilege as lying with the research participant, *not* the researcher; and (b) “academic privilege” conflates two sets of interests that should be distinguished:

- (a) Situations where the personal interests of the *researcher* are at stake, such as having to reveal information before it is published, or having to spend large amounts of time responding to a subpoena;



- (b) Situations where the personal interests of *research participants* are at stake, e.g. the participants' rights to privacy, which depends on the researcher maintaining confidentiality.

Although in most instances these interests coincide, they are nonetheless distinguishable and may sometimes conflict. A researcher's primary ethical responsibility is to safeguard the research participants' interests. Nevertheless, the researcher's interests also are important, as the following discussion shows.

*When Subpoenas Make Life Difficult for Researchers*

Receipt of a subpoena or an order to disclose information has the potential of disrupting the normal flow of research and publication. Subpoenas can come at a time when the research is not yet ready for publication, leaving the researcher vulnerable to potentially career-damaging critique.<sup>69</sup>

A subpoena also can pose a significant burden depending on the breadth of documentation that is sought, because of the time and resources it takes away from doing research. Some subpoenas are written very broadly. For example, when R. J. Reynolds Tobacco subpoenaed Dr. Irving Selikoff at the Mount Sinai School of Medicine to acquire information regarding "ongoing research" plus documentation for three published studies,<sup>70</sup> they requested,

... all documents related to the studies that describe, constitute, comment upon, criticize, review, or concern the research design, methodology, sampling protocol, and/or conduct of any of the studies; copies of questionnaires, answers to questionnaires, interview forms, responses to interviews, death certificates, autopsy reports, and other causes of death ...; and data sheets, computer tapes and/or copies of computer discs containing all coded data ... in as "raw" a form as possible.<sup>71</sup>

Similarly, when faced with six separate lawsuits regarding an intrauterine device (I.U.D.) known as the Copper Seven, the manufacturer subpoenaed Dr. Malcolm Potts, President of a non-profit institute that had done research on the effects of various I.U.D.s. In its subpoena, the manufacturer demanded that Potts produce seventy-seven

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<sup>69</sup> See E. C. Wiggins & J. A. McKenna, "Researchers' reactions to compelled disclosure of scientific information" (1996) 59:3 Law and Contemporary Problems 67 at 87.

<sup>70</sup> *In re R.J.Reynolds*, 518 N.Y.S.2d 729 (Sup. Ct. 1987).

<sup>71</sup> Wiggins & McKenna, *supra* note 69 at 69.

different categories of documents that covered all studies the institute had conducted regarding I.U.D.s. Dr. Potts estimated that the documentation would total 300,000 pages and take his complete staff several weeks of full-time work to compile and reproduce.<sup>72</sup>

In each of these cases, the courts quashed the subpoenas — in the case of Mount Sinai and R. J. Reynolds, because they placed an “unreasonable burden” on the medical hospital;<sup>73</sup> and in Potts's case, because “the burden of producing the information outweighed the plaintiffs’ need for it.”<sup>74</sup>

#### *Violations of Research Participant Privacy*

Subpoenas cross an *ethical* line when they seek information that identifies individual participants or what they told researchers. Normally, such subpoenas should be resolutely challenged because they strike at our primary ethical obligation, protecting research participants, and our primary mission, doing research. The U.S. literature reveals that attempts to discover the identities of research participants are rare, even in so highly litigious a nation. Although subpoenas have ranged from minor and specific to voluminous and comprehensive, very few ask for information that would identify participants.<sup>75</sup> This may be because the U.S. courts very early established a pattern of being very protective about maintaining the anonymity of research participants, even in cases where confidentiality was not explicitly guaranteed but was inferred by the courts because of the sensitivity of the information gathered.<sup>76</sup>

The U.S. courts’ recognition of the need to protect research participants is exemplified in the most recent U.S. case regarding research-participant privilege, which pitted the world's largest and wealthiest company (Microsoft) against researchers from two of the most prestigious universities (Harvard and M.I.T.). The two researchers, Professors Cusumano and Yoffie, had interviewed 40 persons at Netscape, and written a book on the “browser wars” between Microsoft and Netscape. Microsoft believed that the transcripts of interviews and names of participants would benefit them in their fight against the Department of Justice's anti-trust case. Cusumano and Yoffie claimed privilege. Although neither their argument nor the court's decision was based explicitly on the Wigmore criteria, the balancing of considerations followed a distinctly Wigmorean logic.

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<sup>72</sup> *Ibid.* at 70, 76.

<sup>73</sup> *Ibid.* at 69.

<sup>74</sup> *Ibid.* at 76.

<sup>75</sup> *Ibid.* at 79.

<sup>76</sup> See *e.g. Proctor & Gamble, supra* note 62.

Notwithstanding the relevance that Microsoft had shown of the data and the billions of dollars that were at stake, the Court of Appeals quashed the Microsoft subpoena, stating:

Scholars studying management practices depend upon the voluntary revelations of industry insiders to develop the factual infrastructure upon which theoretical conclusions and practical predictions may rest. These insiders often lack enthusiasm for divulging their management styles and business strategies to academics, who may in turn reveal that information to the public. Yet, path-breaking work in management science requires gathering data from those companies and individuals operating in the most highly competitive fields of industry, and it is in these cutting-edge areas that the respondents concentrate their efforts. Their time-tested interview protocol, including the execution of a nondisclosure agreement with the corporate entity being studied and the furnishing of personal assurances of confidentiality to the persons being interviewed, gives chary corporate executives a sense of security that greatly facilitates the achievement of agreements to cooperate. Thus, ... the interviews are “carefully bargained-for” communications which deserve significant protection. ...

Considering these facts, it seems reasonable to conclude — as the respondents' affidavits assert — that allowing Microsoft to obtain the notes, tapes, and transcripts it covets would hamstring not only the respondents' future research efforts but also those of other similarly situated scholars. This loss of theoretical insight into the business world is of concern in and of itself. Even more important, compelling the disclosure of such research materials would infrigate the free flow of information to the public, thus denigrating a fundamental First Amendment value.<sup>77</sup>

#### *Deleterious Effects on Future Research*

We take the central message of these U.S. decisions to be that academics are not “special,” but research participants *are* because the research relationship that all society benefits from is fuelled by the trust that participants place in researchers not to harm them. Academics are subject to subpoena like any other witnesses or expert witnesses — i.e. there is no “academic privilege” — but the courts should recognise “research-participant privilege” because of the social value of voluntary research participation.

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<sup>77</sup> *Microsoft*, *supra* note 12 at 9.

This focus on protecting research participants does not mean the courts have or should declare open season on researchers. The U.S. courts have ensured that litigants with deep pockets are not allowed to engage in “fishing expeditions,” or to harass, bully, or intimidate researchers whose research benefits the public good. Protection of the research enterprise is warranted because it is done in everyone's interest, including the courts'. Indeed, the courts would thwart their own search for truth if their actions were to cause the end of the empirical evidence that, with increasing frequency, plays an important role in litigation. The U.S. courts have been particularly protective when researchers are not party to the litigation, and when their independence contributes to the credibility of their evidence.

For example, in a case that Judge Barbara Crabb considers “paradigmatic,”<sup>78</sup> women who contracted adenocarcinoma of the vagina were suing E. R. Squibb and Sons, Inc., manufacturer of the drug diethylstilbestrol (DES). The women cited research by Dr. Arthur Herbst of the University of Chicago who compiled a database of all cases of adenocarcinoma of the vagina contracted since 1940. The research showed a link between a mother's use of DES during pregnancy and subsequent adenocarcinoma of the vagina among their daughters. Squibb subpoenaed Dr. Herbst for all data in the registry. The courts agreed that Dr. Herbst should supply documentation sufficient to assess the validity of his research and its conclusions, but ordered that the anonymity of the women in the database be maintained. As Judge Crabb explains,

Deitchman was a high stakes case in terms of money. It was also a high stakes case in another respect: the risk of serious harm to a significant research study. Not only did the district court and the court of appeals agree that Herbst's concern for the confidentiality of the registry was well-founded, even Squibb appeared to concede that the loss of confidentiality would affect the registry adversely and that “all society would be poorer ... [because] a unique and vital resource for learning about the incidence, causes[,] and treatment of adenocarcinoma would be lost.”<sup>79</sup>

The *Squibb* case exemplifies the way U.S. courts have crafted orders that minimise their impact on the viability of research. U.S. courts generally weigh the balance in the researcher's favour when:

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<sup>78</sup> B. Crabb, “Judicially compelled disclosure of researchers' data: A judge's view” in Cecil and Wetherington, *supra* note 16 at 9.

<sup>79</sup> *Ibid* at 14.

- (a) the subpoena is overly broad and/or gives the appearance of being a "fishing expedition" or part of a strategy of harassment;
- (b) the person/organisation issuing the subpoena has not demonstrated the relevance of the requested information to the litigation;
- (c) the researcher is an independent third party with no interest in the dispute;
- (d) the issue on which the information is sought can be addressed through alternative evidence or is of marginal use; and
- (e) this and/or other future research would be jeopardised by a violation of confidentiality.<sup>80</sup>

Notwithstanding the considerable respect U.S. courts have shown for academic freedom, researchers should not assume that the courts understand what the deleterious effects of a subpoena or court order will be, and should not make sweeping statements about prospective effects. The more concretely one can articulate prospective effects with direct reference to the research at hand, the more likely the court will take those interests into account in their decision-making.<sup>81</sup>

#### *Canadian Jurisprudence on Privilege*

However helpful it is to peruse U.S. jurisprudence regarding research-participant privilege, Canadian courts, of course, are not bound by the decision-making of their U.S. counterparts. In the absence of any Canadian jurisprudence on research-participant privilege *per se*, a consideration of how the Supreme Court has adjudicated other forms of privilege — such as the claims of therapist-client privilege that were a part of *O'Connor*,<sup>82</sup> *A.(L.L.) v. B.(A.)*,<sup>83</sup> *Ryan*,<sup>84</sup> and *Mills*<sup>85</sup> — help researchers anticipate the conceptual legal filters through which a claim of research-participant privilege would have to pass.

As noted earlier, the adjudication of privilege involves a balancing of the rights of all persons involved in a particular court proceeding. As Madame Justice McLachlin stated in *Ryan*:

While the traditional common law categories conceived privilege as an absolute, all-or-nothing proposition, more recent jurisprudence recognizes the appropriateness in

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<sup>80</sup> See, e.g. Crabb, *supra* note 78; Wiggins & McKenna, *supra* note 69; P. M. Fischer, "Science and subpoenas: When do the courts become instruments of manipulation?" in Cecil & Wetherington, *supra* note 16 at 159.

<sup>81</sup> See Crabb, *supra* note 78; Wiggins & McKenna, *supra* note 69.

<sup>82</sup> *Supra* note 27.

<sup>83</sup> *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536.

<sup>84</sup> *Supra* note 43.

<sup>85</sup> *Supra* note 31.

many situations of partial privilege. The degree of protection conferred by the privilege may be absolute or partial, depending on what is required to strike the proper balance between the interest in protecting the communication from disclosure and the interest in proper disposition of the litigation.<sup>86</sup>

In this regard, Canadian and U.S. courts operate on a similar logic. Privilege involves a balancing of competing interests. The balancing is usually achieved by “partial disclosure,” which is done in the context of the facts of each case and the rights in conflict. In practice, “partial disclosure” involves keeping the door partly open — usually regarding evidence needed to assess the research methodology and whether particular conclusions are justified — and partly closed. US courts almost always close the door to conceal the identity of individual participants. They are, in short, highly protective of research-participant privilege.

#### *The Right to a Fair Trial*

Jackson and MacCrimmon suggest that when courts balance competing interests, the most difficult challenge to research-participant privilege will arise when the participant’s right to privacy is pitted against an accused person’s right to a fair trial. The absence of any Canadian jurisprudence on research-participant privilege places us all in the role of speculators regarding what the courts might do if asked to weigh the researcher-participant’s right to privacy against the right of an accused to a fair trial. Much would depend on the particular facts of the case. In *O’Connor*, the Supreme Court had occasion to comment on how privilege would fare *if* pitted against the right of an accused to full answer and defence. Lamer C. J. and Sopinka J. stated:

[I]t must be recognized that any form of privilege *may* be forced to yield where such a privilege would preclude the accused’s right to make full answer and defence. As this Court held in *Stinchcombe* (at p. 340), a trial judge may require disclosure “in *spite* of the law of privilege” (emphasis added) where the recognition of the asserted privilege unduly limits the right of the accused to make full answer and defence.<sup>87</sup>

We emphasise “may” in the preceding passage because the Court also acknowledged that just as privilege is not absolute, nor is the right of an accused to full answer and defence. For example, in her minority

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<sup>86</sup> Ryan, *supra* note 43 at 170.

<sup>87</sup> *Supra* note 27 at 431.

decision in *O'Connor*, Madame Justice L'Heureux-Dubé commented: “As important as the right to full answer and defence may be, it must co-exist with other constitutional rights, rather than trample them... . Privacy and equality must not be sacrificed willy-nilly on the altar of trial fairness.”<sup>88</sup> More recently, in *Mills*, which again considered the privacy rights of sexual assault victims against the right of an accused to subpoena therapeutic records in order to make full answer and defence, Justices MacLachlin and Iacobucci writing for the majority state:

When the protected rights of two individuals come in to conflict, *Charter* principles require a balance to be achieved that fully respects both sets of rights.<sup>89</sup> ...

The ability to make full answer and defence, as principles of fundamental justice, must therefore be understood in light of other principles of fundamental justice, which may embrace interests and perspectives beyond those of the accused.<sup>90</sup>

Another factor the Court will consider is whether the case is criminal or civil. In *Ryan*, Madame Justice McLachlin wrote:

[T]he interest in disclosure of a defendant in a civil suit may be less compelling than the parallel interest of an accused charged with a crime. The defendant in a civil suit stands to lose money and repute; the accused in a criminal proceeding stands to lose his or her very liberty. As a consequence, the balance between the interest in disclosure and the complainant's interest in privacy may be struck at a different level in the civil and criminal case; documents produced in a criminal case may not always be producible in a civil case, where the privacy interest of the complainant may more easily outweigh the defendant's interest in production.<sup>91</sup>

Of course, in lieu of case law, how the courts will view research-participant privilege *per se* remains an open question. Most other claimants of privilege provide information for a tangible benefit: the police informant's charges are dropped, the penitent is absolved, and the patient is healed. In contrast, research participants have little to gain by divulging private information — indeed the gain is primarily other people's — and in some instances, could experience serious harm if their identity is linked to the information they provide. Participants share information on a voluntary basis for the greater social good after being

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<sup>88</sup> *Ibid.* at 56.

<sup>89</sup> *Supra* note 31 at 713.

<sup>90</sup> *Ibid.* at 73.

<sup>91</sup> *Ryan*, *Supra* note 43 at 179.

approached by a researcher. Without their enduring trust and good will, there may be no social research enterprise.

### **If All Appeals Fail and the Court Orders Disclosure...**

If all appeals fail and the court orders disclosure of confidential research material, the researcher is still faced with a choice: whether or not to comply. This choice will reflect decisions that the researcher must make at the outset when providing information to prospective participants for informed consent. It is at this point that the law of privilege and ethics may conflict.

### ***Social Science Ethics Codes and the Policy Statement: Ethics and Law May Lead to Different Conclusions***

Earlier we quoted various North American social science ethics code sections on confidentiality. Some do not mention conflicts between ethics and law. Others urge that confidential research information should be kept confidential even when there is no legal protection and legal force is applied.<sup>92</sup> The American Political Science Association Code is the most explicit in its assertion that scholars, “have a professional duty not to divulge the identity of confidential sources of information ... even though in the present state of American law they run the risk of suffering an applicable penalty.” Like many of its disciplinary counterparts, the *Policy Statement* recognises that:

[e]thical and legal approaches to issues may lead to different conclusions. The law tends to compel obedience to behavioural norms. Ethics aims to promote high standards of behaviour through an awareness of values, which may develop with practice and which may have to accommodate choice and liability to err. Further, though ethical approaches cannot preempt the application of law, they may well affect its future development or deal with situations beyond the scope of the law.<sup>93</sup>

The *Policy Statement* is unequivocal that researchers *must* comply with laws on competence<sup>94</sup> and conform to applicable laws on use of

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<sup>92</sup> For discussion of the ethical and legal implications of this, the American Sociological Association's Code of Ethics, see J. Lowman & T. Palys, “Confidentiality and the 1997 ASA Code of Ethics: A Query” *Footnotes*, (February 1999); J. Iutovich et al., “Confidentiality and the 1997 ASA Code of Ethics: A Response from COPE” *Footnotes* (February 1999).

<sup>93</sup> *Supra* note 6 at i-8.

<sup>94</sup> *Ibid.* at 2.9.



human tissues for research purposes<sup>95</sup>. In both cases, the requirement is designed to protect research subjects and is thus consistent with the primary mandate of research ethics. But nowhere does it say that researchers must comply with a court order to divulge confidential information.

The section on confidentiality and law says, “researchers should indicate to research subjects the extent of confidentiality that can be promised, and hence should be aware of the relevant law.” This statement is dangerously ambiguous because it could be taken to imply that law absolutely specifies the ethical limit to confidentiality. Consequently, we wrote to the three councils asking for clarification of the *Policy Statement*: is it intended to subordinate ethics to law? Writing on behalf of the three councils, NSERC responded:

If there is a conflict, the researcher must decide on the most acceptable course of action. The principle of maintaining the confidentiality of research information is an important element of the TCPS. The onus is on the researcher to know the legal context of the research before starting his/her research activities, and to anticipate his/her options in the unlikely event of a court-ordered disclosure. It is also the researcher's responsibility, in consultation with the REB, to develop a free and informed consent process for recruiting research subjects, which takes into account that knowledge.<sup>96</sup>

Of course, if researchers follow their conscience and disobey a court order, they must accept the legal consequences<sup>97</sup> because, as the *Policy Statement* recognises, “ethical approaches cannot preempt the application of law.”<sup>98</sup>

NSERC's response establishes that researchers — not REBs or university administrators — are ultimately responsible for deciding the acceptable ethical course of action should a court order them to identify participants or link information to them.

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<sup>95</sup> *Ibid.* at 10.2.

<sup>96</sup> Letter from A-M Monteith to J. Lowman & T. Palys (27 April 2000), online: T. Palys Homepage <<http://www.sfu.ca/~palys/TCPSFAQ.pdf>> (date accessed: 14 June 2000) [hereinafter NSERC letter].

<sup>97</sup> An indictable conviction for contempt of court (CCC s. 127) with a penalty not exceeding two years.

<sup>98</sup> *Supra* note 6 at i-8.

***Should Confidentiality Be Limited A Priori ?***

In 1995, after Russel Ogden's appearance in Coroner's Court the SFU research, ethics committee insisted that researchers collecting information from participants about criminal and civil offences warn them that a court or other public body might order disclosure of confidential research information. The warning was said to be necessary for informed consent.<sup>99</sup>

But if informed consent is the issue, the committee should have required that researchers declare their intentions should a court order them to disclose research participant identities, or link information to them. Warning research participants about the legal limits to confidentiality without declaring whether the researcher will defy a court order would create a huge problem in all areas of sensitive social research where the researcher knows some or all participant identities. The mention of the risk of a court order for disclosure accentuates it out of all proportion and is particularly problematic in research on subcultures where "ratting" has a special symbolic significance, including police, prison guards and criminal offenders, or where the research involves key individuals in corporations and government. This problem was recognised by the U.S. Law Enforcement Assistance Administration (L.E.A.A.) when deciding whether to inform prospective participants in research on illicit drug use about the statutory protections that had been created for them:

The original draft regulations proposed that the individual be advised that the information provided would be immune from legal prosecution. Again, LEAA was persuaded by the researcher panel that such a notification might be inhibiting in nature since, in most circumstances, an individual would be unlikely to be concerned about such a situation and for him or her to be routinely advised of "legal process" considerations would create a fear that would not normally be present.

The regulations, therefore, leave to the discretion of the researcher whether to advise the individual regarding the immunity provisions.<sup>100</sup>

In the case of field research with offenders, the SFU limited confidentiality consent statement was like a neon flashing sign saying, "don't participate in this research." The warning invited the participant to ask, "Will you rat on me?" and in the interest of informed consent, the researcher must give an answer. Ironically, in these circumstances, the

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<sup>99</sup> See *The History of Limited Confidentiality at SFU*, *supra* note 3.

<sup>100</sup> See T. J. Madden & H. S. Lessin "Statutory approaches to ensuring the privacy and confidentiality of social science research information: The Law Enforcement Assistance Administration experience" in Boruch & Cecil, *supra* note 16 at 248.

subject's main concern is that the researcher will provide evidence to a prosecutor, when in fact the main risk of court-ordered disclosure in Canada is from an order that would aid the defence, not the prosecution.

The common law of privilege leaves researchers in a difficult situation. The courts make their determinations after the fact, on the basis of evidence presented to them. Researchers must make research decisions ahead of time, often on the basis of general and sometimes vague expectations about what will happen when the research is actually done, and then live with those decisions. Considerations of free and informed consent mean that, where the risk of court order is addressed in a consent statement, researchers must declare whether they will comply with a court order, defy it or, if they don't know what they will do, say so.

Jackson and MacCrimmon<sup>101</sup> have objected to researchers promising they will maintain confidentiality even in the face of a court order for disclosure on the ground that it precludes a researcher complying with a court order in the event that it would be ethical to do so. Our point is that if handing over the information were the ethical course of action, we would hand it over without the court needing to order us to do so. The only reason a court would be put in the position of having to order us to disclose information is because we believe that handing it over would be the *unethical* thing to do. That is precisely why the court order would be necessary in the first place, and why we would not comply with it. Most importantly of all, we have yet to encounter an instance described in the secondary literature on U.S. cases<sup>102</sup> where we thought the ethical response to a subpoena or a court order would have been to violate a confidence.

The most perplexing feature of warnings about the risk of court-ordered disclosure of confidential research information is that such orders are extremely rare. In Canada, we cannot find a single instance of it happening. In the U.S., three cases are reported in the secondary literature: Samuel Popkin's research on the Pentagon papers,<sup>103</sup> *Atlantic Sugar*,<sup>104</sup> and Rik Scarce's research on animal rights activists.<sup>105</sup> Two of these cases involve grand jury investigations, and so represent problems

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<sup>101</sup>*Supra* note 22.

<sup>102</sup>See *supra* notes 9 and 16.

<sup>103</sup>In 1972, Popkin, a Harvard political scientist, spent eight days in jail for refusing to reveal to a grand jury the identities of the persons he interviewed regarding the Pentagon papers, a secret war study. See J. Carroll & C. Knerr, "Confidentiality of social science research sources and data: The Popkin case" (1973) 6 *Polit. Sci. Quart.* 268.

<sup>104</sup>*Supra* note 51.

<sup>105</sup>*Supra* note 13.

that we will not encounter in Canada, and the third resulted from a limited confidentiality warning that the court interpreted as a waiver of privilege. We have not discovered a single case where a violation of research confidentiality actually harmed a participant.<sup>106</sup>

Against the minuscule risk of disclosure has to be weighed the value of the lengthy tradition of research on sensitive topics where anonymity is not possible. Such research could not be done if researchers were to limit confidentiality at the outset. Taking criminal offenders as an example, Friedson summarises the value of such research this way:

One can, of course, survey those who have been apprehended and conveniently incarcerated, but one could hardly use conventional survey methods to find as yet unapprehended offenders and get them to answer questions. And it is information about the deviance that goes on in the everyday world that is critical for adequate public knowledge and evaluation of the laws and policies of a given time, and their consequences. Such information, collected, analyzed, and reported independently of law-enforcement agencies, is precisely the information that is critical to informed public debate and to intelligent reform of previously acceptable laws or policies, and to counterbalance the self-protective tendencies of established governmental institutions.<sup>107</sup>

To be valid, reliable, and ethical, research that involves participants disclosing both their identity and information that could do them serious harm requires an unlimited guarantee of confidentiality. Without this guarantee, who could trust the results? Without it, how could we fulfil our ethical obligation to protect research participants? Consequently, the only way to protect research participants *and* do valid and reliable research on sensitive topics is to give an unlimited guarantee of confidentiality and hope that the courts agree that privilege is merited. If the courts do not agree, it will not change the promise the researcher made.

#### *Grounds for Violating A Confidentiality Agreement*

Of course, the duty to uphold a promise of confidentiality is not absolute. Sometimes the duty to prevent a greater harm to a third party could outweigh the ethical responsibility to prevent harm to a research participant. But this is still not a reason to limit confidentiality *a priori*.

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<sup>106</sup> If any reader knows of such a case, we would appreciate it being brought to our attention.

<sup>107</sup> E. Friedson, "The Legal Protection of Social Research: Criteria for Definition" in Nejelski, *supra* note 16 at 123.

To clarify this point, we use the term “heinous discovery” to refer to the revelation of serious prospective harm, and identify situations where it would be appropriate to *violate* a pledge of confidentiality rather than limiting it from the outset.

Heinous discovery includes, but is not limited to, situations coming under the umbrella of “the public safety exception” in law. The most recent example of the public safety exception in Canada is the case of *Smith* mentioned earlier. Defendant Jones revealed to psychiatrist Smith that he intended to serially kill Vancouver prostitutes. When the psychiatrist petitioned to divulge this information to the court, Jones's lawyer, who had referred Jones to Smith for a pre-trial assessment, argued that disclosure would violate lawyer-client privilege. The Supreme Court decided that preventing a serious and specific threat to prostitutes should take precedence over the interests served by the privilege. The Court did not *require* the confidence to be violated in these circumstances, but viewed it as *permissible* to do so, given the higher ethic involved. If this kind of revelation occurred in a research setting with an undetected offender, the researcher thus would be faced with an *ethical* rather than a *legal* choice as to whether to violate confidentiality.

Another form of heinous discovery involves information that could prevent the conviction of an innocent person. This is akin to the “innocence at stake” exception to police-informer privilege.<sup>108</sup> To prevent wrongful conviction of a third party on a serious offence, a researcher might well decide to violate confidentiality (we have never heard of a researcher being confronted with this choice).

But here is the important point. Having recognised heinous discovery as a reason to *violate* confidentiality, does it makes sense to *limit* it? Consider the result had psychiatrist Smith told Jones, “This conversation is completely confidential, unless you tell me that you're going to kill prostitutes when you're released, in which case I'll have to report you.” With confidentiality limited thus, Jones surely never would have revealed his plans to Smith, would have been released after serving a sentence for assault, and may well have become a serial killer. Ironically, the *a priori* limitation of confidentiality to account for the reporting of serious prospective harm would produce its own apparently unethical resolution: the death of the victim or, in Jones's case, many victims.

Limiting confidentiality *a priori* does nothing to prevent the prospective harm. Instead, it creates the unethical situation of retaining one's ethical purity by donning blinkers that prevent one from seeing

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<sup>108</sup> See *e.g. R. v. Scott*, [1990] 3 S.C.R. 979.

someone else's misfortune. Accordingly, we do not believe it makes sense to limit confidentiality to account for heinous discovery that the researcher cannot reasonably anticipate.

### *Anticipated Heinous Discovery*

However, if the researcher can reasonably anticipate learning about serious prospective harm, as would be the case if we could study the attitudes and actions of persons who had committed murders for which other persons had been convicted, the research would be of doubtful validity if confidentiality were limited. In this instance, the researcher should give an unqualified guarantee of confidentiality and keep the pledge, or not do the research at all.<sup>109</sup>

## **Conclusions**

### *Summary of the Wigmore Strategy*

On the basis of Canadian and U.S. jurisprudence, designing research in anticipation of invoking the Wigmore criteria involves several fundamental tenets:

1. Researchers should secure ethics approval as part of demonstrating their research is consistent with the canons of their discipline, the *Policy Statement*, and is indeed a “research” project.
2. The application to a Research Ethics Board should include a discussion of why confidentiality is essential to undertaking the proposed research project (or why it is not). The application then provides clear evidence that any provision of confidentiality was part of a well-considered research plan. Once in the field, researchers are advised to ask prospective participants if they would participate in the research if they could be identified. A record should be made of the response — provided, of course, the record itself does not jeopardise confidentiality.<sup>110</sup> Such a record would provide further evidence that confidentiality was/is essential to the researcher-participant relationship in that project.

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<sup>109</sup> We would make a similar argument in the case of research on offences, such as child abuse, that one is required to report. The solution to the problems posed by mandatory reporting laws may well be addressed by use of confidentiality certificates, which are discussed in the conclusion to the paper.

<sup>110</sup> We mean “record” broadly. For example, the researcher could note the response anonymously or with a pseudonym in contemporaneous field notes, or have a verbatim record in an anonymised interview transcript.

3. On the basis of the researcher's experience, colleagues' experiences and the extant literature, consider the range of challenges to confidentiality that might reasonably be anticipated and consider whether the benefits of doing the research outweigh the interests that might reasonably be represented in any challenge to confidentiality.
4. If convinced that the research is worth doing and cannot be done without a guarantee of confidentiality, ensure that an unambiguous promise to that effect is made, and that the promise is maintained.

In light of the Ogden case in Canada and the existing jurisprudence in the United States, it seems likely that, in most circumstances, the courts will maintain confidentiality of participant identities. At worst, they will use very restrictive disclosure orders to minimise the impact of disclosure on researchers, research participants and the research enterprise.

### ***Where To Next? The Three Councils' Obligations***

Because the *Policy Statement* makes the risk of court-ordered disclosure an issue, our attention is drawn to the lack of statutory protection for research participants in Canada. The possibility of court-ordered disclosure in Canada exists in theory because there is a gap between the researcher's ethical obligations to research participants and the legal protections that exist. The very existence of this gap may already exert a chilling effect on some kinds of research.<sup>111</sup> One way to fill it would be for federal and provincial governments to create "confidentiality certificates" and/or "privacy certificates" similar to those available to some U.S. researchers.

Confidentiality certificates are currently available through the U.S. National Institutes of Health (NIH) on a case-by-case basis or to classes of research. They were introduced in 1970 when it became clear that the federal government could not conduct research on drug addiction among returning Vietnam veterans unless confidentiality could be guaranteed.<sup>112</sup> Currently, confidentiality certificates may be awarded to "health"

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<sup>111</sup> See F. Levine & J. M. Kennedy, "Promoting a scholar's privilege: Accelerating the pace" (1999) 24:4 L. & Soc. Inquiry 967.

<sup>112</sup> On the history of confidentiality and privacy certificates see Madden & Lessin, *supra* note 100 at 263; R.T. Nelson & T.E Hedrick, "The Statutory Protection of Confidential Research Data: Synthesis and Evaluation" in R.F. Boruch & J. Cecil, eds., *Solutions to Ethical and Legal Problems in Social Research* (New York: Academic Press, 1983) 213.

research, whether funded by NIH or not, where confidentiality is essential, including research on:

- sexual attitudes, preferences, or practices;
- the use of alcohol, drugs, or other addictive products;
- illegal conduct;
- subjects that could damage an individual's financial standing, employability, or reputation within the community;
- a patient's medical record, the disclosure of which could lead to social stigmatization or discrimination;
- an individual's psychological well being or mental health;
- genetics.

The U.S. *Public Health Services Act* describes confidentiality certificate protection as follows:

The Secretary may authorize persons engaged in biomedical, behavioral, clinical, or other research (including research on mental health, including research on the use and effect of alcohol and other psychoactive drugs) to protect the privacy of individuals who are the subject of such research by withholding from all persons not connected with the conduct of such research the names or other identifying characteristics of such individuals. Persons so authorized to protect the privacy of such individuals may not be compelled in any Federal State or local civil, criminal, administrative, legislative, or other proceedings to identify such individuals.<sup>113</sup>

Statutory protection<sup>114</sup> is also available for research conducted by the National Institute of Justice (N.I.J.) and Office of Justice Programs (O.J.P.). The statute provides that N.I.J. and other program officers and recipients of O.J.P. funding shall not reveal confidential information furnished by research participants, and shall use all research information only for research purposes. Any identifiable information collected using O.J.P. funds is immune from legal process and cannot be admitted as evidence “in any action, suit or other judicial, legislative, or administrative proceedings.”

O.J.P.-funded research also is subject to 28 *C.F.R.* Part 22 (§22.23). Prior to the approval of funding, all applicants are required to submit a “privacy certificate,” which provides an assurance that they will maintain the confidentiality of information identifiable to a private person. The certificate has to describe the methodological and other procedures that will be used to maintain confidentiality.

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<sup>113</sup> §301(d), 42 U.S.C. §241(d).

<sup>114</sup> 42 U.S.C. §3789g



There are problems with a government agency controlling the issuing of confidentiality certificates. In particular, the procedure for issuing the certificates effectively places academic freedom in the hands of the state. Also, the pragmatics of administering confidentiality certificates could prove overwhelming — how large a bureaucracy would be required to administer what could be thousands of such certificates every year? Nonetheless, confidentiality certificates offer impressive protections. They have been in use for thirty years in the U.S. without ever being challenged successfully in court. Indeed, we can find reference to only one court challenge. In *Newman*<sup>115</sup> the New York Court of Appeal upheld the certificates; the U.S. Supreme Court declined to hear the case.<sup>116</sup> Statutory protections along the lines of confidentiality certificates and privacy certificates could be developed in Canada. Indeed, the *Policy Statement* suggests that:

Researchers enjoy, and should continue to enjoy, important freedoms and privileges. To secure the maximum benefits of research, society needs to ensure that researchers have certain freedoms. It is for this reason that researchers and their academic institutions uphold the principle of academic freedom and the independence of the higher education research community.<sup>117</sup>

One thing researchers in Canada do *not* enjoy is a legal protection that reflects their ethical obligation to protect research participants. The *Policy Statement* recognises that ethical approaches may affect the future development of law. In this spirit, we encourage Canada's three granting Councils to initiate a campaign for legislation in Canada to create statutory protections along the lines of confidentiality certificates. And we urge all Canadian universities, faculty associations, disciplinary associations and the Canadian Association of University Teachers to support the three Councils in this endeavour.

In the interim, to protect research participants to the full extent possible in law, researchers should design their research with the evidentiary requirements of the Wigmore test in mind.

### **Abstract**

The paper begins with an outline of some legal and ethical principles regarding research confidentiality that frame researchers' choices, and then reviews the common law on privilege in Canada and the U.S. to show how researchers can design their research to maximise the legal protection of confidential research

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<sup>115</sup> *People v. Newman*, 32 N.Y.2d 379, 298 N.E.2d 651, 345 N.Y.S.2d 502 (1973), cert. denied, 414 U.S. 1163 (1973).

<sup>116</sup> See Nelson & Hedrick, *supra* note 112 at 213.

<sup>117</sup> *Supra* note 6 at i-8.

information. The paper describes various disciplinary ethics codes and the new federal *Tri-Council Policy Statement* on ethics to illustrate the principles that should be considered in the unlikely event that a Canadian court orders disclosure of confidential information that could harm a research participant. We conclude by proposing that universities and the three granting councils should campaign for statutory protection of research participants along the lines of the confidentiality certificates that are currently available in the United States for research on sensitive topics such as drug use, criminal activities, sexual behaviour, and genetic information.

### **Résumé**

L'article commence par tracer les principes de droit et de l'éthique concernant la confidentialité de la recherche. La jurisprudence de privilège au Canada et aux Etats-Unis est considérée pour démontrer comment on peut utiliser le droit afin d'augmenter les protections légales des sujets de recherche. Nous décrivons les codes d'éthiques des associations de différentes disciplines scientifiques ainsi que celui du nouvel *Énoncé de politique des trois Conseils* pour illustrer les principes dont on devrait tenir compte au cas où un tribunal canadien exigerait d'un/e chercheur/e qu'il/elle révèle des informations confidentielles pouvant heurter un sujet de recherche. Nous proposons que les universités et les trois Conseils de recherche luttent pour l'obtention de protections statutaires, tels les certificats de confidentialité utilisés aux Etats-Unis, pour les recherches portant sur des sujets particulièrement sensibles comme par exemple, l'usage de la drogue, les activités criminelles, le comportement sexuel et l'information génétique.

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