

Research Confidentiality and Academic Privilege: A Legal Opinion

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Professor Ellen M. Gee
Chair of the President's Task Force on Revision of the Research Policy
Simon Fraser University

Dear Professor Gee,

In your letter of instruction of 6 March 1999 you asked us to provide the Task Force:

with a commissioned legal opinion on research confidentiality and academic privilege. This would focus on such issues as individual rights (subjects mainly, but researchers too), privacy, risks, benefits, academic freedom - in the light of individual, institutional and societal interests. It would also focus on confidentiality, with a legal opinion on the appropriateness of the Wigmore Criteria in the University context.

A second report would provide the Task Force with specific suggestions/recommendations for wording of the new "Ethics Policy and Associated Procedures."

As part of the relevant background documentation that you sent to us were three previous legal opinions that had addressed some of these issues. Rather than provide you with a fourth opinion retracing the same ground, we have endeavoured to place the issues of research confidentiality and academic privilege in the broadest context. We believe that this will best enable you and the other Task Force members to understand the principles and values underlying the relevant law and how they apply to and intersect with the ethical considerations implicated in research involving

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human subjects. In reviewing the issues and formulating our opinion we have given particular consideration to the *Tri-Council Policy Statement* on Research Ethics, not only because the statement is regarded as the "state of the art" document in the context of Canadian research ethics but also because the three major funding agencies that constitute the Tri-Council will "require, as a minimum, that researchers and institutions apply the ethical principles and articles of this policy." (*Tri-Council Policy Statement* on Ethical Conduct for Research Involving Humans, i.2)

An Overview of the Opinion

In Part I we articulate the objectives, interests, and values of the university which should inform and infuse its ethics review policies.

In Part II we describe what we see as the precipitating issues that have given rise at SFU to the vigorous debate about research confidentiality ethics and the law. These issues are reflected in the Site Visit Report of the National Council on Ethics in Human Research, which while noting some concerns in the university's ethics review process, felt that SFU could take "positive leadership" in the search for a solution to the issues of research confidentiality. These issues also lie at the heart of the case of Russel Ogden, the graduate student whose research on euthanasia and assisted suicide in AIDS patients led to his being subpoenaed before a Vancouver Coroner's Inquest, where he successfully claimed legal privilege in relation to the names of his research subjects, marking the first legal precedent for such privilege in Canadian law.

In Part III we give a summary of the relevant legal rules of Privilege and how they have been applied by Canadian courts, to enable the Task Force to understand the relevance of these rules to the recognition of researcher-subject privilege. Because an understanding of the law requires not only a statement of the legal principles but also the framework of judicial inquiry, we review in some detail some of the leading cases of the Supreme Court of Canada of Canada to show how the modern law of privilege, while building upon traditional foundations, has continued to evolve in the context of modern social realities and in light of *Charter* values.

In Part IV we turn to the American jurisprudence on privilege, where the issue of academic

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privilege has been the subject of a number of judicial decisions over the past twenty years. While there are important differences between American and Canadian law, the American cases are helpful in identifying the circumstances in which court disclosure has been sought of academic research and how the courts have balanced the interests at stake. The American jurisprudence therefore provides a window through which to scan the legal horizon to see the types of issues that may arise in Canada and some of the pathways to resolving them.

In Part V we re-examine the Russel Ogden case, utilizing the transcripts of the proceedings, review the evidence that was placed before the Coroner's Inquest, apply the legal analysis that we have developed in the preceding parts of the Opinion, and consider whether the Coroner's decision in extending privilege was the right one and can be regarded as a guide both for the Task Force and university researchers. We conclude this section of the Opinion with a brief summary of the application of the law of privilege to the researcher-subject relationship.

In Part VI we draw upon our legal analysis to make recommendations for a new ethics policy. We consider the University's role in providing a legal and ethical framework to protect research confidentiality and suggest that this role be a constructive and proactive one. We then chart a strategic pathway, framed by the legal and ethical issues that should be taken into account in the design, approval, and execution of research, to ensure the greatest degree of protection for research confidentiality, consistent with the objectives, interests, and values of the University.

Part I THE OBJECTIVES, INTERESTS AND VALUES OF THE UNIVERSITY

In designing an ethics policy, the University should take into account the full panoply of goals of a modern university and should adopt an ethics policy which advances these goals. These goals can be grouped under four heads.

A. To Promote Research and the Social Benefits that It Advances

The *Tri-Council Policy Statement* articulates these objectives, interests and values in resonant tones.

Research involving human subjects is premised on a fundamental moral commitment to advancing human welfare, knowledge and understanding, and to examining cultural dynamics. Researchers, universities, governments and private institutions undertake or fund research involving human subjects for many reasons, for example: to alleviate human suffering, to validate social or scientific theories, to dispel ignorance, to analyze policy, and to understand human behaviour and the evolving human condition. Research involving human subjects imparts at least three general categories of benefits:

- The basic desire for new knowledge and understanding is the driving force for research.
- The quest to advance knowledge sometimes benefits research subjects. Subjects may benefit from improved treatments for illnesses; the discovery of information concerning one's welfare; the identification of historical, written, oral or cultural traditions; or the satisfaction of contributing to society through research.
- As well, research benefits particular groups and society as a whole. Thus, insights into political behaviour may produce better policy; information about the incidence of disease may improve public health; sociological data about lifestyles may yield social reform; and disciplines based on, for example, texts, dance, theatre or oral history, continue to illuminate past and present realities.

(Tri-Council Policy Statement i.4)

B. To Promote Academic Freedom

This objective and value, which many regard as the heartbeat of the University, is set out in this way by the *Tri-Council Policy Statement*:

Researchers enjoy, and should continue to enjoy, important freedoms and privileges.

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To secure the maximum benefits from research, society needs to ensure that researchers have certain freedoms. It is for this reason that researchers and their academic institutions uphold the principles of academic freedom and the independence of the higher education research community. These freedoms include freedom of inquiry and the right to disseminate the results thereof, freedom to challenge conventional thought, freedom from institutional censorship, and the privilege of conducting research on human subjects with public monies, trust and support.

(i.8)

Simon Fraser's own Framework Agreement with its faculty defines academic freedom as “the freedom to examine, question, teach and learn ... involv[ing] the right to investigate, speculate and comment without reference to prescribed doctrine, as well as the right to criticize the University, the Faculty Association and the society at large.” Included are “freedom in undertaking research and publishing or making public the results thereof, and freedom from institutional censorship.” (SFU Framework Agreement)

The University's responsibility for promoting academic freedom has also been the subject of recent commentary by SFU Faculty members, Professor Nicholas Blomley and Professor Steven Davies. In their *Russel Ogden Decision Review* of October 1998 they write:

Challenges to academic freedom can come both from within and without the university. A university can guarantee to protect academic freedom against actions inside the institution that are within its legal and moral jurisdiction. It can, of course, give no such guarantee about threats to academic freedom that come from outside the university, but a university has the obligation to try and protect this freedom from such external threats and challenges. If universities do not take on this obligation to protect such a basic institutional right, who will?

In his Reasons for Judgment in Russel Ogden's claim against Simon Fraser, Judge Steinberg, in one of the rare Canadian judicial references to academic freedom, commented that “the principles of academic freedom and privilege ... are fundamental to the operation of any accredited university.” The Supreme of Canada in *McKinney v. University of Guelph* [1990] 3 S.C.R.229 stated that “the preservation of academic freedom...is an objective of pressing and substantial importance”. As we will see, academic freedom has been given greater consideration in courts in the United States, and the issue of “judicially authorized intrusion” into the scholarly research activities of scholarly researchers has been discussed in the context of the U.S. Constitution's First Amendment protection of freedom of speech. Thus, the Seventh Circuit Court of Appeals in its decision in *Dow Chemical Co. v. Allen*

characterized Dow's efforts to subpoena ongoing research as a threat of "substantial intrusion into the enterprise of university research ... capable of chilling the exercise of academic freedom," which would "inevitably tend to check the ardor and fearlessness of scholars." (*Dow Chemical Co. v. Allen*, 672 F.2d 1162 (7th Cir.1982) at 1275 - 6) In this case the court defined academic freedom as "the right of the individual faculty member to teach, carry on research, and publish without interference from the government, the community, the university administration, or his fellow faculty members."

C. To Promote the Ethical Conduct of Research Involving Human Subjects and to Educate the Research Community About Research Ethics.

The intersection between academic freedom and ethical research is highlighted in the *Tri-Council Policy Statement*. After referring to the importance of academic freedom and the importance of the higher education research community, the statement continues:

However, researchers and institutions also recognize that with freedom comes responsibility, including the responsibility to ensure that research involving human subjects meets high scientific and ethical standards.

(i.8)

The *Tri-Council Policy Statement* sets out the "guiding ethical principles" for research involving human subjects, principles which reflect the guidelines of the Councils over the last decades, more recent statements by other Canadian agencies such as the National Research Council of Canada and statements from the international community. The eight principles articulated by the Tri-Council are these:

Respect for Human Dignity: The cardinal principle of modern research ethics, as discussed above, is respect for human dignity. This principle aspires to protecting the multiple and interdependent interests of the person -- from bodily to psychological to cultural integrity. This principle forms the basis of the ethical obligations in research that are listed below.

In certain situation, conflicts may arise from application of these principles in isolation from one other. Researchers and REBs must carefully weigh all the principles and circumstances involved to reach a reasoned and defensible conclusion.

Respect for Free and Informed Consent: Individuals are generally presumed to have the capacity and right to make free and informed decisions. Respect for persons thus means respecting the exercise of individual consent. In practical terms within the ethics review process, the principle of respect for persons translates into the dialogue, process, rights, duties and requirements for free and informed consent by the research subject.

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Respect for Vulnerable Persons: Respect for human dignity entails high ethical obligations towards vulnerable persons—to those whose diminished competence and/or decision-making capacity make them vulnerable. Children, institutionalized persons or others who are vulnerable are entitled, on grounds of human dignity, caring, solidarity and fairness, to special protection against abuse, exploitation or discrimination. Ethical obligations to vulnerable individuals in the research enterprise will often translate into special procedures to protect their interests.

Respect for Privacy and Confidentiality: Respect for human dignity also 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.

Respect for Justice and Inclusiveness: Justice connotes fairness and equity. Procedural justice requires that the ethics review process have fair methods, standards and procedures for reviewing research protocols, and that the process be effectively independent. Justice also concerns the distribution of benefits and burdens of research. On the one hand, distributive justice means that no segment of the population should be unfairly burdened with the harms of research. It thus imposes particular obligations toward individuals who are vulnerable and unable to protect their own interests in order to ensure that they are not exploited for the advancement of knowledge. History has many chapters of such exploitation. On the other hand, distributive justice also imposes duties neither to neglect nor discriminate against individuals and groups who may benefit from advances in research.

Balancing Harms and Benefits: The analysis, balance and distribution of harms and benefits are critical to the ethics of human research. Modern research ethics, for instance, require a favourable harms-benefit balance—that is, that the foreseeable harms should not outweigh anticipated benefits. Harms-benefits analysis thus affects the welfare and rights of research subjects, the informed assumption of harms and benefits and the ethical justifications for competing research paths. Because research involves advancing the frontiers of knowledge, its undertaking often involves uncertainty about the precise magnitude and kind of benefits or harms that attend proposed research. These realities and the principle of respect for human dignity impose ethical obligations on the prerequisites, scientific validity, design and conduct of research. These concerns are particularly evident in biomedical and health research; in research they need to be tempered in areas such as political science, economics or modern history (including biographies), areas in which research may ethically result in the harming of the reputations of organizations or individuals in public life.

Minimizing Harm: A principle directly related to harms-benefits analysis is non-maleficence, or the duty to avoid, prevent or minimize harms to others. Research subjects must not be subjected to unnecessary risks of harm, and their participation in research must be essential to achieving scientifically and societally important aims that cannot be realized without the participation of human subjects. In addition, it should be kept in mind that the principle of minimizing harm requires that the research involve the smallest number of human subjects and the smallest number of tests on these subjects

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that will ensure scientifically valid data.

Maximizing Benefit: Another principle related to the harms and benefits of research is beneficence. The principle of beneficence imposes a duty to benefit others and, in research ethics, a duty to maximize net benefits. The principle has particular relevance for researchers in professions such as social work, education, health care and applied psychology. As noted earlier, human research is intended to produce benefits for subjects themselves, for other individuals or society as a whole, or for the advancement of knowledge. In most research, the primary benefits produced are for society and for the advancement of knowledge.

(i.5-6)

D. To Develop Policies and Procedures that Promote Respect for the Rule of Law, and Encourage a Culture of Research that Enhances the Protection of Human Rights Affirmed by the *Canadian Charter of Rights and Freedoms* and International Covenants to which Canada is a Signatory.

The relationship between law and ethics is set out in the following passage of the *Tri-Council Policy Statement*:

The law affects and regulates the standards and conduct of research involving human subjects in a variety of ways, such as privacy, confidentiality, intellectual property, competence, and in many other areas. Human rights legislation prohibits discrimination on a variety of grounds. In addition, most documents on research ethics prohibit discrimination and recognize equal treatment as fundamental. REBs should also respect the spirit of the *Canadian Charter of Rights and Freedoms*, particularly the sections dealing with life, liberty and the security of the person as well as those involving equality and discrimination.

This legal context for research involving human subjects is constantly evolving and varies from jurisdiction to jurisdiction. For this reason, researchers, institutions and REBs should have recourse to expertise to identify legal issues in the ethics review process.

However, legal and ethical approaches to issues may lead to different conclusions. The law tends to compel obedience to behavioural norms. Ethics aim 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 the law, they may well affect its future development or deal with situations beyond the scope of the law.** (emphasis added)

(i.8)

The last bolded sentence is of particular significance to this legal opinion. As we will describe, the state of the law as to when the disclosure of research information will be legally compellable is a classical example of what Professor H. L. A. Hart referred to as "problems of the penumbra." (H. L. A. Hart, *The Concept of Law*, 1961) In plain English, the general principles of the law are relatively easily stated, but their application to the spectrum of different facts that give rise to disputes about research confidentiality and legally mandated disclosure are less amenable to definitive answers. For problems of the penumbra, the arguments marshaled in support of the values and the policies underlying the relevant law play an important part in the resolution and disposition of the issue. In this way the university through the articulation of values in its research ethics policies and the practices in support of

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those policies can play an important role in the development of the law.

Although, as the *Tri-Council Policy Statement* correctly states, legal and ethical approaches to issues may lead to different conclusions (and we will be discussing this later in the opinion) there are basic values that constitute a common framework for legal and ethical protection of human rights. With the advent of the Canadian *Charter of Rights and Freedoms*, the Supreme Court of Canada has over the past twenty years been called upon to articulate the values upon which the *Charter* is built, and these values not only inform the interpretation of the *Charter* provisions themselves, but also the interpretation of the common law, including the law of privilege. The values of human dignity and privacy are two such values that are the centrepiece of both *Charter* protections and ethical guidelines. Mr. Justice Lamer in the *Motor Vehicle Reference* case, in interpreting the meaning of “principles of fundamental justice” in section 7 of the *Charter* and the relationship of these principles to other provisions of the *Charter* stated:

They represent principles that have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is grounded upon the belief in the dignity and worth of the human person and the rule of law.

(*Reference re: 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486)

The Supreme Court has also addressed the importance of privacy as a fundamental value of human society. In *R. v. Dyment* the court declared that “privacy is at the heart of liberty in a modern state,” and, “is essential for the well-being of the individual.” 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. Territorial privacy refers to places such as the home that are considered to be private; personal privacy is concerned with the human body. Informational privacy, the zone with which this Opinion is primarily concerned:

. . . “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

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information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.

(*R. v. Dyment*, [1988] 2 S.C.R. 417 at 429-30)

In the later decision of *R. v. 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 tend to reveal intimate details of the lifestyle and personal choices of the individual.

(*R. v. Plant*, [1993] 3 S.C.R. 281 at 293)

Informational privacy, however, is not absolute. As the Supreme Court has made clear, it must be balanced against other legitimate societal needs. In *R. v. O'Connor* Madame Justice L'Heureux-Dubé stated:

This court has recognized that the essence of such a balancing process lies in assessing reasonable expectation of privacy and balancing that expectation against the necessity of interference from the state. Evidently, the greater the reasonable expectation of privacy and the more significant the deleterious effects flowing from its breach, the more compelling must be the state objective, and the salutary effects of that objective, in order to justify interference with this right.

(*R. v. O'Connor*, [1995] 4 S.C.R. 411 at 477)

The *Tri-Council Policy Statement* approaches the issue of the protection of privacy interests consistent with the Supreme Court's approach.

For the purpose of this policy, identifiable personal information means information relating to a reasonably identifiable person who has a reasonable expectation of privacy. It includes information about personal characteristics such as culture, age, religion and social status, as well as their life experience and educational, medical or employment histories.

(3.2)

Privacy interests have not only received protection under the Charter, but also legislative protection under federal and provincial legislation. Thus British

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Columbia's provides for a civil cause of action for willful violation of privacy:

1. (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
- (2) The nature and degree of privacy to which a person in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

The principle of informed consent necessarily looms large in the framing of this Opinion. The set of values underlying this pivotal concept is another one of the areas in which ethics and the law converge. The *Tri-Council Policy Statement* requires that:

Free and informed consent lies at the heart of ethical research involving human subjects. It encompasses a process that begins with the initial contact and carries through to the end of the involvement of research subjects in the project. As used in this Policy, the process of free and informed consent refers to the dialogue, information sharing and general process through which prospective subjects choose to participate in research involving themselves.

(2.1(a))

The *Policy Statement* affirms that this principle "states the requirement both in ethics and law: to protect and promote human dignity. Ethical research involving humans requires free and informed consent."

The Supreme Court of Canada in its jurisprudence on the doctrine of informed consent has explained the underpinnings of the doctrine and the obligation of full disclosure that it entails.

The Supreme Court in *Ciarlariello v. Shacter* stated:

It should not be forgotten that every patient has a right to bodily integrity. This encompasses the right to determine what medical procedures will be accepted and the extent to which they will be accepted. Everyone has the right to decide what is to be done to one's own body. This includes the right to be free from medical treatment to which the individual does not consent. **This concept of individual autonomy is fundamental to the common law and is the basis for the requirement that disclosure be made to a patient.** (emphasis added)

([1993] 2 S.C.R. 119 at 135)

In *Hopp v. Lepp*, Chief Justice Laskin described the duty of disclosure in the medical context (and most of the cases have arisen in the medical context) as the duty to "disclose . . . the nature of the proposed operation, its gravity, any material risks and any special or unusual

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risks attendant upon the performance of the operation.” ([1980] 2 S.C.R. 192) In *Riebl v. Hughes*, Chief Justice Laskin expanded on the principle of disclosure, adding that:

Even if a certain risk is a mere possibility which ordinarily need not to be disclosed, yet if its occurrence carries serious consequences, as for example, paralysis or even death, it should be regarded as a material risk requiring disclosure.

([1980] 2 S.C.R. 880)

More recently, in *Ciarlariello v. Schacter* the Supreme Court confirmed that to evaluate whether a risk is material, one must take an objective point of view, and assess whether a reasonable person in the patient’s situation would want to know the risk.

In some provinces, legislation has codified the concept of informed risk in the context of health care. Thus the *Ontario Health Care Consent Act*, 1996 provides that:

A consent to treatment is informed if, before giving it:

- (a) the person received the information about matters set out in subsection (3) that a reasonable person in the same circumstances would require in order to make a decision about the treatment.

...

(3) The matters referred to in subsection (2) are:

- (i) the nature of the treatment;
- (ii) the expected benefits of the treatment;
- (iii) the material risks of the treatment;
- (iv) the material side effects of the treatment;
- (v) alternative courses of action;
- (vi) the likely consequences of not having the treatment.

The *Tri-Council Policy Statement*, in its detailed provisions relating to informed consent (which we will be reviewing later in this Opinion) may be seen as building upon these legal precedents and applying them in the specific context of research involving human beings.

PART II THE PRECIPITATING ISSUES

A. The Report of the National Council on Ethics in Human Research

On October 26 - 7 the National Council on Ethics in Human Research conducted a site visit to Simon Fraser and issued a report. The purpose of the visit was:

to assess the degree of attention directed to research ethics review, and to assess the role and function of the research ethics committees. Specific objectives were to review SFU's policy and processes with respect to the protection of human subjects in research, and to assist SFU administration, committee members and faculty researchers in interpreting and implementing the ethical guidelines provided through the Tri-Council Policy: Ethical Conduct for Research Involving Humans.

(Formal NCEHR Site Visit Report, October 26 - 7, 1998 at 1)

Based upon meetings with the University Research Ethics Review Committee, Deans of various faculties, Department Chairs and individual researchers the authors of the report summarized what they characterized as "concerns in the ethics review process."

The high percentage of proposals receiving expedited review, the peripheral involvement of faculty members in the majority of research ethics reviews, the lack of attention to the review of scholarly or scientific merit, the lack of formal monitoring mechanism for ongoing research, what appears to be a narrow view of acceptable research methodologies, an undue emphasis on bureaucratic processes with seemingly inconsistent application of the rules, and the effect of the current ethics review process on graduate students' perceptions of appropriate ethics review. **The application of confidentiality in human subject research is clearly a top concern which reaches beyond SFU.** (emphasis added)

(at 6)

It is of course the last bolded concern on which we have been asked to focus in this Opinion, although the intertwining of the process and substance of ethics review will cause us to comment on several other of the concerns identified in this passage. The Site Visit Report set out a number of recommendations, one of which was specific to the issue of research confidentiality. The Report recommended that Simon Fraser University:

Work with National bodies in reconsidering the process which requires researchers to disclose the potential for breaching confidentiality. This is a critical issue and one in which SFU can take positive leadership in the search for a solution to the conflict which balances ethical obligations to research subjects against concern for institutional liability.

(at 7)

In thinking about the appropriate framework for analysis for this Opinion we have given particular consideration to helping your Task Force provide that "positive leadership."

B. The *Russel Ogden* Case

We believe it is useful to begin our review of the legal and ethical issues involved in research confidentiality and academic privilege by reviewing the case that has generated the current controversy at Simon Fraser and that has animated the search for a principled solution. As we will show, the factual matrix of the *Ogden* case is only one of a much wider spectrum of cases that must be taken into account in framing a research ethics policy.

In setting out the summary of the *Russel Ogden* case we have drawn upon the *Russel Ogden Decision Review* conducted by Professors Blomley and Davis (October 1998), the Oral Reasons for Judgment delivered by the Honourable L. W. Campbell in his *Inquest of Unknown Female of October 20, 1994* and the Reasons for Judgment of the Honourable Judge D. Steinberg in *Ogden v. Simon Fraser University*, June 10, 1998.

On May 12th, 1991, the Province newspaper published a story entitled *An Act of Courage*. In the article the reporter discussed an interview that she had done with an anonymous male who had advised her that he had assisted in the death of an unidentified woman. As a result of learning this information, on June 17th, 1991, the Chief Coroner of British Columbia directed an inquest into the death of the unknown female pursuant to section 20(2) of the *Coroners Act*.

In the spring of 1991, Russel Ogden, who had been employed as a social worker, spoke with Dr. Brian Burtch, an associate professor in the school of Criminology at Simon Fraser University about his interest in researching the area of euthanasia. As a result, Dr. Burtch wrote a letter of reference to the School recommending acceptance of Russel Ogden as a graduate student in the M. A. program. Between September 1991 and the spring of 1994, Russel Ogden was registered in the M.A. program at the Simon Fraser University School of Criminology. He researched and published a thesis entitled *Euthanasia and Assisted Suicide in Persons Who Have Acquired Immune Deficiency Syndrome (AIDS) or Are HIV Positive*.

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Between August 31st, 1992 and October 1st, 1992, Ogden submitted four drafts of his research proposal to his supervisor Dr. Burtch for approval by his supervisory committee. This procedure was required pursuant to the University regulations as set out in the Simon Fraser University Calendar and the Graduate Studies Handbook. The University regulations also required that the proposal be approved by the Ethics Review Committee since it dealt with research involving human subjects in a highly sensitive area. Each draft of the proposal was vetted by Mr. Ogden's supervisor, Professor Burtch, and various changes were made in compliance with the directions and suggestions made by Professor Burtch. Each draft of the proposal contained an appendix dealing with the ethical constraints under which Mr. Ogden would be conducting his research. Before Mr. Ogden could proceed with his research project, the ethical terms of reference had to be approved both by his departmental supervisory committee and by the Ethics Review Committee of the university as a whole. Each draft of the proposal which was approved by his senior supervisor contained the following two paragraphs dealing with the ethical considerations.

There are serious ethical considerations in the proposed research project. There is no intent to influence the choices of adult research participants regarding euthanasia. Prior to requesting consent from the participants, subjects will be fully informed of the nature of the research, the potential value of the research, and their right to withdraw during the course of the interviews. Each subject will have the choice to decide what information not already in the public domain or available to the public relating to physical or mental condition, personal circumstances and relationships shall be conveyed or withheld from others. No information regarding procedures or purposes of the research shall be withheld from the participants. Informed consent forms will be issued, though it is expected that many subjects will decline to sign. In this event, verbal consent will be noted. All subjects will be issued a subject feedback form.

Absolute confidentiality of all participants will be assured. It is recognized that the proposed research involves data about illegal behaviour; aiding and abetting a suicide, and homicide are potential charges stemming from the identification of subjects. For the protection of participants and the researcher, no participant will be required to give information regarding their identity. It will be sufficient that they give the researcher only a pseudonym. The researcher will advise participants of the possibility of court action ordering the researcher to produce a list of participant names. The researcher will take steps to ensure that all identifying information is carefully coded and secretly stored in order to minimize risks to the privacy of the participants.

Mr. Ogden also wrote a covering letter to the Ethics Review Committee to accompany his application for ethical approval of his research protocol.

To Whom It May Concern:

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I have met with Dr. Ray Corrado, Criminology Ethics Representative, and some questions concerning legal accountability were raised. Specifically, the proposed study may result in my learning of criminal behaviour such as aiding suicide or murder -- how might I, or the University be held accountable?

I have sought legal advice on this question. To the best of my knowledge there is no precedent in Canada requiring individuals to share information with Crown Counsel. Nor is there any statutory obligation to report criminal activity. The only duty report legislation in British Columbia is with respect to child abuse or neglect, and sexually transmissible disease.

Participants in this proposed study are under no obligation to disclose identifying information. This serves to protect myself as well as the research participants. It is a remote possibility that Crown Counsel or the Coroner's Office may request cooperation with an investigation. In such a circumstance, I accept full responsibility for any decision I make with respect to the sharing of information.

I trust this satisfactorily resolves the concern of the University.

Following some further amendments to Mr. Ogden's proposal suggested by the Secretary to the Ethics Review Committee on September 24, 1992 Dr. Leiss, Chair of the Ethics Review Committee, granted ethics approval to Mr. Ogden's proposal. On October 9, 1992, after an oral defence of the proposal before Dr. Burtch, the School of Criminology approved Mr. Ogden's proposal and he commenced his research.

Mr. Ogden made known the nature of his inquiry in the AIDS and HIV community, and people self referred themselves to him for the purpose of being interviewed and providing information. During the course of this investigation, one of the persons interviewed disclosed a case of assisted suicide. On January 12, 1994, Ogden submitted his thesis to the Examining Committee and on February 8, 1994, he successfully defended his thesis.

On January 17, 1994, Dr. Stubbs, the President and Vice-Chancellor of SFU, met with Dr. Verdun-Jones, in his capacity as President of the Faculty Association, during a scheduled lunch meeting. At that meeting Dr. Verdun-Jones asked President Stubbs about SFU providing legal advice to Ogden in the event of legal proceedings arising from information that might be disclosed when the thesis was published. Dr. Stubbs indicated his personal support but made no specific commitment on behalf of the University. On February 3, 1994, Ogden granted an exclusive interview to Douglas Todd of the *Vancouver Sun* for an article to be published on February 12, 1994. The article revealed that Ogden had information concerning

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the ongoing Inquest.

On February 25, 1994, Coroner Larry Campbell requested a copy of Ogden's thesis in connection with the ongoing inquest into the assisted suicide of the unknown female. It would appear that the case of assisted suicide that Ogden had come across was the same case that had been referred to in the Province newspaper story. As a result, Ogden was subpoenaed to testify at the inquest into the death of the unknown female as the Coroner had to that date been unable to ascertain the identity of either the deceased or the person who had assisted the apparent act of euthanasia. The Coroner felt that because of the interview that Ogden had conducted, he would be able to provide the identities of the people involved.

After reading the *Vancouver Sun* on March 18, 1994 that the Vancouver coroner Larry Campbell had asked for a copy of Ogden's thesis, and that Ogden had been quoted as saying that he believed it inevitable that he would eventually have to refuse to testify about his sources, President Stubbs wrote the following message on March 27, 1994, to Dr. Clayman and Dr. Jock Munro:

"We will need to think about this and be ready to respond to Simon and the Faculty Assoc."

Dr. Clayman was the Dean of Graduate Studies and Vice President of Research and Dr. Munro was the Academic Vice-President. This message was in obvious anticipation of an approach by Dr. Simon Verdun-Jones who was President of the Faculty Association. At the time, the administration and the faculty were in the midst of negotiating a framework agreement putting in writing the obligation of the University to support the faculty and provide legal counsel in certain situations.

On May 12, 1994, Dr. Verdun-Jones approached Dr. Clayman, to request that SFU assist Ogden with his legal costs associated with the inquest. The following day, the Coroner advised Ogden by telephone that he would be sending him a subpoena.

In response to this, Dr. Clayman sent President Stubbs an E-mail regarding the subpoena:

The situation:

Russel Ogden's MA Crim thesis research dealt with assisted suicide. The research was approved by our Ethics Committee in 1992. He knows the identity of some persons who

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participated in such illegal actions. He has been told (according to Simon V-J) that he will be subpoenaed in the next few weeks and asked to reveal their names. He intends to refuse and will likely be found in contempt of court. In his correspondence to the Ethics Committee, he acknowledged the possibility of this happening and said that "I accept full responsibility any for decision I make with respect to sharing this information."

Simon asks that we assist with his legal bills. Mr. Ogden himself hasn't been in contact with me. He's a social worker, presumably of modest means. Whether we do or not, we will be drawn into the controversy surrounding the matter since the work was done as part of his thesis research with approval of our Ethics Committee. The committee of course did not approve his withholding information from the court or coroner, so I don't think there's any legal liability on our part.

We might wish to offer to assist with his initial legal expenses, say, up to \$2,000, on compassionate grounds or possibly based on support for his academic freedom. Other external groups will undoubtedly rally 'round him in his refusal to divulge names. I'd like to be able to help him. But what worries me though is that our offer to provide \$ will be interpreted by media (et al.) as SFU support for his position ... supporting assisted suicide.

On May 24, 1994, Mr. Ogden was advised by Dr. Clayman that the President and Vice-Presidents of SFU had considered his request for assistance and had rejected it. The following day, the Vancouver Coroner issued a Subpoena to Mr. Ogden to testify at the Coroner's Inquest. Also that same day, following further discussion between Dr. Verdun-Jones and President Stubbs, SFU agreed to provide \$2,000.00 to Mr. Ogden to assist with his legal costs in preparation for his appearance before the Coroner.

In the course of preparing to make further submissions before the coroner, Mr. Ogden wrote to Dr. Clayman on June 16, 1994, requesting:

...a statement that [endorsed] the tradition of a confidential relationship between researcher and participant and that such tradition should be continued.

Dr. Clayman responded to Mr. Ogden on June 29, 1994 in the following terms:

This is in reply to your letter dated June 16. I regret the delay in response; I wished to consult with several of my colleagues in developing the statement that you requested on confidentiality of research information.

As you are aware, Simon Fraser University, in its official Policies and Procedures does not address this issue. The following statement reflects my position as the university administrator with overall responsibility for research at this institution.

Academic research often requires that information be obtained from human subjects. In

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some cases, this includes information that is highly personal and/or concerns activities that may be in conflict with the civil or criminal law. In such cases, the researcher needs to be able to assure the subjects that the information will be held in confidence by the researcher. This is because subjects would likely not provide the needed information to the researcher if they believed that it would be divulged to others. This in turn would adversely affect the validity of the results of the research and would likely prevent the research from being carried out at all. This outcome would deprive society of the benefits stemming from the results of the research. These results could typically bear on and inform important public policy issues. Such research should therefore be encouraged. Thus it is essential to preserve, subject to limitations discussed below, a relationship of confidentiality between researcher and research subject.

Nonetheless, both researchers and their subjects must recognize that a communication that has been made in confidence does not give either party absolute privilege against disclosure. Where information that has been obtained in confidence becomes the subject of a legal dispute, the courts will determine whether the public interest demands that it be disclosed. Research subjects must be informed of this possibility at the time they consent to participate in the research.

On July 22, 1994, Ogden wrote to Dr. Clayman to advise that he wished to accept SFU's offer \$2,000.00 to assist in the payment of his legal expenses. A letter from Ogden's counsel invited SFU to review the legal argument that Ogden would rely upon before the Coroner. SFU declined the invitation.

At a meeting of the Vice-Presidents on July 27, 1994, the previous decision that no further funding would be provided beyond the \$2,000.00 already granted to Ogden was confirmed. Ogden was advised of this on August 11, 1994. SFU then forwarded the \$2,000.00 to Ogden's lawyer who was appearing in the proceedings before the Coroner.

Russel Ogden appeared before the Coroner on August 19, 1994, with his lawyer and declined to identify his research subjects, claiming legal privilege.

On October 20, 1994, Coroner Larry Campbell issued his decision finding that the communications between Mr. Ogden and his research subjects were privileged and therefore his refusal to reveal the identities of his research subjects did not amount to contempt of court. There was no appeal taken from the decision of the Coroner.

Coroner Campbell, in his Oral Reasons for Judgment, addressed the arguments of both Mr. Ogden and those of the *Vancouver Sun* reporter whose original story had precipitated the inquest, that the information they had received regarding the assisted suicide was

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confidential and legally privileged, so that they could not be legally compelled at the inquest to answer questions as to the identity of the deceased or person or persons who assisted her. The following passages from Coroner Campbell's reasons identified and applied the relevant legal tests to resolve the issue before him.

Counsel for Mr. Ogden, Mr. Crossin, has called evidence in support of an argument that his client is exempt from disclosure, not on the basis of a *Charter* right but in the common law exceptions as set out in what is known in legal circles as the Wigmore Test. Mr. Orchard has joined Mr. Crossin in his argument, and therefore I have to decide the question in a new light.

In my opinion, the issue of whether the witnesses called to this inquest are compellable or not can be answered using the Wigmore Test. This test outlines four basic criteria that must be met to establish confidentiality between two people. They are:

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- 1. The communication 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 in which the opinion of the community ought to be sedulously fostered.**
- 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.**

In reviewing testimony, it is abundantly clear to me that the first three criteria have been met by all three witnesses who have refused to divulge a confidentiality. After reading all of the testimony and briefs, it is obvious that the fourth criteria must be explored.

Mr. Crossin called witnesses who testified to the public good that has flowed from Mr. Ogden's publication. His witnesses detailed the steps required to ensure confidentiality, the necessity of this confidentiality and the contribution this document has made to the society as a whole and to persons with AIDS in particular. I am convinced after listening to the testimony and the arguments of Mr. Crossin that, in fact, Mr. Ogden should not be compelled to answer questions that would breach his promise of confidentiality. It is my finding that Mr. Ogden has fulfilled the fourth requirement under the Wigmore Test.

It has been argued by counsel for the members of the press that their position is covered under the Wigmore Test. Further, if the Wigmore Test was found to apply [to] Mr. Ogden, then it should apply "doubly to their clients." I reject that concept. As the Wigmore Test is applied on a case by case basis, it is my belief that even within each case there can be different circumstances surrounding each decision to extend confidentiality and protection therein. With regards to Mr. Butters, Ms. Graham and Ms. Cockburn, I have heard no compelling testimony or argument that by refusing to divulge the name of the informant society's interests would be served. The name of the informant would greatly assist the Coroner's Service in ascertaining the name of the unknown female. This would allow the investigation to continue into the circumstances surrounding the death and to allow you as members of the jury to make recommendations that would ensure that the care received by persons in similar circumstances in the future would be of a caring and compassionate nature.

As stated previously, Mr. Orchard's and Mr. Millar's arguments tended to dwell on the powers of the coroner rather than journalistic privilege under the Wigmore Test. No witnesses except for the clients themselves were called to support Mr. Orchard's or Mr. Millar's argument on the fourth criteria. Indeed Mr. Butters himself wrote that there had been no response to the article save and except within the journalistic society and then only to raise a question of journalistic ethics. It is my finding

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society's best interests are served by determining the identity of the deceased. It is my finding that the injury to society would be greater than the injury suffered by these parties by allowing them relief from testifying. I therefore find that Mr. Butters, Ms. Graham and Ms. Cockburn are compellable witnesses in regards to the challenged questions.

Having found that Mr. Ogden fits the common law exception to compellability in this matter, I release him from any stain or suggestion of contempt.

The opposite is true, however, of Ms. Cockburn, Ms. Graham and Mr. Butters. Having found that they do not fit the Wigmore Test, their refusal to answer is contempt.

(Oral Reasons for Judgment, the Honourable L.W. Campbell, Coroner in the Inquest of Unknown Female 91-240-0838, October 20, 1994 at 6-10.)

We will be revisiting the Ogden case latter in this Opinion where we will consider, in greater depth, the evidence and legal argument presented at the Coroner's Inquest.

PART III THE LAW OF PRIVILEGE

In this section, we propose to give a summary of the relevant legal rules and how they have been applied by Canadian courts, to enable the Task Force to understand the relevance of these rules to the recognition of researcher-subject privilege.

A. The Concept of Privilege

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. The fundamental conflict between the goal of ascertaining the truth and the goal of protecting confidential relationships by excluding relevant evidence should always be kept in mind when considering whether information is privileged.

B. The Typology of Privilege

In *R. v. Gruenke* [1991] 3 S.C.R. 263, the accused claimed that her communications to her religious advisor in which she described the circumstances of a murder were privileged. The Supreme Court drew a distinction between class privilege and case by case privilege holding that religious communications are not covered by a class privilege.

1. Class Privilege:

Certain relationships are protected by a class privilege. That is, any relationship falling within a protected class such as husband-wife, solicitor-client, or police-informant, grounds a claim of privilege for any communications that take place within its confines. Within class privilege, there are two further categories of protection of communications: absolute and qualified. A few absolute privileges have been created by statute. For example, section 39 of the *Canada*

Evidence Act creates an absolute privilege for confidences of the Queen's Privy Council.

Whether absolute privileges are really 'absolute' is currently before the courts. In the inquiry into government misconduct in the Asia-Pacific Economic Cooperation Summit (the APEC Inquiry) the lawyer for the protesters is applying to have a dozen cabinet documents delivered to the Inquiry Chair although these documents are, arguably, protected by the absolute privilege under the *Canada Evidence Act*.

All other forms of class privilege are qualified. Although granted a very high level of protection, communications falling within the classes of qualified privilege are subject to competing interests and will not be protected if the proponent of admission (or disclosure pre-trial) can show that admission or disclosure is necessary for a compelling public interest.

The most prominent example of a class privilege qualified in this sense is the privilege for solicitor-client communications. In *Gruenke*, the Supreme Court stated that protection of the solicitor-client relationship and their communications is essential to the effective operation of the legal system. Further, the Court held 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. Not surprisingly given this condition, there are very few relationships whose communications are protected by common law class privileges at the present time, the foremost being solicitor-client and police-informant. Confidential relationships many people might think as important as the lawyer-client relationship such as doctor-patient, therapist-client, journalist-informer, or priest-penitent are not protected by a class privilege. Communications within marriage, originally protected at common law as a class, are now protected by s. 4(3) *Canada Evidence Act*.

2. Case by Case Privilege:

Communications which are not protected by a class privilege may be protected on a case by case basis. The applicable principles for identifying privilege on a case by case basis are derived from the four criteria of Wigmore that are set out in the oral reasons for judgement in the Ogden case. In *Gruenke*, Chief Justice Lamer stated:

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[T]hese considerations [the Wigmore Criteria] provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court. Nor does this preclude the identification of a new class on a principled basis.... The Wigmore criteria will be informed both by the *Charter* guarantee of freedom of religion...

([1991] 3 S.C.R. 263)

Throughout this Opinion, reference has been made to the Wigmore criteria. John Henry Wigmore (1863-1943), was one of the most prodigious scholars in Anglo-American law. He developed a broad interdisciplinary approach to the law of evidence and the process of proof, and produced an eleven volume treatise, now entitled *Evidence in Trials at Common Law* which is still influential in Canada today. Wigmore's objective was to set forth the law of evidence as a system of reasoned principles and rules as can be seen in his principled analysis of the law of privilege.

The balancing approach reflected in the Wigmore criteria has introduced into the modern law of privilege a flexible, nuanced and multi-valued framework. This is best reflected in the following passage from Madam Justice McLaughlin's judgment in *R. v. Ryan* [1997] 1 S.C.R. 157, a 1997 decision of the Supreme Court of Canada:

While the traditional common law categories conceived privilege as an absolute, all-or-nothing proposition, more recent jurisprudence recognizes the appropriateness in 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. Partial privilege may signify that only some of the documents in a given class must be produced. Documents should be considered individually or by sub-groups on a "case-by-case" basis.

(at para. 18)

C. The *Ryan* Case: Applying The Rules

An understanding of the law of privilege requires not simply a statement of the bare legal principles but also the framework of judicial enquiry in the application of those principles to particular facts. In *A.M. v. Ryan*, Madam Justice McLaughlin summarizes both the general principles and the framework for judicial enquiry in a way which represents an appropriate model for understanding how the modern law of privilege, while building upon traditional foundations, has continued to evolve in the context of modern social realities and in light of *Charter* values. For these reasons we propose to set out paragraphs from Madam Justice McLaughlin's judgment so that members of the Task Force can fully appreciate the legal and constitutional tools that have to be brought to bear in the resolution of the issues that are the subject of this Opinion. To assist in understanding the progression of the argument we have added our own headings.

A primary purpose of the trial system in our society is the search for truth.

The common law principles underlying the recognition of privilege from disclosure are simply stated. They proceed from the fundamental proposition that everyone owes a general duty to give evidence relevant to the matter before the court, so that the truth may be ascertained. To this fundamental duty, the law permits certain exceptions, known as privileges, where it can be shown that they are required by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."

The categories of privilege, whether on a class basis or a case-by-case basis, are not fixed in legal stone.

While the circumstances giving rise to a privilege were once thought to be fixed by categories defined in previous centuries -- categories that do not include communications between a psychiatrist and her patient -- it is now accepted that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate: *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 286. The applicable principles are derived from those set forth in Wigmore on Evidence, vol. 8 (McNaughton rev. 1961), sec. 2285. First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

Privileges may evolve to reflect social and legal realities

It follows that the law of privilege may evolve to reflect the social and legal realities of our time. One such reality is the law's increasing concern with the wrongs perpetrated by sexual abuse and the serious effect such abuse has on the health and productivity of the many members of our society it victimizes. Another modern reality is the extension of medical assistance from treatment of its physical effects to treatment of its mental and emotional aftermath through techniques such as psychiatric counseling. Yet another development of recent vintage which may be considered in connection with new claims for privilege is the *Canadian Charter of Rights and Freedoms*, adopted in 1982.

Charter rights and values will be factored into the balancing of the various interests.

I should pause here to note that in looking to the *Charter*, it is important to bear in mind the distinction drawn by this Court between actually applying the *Charter* to the common law, on the one hand, and ensuring that the common law reflects *Charter* values, on the other. As Cory J. stated in *Hill*:

When determining how the *Charter* applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action.

...

The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common law only to the extent that the common law is found to be inconsistent with *Charter* values.

While the facts of *Hill* involved an attempt to mount a *Charter* challenge to the common law rules of defamation, I am of the view that Cory J.'s comments are equally applicable to the common law of privilege at issue in this case. In view of the purely private nature of the litigation at bar, the *Charter* does not "apply" per se. Nevertheless, ensuring that the common law of privilege develops in accordance with "*Charter* values" requires that the existing rules be scrutinized to ensure that they reflect the values the *Charter* enshrines. This does not mean that the rules of privilege can be abrogated entirely and replaced with a new form of discretion governing disclosure. Rather, it means that the basic structure of the common law privilege analysis must remain intact, even if particular rules which are applied within that structure must be modified and updated to reflect emerging social realities.

The application of these principles in Ryan provides guidance for understanding the legal treatment of researcher/subject communications.

Madam Justice McLaughlin then proceeded to consider whether and to what extent the application of the relevant principles of law shielded the communications in issue in *Ryan* from disclosure. The facts in *Ryan* were that A.M. when seventeen years old had undergone psychiatric treatment with Dr. Ryan in the course of which Dr. Ryan had sexual relations with her. A.M. sued Dr. Ryan for damages. In order to deal with the problems caused by the sexual assault, A.M. sought psychiatric treatment from Dr. Parfitt. A.M. was concerned that communications between her and Dr. Parfitt should remain confidential and Dr. Parfitt assured her that everything possible would be done to ensure that this was the case.

The British Columbia Rules of Court permit each party to an action to examine the other for discovery and to obtain discovery of all documents in the possession of the other party that are relevant to the lawsuit and are not protected from disclosure by privilege or some other legal exemption. During examination for discovery of A.M., counsel for Dr. Ryan requested production of Dr. Parfitt's records and notes. A.M.'s counsel advised that they would not be produced without a court order and accordingly Dr. Ryan's counsel brought a motion to obtain disclosure. Dr. Parfitt agreed to release her reports but claimed privilege in relation to her notes. At the hearing before the Judicial Master it was held that the first branch of the Wigmore Test – that the communications originate in confidence – was not met since A.M. had been fearful throughout that the doctor's notes would be disclosed and Dr. Parfitt promised only that everything possible would be done to ensure that their discussions were kept private. When the issue reached the Supreme Court of Canada this is how Madam Justice McLaughlin charted the Supreme Court of Canada through the Wigmore principles.

A communication may originate in confidence although the subject is notified that there is a possibility that disclosure may be ordered by a court.

The first requirement for privilege is that the communications at issue have originated in a confidence that they will not be disclosed. The Master held that this condition was not met because both the appellant and Dr. Parfitt had concerns that notwithstanding their desire for confidentiality, the records might someday be ordered disclosed in the course of litigation. With respect, I do not agree. 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. With the possible exception of communications falling in the traditional categories, there can never be an absolute guarantee of confidentiality; there is always the possibility that a court may order disclosure. Even for documents within the traditional categories, inadvertent disclosure is always a possibility. If the apprehended possibility of disclosure negated privilege, privilege would seldom if ever be found.

The importance of confidentiality to the maintenance of the relationship is evidenced by harm to the relationship in general and to the specific relationship in issue.

The second requirement -- that the element of confidentiality be essential to the full and satisfactory maintenance of the relation between the parties to the communication -- is clearly satisfied in the case at bar. It is not disputed that Dr. Parfitt's practice in general and her ability to help the appellant in particular required that she hold her discussions with the appellant in confidence. Dr. Parfitt's evidence establishes that confidentiality is essential to the continued existence and effectiveness of the therapeutic relations between a psychiatrist and a patient seeking treatment for the psychiatric harm resulting from sexual abuse. Once psychiatrist-patient confidentiality is broken and the psychiatrist becomes involved in the patient's external world, the "frame" of the therapy is broken. At that point, it is Dr. Parfitt's practice to discontinue psychotherapy with the patient. The result is both confusing and damaging to the patient. At a time when she would normally find support in the therapeutic relationship, as during the trial, she finds herself without support. In the result, the patient's treatment may cease, her distrustfulness be exacerbated, and her personal and work relations be adversely affected.

The appellant too sees confidentiality as essential to her relationship with Dr. Parfitt. She insisted from the first that her communications to Dr. Parfitt be held in confidence, suggesting that this was a condition of her entering and continuing treatment. The fact that she and Dr. Parfitt feared the possibility of court-ordered disclosure at some future date does not negate the fact that confidentiality was essential "to the full and satisfactory maintenance" of their relationship.

The court assesses the value to society of the relationship.

The third requirement -- that the relation must be one which in the opinion of the community ought to be sedulously fostered -- is equally satisfied. Victims of sexual

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abuse often suffer serious trauma, which, left untreated, may mar their entire lives. It is widely accepted that it is in the interests of the victim and society that such help be obtained. The mental health of the citizenry, no less than its physical health, is a public good of great importance. Just as it is in the interest of the sexual abuse victim to be restored to full and healthy functioning, so is it in the interest of the public that she take her place as a healthy and productive member of society.

It may thus be concluded that the first three conditions for privilege for communications between a psychiatrist and the victim of a sexual assault are met in the case at bar. The communications were confidential. Their confidence is essential to the psychiatrist-patient relationship. The relationship itself and the treatment it makes possible are of transcendent public importance.

The balancing must reflect Charter values, in this case privacy, equality, and access to justice.

The fourth requirement is that the interests served by protecting the communications from disclosure outweigh the interest of pursuing the truth and disposing correctly of the litigation. This requires first an assessment of the interests served by protecting the communications from disclosure. These include injury to the appellant's ongoing relationship with Dr. Parfitt and her future treatment. They also include the effect that a finding of no privilege would have on the ability of other persons suffering from similar trauma to obtain needed treatment and of psychiatrists to provide it. The interests served by non-disclosure must extend to any effect on society of the failure of individuals to obtain treatment restoring them to healthy and contributing members of society. Finally, the interests served by protection from disclosure must include the privacy interest of the person claiming privilege and inequalities which may be perpetuated by the absence of protection.

As noted, the common law must develop in a way that reflects emerging *Charter* values. It follows that the factors balanced under the fourth part of the test for privilege should be updated to reflect relevant *Charter* values. One such value is the interest affirmed by s. 8 of the *Charter* of each person in privacy. Another is the right of every person embodied in s. 15 of the *Charter* to equal treatment and benefit of the law. A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong. The result may be that the victim of sexual assault does not obtain the equal benefit of the law to which s. 15 of the *Charter* entitles her. She is doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress – redress which in some cases may be part of her program of therapy. These are factors which may properly be considered in determining the interests served by an order for protection from disclosure of confidential patient-psychiatrist communications in sexual assault cases.

These criteria, applied to the case at bar, demonstrate a compelling interest in protecting

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the communications at issue from disclosure. More, however, is required to establish privilege. For privilege to exist, it must be shown that the benefit that inures from privilege, however great it may seem, in fact outweighs the interest in the correct disposal of the litigation.

At this stage, the court considering an application for privilege must balance one alternative against the other. The exercise is essentially one of common sense and good judgment. This said, it is important to establish the outer limits of acceptability. I for one cannot accept the proposition that "occasional injustice" should be accepted as the price of the privilege. It is true that the traditional categories of privilege, cast as they are in absolute all-or-nothing terms, necessarily run the risk of occasional injustice. But that does not mean that courts, in invoking new privileges, should lightly condone its extension. In the words of Scalia J. (dissenting) in *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996), at p. 1941:

It is no small matter to say that, in some cases, our federal courts will be the tools of injustice rather than unearth the truth where it is available to be found. The common law has identified a few instances where that is tolerable. Perhaps Congress may conclude that it is also tolerable. . . . But that conclusion assuredly does not burst upon the mind with such clarity that a judgment in favor of suppressing the truth ought to be pronounced by this honorable Court.

Disclosure orders my be drafted to minimize the harm arising from disclosure—so called partial privilege.

It follows that if the court considering a claim for privilege determines that a particular document or class of documents must be produced to get at the truth and prevent an unjust verdict, it must permit production to the extent required to avoid that result. On the other hand, the need to get at the truth and avoid injustice does not automatically negate the possibility of protection from full disclosure. In some cases, the court may well decide that the truth permits of nothing less than full production. This said, I would venture to say that an order for partial privilege will more often be appropriate in civil cases here, as here, the privacy interest is compelling. Disclosure of a limited number of documents, editing by the court to remove non-essential material, and the imposition of conditions on who may see and copy the documents are techniques which may be used to ensure the highest degree of confidentiality and the least damage to the protected relationship, while guarding against the injustice of cloaking the truth.

It must be conceded that a test for privilege which permits the court to occasionally reject an otherwise well-founded claim for privilege in the interests of getting at the truth may not offer patients a guarantee that communications with their psychiatrists will never be disclosed. On the other hand, the assurance that disclosure will be ordered only where clearly necessary and then only to the extent necessary is likely to permit many to avail themselves of psychiatric counseling when certain disclosure might make them hesitate or decline. The facts in this case demonstrate as much. I am reinforced in this view by the fact, as Scalia J. points out in his dissenting reasons in *Jaffee v. Redmond*, that of the 50 states and the District of Columbia which have enacted some form of psychotherapist privilege, none have adopted it in absolute form. All have found

it necessary to specify circumstances in which it will not apply, usually related to the need to get at the truth in vital situations. Partial privilege, in the views of these legislators, can be effective.

The balance between the interest in disclosure and the interest in privacy may be struck at a different level in civil and criminal cases.

The view that privilege may exist where the interest in protecting the privacy of the records is compelling and the threat to proper disposition of the litigation either is not apparent or can be offset by partial or conditional discovery is consistent with this Court's view in *R. v. O'Connor*, [1995] 4 S.C.R. 411. The majority there did not deny that privilege in psychotherapeutic records may exist in appropriate circumstances. Without referring directly to privilege, it developed a test for production of third party therapeutic and other records which balances the competing interests by reference to a number of factors including the right of the accused to full answer and defence and the right of the complainant to privacy. Just as justice requires that the accused in a criminal case be permitted to answer the Crown's case, so justice requires that a defendant in a civil suit be permitted to answer the plaintiff's case. In deciding whether he or she is entitled to production of confidential documents, this requirement must be balanced against the privacy interest of the complainant. This said, the 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.

Two factors in deciding on disclosure are the probative value of the information and whether the information is available from other sources.

My conclusion is that it is open to a judge to conclude that psychiatrist-patient records are privileged in appropriate circumstances. Once the first three requirements are met and a compelling prima facie case for protection is established, the focus will be on the balancing under the fourth head. A document relevant to a defence or claim may be required to be disclosed, notwithstanding the high interest of the plaintiff in keeping it confidential. On the other hand, documents of questionable relevance or which contain information available from other sources may be declared privileged. The result depends on the balance of the competing interests of disclosure and privacy in each case. It must be borne in mind that in most cases, the majority of the communications between a psychiatrist and her patient will have little or no bearing on the case at bar and can safely be excluded from production. Fishing expeditions are not appropriate where there is a compelling privacy interest at stake, even at the discovery stage. Finally, where justice requires that communications be disclosed, the court should consider qualifying the disclosure by imposing limits aimed at permitting the opponent to have the access justice requires while preserving the confidential nature of the documents to the greatest degree possible.

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(at paras. 24-37)

These passages from Madam Justice McLaughlin's judgment in *Ryan* illustrate a number of elements of the law of privilege that are important to an understanding of the application of the law to the issues facing the Task Force, the University Ethics Review Board, and university researchers. Even though the subject matter of the *Ryan* case itself was the confidentiality between client and therapist, the critical path of enquiry along which the judgment proceeds is well mapped and provides a guide to applying the law to the research context. It is useful to summarize the highlights of this legal map. The resolution of a dispute concerning the compelled production of records or other information begins with a careful articulation and analysis of the interests advanced and threatened in the particular proceedings. The court will work through a disclosure calculus anchored by the balancing metaphor in order to assess the interests at stake. How these interests are characterized will determine the relevance of constitutional norms and will affect the manner in which a party's right to adjudicative fairness will be weighed against the other party's right to privacy and equality. The court will apply criteria of relevance to the information sought and it will seek to identify the least intrusive form of disclosure.

What has been referred to by one writer as the "ubiquitous balancing test" (John Dawson, "Compelled Production of Medical Reports", 43 *McGill Law Journal* 25, 1998) is the centrepiece of this area of the law. As we have seen, it is embodied in the fourth aspect of the Wigmore criteria where the court must consider whether the interest served by protecting the communications from disclosure outweighs the interest in getting at the truth and disposing correctly of the litigation. As reflected in Madam Justice McLaughlin's judgment in *Ryan*, an important feature of the context in which the balancing of interests occurs is the nature of the proceedings in which production of records or disclosure of confidential information is sought. Different kinds of interests are advanced and threatened by criminal, civil, and administrative proceedings. Criminal proceedings are invoked by the State and are the quintessential example of "governmental action" to which the provisions of the *Charter* apply. A criminal prosecution puts in jeopardy an accused person's rights of liberty and security of the person which under section 7 of the *Charter* cannot be impaired without "fundamental principles of justice," which include the right to make a full answer and defence to the charge. By contrast, civil proceedings usually (but not necessarily) involve

private, not public, interests and typically do not involve governmental action directly implicating the protections of the *Charter* though, as Madam Justice McLaughlin judgment in *Ryan* also makes clear, the courts analysis must still be consistent with *Charter* values. In civil and administrative proceedings where a liberty or security of the person is not usually at stake the interest in favouring disclosure in furtherance of fairness may carry less weight against compelling arguments grounded in privacy and equality values.

D. The *O'Connor* Case: The Criminal Context

The privilege rules have been subjected to special scrutiny in the criminal context where the courts and Parliament have struggled with balancing the rights of the accused to a fair trial with the privacy and equality rights of victims, particularly victims of sexual violence.

The adversary process assumes a high level of disclosure of the case being brought against someone--an assumption that amounts to a right in the case of the accused facing a criminal charge. In *R v. Stinchcombe* [1995] 1 S.C.R.754 the Supreme Court of Canada described the right to make a full answer and defence as one of the pillars of criminal justice on which we heavily depend in order to ensure that the innocent are not convicted. Counsel have an obligation to gather evidence in their preparation for trial--an obligation that may however, trench on the privacy and other concerns of witnesses and complainants. These interests may generate difficult conflicts. In *R. v. O'Connor* [1995] 4 S.C.R. 411, the accused who was charged with sexual assault, sought disclosure of therapists' records of the complainants. The Supreme Court adopted a series of steps to be followed in determining whether records in which there is a reasonable expectation of privacy should be disclosed to the defence. For the purposes of this Opinion, it is sufficient to highlight the following points.

First, the Court recognized that the complainants had a privacy interest in the records and that this privacy interest must be taken into account in the decision whether to order disclosure to the accused.

Second, in sexual offence proceedings, the procedures set out in *O'Connor* will be applied rather than the Wigmore criteria when there is reasonable expectation of privacy in the records.

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Third, the production application involves a balancing of the rights of the accused and the person whose privacy rights are affected. The rights identified by the majority in *O'Connor* were the complainant's privacy rights and the accused right to a fair trial and to full answer and defence. The dissenting justices also identified the right to equality without discrimination.

Fourth, a distinction was drawn between stage 1: producing the records to the trial judge who would view them in private and stage 2: disclosure to the defence. The majority adopted a fairly low threshold for production at stage 1, holding that once the accused had shown that the records were "likely relevant", the records would be produced to the trial judge. The balancing process would occur only at the second stage.

Fifth, if disclosure is ordered, a court may draft the order so as to limit intrusions on the privacy of the subject.

Subsequent to *O'Connor*, Parliament passed Bill C-46. Sections 278.1 to 278.91 of the Criminal Code now govern the production to the defence of records regarding complainants and witnesses in sexual offence proceedings. The provisions cover records in which there is a reasonable expectation of privacy such as medical, psychiatric, therapeutic, education, employment, child welfare, adoption, social services records and personal journals or diaries:

278.1 For the purposes of sections 278.2 to 278.9, "record" means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

To the extent that a complainant of sexual assault has a reasonable expectation of privacy in the information given to a researcher, there is a risk that the researcher will be ordered to disclose this information if the complainant decides to bring charges.

The Bill C-46 procedures differ in some respects from those adopted in *O'Connor*. The principal differences are the judge is to engage in a balancing process in stage 1 and the factors that are to be considered are expanded to include society's interest in encouraging

the reporting of sexual offences and the effect of production on the integrity of the trial process factors. Bill C-46 is the subject of a *Charter* challenge in the case of *R v. Mills*. (1997), 56 Alta. LR (3d) 277. The case has been heard by the Supreme Court of Canada and a decision is expected at any time. This will mark the third time in four years that the Supreme Court has been engaged in this judicial debate, a measure of the difficulty of the multi-valued balancing act required.

E. *Smith v. Jones*: The Public Safety Exception

In its most recent decision on the law of privilege, the Supreme Court in *Smith v. Jones* (1999), 169 D.L.R.(4th) 385 (S.C.C.), considered whether a psychiatrist could disclose information protected by the solicitor client privilege in order to protect public safety.

The lawyer of a man charged with aggravated sexual assault on a prostitute referred the accused to a psychiatrist hoping that it would be of assistance in the preparation of the defence or with a submission on sentencing. During his interview with the psychiatrist, the accused described in detail his plan to kidnap, rape and kill prostitutes. The psychiatrist informed defence counsel that in his opinion the accused was a dangerous offender who would, more likely than not, commit offences unless he received treatment. The accused pled guilty to aggravated sexual assault. The psychiatrist inquired of defence counsel whether his report would be considered in the sentencing of the accused and learned that it was protected by the solicitor-client privilege and would not be disclosed to the sentencing judge. The psychiatrist commenced an action for a declaration that he was entitled to disclose the information he had in his possession in the interests of public safety.

The trial judge ruled that the public safety exception to the solicitor-client privilege and doctor-patient confidentiality released the psychiatrist from his duties of confidentiality and concluded that he was under a duty to disclose to the police and the Crown both the statements made by the accused and his opinion based upon them. The Court of Appeal allowed the accused's appeal but only to the extent that the mandatory order was changed to one permitting the psychiatrist to disclose the information to the Crown and police. The Supreme Court dismissed the appeal and affirmed the order of the Court of Appeal subject to the directive that only those parts falling within the public safety exception would be disclosed.

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The Supreme Court held that communications protected by a legal privilege may be disclosed in order to protect the public safety. Although decided in the context of the solicitor-client privilege, **the Supreme Court emphasized that the public safety exception applies to all privileges:**

Both parties made their submissions on the basis that the psychiatrist's report was protected by solicitor-client privilege, and it should be considered on that basis. It is the highest privilege recognized 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. It follows that, in these reasons, it is not necessary to consider any distinctions that may exist between a solicitor-client privilege and a litigation privilege.

((at para. 44)

The Supreme Court left open the question whether such disclosure is mandatory. While the Court cited US cases which had established a tort duty on doctors to disclose confidential information when a public safety concern arises, the Court refused to decide whether such a duty existed in Canada. At the moment, a researcher or other person in a confidential relationship may disclose confidential or private information in order to protect the public safety. However, the possibility that such a duty will be imposed in the future should be taken into account by researchers in deciding whether to warn of a threat to public safety.

In *Smith v. Jones*, the Supreme Court held that the psychiatrist could disclose the following communications although they were made during a conversation protected by solicitor-client privilege:

Dr. Smith reported that Mr. Jones described in considerable detail his plan for the crime to which he subsequently pled guilty. It involved deliberately choosing as a victim a small prostitute who could be readily overwhelmed. He planned to have sex with her and then to kidnap her. He took duct tape and rope with him, as well as a small blue ball that he tried to force into the woman's mouth. Because he planned to kill her after the sexual assault he made no attempt to hide his identity.

Mr. Jones planned to strangle the victim and to dispose of her body in the bush area near Hope, British Columbia. He was going to shoot the woman in the face before burying her to impede identification. He had arranged time off from his work and had carefully prepared his basement apartment to facilitate his planned sexual assault and murder. He had told people he would be going away on vacation so that no one would visit him and he had fixed dead bolts on all the doors so that a key alone would not open them.

Mr. Jones told Dr. Smith that his first victim would be a "trial run" to see if he could "live

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with" what he had done. If he could, he planned to seek out similar victims. He stated that, by the time he had kidnapped his first victim, he expected that he would be "in so deep" that he would have no choice but to carry out his plans.

(at paras 37-39)

The Supreme Court recognized the importance of the solicitor client privilege, calling it the "the highest privilege recognized by the courts." However, Mr. Justice Cory speaking for the majority stated:

Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to clearly defined exceptions. 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. In certain circumstances, however, other societal values must prevail.

(at para. 51)

The Court adopted three factors to be considered in determining whether a privilege should be set aside in order to protect the safety of the public:

There are three factors to be considered: First, is there a clear risk to an identifiable person or group of persons? Second, is there a risk of serious bodily harm or death? Third, is the danger imminent? Clearly if the risk is imminent, the danger is serious.

These factors will often overlap and vary in their importance and significance. The weight to be attached to each will vary with the circumstances presented by each case, but they all must be considered. As well, each factor is composed of various aspects, and, like the factors themselves, these aspects may overlap and the weight to be given to them will vary depending on the circumstances of each case. Yet as a general rule, if the privilege is to be set aside the court must find that there is an imminent risk of serious bodily harm or death to an identifiable person or group.

(at paras. 77-78)

The following extended quotation from *Smith v. Jones* provides guidance for identifying when the public safety exception applies:

(a) Clarity

What should be considered in determining if there is a clear risk to an identifiable group or person? It will be appropriate and relevant to consider the answers a particular case may provide to the following questions: Is there evidence of long range planning? Has a method for effecting the specific attack been suggested? Is there a prior history of violence or threats of violence? Are the prior assaults or threats of violence similar to that which was planned? If there is a history of violence, has the violence increased in

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severity? Is the violence directed to an identifiable person or group of persons? This is not an all-encompassing list. It is important to note, however, that as a general rule a group or person must be ascertainable. The requisite specificity of that identification will vary depending on the other factors discussed here.

The specific questions to be considered under this heading will vary with the particular circumstances of each case. Great significance might, in some situations, be given to the particularly clear identification of a particular individual or group of intended victims. Even if the group of intended victims is large considerable significance can be given to the threat if the identification of the group is clear and forceful. For example, a threat, put forward with chilling detail, to kill or seriously injure children five years of age and under would have to be given very careful consideration. In certain circumstances it might be that a threat of death directed toward single women living in apartment buildings could in combination with other factors be sufficient in the particular circumstances to justify setting aside the privilege. At the same time, a general threat of death or violence directed to everyone in a city or community, or anyone with whom the person may come into contact, may be too vague to warrant setting aside the privilege. However, if the threatened harm to the members of the public was particularly compelling, extremely serious and imminent, it might well be appropriate to lift the privilege. See in this regard Egdell, *supra*. All the surrounding circumstances will have to be taken into consideration in every case.

In sum, the threatened group may be large but if it is clearly identifiable then it is a factor – indeed an essential factor – that must be considered together with others in determining whether the solicitor-client privilege should be set aside. A test that requires that the class of victim be ascertainable allows the trial judge sufficient flexibility to determine whether the public safety exception has been made out.

(b) Seriousness

The "seriousness" factor requires that the threat be such that the intended victim is in danger of being killed or of suffering serious bodily harm. Many persons involved in criminal justice proceedings will have committed prior crimes or may be planning to commit crimes in the future. The disclosure of planned future crimes without an element of violence would be an insufficient reason to set aside solicitor-client privilege because of fears for public safety. For the public safety interest to be of sufficient importance to displace solicitor-client privilege, the threat must be to occasion serious bodily harm or death.

It should be observed that serious psychological harm may constitute serious bodily harm, as this Court held in *R. v. McCraw*, [1991] 3 S.C.R. 72, at 81:

So long as the psychological harm substantially interferes with the health or well-being of the complainant, it properly comes within the scope of the phrase "serious bodily harm". There can be no doubt that psychological harm may often be more pervasive and permanent in its effect than any physical harm.

(c) Imminence

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The risk of serious bodily harm or death must be imminent if solicitor-client communications are to be disclosed. That is, the risk itself must be serious: a serious risk of serious bodily harm. The nature of the threat must be such that it creates a sense of urgency. This sense of urgency may be applicable to some time in the future. Depending on the seriousness and clarity of the threat, it will not always be necessary to impose a particular time limit on the risk. It is sufficient if there is a clear and imminent threat of serious bodily harm to an identifiable group, and if this threat is made in such a manner that a sense of urgency is created. A statement made in a fleeting fit of anger will usually be insufficient to disturb the solicitor-client privilege. On the other hand, imminence as a factor may be satisfied if a person makes a clear threat to kill someone that he vows to carry out three years hence when he is released from prison. If that threat is made with such chilling intensity and graphic detail that a reasonable bystander would be convinced that the killing would be carried out the threat could be considered to be imminent. Imminence, like the other two criteria, must be defined in the context of each situation.

In summary, solicitor-client privilege should only be set aside in situations where the facts raise real concerns that an identifiable individual or group is in imminent danger of death or serious bodily harm. The facts must be carefully considered to determine whether the three factors of seriousness, clarity, and imminence indicate that the privilege cannot be maintained. Different weights will be given to each factor in any particular case. If after considering all appropriate factors it is determined that the threat to public safety outweighs the need to preserve solicitor-client privilege, then the privilege must be set aside. When it is, the disclosure should be limited so that it includes only the information necessary to protect public safety.

(at paras. 79-85)

The nature of the Supreme Court's judgment in *Smith v. Jones*, as with its judgments in *Ryan* and *O'Connor*, reveals that the modern law of privilege, in determining the relationships that will be covered by privilege and the outer limits of that privilege, is the evolving product of a multi-faceted and multi-interest policy analysis. For university researchers the challenge is to ensure that their interests and values, and those of their subjects, are part of that evolution.

PART IV THE AMERICAN JURISPRUDENCE

A. The Relevance of American Law

Understanding the legal contours of privilege in the context of university research can be further assisted by looking at developments in American law, where the issue of academic privilege has been the subject of a number of court cases over the past twenty years. In

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reviewing American law it is important, however, to realize that the American cases have been decided pursuant to relevant State and Federal rules of procedure; while these are generally based on the Wigmore Criteria there are some significant differences. Further, State and Federal laws have, through legislative reform, significantly enlarged the scope of the common law of class privilege, extending it to categories such as journalists and therapists, developments that have thus far not taken place in Canada. Caution must therefore be used in assessing the relevance of the American cases to the Canadian context. That having been said, the American jurisprudence is very helpful in two particular areas; first, in identifying of different kinds of circumstances in which disclosure has been sought of university research, and secondly, in identifying and weighing the distinctive kinds of interests that are at stake in the resolution of claims for disclosure. From the perspective of your Task Force, the University Ethics Review Board and University researchers, an understanding of developments in American law provides a window through which you can scan the legal horizon to see the kinds of issues that may well arise in Canada and the pathways to resolving them.

That this issue has become an important one in the United States is reflected in a series of legal essays contained in the 1996 issue of the prestigious American law journal, *Law and Contemporary Problems*, under the title "Court-Ordered Disclosure of Academic Research: A Clash of Values of Science and Law." In their introduction to the volume, Professors Cecil and Wetherington preface the contributions of judges, legal academics, practicing lawyers, and university researchers with these comments:

Academic researchers are increasingly concerned that their work will be subpoenaed and their testimony will be compelled to aid in resolving disputes in which they are not involved. Subpoenas recently issued to scientists studying the effects of the Exxon Valdez spill on Alaskan communities and of cigarette advertising on children demonstrate the variety of research activities that may be affected. Subpoenas to compel researchers' testimony are more common in civil cases, but such subpoenas have also been issued in criminal proceedings. Should scholars who explore issues that later become topics of litigation be given special consideration when courts are asked to enforce such subpoenas?

Answering this question requires an analysis of the fundamental interests of science and of our legal system. The interest of the legal system in compelling testimony by reluctant witnesses is well-recognized. All citizens, including scholars, have an interest in the correct resolution of legal conflicts and a corresponding duty to provide evidence that is essential to the resolution of such conflicts. This duty has been declared to be part of the compact that each citizen has with society and may be enforced by courts

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even though providing evidence may place personal relationships or well-being at risk. Exceptions to this duty are recognized only when compelling countervailing interests are involved.

Are such countervailing interests present when a court considers whether to compel evidence from a scholar who has not agreed to be an expert witness? . . . Compelling evidence from unretained scholars can disrupt ongoing studies, jeopardize confidential communications with research participants, impose temporal and economic burdens, improperly discredit incomplete research, and undermine the independence that has been considered essential to the exercise of academic freedom. Do these interests justify a court's refusal to compel disclosure of scientific evidence?

. . . The courts are faced with the complex task of assessing the consequences and the flow of research information of compelling its disclosure for unintended purposes to resolve conflicts in litigation. The needs of the litigants for information to resolve a dispute is the precipitating incident, and the risk of depriving a litigant of a fair hearing demands the courts' thoughtful attention. Society requires a free flow of information to aid scholarly inquiry, and courts must balance the effects of compelling disclosure of future research against the need for information in the litigation.

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(Joe Cecil and Gerald Wetherington, "Foreword to Court-Ordered Disclosure of Academic Research: A Clash of Values of Science and Law," 59 *Law and Contemporary Problems* 1 (1996) at 1 – 3)

B. A Paradigmatic Case

Judge Barbara Crabb has described one of the leading American cases, *Deitchman v. E. R. Squibb and Sons, Inc.* 740 F.2d. 556 (7th Cir. 1984) as "the paradigmatic case of the conflict between the demands of the legal system and the legitimate concerns of researchers." It is therefore an appropriate starting point for our review of the American law. Squibb and other drug companies were defendants in civil actions brought by plaintiffs who alleged that their mothers took the drug "DES" while pregnant causing the plaintiffs to develop adenocarcinoma of the vagina. Squibb served a subpoena upon Dr. Arthur Herbst, Chairman of the Department of Obstetrics and Gynecology at the University of Chicago, seeking every document in the records of a registry Dr. Herbst had established of cases of vaginal and cervical adenocarcinoma contracted by women since 1940. Dr. Herbst had not treated the plaintiffs or their mothers at any time and had not agreed to serve as an expert witness for any party to the litigation. He had established the registry in 1972 to serve as a centralized repository of data on adenocarcinoma of the genital tract. In soliciting medical records of women throughout the world of women who were born after 1940 and had contracted this particular form of cancer, Dr. Herbst promised that all information turned over to the registry would be kept confidential. At the time of the litigation in 1984 the registry had collected more than five hundred case files and Dr. Herbst had published more than a dozen articles reporting significant findings based upon the data from the registry. Although Dr. Herbst refused to become involved personally in any DES litigation, DES victims used his studies in cases against the manufacturers against DES to try and establish a causal connection between their cancer and their mothers' use of the drug.

When Dr. Herbst was served with the subpoena he argued that it was unreasonable and oppressive and that the risk of destruction of the registry outweighed the prejudice to Squibb of not obtaining the documents. Dr. Herbst maintained that if his promises of confidentiality were breached, his sources would dry up and he would be unable to study the additional cases of adenocarcinoma expected to occur throughout the 1990s. Numerous

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epidemiologists and physicians supported his position. The trial judge agreed with Dr. Herbst that his need to retain the confidentiality of the registry was important to society, whereas Squibb's need for the data was not compelling. The court relied on several factors: the registry documents were not relevant because the major findings on which the plaintiffs would rely were those in a 1971 study and the registry was not established until after that study had been made public; Dr. Herbst's studies had not been in the public domain for years and had not been challenged by his peers; Dr. Herbst would not be a witness at the trial; and Squibb had failed to show what it hoped to prove by obtaining access to the data in the registry. By contrast, Dr. Herbst had shown that disclosure of registry data threatened the viability of the registry because doctors would stop reporting cases if Dr. Herbst could not guarantee the confidentiality of that data. Furthermore, the court found that premature disclosure of data in an ongoing study threatened its validity and usefulness by exposing information before the researchers could test and verify their conclusions.

The Court of Appeals for the Seventh Circuit reversed the trial judge's decision to quash the subpoena. It found that Squibb was defending many cases in which the plaintiffs were relying on Dr. Herbst's published studies; Dr. Herbst and the registry were the "sole monitors" for investigating the possible correlation between prenatal DES exposure and adenocarcinoma; and Dr. Herbst's views would be crucial to the verdict, whether or not he testified at the trial. The appeal court found that Squibb's ability to defend itself was impaired by the denial of access to the registry data upon which Dr. Herbst was basing his conclusions, because it could not effectively cross-examine the witnesses who relied on those conclusions without knowing how Dr. Herbst had arrived at them. The appeal court gave short shrift to the trial judge's observations that Dr. Herbst's studies had withstood peer review and for that reason his data should be shielded from discovery. It noted that not all physicians in the medical community had reported all their adenocarcinoma cases to the registry and this fact could make the statistical basis for Dr. Herbst's published conclusions inaccurate or incomplete. Perhaps most significantly the appeal court observed that the trial judge had proceeded on the basis that either the entire subpoena had to be obeyed or Squibb was entitled to nothing. What the trial judge should have done was to recognize Squibb's critical need for the materials sought, and fashion a protective order that would guard Herbst and the registry against any loss of confidential information and unreasonable financial and time-consuming costs. The appeal referred the case back to the trial judge "to

hear the parties and to fashion as inventive an order as the necessities of this unique case dictate, one which allows Squibb the least necessary amount of information to avoid a miscarriage of justice without doing needless harm to Dr. Herbst or his registry.” (*Deitchman*, 740 F.2d. at 566)

The Seventh Circuit Court of Appeals approach in *Deitchman* bears a clear relationship to the Supreme Court of Canada’s analysis in *A.M. v. Ryan*, in that in both cases the court avoided the absolute, all-or-nothing approach to disclosure and instead favoured an approach of qualifying disclosure by imposing limits aimed at permitting a party to have “the access justice requires while preserving the confidential nature of the documents to the greatest degree possible.” ([1997] 1 S.C.R. 157 at para.37)

Deitchman illustrates what the American commentators refer to as “high stakes litigation.” It is high stakes not only in terms of the money involved; the drug companies involved faced multiple litigation on a scale that threatened their financial existence. But it was also high stakes in terms of the risk of serious harm to an important scientific endeavour. Recognizing the importance of confidentiality of the research data, yet also recognizing that registry data played a significant part in the plaintiffs’ cases and that it was unfair to the drug companies to withhold full information from the registry, the appropriate response was not to choose between the two competing interests but to accommodate the confidentiality concerns with a carefully drawn protective order.

C. The Interests Harmed Through Court Disclosure

We have found it to be a useful exercise to distill from the American cases the arguments that have been raised by researchers as to the interests that will be harmed through court-ordered disclosure. They include (1) premature disclosure of incomplete research; (2) substantial economic and time consuming burdens; (3) the violation of the privacy rights of individual research participants and the breaching of researchers’ promises of confidentiality; and (4) the detrimental effect on future research. What is important to realize here is that although it was the problems associated with research confidentiality that precipitated concerns at Simon Fraser University, and in many cases this has been the most important consideration in the American cases, there are other relevant interests that factor into the balancing process.

1. Disclosure of Incomplete and Unpublished Research Findings

Elizabeth Wiggins and Judith McKenna, in a survey of published court opinions and interviews with lawyers and researchers involved in disclosure cases, summarize the prejudice such disclosure can cause.

The consequences to researchers of releasing incomplete or unpublished data may be serious and far-reaching. The researcher's professional reputations may be damaged if they do not complete and present their work to the scientific community, if they fail to receive sufficient credit for the work, and if faulty interpretations of their work are attributed to them. Young scientists may be affected especially harshly by compelled disclosure of their work, disclosure may interfere, for example, with the ability of graduate students to complete their degrees or young professors to obtain tenure.

(Elizabeth C. Wiggins and Judith A. McKenna, "Researchers' Reactions to Compelled Disclosure of Scientific Information," 59 *Law and Contemporary Problems* 67 (1996) at 87)

This legitimate concern was the subject of contention in *Dow Chemical Co. v. Allen*, 494 F.Supp. 107 (1980). The underlying issue was whether the U.S. Environmental Protection Agency should cancel the registration for certain herbicides containing the substance commonly known as Dioxin. Dow Chemical Company and veterans involved in the "Agent Orange" litigation intervened. Two researchers at the University of Wisconsin's Medical School received subpoenas to produce documents from records relating to four studies. In quashing the subpoena District Court Judge Barbara Crabb wrote:

I take judicial notice that it would be a substantial burden for respondents to produce the information from [two of the studies] which are nowhere near completion and which have not been subjected to peer review. In the early stages of any research project there are likely to be false leads or problems which will be resolved in the course of the study with no ultimate adverse effect on the validity of the study. To force production of all information demanded by the subpoenas is likely to jeopardize the study by exposing it to the criticism of those whose interest it may ultimately adversely affect, before there has been an opportunity for the researchers themselves to make sure the study is the result of their best efforts. This is not the kind of burden which can be lightened by a protective order. Putting this study in jeopardy would be heavy burden not only on those involved in the research, but also on the public which has helped to fund it through tax money and which ultimately stands to gain from knowledge of the final results.

(at 113)

The Seventh Circuit Court of Appeals in affirming this judgment added that the District Court should have also considered the subpoenas' "chilling effect" on academic freedom in reaching its decision 672 F.2d 1262 (1982) at 1276).

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In the litigation involving Dr. Herbst's research, the District Court also accepted the legitimacy of concerns regarding premature disclosure of research. The court cited the affidavit of one medical researcher to this effect:

Epidemiological investigators, and indeed medical investigators in general, pursuing the spirit of scientific inquiry, often speculate, hypothesize, and draw possible and probable conclusions as they probe various questions related to their research. Freedom to proceed in this manner requires confidentiality. Involuntary disclosure of this uninhibited communication among scientists to parties that are not participants in the research demolishes the freedom of thought and interchange of ideas that is so essential to productive research. Also, interpretation of the speculations, hypotheses, and possible or probable conclusions by outsiders carries a serious risk of being faulty, resulting in medical misinformation and possibly unjustifiably discrediting the investigators.

(Cited in Wiggins and McKenna 59 *Law and Contemporary Problems* at 88)

2. Economic and Temporal Burdens

Researchers have objected to subpoenas in the United States on the grounds that compliance would be unduly expensive, time-consuming and disruptive of their research productivity. This was one of the issues in *Anker v. G.D. Searle and Co.* 126 F.R.D. 515 (M.D.N.C. 1989). The Searle Company was sued for negligence arising from the design of IUDs. The plaintiffs served a subpoena on Dr. Malcolm Potts, the President of Family International Health, a non-profit organization. FIH conducted a study comparing different kinds of IUDs and the subpoena demanded production of seventy-seven categories of documents. Dr. Potts estimated that compliance with the request would entail producing at least 300,000 pages of documents and the plaintiffs did not even offer to compensate him for complying with the subpoena. He also stated that compliance would stop the activities of his organization for two to three weeks. The court found that the burden of producing the research information outweighed the plaintiffs' need for it, in part because much of the information sought was not directly related to the underlying issues in dispute and some of the documents were already publicly available.

Litigation involving tobacco companies, not surprisingly, has prompted requests for information related to studies of the effects of cigarette smoking. In *re: R. J. Reynolds* 518 N.Y.S. 2d 729 (Sup. Ct. 1987), various tobacco company defendants sought to obtain information about studies conducted by Dr. Irving Selikoff, in association with the American Cancer Society, at the Mt. Sinai School of Medicine. The subpoenas were extremely broad,

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covering ongoing research as well as studies published over the course of a decade, and demanded production of 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,” and copies of “questionnaires, answers to questionnaires, interview forms, responses to interviews, death certificates, autopsy reports and other cause of death . . .” A New York State trial court quashed the subpoenas, finding that compliance with them would place an unreasonable burden on Mt. Sinai and the American Cancer Society, and would unduly disrupt ongoing research.

In a later case, *Re: American Tobacco Co.* 880 F.2d 1520 (2d Cir. 1989), the tobacco companies served much narrower subpoenas directed specifically to only two of Dr. Selikoff's studies. The document requested was limited to computer tapes containing the data underlying the two studies and documentation necessary to understand the tapes. The subpoenas did not seek information about Dr. Selikoff's ongoing research. Mt. Sinai and the American Cancer Society again sought to quash the subpoenas. The tobacco companies argued that many of the experts testifying against the companies had relied upon Dr. Selikoff's published results on the effects of smoking and asbestos exposure on cancer. The companies wanted Dr. Selikoff's data, in order to re-examine his methods and his results. The court in this case found that by publishing the results of his study, Dr. Selikoff had invited other scientists to rely on his conclusions and in turn the public now had an interest in resolving disputes that involved the accuracy of those conclusions. However, the court entered a protective order that permitted the researchers to “redact” (remove) information identifying research participants and prohibited tobacco companies from using the released data to identify those participants.

3. Privacy of Research Participants and Confidentiality of Data and

4. The Effect on Future Research

In the *Deitchman* case privacy and confidentiality were important issues. Dr. Herbst argued that the release of individually identifiable information would violate the privacy rights of the patients whose medical information was contained in the registry and also that the release of information traceable to particular physicians would be a breach of his promise of confidentiality. As we have seen, the Appeal Court remanded the case with directions to the

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trial judge to fashion an appropriate protective order which sought to accommodate the issue of patient confidentiality. In many cases, those seeking disclosure of research information are not interested in the identity of study participants, only in aggregated data and information about the methods used in the study. However, in some cases the identity of the research participants is precisely what is being sought.

In the 1980s, Proctor and Gamble faced a series of product liability cases alleging that one brand of its tampons caused toxic shock syndrome. The plaintiffs' experts based their opinion on a study by the Centers for Disease Control (CDC) that showed a link between the syndrome and the use of tampons. Proctor and Gamble sought the names and addresses of women who participated in the study so the company could validate the research results by re-interviewing the participants. The participants provided information about such personal subjects as their medical, menstrual and pregnancy histories and sexual and contraceptive practices. Although the information had been gathered without a promise of confidentiality the CDC asserted that the production would violate the participants' privacy rights. The CDC did release the names and addresses of participants whom they were able to contact and who consented to the release of this information but was unwilling to divulge identifying information about other participants, although all other data was supplied. The District Court in *Lampshire v. Proctor and Gamble* concluded that personal identifying information about the research participants should be redacted (removed) from all produced documents, stating, "It is . . . appropriate to protect the subjects of the CDC studies, who may have no connection with this lawsuit, from questions by strangers about such personal matters." (94 F.R.D. 58 (N.D. Ga. 1982) at 60) The District Court in a companion case, *Farnsworth v. Proctor and Gamble*, also agreed that research participants should be protected from the potential embarrassment and annoyance that would flow from disclosure of identities to the company. However, the court also focussed on the effect of disclosure on future research. The court reasoned that there was a compelling social interest in promoting research of the sort conducted by the Centers for Disease Control and that the possible future harm from disclosure to the Centers public health mission outweighed *Proctor and Gamble's* need for the information. The company's argument that access to the withheld information would help it to demonstrate flaws in the Centers research results was, the court concluded, "undercut by the increasing amount of research, including some funded by Proctor and Gamble, that supports the CDC's finding of some relationship between [toxic shock syndrome] and tampon

usage.” (101 F.R.D. 335 (N.D. Ga. 1984) at 358)

On appeal the Court of Appeals agreed that the disclosure of the identifying information would seriously damage the voluntary reporting on which the CDC relied. The court wrote “Even without an express guarantee of confidentiality there is still an expectation, not unjustified, that when highly personal and potentially embarrassing information is given for sake of medical research it will remain private.” (*Farnsworth v. Proctor & Gamble* 758 F.2d 1545 (11th Cir. 1985) at 1547)

D. The Importance of Protective Orders

The unpredictable way in which researchers can become implicated in high-stakes litigation and the way in which protective orders have been used to minimize harm is illustrated in the *Exxon Valdez* litigation that ensued following the largest and most ecologically destructive oil spill in North American history. Professor Steven Picou of the University of South Alabama directed the collection of survey data relating to the disaster in several small Alaskan communities from 1989 to 1992. The study was a longitudinal one and necessitated a detailed record of respondent identities for re-interviewing. Respondents were guaranteed confidentiality and were told that immediately following the receipt of their final interview all personal identifiers would be eliminated from the master data file and that all hard copies would be discarded.

Although not designed as a social damage assessment, Professor Picou’s study collected data on spill-related stress-levels and patterns of social disruption. Professor Picou presented the papers at professional meetings and published two peer-reviewed articles that detailed the patterns of stress and disruption between impacted and control communities. In the litigation brought against Exxon for damages arising from the oil spills the plaintiffs’ experts referenced Dr. Picou’s studies. As a result, Exxon’s lawyers issued a subpoena seeking production of Dr. Picou’s research records and documentation. Professor Picou resisted the release of information that would allow the identification of his respondents and the matter proceeded to a judicial hearing. The court’s ruling on the issue was consistent with the approach taken in the *Deitchman* and *Farnsworth* decisions. The court distinguished between the release of data that had been used in the publication of a peer-reviewed article and data that reflected ongoing research which had not been subject to any peer review

process. Professor Picou was ordered to turn over the data collected for the peer-reviewed articles although a protective order was designed to protect the confidentiality of informants. This protective order limited access to the data to Exxon's designated experts. Hard copies were for expert's eyes only, and any reproduction of data was prohibited. Exxon's experts were required to complete an agreement signifying their understanding of the confidentiality before gaining access to the material. The data were to be produced solely for statistical analysis, and attempts to identify individuals listed on the computer documents were prohibited. (See J. Steven Picou, "Compelled Disclosure of Scholarly Research: Some Comments on High-Stakes Litigation," 59 *Law and Contemporary Problems* 149)

E. The Evidentiary Basis for a Researcher-Subject Privilege

Several American appeal court decisions have emphasized that if a researcher's or scholar's privilege is to be recognized there must be sufficient evidentiary foundation for it. This issue arose in a case enigmatically titled *In Re: Grand Jury Subpoena*. The case has some similarities with the *Russel Ogden* case, insofar as it concerned a graduate student and the disclosure being sought was in the course of an investigation, although in this case one of a Grand Jury rather than a Coroner's Inquest. However, as we will see, there were also some very significant differences. In *re: Grand Jury Subpoena*, Mario Brajuha, while preparing his dissertation on "The Sociology of the American Restaurant" worked as a waiter in *Le Restaurant* on Long Island. While so employed had kept a record of his observations and comments and gathered information from a variety of sources, many of whom were promised confidentiality. A suspicious fire and explosion occurred at *Le Restaurant* while Mr. Brajuha was still working there and Mr. Brajuha, who was not a suspect in the investigation, was interviewed by the police and he advised them that it was his practice to record contemporaneously his daily observations and conversations at *Le Restaurant* as field notes to be used in the preparation of his dissertation. During the nine months he worked there he had several hundred pages in his journal relating to his observations at the restaurant.

A Federal Grand Jury investigating the fire as a suspected arson subpoenaed Mr. Brajuha and his research journal. Mr. Brajuha agreed to appear and testify about his recollections of the restaurant and its employees but, claiming a scholar's privilege, refused to produce the journal. In support of his claim against disclosure the American Sociological Association, the

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American Political Science Association and the American Anthropological Association, in an *amicus curiae* brief, cited the comments of Professor Lofland, the then Chair of the American Sociological Association's Committee on Professional Ethics, on the importance of maintaining the confidences of sources in a field study situation.

Ethically, social scientists have desired not to harm people who have been kind enough to make them privy to their lives. At the level of sheer civility, indeed, it is frankly ungracious to expose to public view personally identified and inconvenient facts on people who have trusted one another to provide such facts. **Strategically, fieldwork itself would become for all practical purposes impossible if field workers routinely aired their raw data – their field notes – without protecting the people studies. Quite simply, no one would trust them.** (emphasis added)

(In *re: Grand Jury Subpoena*, dated January 4, 1984, 583 F.Supp. 991 (E.D.N.Y. 1984) at 994)

The *amicus* brief also relied on the American Sociological Association's Code of Ethics which at that time required that "confidential information provided by research participants must be treated as such by sociologists, even when this information enjoys no legal protections or privilege and legal force is applied."

The District Court in quashing the grand jury subpoena referred extensively to the *amicus* brief and recognized how disclosure might undermine the scholarly process.

Affording social scientists protective freedom is essential if we are to understand how our own and other societies operate. Recognized by cultural anthropologists since at least the turn of the century as a basic tool, field work is used widely in other disciplines, particularly in sociology and political science. In order to work effectively researchers must record observations, communications and personal reactions contemporaneously and accurately.

(at 993)

However, on appeal, the Second Circuit Court of Appeal while acknowledging that the record contained "statements by scholars asserting in the abstract the need for a scholar's privilege," declined to rule on whether such a privilege existed under the Federal Rules of Evidence. The Court referred to *Federal Rule 501* as setting forth "a general rule covering all recognized common-law privileges and empowers Federal Courts to fashion testimonial privileges, guiding by the '**principles of the common law as . . . interpreted . . . in the light of reason and experience.**'" (emphasis added) The Senate report accompanying the enactment of this rule expressly states that judicial "recognition of a privilege based on a confidential

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relationship and other privileges should be determined on a case-by-case basis.” The Court of Appeal held that the trial record was “far too sparse to serve as a vehicle for consideration of whether a scholar’s privilege exists, much less to provide grounds to apply it to Brajuha.” The Court went on to describe what would have to be established for recognition of a scholar’s privilege.

It is axiomatic that the burden is on a party claiming the protection of a privilege to establish those facts that are the essential elements of the privilege relationship, a burden not “discharged by mere conclusory or *ipsi dixit* assertions.” Brajuha’s factual proffer in support of his claim of privilege hardly rises to the level of conclusory assertion. His attorneys affidavit states only that Mr. Brajuha is a doctoral candidate . . . writing a dissertation entitled “The Sociology of the American Restaurant,” and that, in the course of his employment as a “participant observer” at various Long Island restaurants, he has gathered information “from a variety of sources, many of whom were promised confidentiality.”

Surely the application of a scholar’s privilege, if it exists, requires a threshold showing consisting of a detailed description of the nature and seriousness of the scholarly study in question, of the methodology employed, of the need for assurances of confidentiality to various sources to conduct the study, and of the fact that the disclosure requested by the subpoena will seriously impinge upon that confidentiality. Brajuha has provided none of the above. (emphasis added)

(750 F. 2d 223 (2d Cir. 1984) at 225)

Reviewing the trial record, the Court of Appeals noted that there was neither documentary nor testimonial evidence from scholars of the nature of the work or of its role in the scholarly literature of sociology. The court tartly observed “one need not quip ‘you can’t tell a dissertation by its title’ to conclude that the words ‘the Sociology of the American Restaurant’ afford precious little information about the subject matter of Brajuha’s thesis.” The court was also critical of the lack of explanatory material regarding the research methodology and the need for assurances of confidentiality.

So far as methodology is concerned, we know only that Brajuha has chosen to be “participant observer” of some sort as a means of collecting material. What exactly Brajuha’s role is, what kinds of material he hopes to collect, and how that role and that material relate to a need for confidentiality are unknown. Similarly, Brajuha has made no showing whatsoever that assurances of confidentiality are necessary to the study he is undertaking. Astonishingly, he has not even stated explicitly that confidentiality was necessary to his particular study. Rather, we know only that his attorney says he promised it to some people. There is thus no evidence of a considered research plan, conceived in light of scholarly requirements or standards, contemplating assurances of confidentiality for certain parts of the inquiry. Finally, and even more astonishingly, Brajuha has not established that all of the materials he seeks to keep from Grand Jury in

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fact are covered by the privilege he asserts. We are told only that “many” of his sources were promised confidentiality in support of his claim that all of the papers sought by the government are protected by the privilege.

Our concerns here go to the heart of the decisional process. We are asked to recognize a qualified scholar’s privilege but lack a concrete factual situation in which to consider the issue. Given the present record, establishment of a scholar’s privilege would require us to create virtually an unqualified and indeterminate immunity attaching generally to all academically related inquiries upon the broad assertion that someone was promised confidentiality in connection with the study. None of the arguments marshalled by the District Court, taken at their strongest, support a privilege that broad. At best, they raise an arguable question as to the validity of a qualified privilege where a serious academic inquiry is undertaken pursuant to a considered research plan in which the need for confidentiality is tangibly related to the accuracy or completeness of the study.

(750 F.2d 223 at 225)

The Court of Appeal, remanded the case to the District Court to allow Mr. Brajuha to designate those portions of the journal he argued were privileged and the District Court could order appropriate redactions. In the end, the Federal prosecutor accepted production of the research journal as edited by the researcher.

The importance of this case, not only in the American but also the Canadian context, is that the assertion of the need for confidentiality for conducting research, even if buttressed by a learned association’s (or university’s) code of ethics, will not necessarily be sufficient to persuade a court, without evidence of why assurances of confidentiality are essential to the specific study or studies of that particular nature. The signal difference between the assertion of privilege made by Mario Brajuha and Russel Ogden is that Mr. Ogden did lay an evidentiary record setting out his methodology, the critical need for confidentiality to carry out the study, and the significance of his scholarly research.

The requirements necessary for establishing the qualified scholar’s privilege were the subject of further comment in the later case of *Smith v. Dow Chemical Co.* 173 F.R.D. 54 (1997). In that case the plaintiff claimed her husband died from brain cancer caused by work-related exposure to vinyl chloride. She sued the manufacturers of vinyl chloride, including Dow Chemical. As part of the litigation process, the plaintiff sought disclosure of several ongoing research studies into the health effects of vinyl chloride. None of the studies had been completed at the time the plaintiff sought their disclosure. Dow requested a protective order to prevent turning over documents regarding the studies, claiming that the documents were

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protected from disclosure under the “researcher’s” or “scholar’s” privilege. The District Court, in addressing the issue, noted that while some Federal Court of Appeals had recognized the researcher’s or scholar’s privilege, others had been less sympathetic to such recognition. The court referred to the Second Circuit decision *In re: Grand Jury Subpoena* and set out what was said in that case regarding the threshold necessary for establishing such a privilege, if it existed, and elaborated upon them in the context of the relevant *Federal Rules of Civil Procedure*.

These requirements are reflected in *Federal Rules of Civil Procedure* 26(b)(5), which provides as follows:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information in itself privileged or protected, will enable other parties to assess the application of the privilege or protection.

Under this rule, the party asserting the privilege or protection must specifically identify each document or communication, and the type of privilege or protection being asserted in a privileged log. To properly demonstrate that a privilege exists, the privileged log should contain a brief description or summary of the contents of the document, the date the document was prepared, the person or persons who prepared the document, the person to whom the document was directed, or for whom the document was prepared, the purpose in preparing the document, the privilege or privileges asserted with respect to the document, and how each element of the privilege is met as to that document.

The District Court found that Dow Chemical, in resisting disclosure, had not met the onus upon them.

In this case, the defendants have provided the title of the studies in issue, the name of the researcher, the researcher’s place of business or academic institution, and the expected date of completion of the study. However, there is no itemization of the documents claimed to be privileged, and there is no information about the nature or contents of the study, the methodology employed, the need for assurances of confidentiality to the sources employed to conduct the study, or any facts to provide a basis for assessing whether the disclosure requested by the plaintiff will seriously impinge upon that confidentiality. The information provided by defendants in support of their assertion of the privilege is simply not sufficient to enable the court to determine whether the privilege, even if it exists, applies.

(at 58)

The District Court also identified another reason for not upholding the claim for privilege claim: the fact that at least two of the researchers were expected to testify as experts for the

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defence. In the court's view, it would be difficult for them to exclude their research from the information on which they would base their testimony.

F. Balancing the Scales: *In re Cusumano and Yoffie v. Microsoft*

The most recent decision from a U.S. appellate court is also in many respects the most encouraging from the point of view of recognizing the important societal interests furthered by university research; it also reflects the multi-faceted nature of the balancing test and in this respect has real relevance in the Canadian context. The case of *In re Cusumano and Yoffie v. Microsoft Corporation* 162 F.3d 708 (1st Cir. 1998) arose out of a civil anti-trust case brought by the United States Government against Microsoft that alleged that Microsoft had engaged in unfair competitive practices to increase its share of the internet browser market. The Department of Justice alleged that Microsoft illegally tied its Explorer browser to its Windows operating system, refusing to grant computer manufacturers licences to pre-install Windows for their customers unless the manufacturers agreed to pre-install Explorer and no other browser. The Department alleged that in this way Microsoft had boosted its percentage of the browser market from twenty percent to fifty percent in little over a year. Microsoft denied the government's accusations and attributed its increased share of the browser market to Explorer's superiority and also alleged that Netscape had made some significant business blunders allowing Microsoft to increase its share of the market.

In the midst of pre-trial discovery in this anti-trust case, Microsoft learned about a forthcoming book entitled *Competing on Internet Time: Lessons from Netscape and the Battle with Microsoft* and obtained a copy of the manuscript. As the title implied *Lessons* dealt extensively with the browser war waged between Microsoft and Netscape. Its authors, Michael Cusumano and David Yoffie, were distinguished researchers, one from MIT's School of Management, the other from Harvard Business School. As part of their research for *Lessons*, Cusumano and Yoffie interviewed over forty current and former Netscape employees. Their interview protocol dealt with confidentiality on two levels. First, they signed a non-disclosure agreement with Netscape, in which they agreed not to disclose proprietary information conveyed to them in the course of their investigation except upon court order, and then only after giving Netscape notice and an opportunity to oppose disclosure. Second, they requested and received permission from the employees they interviewed to record their discussions, and, in return, promised that each interviewee would be shown any quotes attributed to him upon completion of the manuscript, so that he would have a chance to

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correct any errors, or to object to quotations selected by the authors for publication. Microsoft, believing that some of the statements from Netscape employees referred to in *Lessons* would help them in their defence in the anti-trust case, subpoenaed the professors' notes, tape recordings and transcripts of interviews and correspondence with the people they had interviewed. Cusumano and Yoffie produced some correspondence but declined to hand over the notes, tapes or transcripts. Microsoft sought to compel the production of these items. The District Court judge denied their application.

The court performed a case-specific balancing analysis; on the one hand, it found that Microsoft's need for the information, though real, was not great. Microsoft could have obtained that information directly from the sources revealed by the manuscript; on the other hand, researchers had a substantial interest in keeping the information confidential and significant First Amendment values favoured its protection. Balancing these and other elements, the court declined to compel production of the notes, tapes and transcripts. However, the court retained jurisdiction in order to review individual items and reconsider the matter upon a showing by Microsoft of a particularized need for specific information.

On appeal, Microsoft argued that the District Court underestimated its need for the subpoenaed information because that information would be useful as independent evidence of Netscape's business miscalculations. Moreover, it had no other feasible way to obtain the information since the accelerated schedule in the anti-trust case effectively thwarted direct discovery of the employees referred to in *Lessons*. Microsoft also claimed that the District Court was wrong in affording substantial protection to the materials because they were not confidential and emanated from disclosed sources. Microsoft argued that the only protectable data was the proprietary information covered by the non-disclosure agreement signed with Netscape, not with the individual employees interviewed. Cusumano and Yoffie maintained that Microsoft did not really need the information at all, and that it could secure the same data through other, less intrusive avenues; that the information was confidential because of their interview protocol; and that forcing them to disclose the contents of the notes, tapes and transcripts would endanger the values of academic freedom safeguarded by the First Amendment and jeopardize the future information-gathering activities of academic researchers. The researchers further maintained that they were sufficiently like journalists for the protection afforded to journalists' materials to be applied in their case.

As we did in the *Ryan* case, we propose to cite from the judgment of the First Circuit Court of Appeals extensively because, as in *Ryan*, the court sets out in a comprehensive fashion the relevant law governing the issue and then proceeds to review the trial judge's decision in terms of whether the relevant law was properly applied. It thus becomes possible to reflect on both similarities and differences between American and Canadian approaches in this area of the law. As with the *Ryan* case we have utilized our own headings to better understand the Court's analysis.

The Critical Path

The Court of Appeals critical path of inquiry is set out in the following paragraph:

Initially, we must determine whether the respondent's academic research is protected in a manner similar to the work product of journalists. This inquiry entails two aspects: (1) whether the respondents' positions warrant conferral of any special consideration, and (2) whether their research comprises confidential information. If these hurdles are cleared, we next must determine the type and kind of protection that the law affords. Finally, we must assess the District Court's application of the law to the facts, and the appropriateness of its order.

Researchers and Journalists – A Comparison

The court then proceeded to deal with the availability of protection and concluded that academicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists. The court reasoned:

Courts afford journalists a measure of protection from discovery initiatives in order not to undermine their ability to gather and disseminate information. Journalists are the personification of a free press, and to withhold such protection would invite a "chilling effect on speech" and thus destabilize the First Amendment. The same concern suggests that courts ought to offer similar protection to academicians engaged in scholarly research. After all, scholars too are information gatherers and disseminators. Were their research materials were freely subject to subpoena, their sources likely would refuse to confide in them. As with the reporters, a drying-up of sources would sharply curtail the information available to academic researchers and thus would restrict their output. Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Some similarities of concern and function militate in favour of a similar level of protection for journalists and academic researchers. Given this *mise-en-scene*, it is unsurprising that several of our sister Circuits have held that the medium an individual uses to provide his investigative reporting to the public does not make a dispositive difference to the degree of protection afforded to his work. Whether the creator of the materials is a member of the media or of the academy, the courts will

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make a measure of protection available to him as long as he intended “at the inception of the newspaper gathering” to use the fruits of his research “to disseminate information to the public.”

This case fits neatly into the architecture of these precedents. The sole purpose of the respondents’ interviews of Netscape personnel was to gather data so that they could compile, analyze, and report their findings about management practices in the Internet technology industry. Thus, the respondents are within a group whose pre-publication research merits a modicum of protection.

We pause at this point in the citation to observe that the degree of protection afforded to journalists against court ordered disclosure is significantly greater in the U.S. than that thus far accorded them in the Canadian jurisprudence. We will, however, be addressing in the Canadian context, a comparison of the distinction between journalists and academic researchers.

A Continuum of Confidentiality

The Court of Appeals next focussed on the issue of what was protected from disclosure.

This aspect of the question raises vexing theoretical issues. . . . The prototypical situation in which a court provides protection against disclosure for journalists or researchers’ materials involves confidential information. . . . The District Court found that the information sought by Microsoft was confidential in character, and the record sufficiently supports this finding. **To be sure, confidentiality comes in varying shapes and sizes.** The confidentiality agreed upon by the authors and the interviewees in this instance does not ensure the most perfect privacy. The respondents did not offer the interviewees the sort of detailed non-disclosure agreement that they signed with Netscape. Moreover, they conducted the interviews in the presence of a Netscape official, gave Netscape’s management a preview of planned questions prior to showing those statements to the persons who made them, and circulated their manuscripts (or portions of it) for pre-publication peer review. (emphasis added)

Still, determinations of where particular disclosures fall **along the continuum of confidentiality**, and related determinations and the degree of protection that attaches to them, must take into account the totality of the circumstances. (emphasis added)

Microsoft’s Need for the Information

When the respondents began their inquiry into Netscape’s management practices early in 1997, neither they nor their interview subjects knew (or had any reason to believe) that Microsoft later would be sued for anti-trust violations based upon its peregrinations in the browser market. In that environment, handing individual interview subjects’ complex legal agreements might have made them squeamish (and thus less candid). Instead, the respondents gave each interviewee a personal, albeit verbal, assurance that he would be accorded the opportunity to correct, comment upon, and/or disclaim

attributed quotations prior to publication. **At the very least, this assurance is a species of confidentiality.** Microsoft's demand for the full tapes (including out-takes) and transcripts of interviews with all Netscape employees – materials which have not to date been shown to anyone - obviate this assurance. While the level of confidentiality that characterizes a journalist's or researcher's confidential information may, in the end, affect the degree of protection conferred upon that information in a discovery dispute, **we agree with the District Court that the interviews here fall along the continuum of confidentiality at a point sufficient to justify significant protection.** [emphasis added]

The Legal Balancing Test

When a subpoena seeks divulgement of confidential information compiled by a journalist or academic researcher in anticipation of publication, courts must apply a balancing test. **This test contemplates consideration of a myriad of factors, often uniquely drawn out of the factual circumstances of the particular case.** Each party comes to this test holding a burden. Initially, the movant must make a *prima facie* showing that his claim of need and relevance is not frivolous. Upon such a showing, the burden shifts to the objector to demonstrate the basis for withholding the information. The court must then place these factors that relate to the movant's need for the information on one hand of the scales and those that reflect the objector's interest in confidentiality and the potential injury to the free flow of information that disclosure portends on the opposite hand. [emphasis added]

Calibrating the Scales

In the final stage of its analysis, the Court of Appeal examined “the District Court's handiwork” in light of this legal framework.

Microsoft's need, admittedly, is substantial in the sense that relevant information likely exists – indeed, the District Court specifically found that Microsoft had not embarked on a fishing expedition – and Microsoft has a legitimate use for it. The company, after all, is in the throes of defending a complex case of extraordinary importance to its future, and its primary defence is that Netscape suffered a series of self-inflicted wounds that dissipated its dominant position in the browser market. *Lessons* includes several quotations that suggest missteps by Netscape management during the browser war, and it is reasonable to assume that the notes, tapes and transcripts include more evidence of this genre. Hence, Microsoft has made a *prima facie* showing of need and relevance.

The District Court discounted this showing somewhat because it found that the same information was otherwise available to Microsoft by direct discovery . . . Microsoft, which employed no fewer than eight lawyers in the preparation of its brief in this appeal – had enough time, enough knowledge, and enough resources to depose those individuals [to whom quotations in the book were attributed] . . . or otherwise obtain discovery from them. This factor must figure in the balance.

Researchers' Need for Confidentiality

The opposite pan of the balance is brim-full. 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, pathbreaking work in management science requires gathering data from these 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 non-disclosure 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 co-operate. Thus . . . the interviews are "carefully bargained-for" communications which deserve significant protection.

Considering these factors, 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 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 infrigdate the free flow of information to the public, thus denigrating a fundamental First Amendment value.

It is also noteworthy that the respondents are strangers to the anti-trust litigation, insofar as the record reflects, they have no dog in that fight. Although discovery is by definition invasive, parties to a lawsuit must accept its travails as a natural concomitant of modern civil litigation. Non-parties have a different set of expectations. Accordingly, concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs.

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We need go no further. The District Court used the proper test, balanced the right array of factors, and acted well within its discretion, in determining that the scales tipped in favour of preserving confidentiality and against the wholesale disclosure of investigative materials gleaned in the course of pre-publication academic research. Our confidence in the appropriateness of this ruling is fortified by the fact that **the District Court took pains to protect Microsoft's legitimate interest.** After not denying the motion to compel, the court announced that it would retain jurisdiction so that, should a material conflict develop between quotations from the book and other evidence, it could review the notes, tapes and transcripts in camera for purposes of verification and, if necessary, order production. **This even-handed ruling treats all parties fairly.** [emphasis added]

(at 712-717)

It is easy to see the similarity between the judicial reasoning in the *Microsoft* judgment and *Ryan*. In both cases there is the careful weighing of the need for disclosure to achieve adjudicative fairness in the disposition of the litigation against the need to preserve confidentiality to foster the relationship of trust necessary to achieve, in the one case, the significant goals of therapy, and in the other the gathering of information for scientific inquiry. In both cases the U.S. Federal Court of Appeals and the Supreme Court of Canada are alert to the tailoring of the court's order in order to accommodate the competing interests. The *Microsoft* decision adds to the jurisprudence the important concept of "the continuum of confidentiality," with the degree of protection tailored to the particular circumstances of the case and its location on that continuum.

G. The *Richard Leo* Case

Although it never resulted in any written reasons for judgement, the case involving Richard Leo, a graduate student in a criminal justice Ph.D. program at the University of California at Berkeley, is one of the most relevant decisions to the issues underlying this Opinion. Mr. (now Professor) Leo, from December 1992 to August 1993 conducted research, as a “participant-observer” inside the criminal investigation division of a large urban police department in California. The subject matter of his research was police interrogation practices. Prior to Mr. Leo’s study, no participant observation or general sociological study of American police interrogation practices existed. Mr. Leo spent three months negotiating with Berkeley’s Human Rights Committee before finally acquiring the University’s permission to observe custodial interrogations. The possibility of being called to testify never arose during any of these negotiations and therefore he was not required to discuss it in his official Human Subjects Protocol Agreement. However, the Committee required that he write up his research in a manner that guaranteed the anonymity and confidentiality of his research subjects.

During the course of his research on several occasions Mr. Leo became alerted to the possibility of his being called as a witness. For example, homicide detectives would not permit him to take any notes inside their interrogations fearing that such notes could end up in a courtroom and embarrass or contradict them. On another occasion, when a suspect invoked his right to silence but then, without prompting, unambiguously waived that right and confessed to a murder, the interrogating detective told Mr. Leo that in the event that the suspect’s lawyer claimed that the waiver was not voluntary, Mr. Leo would be called as a witness for the prosecution. As it turns out, Mr. Leo was not called as a witness in that case, but he was subpoenaed in another case by the Public Defender’s Office. In that case Mr. Leo had observed an interrogation in which the suspect had provided detectives with a full confession to his participation in an armed robbery. Subsequently, the suspect maintained that he confessed only because the detectives had first threatened him with other prosecutions if he did not confess, thus violating his constitutional right to remain silent. Both detectives denied these allegations.

The public defender, after learning that Mr. Leo had observed this particular interrogation of

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his client, requested a personal interview with him as well as a copy of his research notes. When Mr. Leo refused to cooperate the public defender served him with a subpoena ordering him to appear at a preliminary hearing and testify about his observations of the interrogation. Mr. Leo, in an article published in the *American Sociologist*, has described the subsequent unfolding of events in a way which throws into sharp relief the competing interests at stake. In some respects, the account also traverses some of the territory that Simon Fraser went through during the course of the *Russel Ogden* case.

Mr. Leo, upon receiving the subpoena, met with members of his dissertation committee and the chair and former chair of the Human Subjects Committee, who agreed that the correct course of action was to convince the judge to quash the subpoena or persuade the district defender to withdraw it. Mr. Leo then met with the Vice-Chancellor of Legal Affairs, “who initially questioned whether Leo’s case was significant enough to warrant legal representation at the University’s expense.” Subsequently, as a result of further meetings, the Associate Dean of Research was persuaded to grant Mr. Leo’s request for University representation, and a meeting was scheduled with the University’s Office of General Counsel. Before that meeting took place, Professor Jerome Skolnick, a member of Mr. Leo’s Dissertation Committee and one of America’s most distinguished criminologists, attempted informally to persuade the Public Defender’s Office to withdraw the subpoena. He suggested that a third party, preferably an attorney whom the public defender trusted, read Mr. Leo’s research notes to determine whether the public defender would advance his client’s case by subpoenaing Mr. Leo. If so, the public defender should go forward with a subpoena and University Counsel could still attempt to challenge it; if, however, the notes were not helpful (and indeed might be detrimental) the public defender could withdraw the subpoena without violating any professional obligations to his client. The public defender refused this suggestion claiming that “his client’s freedom hung in the balance, and as a matter of due process his client was entitled to [the] research notes and testimony as to what really transpired during that interrogation.”

Mr. Leo then met with the Office of the General Counsel of the University at which four university attorneys attended. The discussion that ensued highlights some of the arguments that have been the focus of this Opinion.

. . . These attorneys attempted to persuade us that the University had little if any chance

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of prevailing in a case that pitted a criminal defendant's constitutional right to a fair trial against an academic researcher's professional interest in protecting privately acquired information. When the judge balanced these two interests against one another, as the law demands, surely we would lose. The attorneys continued: even in civil (as opposed to criminal) cases, where there are no constitutional rights at stake and thus a defendant's (or plaintiff's) claim to confidential information is far less compelling, University researchers still lose virtually every balancing test in court. The attorneys reminded us there exists no common law, constitutional or statutory privilege protecting data university researchers acquire, however confidential. Why, then, the attorneys asked, should the University expend time and resources to defend my case when a judge would surely rule against us and, if the case were appealed, perhaps create even stronger legal precedent for future legal rulings against academic researchers?

Professors Smith and Ranney [the Chair and Former Chair of Berkeley's Human Subjects Committee] counter-argued that the University had both a professional and moral obligation to defend its researchers in such situations, regardless of the chances of winning in court. If the University failed to protect its researchers from the compelled disclosure of confidential communications and observations, the very purpose of the University – the collection and public dissemination of knowledge – might be undermined. For without meaningful assurances of confidentiality, research like my own could not be conducted; research subjects would not grant us access into their private worlds if our promises of confidentiality rang hollow when put to the test. In addition, Professors Smith and Ranney argued that it was imperative for the local research community to know that the University would stand behind its principles and defend one of its members in the face of such legal compulsions. Their message was two-fold: "we must assure not only our research subjects of the integrity of our promises and commitments to them, but we must also ensure further researchers that we are willing to act when these promises and commitments are threatened by third parties and so challenged in court."

(Richard A. Leo, "Trial and Tribulations: Courts, Ethnography, and the Need for an Evidentiary Privilege for Academic Researchers", *26 American Sociologist* 113 (1995) at 126-7)

While the Office of General Counsel agreed to fight the subpoena, their arguments before the judge at the preliminary hearing were unsuccessful. Again, as described by Mr. Leo:

"At the preliminary hearing, University of California legal counsel argued that the subpoena should be quashed because the public interest in my research – research that is uniquely predicated on maintaining the assurances of confidentiality that provided to my subjects – should outweigh any due process right the criminal defendant may possess to the discovery of my research notes or to the compulsion of my testimony ... The public defender countered that the defendant's constitutional right to a fair trial unambiguously outweighed any public interest in my research; the prosecutor supported the defense request to compel my written notes and courtroom testimony ... The judge [ruled] the defendant's due process rights clearly outweighed any public interest in my research ... Since the defendant and two LPD detectives had given diametrically opposed accounts of what occurred during the interrogation in question, the judge concluded that my testimony was essential for resolving the dispute that was necessary

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to provide the accused with a fair trial. My attorney nevertheless continued to argue that, like journalists, I enjoyed a limited First Amendment right to the confidentiality of my research materials. The judge was not impressed by this argument either. Moreover, the judge reasoned, the First Amendment would not even shield a journalist in my identical situation from compulsory testimony, much less an academic researcher. The judge informed me that failure to testify would leave me in contempt of court, a penalty that carried a renewable five-day jail term and a \$1,000.00 fine.”

(at 128)

After consulting with his lawyer and faced with the argument that if he refused to testify the case would be appealed and an appellate court would likely rule against the establishment of an evidentiary privilege for academic researchers, Mr. Leo reluctantly agreed to testify, believing that his research notes could do no harm to the interests of his research subjects and that his failure to testify could damage the future interests of all academic researchers.

As it turned out, even though Mr. Leo had thought that his field notes supported the detectives account of the interrogation and the prosecution’s case, the public defender was able to point to certain sections of those notes in which the detective encouraged the suspect to give a confession before talking to the public defender. Relying upon this as evidence undermining the accused’s right to silence, the judge ruled that the confession was inadmissible. The accused was subsequently convicted of one count of armed robbery but acquitted of three other charges.

In reflecting on the events Professor Leo has written that he regrets having chosen to turn over his research notes and testify because “not only have I betrayed my research subjects, but I probably also spoiled the field for future police researchers. ... As a result of my decision to testify, it is likely that my study will not only be the first but also the last participant observation study of American police interrogation practices for some time to come.” Interestingly however, when Professor Leo subsequently visited the police department where he had done the research to apologize to the detectives for betraying his promise of confidentiality, they assured him that he had done the right thing by not breaking the law in response to the judge’s order; Their anger, was directed not towards the researcher but to the criminal justice system. In other words although Mr. Leo considered that he had betrayed his research subjects, they did not feel that he had betrayed them.

Professor Leo uses his experience to join other researchers in a call for legislation that would

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recognize an evidentiary privilege for academic researchers. In making his argument for what amounts to a class privilege Professor Leo grapples with the criticism that “one must evaluate the context and social structure for any given research setting before privileging the privacy rights of research subjects over the legitimate informational needs of third parties”, and that” a principled call for an evidentiary privilege is peculiarly unsociological insofar as it emphasizes an unconditional rule over a case by case analysis of the various interests at issue in any given research project.” (at 131) His response is this

“What these arguments fail to appreciate, however, is that political accountability may be achieved more successfully by the publication of *general* and systematic research findings – such as my own on contemporary police interrogation practice – than by exposing the misdeeds of an individual in any *specific* and idiosyncratic case. If ... we yield to the state’s compulsion and testify in courts about a confidential communications or observations, we are likely to foreclose the opportunity for similar research in the future and thus deprive the scholarly community and the public of one of the most important resources in assessing the accountability of our public officials. This will be disproportionately true for research that seeks to acquire hidden and dirty data, precisely the kind of research in which issues of accountability are most salient.”

(at 131)

Having made his case Professor Leo then seems to undercut it considerably by acknowledging that there will be some situations in which even a legislated privilege will have to yield to other more compelling interests. In the context of his own particular research he observes that it would not have been difficult to imagine a detective physically extracting a confession from a custodial suspect, and “if I had observed such an event during my field research, I probably would reacted much differently to a public defender’s attempt to subpoena my testimony and research notes. Fortunately, I did not witness any physically coercive interrogations.” (at 132) To deal with situations like this he suggests that legislation should recognize that there are “thresholds beyond which such a privilege may no longer be justifiable” and that the threshold would “protect the fundamental human rights of third parties, and, in practice, could be evaluated on a case by case basis.”

Professor Leo’s argument that in the context of his kind of research into the activities of public officials like the police, public accountability will be better served by the publication of general and systematic research findings than by exposing the misdeeds of an individual in any specific case, bears some relationship to the cost benefit calculus that Canadian courts employ in determining whether evidence obtained in violation of the *Canadian Charter of*

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Rights and Freedoms should be excluded in a criminal trial. Pursuant to section 24(2), the test is whether “having regard to all the circumstances, the admission of [the evidence] in the proceedings would bring the administration of justice into disrepute.” Chief Justice Lamer in *R. v. Greffe* in describing this test stated:

In general terms, the purpose of the section is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. ... This further disrepute results from the admission of evidence that would deprive the accused of a fair hearing or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies. As well, and this is a point that bears repetition especially when a very serious crime might go unpunished because of the exclusion of evidence, it is the *long-term* consequences of regular admission or exclusion of the evidence on repute of these administrations of justice that must be considered.

([1990] 1 S.C.R. 755 at 784)

This framework of analysis allows a court to balance general long-term benefits against specific immediate results. However, it is one thing to say that it is more important that a guilty person be acquitted in order to send a clear message to the police that the judiciary will not condone a pattern of disregard for the rights of accused persons; it is quite another to suggest that the courts should tolerate an occasional unfair trial because of the unavailability of a researcher’s information in the long-term interests of researchers acquiring reliable information about police behaviour. In *A.M. v. Ryan*, Madam Justice McLaughlin clearly expressed her, and the Supreme Court of Canada’s view on this. She stated, “I, for one, cannot accept the proposition that ‘occasional injustice’ should be accepted as the price of the privilege.” ([1997] 1 S.C.R. 157 at para. 32)

What is important about Professor Leo’s analysis is that it provides an opportunity to look at one of the strongest cases that could be mounted for academic privilege. His study into police interrogation practices was one in which there was a strong empirical foundation for his claim that without guarantees of confidentiality he would never be given access to the interrogation room and police officers would never have shared their trade secrets regarding interrogation techniques. His research related directly to the administration of justice and therefore was directly related to the interests that the most protected form of privilege – that of solicitor-client - is designed to protect. He could make a strong and compelling case that if researchers like him were required to disclose their research and testify in criminal

prosecutions, whether for the prosecution or the defence, the ability to carry on this kind of research would be greatly undermined and this avenue of knowledge would therefore be foreclosed to law and policy makers. Yet, even in the face of this argument, it is our opinion that Canadian courts, like the American judge in the Leo case itself, would favour the interests of an accused person to have access to the testimony of an independent witness whose evidence is directly relevant to the accused's person's ability to have a fair trial, including access to evidence necessary to either establish his innocence or to invoke the protection of rules that go to the integrity of the administration of justice and the control of unlawful police activities.

H. Protecting Confidentiality: Lessons from America

American commentators have reflected on how the research community can protect its research from disclosure. Judge Crabb has offered this preliminary caution.

Researchers who are subpoenaed should not anticipate that courts are familiar with the needs, operations, or resources of the research world. It is up to researchers and attorneys to educate the courts about these matters and to mount a strong offence if they want to ameliorate the potentially harsh effects of the forced disclosure of research data.

(Barbara Crabb, "Judicially Compelled Disclosure of Researchers Data: A Judge's View," 59 *Law and Contemporary Problems* 10 (1996) at 33)

The advice of Judge Crabb has been taken a step further in a companion essay in the *Law and Contemporary Problems* collection by Michael Traynor, a practicing lawyer who, based upon his review of the American law, examines how researchers, research institutions and their legal counsel may foresee and effectively counter the possibility of having to disclose pursuant to a court order. Because the article, albeit in the context of American law, is designed to enable the research community to predict the occasions in which court disclosure may be required and to help design strategies for promoting and protecting the interests of the research community it provides a useful model. Later in this opinion we will be building on that model in the context of the relevant Canadian law. The importance of this model is that it is pro-active rather than re-active. The model thus requires that the risk and circumstances under which a claim for disclosure might be made be taken into consideration at the earliest planning stages of a research project and that careful attention be given to these matters in the research approval process and in the actual execution of the research.

The Traynor model includes the following elements.

1. The Planning Process

Traynor advises that researchers should determine at the outset whether confidentiality is necessary for the purposes of the study and if so they should document the reasons. He specifically refers to the Wigmore Criteria and comments that “researchers would be well-advised to consider these factors before proceeding with their research.”

2. The Approval Process

The major recommendation here is that the researcher comply with the requirement of the Ethics Review Board for obtaining the informed consent of study participants and protecting their privacy. Such compliance:

...will show the unity of interests and confidentiality of the researcher, the research institution and the research subject, and counter a contention that the confidentiality assurance was not authorized. . . . In sum, a research institution and researcher should adhere to a confidentiality plan from beginning to end.

(Michael Traynor, “Countering the Excessive Subpoena for Scholarly Research”
59 Law & Contemporary Problems 119 (1996) at 125)

Michael Traynor in his article does not deal separately with the ways in which the policies and procedures of review ethics boards can contribute to enhancing and protecting research confidentiality and later in this opinion we will be specifically addressing this issue because, in our judgement such policies and practices can play a very significant role not only within the existing framework of the law, but in shaping the development of the law.

3. After the Subpoena Arrives

The first recommendation Traynor makes is that the researcher consult with their university administration and legal counsel immediately. Speaking of the American practice, Traynor observes:

Subpoenas are often phrased in extraordinarily broad and demanding terms that might further allow researchers who are unaware that sweeping subpoenas are common and mean “just about as much as the asking price for a rug in an Oriental bazaar.

Traynor also offers this salutary advice:

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Researchers might rationally contemplate either destroying, or concealing the data demanded or, conversely, divulging it in detail. However, the belief or hope that such behaviour could stave off an appearance in court or at a deposition is unrealistic. Fear, destruction, concealment or the divulgence of confidential data is not merely inappropriate, but also self-defeating. Evasive tactics may provoke the court to rule adversely and divulgence may remove the basis for protection. Instead, the researcher should report the subpoenas promptly to the appropriate officer within the research institution; the office will usually then contact legal counsel.

(at 26)

We will be returning to this particular issue of destruction of records later in this Opinion.

Another important recommendation of Traynor is that researchers should promptly notify confidential sources whenever their data is subpoenaed.

Giving timely notice to them may help the researcher and facilitate a solution. The sources may waive confidentiality, thereby eliminating the problem. They may support the researcher in pursuing remedies that will limit the scope of the subpoena. Notice also amplifies the court's awareness of the researcher's concern for the privacy of confidential sources.

(at 134)

Should the case proceed, Traynor recommends that a carefully tailored protective order be sought. Judge Crabb in her thoughtful reflection on the American case law on disclosure of research has identified the steps that a court can take if the researcher's primary concern is the confidentiality of the requested information.

If confidentiality of research subjects is at issue, the court should determine the nature of the promise made to the subjects (not all such promises require total confidentiality), as well as any potential harm to the study if confidentiality is not maintained. If the court is convinced that confidentiality must be maintained, it can order that the subject's names be redacted. Depending on the situation, additional redaction of identifying information may be ordered. Other protective options include strictly limiting the dissemination of subpoenaed material, turning it over to an independent third party for review, or restricting its use by certain named experts under a protective order governing future use.

(Barbara Crabb, "Judicially Compelled Disclosure of Researchers Data: A Judge's View," 59 *Law and Contemporary Problems* 10 (1996) at 28)

I. Journalist Claims to Privilege in American and Canadian Law: Lessons for Researchers

The relationship between researcher and research subject has often been compared to that

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between journalist and their sources. Thus, In re *Cusumano and Yoffie v. Microsoft* the court said,

Journalists are the personification of a free press, and to withhold such protection would invite a "chilling effect on speech," and thus destabilize the First Amendment. The same concerns suggest that courts ought to offer similar protection to academicians engaged in scholarly research. After all, scholars too are information gatherers and disseminators. If their research materials were freely subject to subpoena, their sources likely would refuse to confide in them. As with reporters, a drying-up of sources would sharply curtail the information available to academic researchers and thus would restrict their output. Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of a similar level of protection for journalists and academic researchers.

(162 F.3d 708 (1st Cir. 1998) at 714)

There are many similarities between the two relationships. In each case, claims of privilege have been assessed on a case by case basis. Neither has been protected by a class privilege. Both the press and universities serve an important public interest.. The communicative process is integral to both institutions and depends on confidentiality. Freedom of the press should include the freedom to gather all relevant news in the public interest. "It is the necessary corollary of this freedom that the press be allowed to give a credible undertaking that confidential sources will not be disclosed so that information of crucial importance to the public will be forthcoming now and in the future." (Sidney N. Lederman, et al, "Confidentiality of New Sources" in Philip Anisman and Allen M. Linden, *The Media, The Courts and The Charter* (1986) 27.) Similarly, confidentiality is central to the research process.

As with the First Amendment in the U.S., in Canada the *Charter* right of freedom of expression grounds claims of privilege for both journalists and researchers.

2. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

The Supreme Court of Canada has recognized the important societal role of the press. Mr. Justice Cory in *CBC v. New Brunswick (AG)* has stated:

The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an

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informed assessment of the issues which may significantly affect their lives and well being.

((1991), 85 D.L.R. (4th) 57 (S.C.C.) at 67)

In the case of researchers, the Supreme Court has recognized the importance of academic freedom in ensuring that the truth, no matter how unpalatable, is discovered (*McKinney v. U. of Guelph*, [1990] 3 S.C.R.229; *Dickason v. U. of Alberta*, [1992] 2 S.C.R.1103; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R.483.)

The decisions on journalists' claims to privilege provide guidance for laying a foundation for recognition of a privilege for researcher-subject communications. As in the American decisions, so in the Canadian courts a bare assertion that disclosure will impair the gathering of news has not been sufficient. The importance of an evidentiary foundation in support of the Wigmore criteria is underscored by the comments of the Supreme Court of Canada in *Moysa v. Alberta (Labour Relations Board)* (1989), 60 D.L.R. (4th) 1 (S.C.C.). In that case, a week after a journalist wrote an article about union organizing activities at several department stores, the Hudson's Bay Company terminated the employment of six employees. The union, alleging that the employees were fired because of their union organizing activities, brought an unfair labour practices claim against the Bay. The journalist was summoned to attend the Labour Relations Board hearing and objected to being compelled to testify, alleging that she had the right to protect her sources of information either at common law under the Wigmore Criteria or under section 2(b) of the *Charter*. The Labour Relations Board ordered her to testify, holding that Wigmore's four criteria were not satisfied. The Board was of the view that the element of confidence was not part of the maintenance of a continuing relationship between the journalist and her sources, and that the injury resulting from disclosure would not be greater than the benefit. The Board also held, relying upon a decision of the U.S. Supreme Court that held the guarantee of the freedom of the press under the First Amendment did not permit a reporter to refuse to answer questions before a Grand Jury, that a reporter had no constitutional immunity from testifying under section 2(b) of the *Charter*. At the Supreme Court of Canada Mr. Justice Sopinka had this to say about the issues:

The appellant does not suggest that there is in Canada an absolute right for journalists to claim a privilege not to testify in relation to matters discussed with journalists' sources, rather the appellant contends that she should not have been compelled to testify before the Labour Relations Board because she fell within the scope of a qualified testimonial privilege under either common law principles or section 2(b) of the *Charter*. Even if such

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a qualified testimonial privilege exists in Canada, this appeal must be dismissed as the appellant here does not fall within any of the possible tests which have been proposed as establishing the conditions necessary to justify a refusal to testify.

The appellant argued that the four criteria cited by Wigmore . . . provide a guide for the operation of a privilege against the disclosure of communications. The Board examined the submission and held that the injury resulting from disclosure was not greater than the benefit and that the evidence was relevant, proper, and necessary to administer the *Labour Relations Act*. As well, the Board held that an element of confidence was not part of the continuing relationship between the appellant and the managers at the Hudson's Bay Company store in St. Albert. Accordingly, the appellant failed to satisfy several of the necessary criteria propounded by Wigmore. Therefore, even if a qualified form of privilege exists, the appellants claim on the facts of this case must fail.

. . .

Even if I assume for the moment that the right to gather the news is constitutionally enshrined in section 2(b), the appellant has not demonstrated that compelling journalists to testify before bodies such as the Labour Relations Board would detrimentally affect journalists' ability to gather information. No evidence was placed before the court suggesting that such a direct link exists. While judicial notice may be taken of self-evident facts, I am not convinced that it is indisputable that there is a direct relationship between testimonial compulsion and the "drying up" of news sources as alleged by the appellant. The burden of proof that there has been a violation of section 2(b) rests on the appellant. Absent any evidence that there is a tie between the impairment of the alleged right to gather information and a requirement that journalists testify before the Labour Relations Board, I cannot find that there has been a breach of section 2(b) in this case.

In addition, the Labour Relations Board held that the relationship between the appellant and the person she spoke with at the Hudson's Bay Company was not one based on confidence. The protection of confidence was neither sought nor given. The Board also held that the evidence was crucial, relevant, and was not available from alternative sources.

(at 5-8)

In the later decision of the Nova Scotia Court of Appeal in *R. v. Regan* (1997), 144 D.L.R. (4th) 456 (N.S.C.A.), the court relied upon *Moysa* in upholding a lower court's order issuing subpoenas to four journalists employed by the CBC in requiring them to give evidence at a preliminary inquiry involving charges against the former Premier of Nova Scotia, Gerald Regan. Prior to the preliminary inquiry, two of the complainants against Mr. Regan had been interviewed by journalists whose interviews formed part of the CBC program, *The Fifth Estate*. The subpoenas were sought by counsel for Mr. Regan so that he could question the journalists present at the interviews and to obtain their notes or those portions of the

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interviews that were not broadcast, in order to ascertain more fully the evidence against the accused as being “the best evidence” available of out of court statements made by the complainants which may be at variance with other statement that they had made. The trial judge stated “in essence, the defence is seeking the discovery of possible inconsistent statements made out of court to better and more fully make answer and defence at trial should the accused be committed to trial.” The evidence showed that there were variances between what the complainants stated in a broadcast television interview and their testimony at the preliminary inquiry. The Nova Scotia Court of Appeal held that, as in the *Moysa* case, there was no factual basis that the issuance of the subpoenas would impair the function of the press in gathering and disseminating information.

In *Regan*, the journalists also asserted that the subpoenas impaired their right to privacy under section 7 of the *Charter* in that material sought by the defence constituted “third party records” and therefore was protected within the principles articulated in the *O'Connor* case. However, the *O'Connor* principle required that it must first be established that there was “a reasonable expectation of privacy in communications and records.” The court in *Regan* held that there was no evidence that there was any expectation of privacy in relation to the communications and records of the CBC in relation to the interviews because, as the court pointed out, “the very purpose of the interviews was to prepare a publicly broadcast news report about the subject.”

In the most recent decision of the in this area of this law, in *R. v. Hughes*, the British Columbia Supreme Court ordered the disclosure of a reporter’s notes of an interview with the complainants of sexual assault. One factor in the decision was the lack of evidence on news gathering if the information was disclosed:

In the present case, I have been provided with two affidavits in which it is suggested that the giving of evidence will have the effect of drying up sources of news. One is from the applicant, Mr. Hunter and the other is from Joey Thompson, a senior editor with the Province. Both affidavits express the opinion that news sources would dry-up if journalists were compelled to reveal information given to them by their sources. Mr. Hunter asserts, “[i]f a journalist is unable to provide an assurance of confidentiality, sources will not speak to that journalist.” Ms. Thompson deposes “[i]f reporters are compelled to disclose their sources to the courts, police or third parties, reporters will lose access to information.”

In my view these affidavits do not satisfy the evidentiary standard referred to by Mr.

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Justice Sopinka in *Moysa*. They are nothing more than the opinions of the parties involved. I have been given no independent evidence drawing a direct link between the compellability of members of the media and the drying-up of news sources.

([1998] B.C.J. No. 1694 (BCSC) at paras 91-92)

PART V RE-EXAMINING THE RUSSEL OGDEN CASE

A. Building the Legal Case for Privilege

As we have explained earlier in this Opinion, Russel Ogden was successful in his assertion of a claim to privilege before the Coroner's Inquiry regarding the identities of individuals who were present at the death of the unknown woman. The Coroner's Reasons for Decision, while finding that all four of the Wigmore Criteria were satisfied, gives little detail on the nature of the evidence that was presented by Mr. Ogden and it is therefore difficult, on the basis of the Reasons alone, to judge whether had the case been appealed, an appeal court would have upheld the claim to privilege. By the same token, it is also difficult on the basis of the Reasons alone for members of the Task Force and University researchers to appreciate the kind of evidentiary record that would be necessary to sustain a claim of privilege. What we therefore propose to do in this next section is to re-examine the Russel Ogden case utilizing the transcripts of the proceedings, review the evidence that was placed before the Coroner, and applying the legal analysis that we have developed in the preceding sections, consider whether the Coroner's decision was the right one and can be regarded as a precedent to guide both the University and other researchers. What we propose to do is to go through the four Wigmore Criteria again, but this time build into the analysis the evidence that Russel Ogden's counsel placed before the Coroner.

1. Criterion 1 – The Communications Must Originate in a Confidence that They Will Not Be Disclosed

The argument that there was the necessary expectation of confidentiality was supported by two kinds of evidence: first the Notices explaining the research and asking for volunteers assured confidentiality and anonymity, as did the consent form signed by the participants, and second, Russel Ogden's own evidence before the Coroner as to the understanding of research participants regarding assurances of confidentiality. This evidence explained that there were two groups of research subjects. In the first group were the "Persons with AIDS" category, and Mr. Ogden interviewed them around questions of their perspectives towards the issues of euthanasia and assisted suicides. A second group – the "Euthanasia Group" –

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involved individuals who had been involved in acts of euthanasia or assisted suicide or had knowledge of such acts. Mr. Ogden testified that in relation to the first group, some of these informed him that it did not matter to them whether Mr. Ogden protected their anonymity, but the second Euthanasia Group, including the two individual participants whose communications were in issue before the Coroner, only participated in the research on the express and unequivocal understanding that their anonymity and confidentiality would be protected. Mr. Ogden was asked this question by his counsel:

Q. In your view, looking back on it now and having completed your thesis, was the promise of anonymity and confidentiality a necessary assurance to these people in order for you to gather the information together?

A. It was an absolute necessity. Many of the participants explained that they would not participate unless they were confident that their identities would not be disclosed.

(Transcript of proceedings, 19 August 1994 at 9)

Mr. Ogden also gave evidence in relation to the discussions with the research participants on the issue of a possible subpoena.

The issue of subpoena arose in that I explained to the participants that I was aware that there was a remote possibility that I could be subpoenaed to provide information that was not already published in the thesis. . . . I promised the participants that in the event that I was subpoenaed to court, that I would still maintain my pledge of anonymity and confidentiality to them.

(at 8)

In neither this exchange nor in his communications with the Simon Fraser Ethics Review Board did Russel Ogden ever explicitly state that he would be prepared to defy a court order to testify about confidential material, although it is not an unfair inference to draw that he was prepared to “go the distance,” to use the evocative phrase of Professors Lowman and Palys. However, it is not necessary for a researcher to make such a commitment in order to satisfy the expectation of confidentiality required by the first criterion of the Wigmore Criteria. Clearly, no court would require that in order to meet the legal preconditions for privilege a person claiming the privilege would have to undertake to violate a court order in the event that a claim for privilege was unsuccessful. In this connection we must respectfully disagree with the views expressed by Professors Lowman and Palys in their first submission to the Task Force, where they write:

. . . to respect the law, one has to take the first criterion of the test – that the communication must originate in the confidence that it would not be disclosed – very seriously, indeed. Researchers must have the courage of their convictions. If we are to take the law seriously we **have to** promise not to disclose the information to anyone, including a court. The courts cannot have their cake and eat it too.

(The History of Limited Confidentiality, SFU at 38)

In response to this we would say the Wigmore Criteria, in their attempt to balance the importance of protecting confidential communications with the need to ascertain the truth, seek to satisfy an appetite for justice; requiring researchers to declare their willingness to commit civil disobedience is not one of the necessary ingredients.

2. Criterion Two: Confidentiality Must Be Essential for the Maintenance of the Relationship

The argument of Ogden's counsel was that confidentiality was recognized as a critical component in many areas of social science research, and in particular those areas involving issues with difficult legal and ethical implications. It was argued that the research community recognized that persons who were involved in activities with potential legal ramifications will not voluntarily participate in research attaching on those activities without assurances of confidentiality. In the specific context of Mr. Ogden's research, people who have AIDS are vulnerable to discrimination and accordingly are concerned about public exposure. The need for confidentiality was particularly important when conducting research on euthanasia and AIDS because of the potential legal ramifications. All of the participants in the Euthanasia group, including the individuals whose identity was sought by the Coroner, told Mr. Ogden that they would not participate unless their confidentiality and anonymity were assured, and therefore his confidentiality and trust was critical to his relationship with the participants. Without the expectation of confidentiality and anonymity, this relationship would not have existed. Without respecting the confidentiality there was no possibility of Mr. Ogden or anyone else conducting further research of this nature.

In support of this argument expert evidence was called. The first expert was Dr. Richard Ericson, a distinguished and internationally recognized criminologist whose own research activities had included fieldwork with police officers, lawyers, and accused persons. Professor Ericson described how, in the field of criminology, it is not uncommon that research methodologies involve asking people questions about their involvement in criminal activities.

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I would suggest, for example, in the area of drug research, it is probably the primary methodology, because we can never find out about drug use from offences known to the police, which are only the tip of the iceberg, to say the least. So, a typical approach would be to interview a large sample of people, for example high school students, and ask them over a certain period of time what offences they have committed, why they committed them and so on, to get into the whole epidemiology of drug use.

(Transcript at 20)

Professor Ericson was also asked, based upon his own experience, as to the necessity of confidentiality with the participants of any given study. This was his answer.

I think that if you didn't ensure confidentiality, you would not have access to the information you require to conduct social science research. I think it's as fundamental as that.

(Transcript at 22)

In response to a further question as to the prognosis for gathering data in social science research if confidentiality could not be given, he responded "Most research just simply would not be conducted."

In reviewing Professor Ericson's evidence in the context of a judiciary wary of expanding the boundaries of privilege we would recommend that the evidence be substantially buttressed. We have already quoted from some of the American cases where criticism was leveled at over-generalized claims that confidentiality was necessary for the gathering of research data. In Professor Ericson's case, his extensive experience in research projects involving participants in the criminal justice system, particularly his studies involving police behaviour, would have provided a strong foundation for more detailed evidence about the role that confidentiality played in those particular projects.

Professor Ericson's evidence was not, however, the only factual foundation upon which Mr. Ogden's argument under the second criteria of Wigmore was based. Compelling evidence was given by Mr. Andrew Johnson, a community health nurse who specialized in caring for patients with AIDS, and who had written a book entitled *Living with Dying, Dying at Home: An AIDS Care Team Resource Manual*. Mr. Andrews had also given workshops in the area of palliative care and the ethical issues involved with HIV and AIDS. Mr. Johnson was asked, based on his experience and his work, for his view on the importance of confidentiality in research in the area of euthanasia and assisted-suicide of people with AIDS. This was his

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answer:

For not all, but for many people with AIDS, end of life is a very difficult, a very painful, a very isolating and a very hopeless experience. It is not necessarily any different than it is dying with cancer or another life-threatening illness, but there are unique factors to dying with AIDS that do make it different, and that is the persistent societal views related to discrimination, homophobia, isolation, fear of contagion, fear of disclosure. These issues are prevalent, still very much alive in the experience of living and dying with HIV and AIDS and they are not so common as living and dying with another terminal illness.

That makes the psychology of your life extremely difficult to bear, and it is also in the context of no hopeful cure or vaccine, and because of that, many people have chosen to take control of their lives, and feel empowered and make decisions about their living, and now, more and more frequently, about their dying. AIDS means losing everything practically in your life: your job, your loved ones, your income, your housing. It's an experience full of loss. So, when you lose everything in your life, you want to stay in control of whatever is left, and usually that is decision-making. . . . Early on in the HIV epidemic . . . we did not deal very well with this illness. We treated it like a plague. We treated people with HIV illness and AIDS very poorly. We discriminated against them. We did not provide them with fair and adequate access to care and to treatment. Because of those, and many, many other factors related to the societal factors associated with HIV and AIDS, there was very little trust between people with HIV and AIDS and established institutions of health care, of law, of education, of whatever, in society.

It has taken us ten years to get to a place where we can provide a sense of trust in the relationship between client 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.

(Transcript at 33-35)

This evidence was not just compelling as that of a compassionate health care worker who has dedicated his life to working with those on the outer margins of our society, but was compelling also in its relevance to establishing why confidentiality was essential to the relationship of researcher and subject in the study of euthanasia and AIDS. Thus, in Russel Ogden's case, there was a trilogy of evidence from a distinguished criminologist who has himself conducted empirical research, an expert experienced in working in both a caring and

research relationship with AIDS patients, and the evidence of the researcher himself as to why, for to these particular research subjects, he needed to give assurances of confidentiality as a prerequisite to carrying out the research project.

3. Criterion Three: The Relationship Must Be One Which in the Opinion of the Community Ought to Be Sedulously Fostered

Russel Ogden's counsel, David Crossin, suggested that there were at least four "communities" involved in his case: (1) the academic/research community, (2) the community of institutions faced with responding to the issue of euthanasia and assisted suicide, (3) the community of persons suffering from terminal illnesses, and (4) society at large. He argued that the researcher-subject relationship was obviously critical to the academic/research community, particularly in the area of social science research which is heavily dependant on participation by subjects who, for legal reasons, are concerned about confidentiality and anonymity. In the unique circumstances of this case, there was no source of information concerning euthanasia and assisted suicide amongst people with AIDS other than those provided by the participants. It is not surprising, therefore, that the academic research community had appreciated the uniqueness and importance of Mr. 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 a 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. Mr. Johnson'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

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from those who are living it.

Finally, addressing 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.

4. The Fourth Criterion: Balancing the Injury to the Relationship by Disclosure with the Benefits Gained from the Correct Disposal of Litigation

Russel Ogden's argument here was that in the particular circumstance of the issue before the Coroner, the injury which would inure to the public interest from a breach of confidence far outweighed the public's interest in disclosure. The kind of research he had undertaken had provided Canada and the world with the critical information needed to deal with euthanasia and assisted suicide in an enlightened and humane fashion. That information would not be available but for Mr. Ogden's assurances of confidentiality. If Mr. Ogden was compelled to disclose, he would betray the trust of those with whom he had worked, who were already suspicious of the "establishment." Disclosure would not only irreparably damage his own researcher-subject relationship but, fearing that the assurances of confidentiality will not be honoured in the future, persons with sensitive and critical information would not be willing to come forward to participate in research, and thus the public's source of information on these issues would disappear.

As we have previously described, the Coroner agreed with this calculus of benefit in extending privilege so that Mr. Ogden did not have to disclose the name of the persons who were present at the death of the subject of the Inquest. In his Reasons for Judgment, the Coroner articulated the important public interest that disclosure of these names would serve; it would assist the Coroner's Service in ascertaining the deceased's name. That would allow continuation of the inquest into the circumstances surrounding her death and to allow members of the jury to make recommendations that would ensure that the care received by persons in similar circumstances in the future would be of a caring and compassionate nature. The research that Russel Ogden had undertaken had been designed to provide society with an informational platform upon which it could develop AIDS and Euthanasia policies founded upon respect and dignity. Although the Coroner did not explicitly say so, in the particular circumstance of the Ogden case, the long-term benefits of Russel Ogden's research, grounded in assurances and necessity of confidentiality, complimented the public interest served by the Coroner's Inquest.

In our opinion in Russel Ogden's case there was a legally sufficient evidentiary basis upon which to ground the application of the Wigmore principles and Coroner Campbell's decision

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would have withstood appellate review. We would add that in light of subsequent developments in cases such as *Ryan* the case for privilege could be enhanced in accordance with “*Charter values*”, in this particular case the need to protect AIDS patients rights to privacy and to secure equal treatment before the law without discrimination. In this regard, it is worth considering again the testimony of the nurse, Mr. Johnson:

For not all, but for many people with AIDS, end of life is a very difficult, a very painful, a very isolating and a very hopeless experience. It is not necessarily any different than it is dying with cancer or another life-threatening illness, but there are unique factors to dying with AIDS that do make it different, and that is the persistent societal views related to discrimination, homophobia, isolation, fear of contagion, fear of disclosure. These issues are prevalent, still very much alive in the experience of living and dying with HIV and AIDS and they are not so common as living and dying with another terminal illness. (at 33)

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In our earlier discussion of the law we have emphasized the importance of the contextual matrix within which claims of privilege must be asserted. Changing that context will result in a different calculus of benefit that may weigh heavily in favour of disclosure. Consider, for example, if a person had been charged with assisting in the suicide of an AIDS patient and that Russel Ogden had received information from one of his subjects that was inconsistent with the accused person's involvement in the suicide. It might be information that the subject herself had been present, but that the accused person was not present and had not been involved in any way in the planning of the suicide. That evidence would be relevant to an issue that goes to the heart of the criminal justice system – the innocence of the accused – and in the context of a criminal prosecution in which defense counsel sought the disclosure of names of Russel Ogden's subject in order to raise a reasonable doubt as to the accused's guilt, a Canadian and an American court would order disclosure.

To illustrate this point let us revisit the case of *In re Grand Jury Subpoena*. The District Court Judge ruled that Mr. Brajuha's research journal of his observations at Le Restaurant should not be disclosed to the grand jury investigating the suspicious fire (a ruling reversed by the Court of Appeals because there was an insufficient evidentiary basis to support a claim for privilege). However, the District Court Judge at the end of his judgment acknowledged that if the grand jury investigation resulted in a criminal prosecution then the "balance struck between protection and production may well be different. (583 F.Supp 991 (1984) at 995) For example, if Mr. Brajuha was called as a witness and counsel for the accused needed the journal to cross-examine him or otherwise establish his client's innocence the balance would shift towards production.

B. A Summary of The Law Of Privilege and the Researcher-Subject Relationship

1. Class Privilege

We do not believe that a case can be made for a class privilege for researcher-subject relationship. 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. The relationships and

communications between researchers and their subjects for the most part have little to do with the justice system. The fact that there are some research relationships, particularly in criminological research, that delve deeply into the justice system, is an insufficient basis upon which to support a case for class privilege for confidential communication of all researchers with their subjects.

2. Case by Case Privilege

The Wigmore criteria, interpreted and applied in accordance with *Charter* values, can be invoked by researchers to establish a case by case privilege for confidential communications with their subjects. Whether in any particular case a claim for privilege will be granted for the researcher-subject relationship can only be determined in the context of that case. It will depend on the nature of the confidential information, the interests that protecting the confidentiality of the relationship serve, which will be weighed against the interests of pursuing the truth and disposing justly of the litigation. In the research context this will include the importance of the particular research project, the extent to which this kind of research could not have been carried out without assurances of confidentiality and the impact on future research of this kind if confidentiality is not protected. In assessing the interests advanced and threatened in the context of the particular proceedings, Courts will determine the relevance of *Charter* values in balancing the right to adjudicative fairness against other *Charter* rights such as the rights to privacy, access to justice, and equality. The balance may be struck at a different level in criminal and civil cases, because in a criminal case the accused stands to lose his or her liberty. Courts will apply criteria of relevance to the information sought and will seek to identify the least intrusive form of disclosure, to ensure the highest degree of confidentiality, and the least damage to the researcher-subject relationship, while guarding against the injustice of cloaking the truth.

PART VI FORMULATING A NEW ETHICS POLICY

In the next part of our Opinion we will be drawing upon our legal analysis to make recommendations for a new ethics policy. In doing so we have found it instructive to review the extensive debate that has already taken place at Simon Fraser University arising from both the Russel Ogden case and the publication of the *Tri-Council Policy Statement*. In particular, we have studied the three lengthy submissions made by Professors John Lowman and Ted Palys to the Task Force. These submissions represent the most comprehensive and insightful analysis of the debate about confidentiality and its underlying ethical issues that thus far exists in the Canadian literature. The vigour of the debate itself is a reflection of the importance of academic freedom. Because the Lowman – Palys submissions include quite specific and focussed criticisms on the current SFU ethics policy regarding confidentiality and the wording of informed consent statements, particularly in the context of criminological research, we have addressed their major criticisms in our recommendations for the formulation and shaping of new policies consistent with the law and the *Tri-Council Policy Statement*.

A. The University's Role in Providing a Legal and Ethical Framework to Protect Research Confidentiality

It is our opinion that the University and its Ethics Review Policy and Practices can play an important, indeed vital, role in providing a framework for research that is both in compliance with the *Tri-Council Policy Statement* and also enhances the prospects for the legal protection of confidential information in the event that disclosure is sought in legal proceedings. We see, therefore, the University and its research ethics policies playing a constructive and proactive role at the intersection of legal and ethical principles. This proactive approach to research confidentiality has been elegantly stated by Dr. Phillip Hanson, a former member of the URERC.

The University does not set itself above the law by upholding strict confidentiality. Rather, it constructively contributes to and helps to shape the law. That is how the law works. Nor does doing so require a policy that would expect researchers to break the law or stonewall the courts. Rather it requires a policy that upholds the value of

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research, even research into illegal activity, and is prepared to be persuasive about these values in a court of law.

My preferred conception of the law and of universities also has consequences for the wording of consent forms. They should not be worded in a way that legally undermines a researcher's potential to win their defense on grounds of researcher-participant confidentiality. . . . [N]or should they be worded in a way that fails to protect the research participants through fully informed consent. Research participants need to be aware of the possibility that a researcher may be legally summoned to divulge information obtained in the course of their research. And of course the University wants to cooperate with the courts. But what does that mean? I think it should mean that respectfully but vigorously defending in the courts the value of its research to society and the consequent value of researcher-participant confidentiality; in effect, using court decisions to legally establish these values in society.

(Memorandum of Dr. Philip Hanson, set out in Appendix A of J. Lowman and T. Palys' *The History of Limited Confidentiality at SFU*, Dec. 18, 1998.)

Judge Steinberg, in his reasons for decision in the civil suit brought by Russel Ogden against Simon Fraser, offers some further helpful comments on how the University might conceive of its role in upholding the values inherent in academic freedom and researcher privilege.

It is self-evident that the rule of law includes the right to determine what the boundaries or the extent of academic privilege might be by way of a challenging court. This can only be determined by challenging in a particular matter the request to obtain what a researcher considers privileged information. Only if the challenge has been lost in the highest court in which the challenge is being made, would the rule of law say that the boundary of privilege in the particular case has been set. Only continued refusal to disclose the information after such a ruling had been made, would put the claim of privilege outside the law. It is hard to understand how an institution of higher learning, engaged in very important social research, would be thought less of because it undertook to determine the boundaries of academic privilege, when the existence of that privilege is what made the research possible in the first place.

(Reasons for Judgment of the Honourable Judge D. Steinberg in *Russel Ogden v. Simon Fraser University*, June 10, 1998 at para. 71)

The framework for our recommendations is also consistent with the *Tri-Council Policy Statement*:

The situation may arise where a third party attempts to gain access to research records, and hence to breach the promise of confidentiality given by the researcher as part of a research project approved by the REB. By that time the matter has passed from the hands of the REB. 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

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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.

(Tri-Counsel Policy Statement 3.2)

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Professors Palys and Lowman have drawn from the *Tri-Council Policy Statement* the implication that:

It thus behoves persons responsible for designing and maintaining ethical standards to understand the legal means that are available to academics to protect confidential information, and require that researchers design their research protocols to maximize the likelihood of success.

(Informed Consent, Confidentiality and the Law: Implications of the Tri-Council Policy Statement 31 January 1999 at 33)

We concur with this statement and our opinion has been structured to provide the Task Force, the University and researchers with those proper legal means.

Professors Lowman and Palys in their contribution to the debate have also articulated a principled approach consistent with the framework within which we have crafted our recommendations.

We advocate an approach to informed consent and research confidentiality that respects the law, and the challenges posed to us by law, and attempts to maximize the likelihood of a successful defence of researcher-participant privilege by anticipating the courts' requirements ahead of time.

(The History of Limited Confidentiality at SFU at 36)

In what follows we will be charting a strategic pathway framed by the particular legal and ethical issues that should be taken into account in the design, approval, and execution of research to ensure the greatest degree of protection for confidentiality of information.

B. The Design of Research Protocols

Research protocols should be designed to ensure that they address issues that are legally relevant to a successful assertion of privilege. This involves:

1. Identifying the reasons why an assurance of confidentiality is essential to the carrying out of the specific research project.

The salutary advice of Michael Traynor is worth repeating here:

Researchers should determine at the outset whether they can obtain the necessary data free of any guarantee of confidentiality. If not, they should document the reasons requiring confidentiality. In many cases, confidentiality may be essential to protect data sources from an invasion of privacy, from embarrassment or distress, or from criminal prosecution, tax audits, or other government investigations, as well as from litigation by others . . . 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 a project could not have proceeded without the assurance of confidentiality.

(Michael Traynor, "Countering the Excessive Subpoena for Scholarly Research," *59 Law and Contemporary Problems* 119 (1996) at 121)

As our review of both the American case law and the more limited Canadian jurisprudence dealing with assertions of privilege by journalists has shown, the courts have not been impressed with the mere assertion of the importance of confidentiality to the fact-finding process. Professors Lowman and Palys in their second submission to the Task Force, *Informed Consent, Confidentiality and Law*, have argued that, generally speaking, confidentiality is essential to the researcher-subject relationship.

There is a preponderance of evidence suggesting that confidentiality is essential to the "perfect working" of the researcher-subject relationship. Confidentiality may not be essential to every type of research with human subjects – for example, social surveys regarding innocuous topics, however, when it comes to sensitive research involving the collection of information that could cause subjects anything from embarrassment to serious harm, methodologists and field researchers by the score maintain that it could not be done without an unqualified guarantee of confidentiality.

(at 44)

As support for this proposition, Palys and Lowman cite Robert Bower and Priscilla de Gastairs, *Ethics and Social Research* (1978):

The guarantee of anonymity to subjects has long been taken for granted as an indispensable condition in social research; it is a commonly held assumption in the

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profession, just as it is in medicine, law and journalism, that people will tell a truer tale and act with less inhibition if they believe that what they say or do will be held in the strictest confidence. The scientific rationale, combined with the ethical principle that one respects the privacy of research subjects, has created uniform agreement among social scientists that confidentiality should be preserved by every possible means to protect the interests of social science and the subjects of its research.

(at 39)

Lowman and Palys go on to say that:

[T]he assumption is so pervasive as to be thought self-evident. . . . Generally speaking, the methodological belief is that the more clearly anonymous or confidential the data, the greater their probable validity, particularly when the topic under discussion is a sensitive one and/or where there can be negative repercussions for the subject (e.g., consequences at work, in his/her social group, possible incarceration).

Our research experience with persons involved in repeated law violation, most of which remains undetected, as well as with persons involved in catching and dealing with them, leaves us with no doubt that confidentiality is essential to the researcher-subject relationship. Because of the premium put on confidentiality by our research contacts, we believe that if research of this type were to be conducted without an assurance of *unlimited* confidentiality, it would not yield valid and reliable information.

(at 40)

In one of their appendices Lowman and Palys refer to several passages from the article by Wiggins and McKenna in the *Law and Contemporary Problems* volume that question the self-evident assumption of the need for confidentiality. Wiggins and McKenna write:

Would the inability to promise participants unconditional confidentiality impede the flow of information? Although it is often argued that confidentiality is necessary to ensure the future flow of candid, complete information to researchers, empirical support for this proposition is seldom presented to the courts. When the CDC [Centers for Disease Control] argues that disclosure will inhibit future research, for example, it typically submits affidavits to that effect from a CDC researcher or high-ranking administrator. The Assistant U.S. Attorney who has argued these cases for the CDC indicated that she knew of no empirical support for the proposition that disclosure actually affected the amount or quality of information the CDC could obtain. She maintains, however, that numerous statutes protecting the private deliberations of such bodies as medical staff review boards, as well as those protecting certain kinds of health reports, reflect a codification of a widely-held common-sense belief that confidentiality is essential to candid, accurate reporting.

...

Generally speaking, evidence suggests that the common-sense notion that research participants will be less available, less co-operative, and less candid without an assurance of confidentiality is probably an overly simplistic description of reality. For

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example, one study found that an assurance of confidentiality does enhance response rate and quality, but only when the information requested is sensitive.

(Elizabeth C. Wiggins and Judith A. McKenna, "Researchers' Reactions to Compelled Disclosure of Scientific Information," 59 *Law and Contemporary Problems* 67 (1996) at 84-5)

While these comments challenge the mere assertion that confidentiality is a self-evident precondition for reliable data, they support Lowman and Palys' argument that for the kind of research they are conducting, in which both sensitive and potentially prejudicial information is being given, confidentiality is necessary.

In reading the thoughtful arguments of Professors Lowman and Palys we found that their arguments as to the importance of confidentiality gained in strength the more that they were related to specific research projects. It will be recalled that when we revisited the *Russel Ogden* case we made the similar observation that the strength of Mr. Ogden's claim that confidentiality was a *sine qua non* to carrying out the research was most compelling when that argument was made in the context of the particular community of research subjects with whom he was working. The lesson we draw from this is that researchers must self-consciously reflect on what it is about the information that they will be seeking or hearing that can be characterized as sensitive or have potential negative repercussions such that confidentiality is condition precedent for its reception. In the event of a legal dispute, what social scientists may believe to be self-evident propositions will not be as compelling as a researcher's thoughtful analysis, that while informed by general social science insights, is ultimately anchored in the bedrock of the researcher's own particular project.

The research experience of one of the authors of this Opinion also suggests that the assumption that assuring confidentiality is a necessary precondition to doing reliable social science research is case-specific rather than a universal truth. One of us has for the past twenty-five years conducted extensive field work inside Canadian prisons involving hundreds of interviews with both prisoners, guards and prison administrators. Publications arising from these research projects have in the main employed the conventional social science wisdom of anonymizing the names of research subjects. In the most recent study, involving five years of intensive field work at two federal prisons, many research subjects, whether prisoners, guards or senior administrators, have expressed eagerness to see their names in print in a forthcoming book. Their enthusiasm has little to do with whether they have been

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praised or criticized for their actions and everything to do with the fact that the book represents an acknowledgement of their life and professional experiences, experiences which typically are either demonized or consigned to public indifference. During the course of this research many correctional officers advised the author that his interview with them was the first time anyone had expressed any interest in their opinions, values and experiences. For some of the research subjects their preference was that their views on the administration of prison justice be reflected in their own voice and not through the cipher of a pseudonym; to see their expressions anonymized in a publication in which once again their own individuality was not acknowledged, would be seen not as honouring but negating a commitment that their voices would be recognized.

In identifying and documenting in the research protocol the importance of confidentiality, it is also relevant to take into account the cultural context of the research, and the research tradition or methodology to be employed. These vary from discipline to discipline. Here again, Professors Palys and Lowman offer some important observations:

The psychologist and experimental research subject, for example, typically have a relationship that is transient, limited in scope, and where the circumstances of the interaction are highly programmed and constrained. Other traditions involve quite different relations. Reinharz, for example, discusses a range of feminist perspectives on this issue and suggests that being feminist, any kind of feminist, means doing one's all to create an egalitarian interaction between researcher and subject. . . . Accordingly, the idea of researcher-subject relation is one in which the researcher does not impose her power to unilaterally define the research question, constrain responses and simply wave goodbye and the end of the session. Instead, an egalitarian exchange is sought in which the subject is as much collaborator as informant, and where the researcher does her best to ensure that the subject do at least as much for her participation as the researcher gains from having done the research. . . . Similarly, in anthropology and sociology, with their rich traditions of ethnography, participant observation and other kinds of field research, much evidence is placed on the extended duration of interaction that is required to appropriately build rapport and mutual trust. . . . These latter relations, characteristic of phenomenology, ethnography, standpoint feminism, research with "key informants," participant observation, participatory action and research, and other qualitative research traditions – place the researchers in a different relation vis-à-vis the subject than is the case with more experimental and quantitative paradigms. Confidentiality is valued because it allows one to understand people in a manner that is not threatening to them, and is the basic expression of trust that allows access into peoples' lives.

(Informed Consent, Confidentiality and the Law at 41-2)

One of the implications that we draw from these observations is that where confidentiality is

especially valued because of the collaborative nature of the research, what should also be valued is the need for a full dialogue with research subjects on the issue of confidentiality, the measures that will be taken to protect it, and the limits of that confidentiality.

2. Identifying Strategies for Protecting Confidentiality

The research protocol should identify the measures that will be taken to protect any promises of confidentiality. The measures taken should be commensurate with the nature of the information that will be obtained from research subjects and the degree of the risk of harm that would occur if confidentiality were breached. Unlinking names and identifying details of sources from confidential data is one such measure recommended by Michael Traynor.

It is an elementary for caution immediately to unlink the names and other identifying details of the study participants. The researcher should safeguard the identifying names and details and their linkage to the other data by keeping them in restricted areas or locked files and, in some cases, by destroying them. This data should be safeguarded until they are aggregated for publication in a report where no ordinary reader could identify any study participant.

("Countering the Excessive Subpoena for Scholarly Research", 59 *Law and Contemporary Problems* 119 (1996) at 124)

Professors Lowman and Palys have also addressed this issue and have explained how in their own research they have gone to pains to protect confidentiality.

It is well known that researchers usually try to avoid learning the identities of their research participants, and when they do learn the identities of some of their subjects, as we are likely to in our proposed research on off-street prostitution, they remove all identifiers from their research records. This would be our standard practice in the case of interview transcripts and field notes.

...

The timing and means of anonymization in our field research is dictated by the types of threats we can envision for our research participants, either because of what they say about their own lives, or because of what they tell us about others. For example, when interviewing a prostitute or a pimp, Lowman anonymizes the interview as it is taking place, for example, by stopping and rewinding the tape whenever a name is mentioned, deciding jointly on a pseudonym for the particular individual, and using the pseudonym at that point and thereafter. Immediately after transcription, the tapes are destroyed, so that the only record remaining is the anonymized transcript.

Sometimes anonymization is done at the point of transcription, so that no one can ever

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determine who “Respondent A” is. In a recent study Palys was involved in, in which First Nations people were interviewed about how the community is addressing problems of sexual abuse, this was the method used. The resulting publication does not even name the actual community in respect of the community’s wishes to maintain community confidentiality. Indeed, the Supreme Court does much the same thing when it needs to. *Smith and Jones* is an example of case analysis in which all important facts and analysis are reported on the internet for all the world to see, but one would never be able to ascertain from the record the identity of “Smith,” “Jones” or the lawyer, nor is it particularly relevant that we do.

(Lowman and Palys, *Going the Distance: Lessons for Researchers from Jurisprudence on Privilege*, 7 May 1999 at 22 and 32)

There is one cautionary note that must be raised with reference to the destruction of records as a technique to preserve confidentiality. This arises from a decision of the Supreme Court of Canada in *R. v. Carosella* (1997), 112 C.C.C.(3d) 289. This decision dealt with the destruction of documents created in a confidential relationship between a complainant and therapist. Carosella was charged with sexual assault. Before the charges were laid, in March, 1992, the complainant visited a Sexual Assault Crisis Centre (the Centre). The Centre provided counseling and other support to complainants of sexual assault. The complainant was interviewed for over an hour. During the interview she was informed that whatever she said could be subpoenaed and introduced into court. The complainant said that was all right. The interviewer took about 10 pages of notes. After the interview, the complainant contacted the police and charges were laid. A preliminary hearing was held in November, 1992. Although the complainant in her statement to the police and in her testimony stated that she had visited the Centre and that notes had been made, no legal process was undertaken to obtain the notes until October, 1994. In April, 1994, the Board of Directors of the Centre passed a policy motion authorizing the shredding of certain Centre records. Documents that had been subpoenaed or were the subject of a production application were not to be shredded. Documents in files having “police involvement” were to be shredded and relevant computer records were to be altered to eliminate “identifying information”. The express purpose of the shredding and record alteration was to prevent production of material to defence counsel. Following this policy, three to four hundred files were shredded including the notes which became an issue in the Carosella case.

In October, 1994, Carosella made an application for the production of the Centre’s file. The file was produced without the notes. A stay was granted on the basis that the destruction of

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the notes violated Carosella's rights to a fair trial and full answer and defence under sections 7 and 11(d) of the *Charter*. The Ontario Court of Appeal set aside the stay and directed the proceedings continue to trial. The Supreme Court of Canada in a 5 to 4 decision set aside the decision of the Court of Appeal and restored the stay. This result is viewed by many as extraordinary.

Wayne Renke encapsulates the reaction of legal observers to the decision:

The majority decision in the *Carosella* case may seem extraordinary, if not sexist. Because a record-keeper destroyed records relating to a sexual offence, charges against an accused were stayed -- even though the records were not created because of any obligation owed to the accused; had not been subject to an order for production; were not taken in circumstances conducive to accuracy; had never been seen, let alone relied on, by police or Crown; and had contents, by the time of litigation concerning the records, that were unknown.

(Wayne Renke, "Case Comment: Records Lost, Rights Found: *R. v. Carosella*" (1997), 35 *Alta. L. Rev.* 1083)

The decision in *Carosella* is like to be relevant only to research projects that involve gathering information from complainants of sexual assault. In those cases researchers should design procedures to preserve anonymity and confidentiality in the light of *Carosella*, recognizing that the interests and methods of researchers differ from those of sexual assault therapists. Since therapists' notes help in the therapeutic process and anonymity is not possible, the destruction of notes seems to be inconsistent with good therapy. Research in many cases can be conducted while at the same time preserving the anonymity of subjects and therefore destruction of records is consistent with good research methods. Researchers should also recognize that a stay of proceedings denies a complainant access to justice. In *Carosella*, the complainant was never given an opportunity to have her claim heard by a court. Destruction of records is unlikely to be an issue in legal proceedings. However, researchers should be aware that the closer the connection between the destruction of the records and a legal proceeding, the more likely the destruction will prejudice a complainant of sexual assault.

Speaking more generally, and not just in the context of a *Carosella* scenario, researchers who destroy records once the records are subpoenaed or ordered to be produced in court may be subject to legal sanction. Section 127 of the *Criminal Code* makes it an offence to

disobey a court order and section 139 makes it an offence to obstruct justice. In addition, a court retains the power to punish for contempt.

C. Informed Consent Statements

Informed Consent Statements should be drafted so that they are consistent with the legal requirements for the assertion of privilege and the ethical requirements of the *Tri-Council Policy Statement*. They should include the following elements:

- **Recognition of the necessity for confidentiality as the foundation of the researcher-subject relationship, together with an assurance of such confidentiality.**
- **A realistic statement of the risks of disclosure generally, and any special risks associated with the specific research project.**
- **A statement that the researcher and the University will do everything possible to protect confidentiality; that this will include challenging any subpoena or other legal process seeking disclosure, and where there is a meritorious case, exhausting all legal avenues of appeal. This statement should also include the University's commitment to cover reasonable legal costs associated with any such challenge, including appeals.**

1. Criticisms of the Current Limited Confidentiality Policy at SFU

A good deal of the debate at Simon Fraser surrounding the issue of confidentiality has focussed on the terms of the consent form that the University Research Ethics Review Committee has required of researchers engaged in projects where subjects may disclose information that may be in violation of criminal or civil law. In the wake of the Russel Ogden case, a separate question was added to the checklist researchers must complete when applying for URERC approval. That question reads:

9. Does information to be obtained from subjects include information on activities that are or may be in violation of criminal or civil law? Yes or no?

For those who answered this question in the affirmative, the URERC required that informed consent statements contain the following language:

Any information that is obtained during this study will be kept confidential to the **full extent permitted by law**. Knowledge of your identity is not required. You will not be required to write your name or any other identifying information on the research materials. Materials will be held in a secure location and will be destroyed after the completion of the study **However, it is possible that, as a result of legal action, the researcher may be required to divulge information obtained in the course of this research to a court or other legal body.** (emphasis added)

Professors Lowman and Palys, in their submissions to the Task Force, have argued that this informed consent template is unethical and inconsistent with the *Tri-Council Policy Statement*. The Lowman-Palys argument has multiple strands, and we believe that it may be helpful for the Task Force if we review the arguments they have raised in light of our analysis of the relevant law and the *Tri-Council Policy Statement*.

2. Limited Confidentiality and Privilege

Lowman and Palys' principal critique is encapsulated in the following paragraphs of their first submission to the Task Force:

We believe that this limited confidentiality consent statement is unethical because it creates its own deception. Researcher-participant privilege is not explicitly recognized in Canadian law for anyone other than Statistics Canada researchers, who have been granted privilege in section 18 of the *Statistics Act*. Instead, to be considered privileged, research information must pass all four "Wigmore Criteria," the common law test used by the Supreme Court of Canada for establishing privilege of communication on a case-

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by-case basis.

Stating that the researcher might be “required” to divulge information to a court makes it impossible to pass the first criterion of the Wigmore test, which requires that a communication must arise in a confidence that it will not be disclosed. Because of the limited confidentiality statement warning about court-disclosure, the court can simply say, “the research participant was told that a court might order the divulging of information, and it is ordering it now, so hand over the information.” The limited confidentiality statement thus prevents the researcher from living up to the promise that information will be kept confidential “to the full extent permitted by law.”

The *Ogden* case has revealed the extent to which it is possible to legally guarantee confidentiality, and that is “absolutely.” But like anyone wishing to invoke the Wigmore test to prevent court-ordered disclosure of confidential information, Ogden had to be prepared to go the distance in court, should it be necessary, in order to protect research subjects and the integrity of the research enterprise.

In contrast, the limited confidentiality consent statement creates a situation where the receipt of a subpoena effectively becomes the limit of the law. By virtually guaranteeing that they cannot resort to the Wigmore test for protection, researchers give themselves and the University a license to hand over confidential information should a court ask for it.

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Once limited confidentiality was in place, the University did not have to worry about the legal bills that a potentially lengthy (albeit extremely unlikely) court case might occasion. The *a priori* limitation of confidentiality thereby protects researchers and the University from liability, but does so only by undermining the participants right to assert privilege of communication in a situation where they have to rely on the researcher to assert the privilege for them. Instead of protecting participants, the *a priori* limitation of confidentiality exposes them to harm.

(*The History of Limited Confidentiality* at 7-8)

In advancing this argument, Professors Lowman and Palys rely heavily upon the views expressed by Michael Traynor and the 1980 American case of *Atlantic Sugar Ltd. v. United States* 85 Cust. Ct. 128 (1998). In *Atlantic Sugar*, a court ordered disclosure of responses to an International Trade Commission's questionnaire, observing that respondents were notified that the information would not be disclosed "except as required by law." The court observed "the requirement of disclosure for the purpose of judicial review is such a requirement, even though it may not have been exactly foreseen at that time," implying therefore that using the Wigmore Criteria, the communication had not originated in a confidence that would not be disclosed.

Mr. Traynor, relying in part upon this authority, offers researchers this advice:

Researchers frequently qualify their assurances by adding a proviso that confidential data will not be disclosed except as required by law. Such a proviso may alert the source to the possibility of compelled disclosure and may strengthen the researchers' defence against a claim of liability [by research participants] in the event of such disclosure. On the other hand, such a proviso could leave the party subpoenaing the data to contend that the possibility of compelled production was anticipated and that enforcement of a subpoena, therefore, is not inconsistent with the qualified assurance given. . . . Additionally, this type of proviso may dissuade some potential research subjects from participating in research studies. Therefore, because the protective effect of the proviso is questionable, researchers should consider excluding it . . .

(Michael Traynor, "Countering the Excessive Subpoena for Scholarly Research" at 122)

While Professors Lowman and Palys' reference to the *Atlantic Sugar* case and Mr. Traynor's comments provide support for their argument, it is our respectful opinion that in light of the decision of the Supreme Court in *A.M. v. Ryan*, a phrase which promises confidentiality "except as required by law" is not as problematic as Mr. Traynor (and Professors Lowman and Palys) believe it to be. In *Ryan* the lower courts had indeed found that the first criteria of

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Wigmore was not met because the client and Dr. Parfitt had concerns that notwithstanding their desire for confidentiality, the records might someday be ordered disclosed in the course of litigation. The Supreme Court of Canada specifically disagreed with this conclusion, stating that the possibility that a court might order the communications disclosed at some future date over their objections did not change the fact that the communications were made in confidence. Madam Justice McLaughlin pointed out that:

...with the possible exception of communications falling in the traditional categories [for example solicitor-client] there can never be an absolute guarantee of confidentiality; there is always the possibility that court may order disclosure. ...If the apprehended possibility of disclosure negated privilege, privilege would seldom if ever be found.

(R. v. Ryan, para. 24)

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What Madam Justice McLaughlin focussed on in *Ryan* was not so much the form in which the promise of confidentiality was expressed but more the fact that there was a common expectation that the communication was made in confidence. Some American cases support this approach. In one of the cases we have previously referred to, *Farnsworth v. Proctor and Gamble*, the Eleventh Circuit Court of Appeals in upholding the lower court's decision that personal identifying information about research subjects should be redacted from all produced documents stated that "even without an express guarantee of confidentiality there is still an expectation, not unjustified, that when highly personal and potentially embarrassing information is given for the sake of medical research, it will remain private." (*Farnsworth v. Proctor and Gamble*, 758 F.2d at 1547) The First Circuit Court of Appeal judgment in the *Microsoft* case, with its "continuum of confidentiality" analysis, supports the same approach.

We would note also that Mr. Paul Jones, in his Opinion prepared for the Canadian Association of University Teachers, has stated that "a warning of the potential of disclosure, if properly worded and situated in the context of meaningful commitments to confidentiality, will not automatically undermine the application of the Wigmore Criteria." (Opinion of Mr. Paul Jones, February 15, 1999 at 7)

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Mr. Jones, after referring to the *Ryan* case, goes on to state:

In my view, the importation into the consent document of language that assured the research participant that:

1. the foundation of the researcher-participant relationship is confidentiality; and,
2. that the researcher and the university would do everything possible to preserve this confidentiality,

would override the effect of the warning of potential disclosure and ensure the applicability of the Wigmore Criteria.

(at 7-8)

We concur with this opinion and our recommendations for the wording of consent statements are consistent with it.

Professors Lowman and Palys also suggest that the formulation of the “limited confidentiality” consent form proceeded largely from a concern to limit the University’s liability and that this “can subvert other cherished academic values, not the least being academic freedom and the ethical obligations we have to research participants.” Lowman and Palys suggest that the institution of limited confidentiality “represents the extension of what we might call the University’s ‘Ogden risk logic’ to all those engaged in criminological research who might find themselves subpoenaed.”

From the documents available to us it would certainly seem that the original formulation of the University’s policy regarding its position in the Ogden case was influenced by considerations of limiting the University’s liability. In Professors Blomley and Davis’ “Russel Ogden Decision Review” they have written:

The issues involved in the Ogden decision appear to have been framed in a particular way by the University. This shaped both the response that the University gave to Ogden and the ensuing discussions concerning the decision. The question that the University appeared to pose centred on whether it had any legal obligations to assist Ogden. Moreover, the issue seems to have been framed somewhat negatively – that is, as a potentially burdensome obligation. Viewed as a negative issue, the concern seemed to be that of limiting any legal obligation to Ogden and by extension to anyone in the future in a similar position. . .

It appears that there was no point at which the issues involved in the decision were

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framed positively as, for example, an opportunity to explore through the courts the extent and the limits of academic freedom, for the University to go to the defence of one of its researchers whose academic freedom was being put at risk or to protect the rights and interests of research participants in University-approved research. In fact, there is evidence that the University did not consider academic freedom or the protection of the rights and interests of research subjects as central issues in the decision and that for this reason there was very little discussion of them in the VPs meetings at which the *Ogden* decision was considered.

(*Russel Ogden Decision Review 1998*)

The introduction of the “Limited Confidentiality” policy, precipitated by the *Ogden* case, came about in September, 1994, and based upon the minutes of their meeting, the Committee appears to have been concerned not just with protecting the liability of the University but also protecting the interests of researchers and research subjects. The minutes of the Committee Meeting of September, 1994 state:

It was agreed that in cases where it can be foreseen that the researchers may not legally be in a position to ensure confidentiality to their subjects, these researchers must be required to provide only limited confidentiality in the wording of the consent form. It was recognized that limited confidentiality might serve to discourage participation of some subjects, and conceivably even prevent the research from taking place at all due to lack of subjects. Nevertheless, it was agreed that causing the researchers to provide limited confidentiality in appropriate cases would protect the subjects, the University, and the researchers.

(The Minutes of the September 9, 1994 Meeting cited in Lowman and Palys, “*The History of Limited Confidentiality*,” at 18)

In our opinion it is appropriate, and indeed necessary, in formulating an ethics policy to be concerned about liability issues. Privacy is a legally protected value and as we indicated in Part I of this Opinion, under certain circumstances a breach of privacy may ground a civil cause of action for damages under the BC *Privacy Act*. However, under that Act, it is provided that:

(2) An act or conduct is not a violation of privacy if:

(b) [it] was authorized or required by or under a law in force in British Columbia, by a court or by any process of law.

Thus, a researcher will not be civilly liable under the *Privacy Act* for disclosure of confidential research information where that disclosure is made pursuant to mandatory reporting laws, or a subpoena, or to protect public safety. This brings us conveniently to the second set of

criticisms of Professors Lowman and Palys.

3. Mandatory Reporting

The second criticism of Lowman and Palys is that the limited confidentiality consent form required by the Ethics Committee only refers to the risk of court-ordered disclosure. In their first submission to the Task Force they pose the following series of questions:

Why is the risk of mandatory reporting disclosure not mentioned? The URERC went so far as to add a new screening question (question 9) dealing with the situation where the researcher might hear about violations of the law. But if the URERC is concerned about mandatory reporting requirements, why does it not screen applicants for their exposure to situations in which mandatory reporting laws are most likely to be triggered? For example, one of the questions on the research ethics application screening form ask "Will children be involved as subjects in your research?" Those who answer "yes" are told that they must incorporate a "consent form for the parent/guardian" (Form 3). But nowhere on Form 3 is there any mention of laws requiring researchers to inform legal authorities in the event that abuse is discovered. And why does the Committee not also include a screening question that asks whether the researchers might learn about sexually transmitted diseases? The answer "yes" would presumably need a consent statement that included a warning of the risk of disclosure created by venereal disease mandatory reporting laws.

(History of Limited Confidentiality at SFU at 26)

In their second submission, Lowman and Palys expand upon this argument.

The definition of abuse in the *British Columbia Family and Child Services Act* (the *Family and Child Services Act*) is so broad that just about anyone working with children might have reason to believe that they have detected abuse. Consequently, we do not understand why, according to its own logic about informing subjects of every conceivable risk, the URERC does not require all researchers working with children to mention this risk.

(Informed Consent, Confidentiality and the Law at 18)

These are good questions and the implications for informed consent they pose is one anticipated by the *Tri-Council Policy Statement*. In its general provisions dealing with privacy and confidentiality the Policy Statement reads:

The values underlying respect and protection of privacy and confidentiality are not absolute, however. Compelling and specifically identified public interests, for example, the protection of life, health and safety, may justify infringement of privacy and confidentiality. Laws compelling mandatory reporting of child abuse, sexually transmitted diseases or intent to murder are grounded on such reasoning; so too are laws and regulations that protect whistle-blowers.

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(Tri-Council Policy Statement 3.1)

In our opinion the answers to these questions are clear. If it is reasonable to anticipate that the nature of a particular research project is such that in the course of conducting the research and interviewing or observing research subjects a disclosure which is subject to mandatory reporting law may be revealed, then this is a risk which should be identified in the informed consent statement. This does not mean necessarily that every research project involving children in which parental or guardian consent is sought must contain a statement about the mandatory reporting of child abuse; nor does it necessarily mean that projects in which children are not themselves being interviewed can be considered as outside the risk zone. A study that had its focus on students who are experiencing problems at school would be one in which it would be reasonable to anticipate that for some children the problems might be linked to abuse, whether intrafamilial or otherwise. In the same way, for a project whose focus was on women's' experience of violence within the family, even though the project was not child-oriented, it would be reasonable to anticipate that there could be disclosures by subjects of incidents of violence directed towards their children.

As Professors Lowman and Palys correctly point out, the duty to report child abuse is very broadly defined in most provincial statutes (including the *B.C. Child, Family and Community Service Act*, 1996), and any researcher whose project lies within the risk zone of disclosure must therefore acquaint themselves with the legal obligations imposed by the Act. This is consistent with the *Tri-Council Policy Statement* that "in the free and informed consent process, researchers should indicate to research subjects the extent of the confidentiality that can be promised, and hence should be aware of the relevant law." (3.2) This may require more than finding the text of the legislation on the Internet. For example, the *B.C. Child, Family and Community Service Act* sets out the duty to report in these terms:

14(1) A person who has reason to believe that a child

- (a) has been or is likely to be, physically harmed, sexually abused or sexually exploited by a parent or other person, or
- (b) needs protection under section 13(1)(e)(ii)(k)

must promptly report the matter to a Director or a person designated by a Director.

To understand the extent of the duty to report the researcher must therefore explore the definition of a child who "needs protection". The researcher must also understand how "promptly" has been interpreted. Does it mean immediately ending the interview and rushing to the nearest phone, or can it await the end of the field trip? Does it depend on how serious the abuse is and whether the child is in imminent danger? The meaning of "prompt reporting" is one which arises regularly in the context of disclosures to school counselors and other individuals who are in regular contact with children as part of their professional responsibilities. A responsible researcher whose project may give rise to a risk of disclosure of reportable information should communicate with appropriate officials within the government ministry to which reports have to be made to clarify the expectations of the mandatory reporting laws.

4. The Unfair Targeting of Criminological Research

A third criticism of Professors Lowman and Palys is that the existing SFU limited confidentiality policy is both "formulaic and inconsistent." They suggest:

The imposition of limited confidentiality was both formulaic and inconsistent. It was "formulaic" to the extent that only researchers collecting information from subjects that may be in violation of criminal or civil law were required to limit confidentiality. It was inconsistent insofar as the American experience with court-ordered disclosure – to the extent we can use this as a harbinger of what might occur in Canada – shows that such cases comprise only a small proportion of research areas in which such issues arose. The modal scenario is one involving litigants who compete over access to data gained in a clinical, experimental or consultative context, a scenario the SFU URERC has not addressed.

(Informed Consent, Confidentiality and the Law at 11)

Later in the same submission they expand on this point.

The U.S. evidence shows research on law breaking represents only a small minority of the cases in which confidentiality was threatened by the possibility of court-ordered disclosure ... these cases reveal that the target of a subpoena is unpredictable; in the U.S., a researcher in any discipline may be subpoenaed. The cases [cited by Lowman and Palys] included research conducted in criminology, sociology, anthropology, women's studies, kinesiology, psychology, medicine, computing science, economics, and business administration. The implication is that, if the URERC wishes to warn all prospective subjects who might be affected by a subpoena, the only reasonable way to do so would be to warn every prospective subject in every research project involving humans. We suggest that if SFU-limited confidentiality were to be imposed on all researchers, research confidentiality would no longer be possible. We sincerely hope

that the SFU Research Ethics Policy Revision Task Force will not be responsible for taking such a momentous step.”

(at 21-22)

We agree with Lowman and Palys that the issues involved in “court-ordered disclosure” are not limited to criminological research involving actual law breaking. A new ethics policy must address the issue of the risks of court ordered disclosure in every discipline and for every research project where there is such a risk.

5. The Risks of Court Ordered Disclosure – What Should Subjects Be Told?

This brings us to what is in many respects the most important and most difficult question of what research subjects should be told about the risks of court-ordered disclosure, in light of the relevant legal principles governing informed consent and the *Tri-Council Policy Statement*. As we have explained earlier in this Opinion, the law, which has developed mainly in response to medical interventions, hinges upon the concept of “material risks.” In deciding whether a risk is material, the crucial question is whether a reasonable person in the position of the research subject would want to know of the risk. Even if a certain risk is a mere possibility which ordinarily need not be disclosed, yet if its occurrence carries serious consequences it should be regarded as a material risk requiring disclosure.

Applying these principles, the question that must be asked of any research project is whether the possibility of court-ordered disclosure is a material risk in the sense of one that a reasonable person in the research subject’s position would want to know. It is tempting to point to the few occasions in which the issue of court-ordered disclosure of confidential research material has arisen in the United States – the most litigious nation on earth – to ground an argument that the risk is a very low one. It is even more tempting to point to the Canadian experience which thus far reveals not a single case in which a researcher has been compelled to disclose information, and that in the only case where this issue has even arisen, Russel Ogden’s case, the researcher was able to invoke a claim of privilege, to reinforce the argument that the risk of court-ordered disclosure in Canada is even lower than in the United States.

Several things must be borne in mind in determining whether SFU’s Ethics Review Policy should succumb to or resist the temptations of this argument. First, while it may be unlikely

that Canadians' appetite for litigation will ever match that in the United States, over the last twenty years there has been in Canada what Chief Justice Allan McEachern has referred to as the "judicialization of society" in which issues that hitherto have not been the concern of the courts, have become the subject of litigation. Related to this development is the increasing incidence of large-scale litigation along the American model involving class actions against manufacturers of defective products and government initiated actions against large corporations for environmental and health degradation. The recent decision by the B.C. government to sue the tobacco industry is illustrative of this development. In the United States, a significant part of the law around academic privilege has been developed in the context of these kinds of cases and it is not unreasonable to expect that the same issues will ultimately find their way before Canadian courts. The involvement of university researchers in high-stakes civil litigation will also become a greater possibility given the close relationship that is developing between university research and the corporate sector at a time when government funding for research is coming under increasing pressure. The existence of collaborative partnerships with colleagues in American universities is also a factor since Canadian researchers may find their research implicated in American litigation.

In light of these factors, we believe that it is reasonable to conclude that across the full spectrum of research activities there is a risk that research may become the subject of legal proceedings. This risk is very small for the vast majority of research projects, and for those in which it does become an issue, a claim of privilege may be successfully advanced, or a negotiated settlement or protective order may provide a remedy avoiding disclosure of confidential information. Even though the risk is very small, we are of the opinion that it is a material risk that a reasonable research subject would want to know about because, if the risk did materialize, it could have serious consequences for the research subject. Specific research projects, depending upon their nature and the information that is being sought from research subjects, may pose greater risks that the information will be disclosed and potential harm caused to the research subjects.

6. *Tri-Council Policy Statement on Informed Consent*

Before proceeding any further with the implications of this for what should be contained in informed consent statements either as a general proposition, or in the context of particular research projects. It is helpful to review the provisions of the *Tri-Council Policy Statement* on

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Informed Consent.

Article 2.4

Researchers shall provide, to prospective subjects or authorized third parties, full and frank disclosure of all information relevant to free and informed consent. Throughout the free and informed consent process, the researcher must ensure that prospective subjects are given adequate opportunities to discuss and contemplate their participation.

Subject to the exception in Article 2.1(c), at the commencement of the free and informed consent process, researchers or their qualified designated representatives shall provide prospective subjects with the following:

- a. Information that the individual is being invited to participate in a research project;
- b. A comprehensible statement of the research purpose, the identity of the researcher, the expected duration and nature of participation, and a description of research procedures;
- c. A comprehensible description of reasonably foreseeable harms and benefits that may arise from research participation, as well as the likely consequences of non-action, particularly in research related to treatment, or where invasive methodologies are involved, or where there is a potential for physical or psychological harm;
- d. An assurance that prospective subjects are free not to participate, have the right to withdraw at any time without prejudice to pre-existing entitlements, and will be given continuing and meaningful opportunities for deciding whether or not to continue to participate; and
- e. The possibility of commercialization of research findings, and the presence of any apparent or actual or potential conflict of interest on the part of researchers, their institutions or sponsors.

These provisions must be read together with Article 2.1(c) which provides for altering or waiving the informed consent requirements. Article 2.1(c) reads in part:

The REB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent ... or waive the requirement to obtain informed consent, provided that the REB finds and documents that

- i. the research involves no more than minimal risk to the subjects.

The reference to “minimal risk” in subsection (i) must also be related to what the Tri-Council refers to the “proportionate approach” to ethics assessment. Article D1.6 provides:

The REB should adopt a proportionate approach based on the general principle that the more invasive the research, the greater should be the care in assessing the research.

The concept of proportionate review gives practical expression to the general principle that, specially in the context of limited resources, the more potentially invasive or harmful is the proposed and ongoing research, the greater should be the care in its review. While all of the research must be reviewed adequately, proportionate review is intended to reserve most intensive scrutiny, and correspondingly more protection, for the most ethically challenging research.

Potential harms are usually understood in relation to risks, which are defined in terms of the magnitude of the harm and the probability of its occurrence. Both potential harms and benefits may span the spectrum from minimal to significant to practically substantial. A proportionate approach to ethics review thus starts with an assessment, primarily from the viewpoint of the potential subjects of the character, magnitude and probability of potential harms inherent in the research. The concept of minimal risk provides a foundation for proportionate review.

(Tri-Council Policy Statement 1.7)

The concept of minimal risk, is in keeping with the overall perspective of the *Tri-Council Policy Statement* and to be assessed from the perspective of research subjects.

The standard of minimal risk is commonly defined as follows: if potential subjects can reasonably be expected to regard the probability and magnitude of possible harms implied by participation in a research to be no greater than those encountered by the subject in those aspects of his or her every day life that relate to the research than the research can be regarded as within the range of minimal risk. Above the threshold of minimal risk, the research warrants a higher degree of scrutiny and greater provision for the protection of the interests of prospective subjects.

(Tri-Council Policy Statement 1.5)

7. Proportionate Review, Minimal Risk and Court Ordered Disclosure

Professors Lowman and Palys in their second submission to the Task Force have argued that the informed consent statement required under the existing SFU policy, requiring them to refer to the risk of court-ordered disclosure for research projects that may include information on activities in violation of criminal or civil law, is inconsistent with the Tri-Council's proportionate approach to ethics review in which the level of risk to subjects and the level of protection required is proportionate to that risk. The gravamen of Lowman and Palys' position is that their research projects (and it would seem by implication most criminology projects) fit within the category of minimal risk and that therefore it is "both alarmist and

excessive” to require them to utter warnings of the possibility of a subpoena.

Applying the Tri-Council’s definition of “minimal risk,” Lowman and Palys argue that two of their research projects which have not been approved by the Ethics Review Board because of the impasse in relation to the limited confidentiality consent form, fit below this threshold of minimal risk. This is their argument:

The research we proposed involves studying managers of escort agencies and other avenues of off-street prostitution. What are the confidentiality risks associated with such a project?

From the perspective of subjects, our interest in their world posed no greater risk than they run in the course of their daily lives, i.e., a situation consistent with the *Policy Statement’s* definition of minimal risk. With the respect to the likelihood of us being subpoenaed to testify, we again conclude that the risk is clearly minimal; in Canada, there has only ever been *one* case in which a researcher was subpoenaed and asked for confidential information. If however, they *were* to be subpoenaed, what is the risk the court would compel us to share confidential information? Obviously the risk is minimal. As far as we know, there has *never* been a case in Canada in which a researcher has been ordered to reveal confidential information. And, when we invoked the *Wigmore Criteria* as a legal explanation in order to protect the confidentiality of our respondents, the idea that a court might value the conviction of a prostitute or pimp more than the research enterprise is highly unlikely. And even if the Supreme Court of Canada were to order us to reveal confidential information, given the guarantee of confidentiality we *must* give to satisfy the first criterion of the *Wigmore* test, we see no *ethical* course but to defy the order and accept the consequences. Each one of these possibilities is highly unlikely, and the joint probability of them all occurring in sequence would seem incalculably low. If we take the *Wigmore* test seriously, particularly the first criterion, the risk to subjects is miniscule.

(Informed Consent, Confidentiality and the Law at 12)

The problem we have with this argument is that some of the propositions are debatable and others seem to be predicated on a best-case scenario. For example, the assertion that asking prostitutes questions about their lives exposes them to no greater risk of harm than encountered in their everyday life, does not seem to take into account that the researchers may be exploring certain aspects of the research subjects’ lives that for a variety of reasons they do not discuss with other people; furthermore, the fact that the researchers are university researchers and that their research will be published exposes the information (even if anonymized) to a degree of public scrutiny that would not otherwise exist. The question they pose as to the balance of probability that they would, if subpoenaed, be compelled to disclose confidential information is framed in the context of the state interest in prosecuting a

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prostitute or pimp; changing that frame so that the interest is in requiring disclosure to establish the innocence of someone wrongfully accused of being a pimp, dramatically shifts the probability that a court would compel disclosure. Ultimately, Lowman and Palys' argument rests on their assertion that even if a court ordered disclosure they would, as a matter of ethical obligation, refuse to disclose. Since it is far from clear that either as a matter of law or ethics such a promise could be given to their research subjects, building it in to the calculus of minimal risk is problematic.

We also find problematic Professors Lowman and Palys' argument that the *Tri-Council Policy Statement* on proportionate review would justify invoking the informed consent alteration criteria so as not to require a reference to the possibility of court-ordered disclosure. The full text of these provisions reads:

The REB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent ... or waived the requirement to obtain informed consent, provided that the REB finds and documents

- i. the research involves no more than minimal risk to the subjects.
- ii. the waiver or alteration is unlikely to adversely affect the rights and welfare of the subjects;
- iii. the research could not practically be carried out without the waiver or alteration;
- iv. whenever possible and appropriate, the subjects will be provided with additional pertinent information after participation; and
- v. the waived or altered consent does not involve a therapeutic intervention.

(*Tri-Council Policy Statement 2.1*)

Lowman and Palys develop their argument that there should be no obligation to inform research subjects of the possibility of court-ordered disclosure by considering the five consent alteration criteria in relation to their own research on prostitution.

Criterion v does not apply because our research does not involve any therapeutic intervention. Also Criterion iv does not apply because we do not plan to deceive anyone. Our prostitution research meets Criterion iii because it cannot be practically carried out using the current SFU consent form template. Our prospective subjects interpret SFU's limited confidentiality statement as meaning that the university expects us to divulge information if a court so orders, without contesting the order in court. Under these circumstances we would not expect subjects to talk honestly about their undetected criminal activity. Indeed, if we limit confidentiality this way, most of our contacts will not talk to us at all. Nor would we want to talk to them in that circumstance: to gather data from voluntary participants without taking their rights and interests to heart

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is exploitative and unethical. Additionally, under a regime of *a priori* limitation of confidentiality, such as the one embodied in the SFU consent form template, our research results would not be valid.

As to Criterion i we have outlined above the various ways in which our research is clearly “at minimal risk” from the perspective of subjects. We are confident the courts will support our decision to pledge unlimited confidentiality. . . . Our bottom line is that we prepared to accept the sanctions if the Supreme Court were to disagree. . . . As to Criterion ii, would the omission of a statement about risk of court-ordered disclosure adversely affect the welfare and rights of our subjects? No. It would do just the opposite. It would enhance our ability to use the *Wigmore* test to protect their right to privacy, confidentiality and anonymity.

(Informed Consent, Confidentiality and the Law at 13-14)

As with their earlier arguments, the bottom line of this argument is Professors Lowman and Payls' willingness, notwithstanding a court order, to refuse to disclose confidential information. This is not, however, the only problematic feature of their argument. The point they make that omitting a statement about the risk of court-ordered disclosure enhances subjects' rights because the inclusion of such a statement undermines the ability of a researcher to maintain a claim of privilege is one which we have already answered by recommending language that avoids any undermining of the *Wigmore* Criteria. We are also less confident than Professors Lowman and Palys that, even if a claim of privilege is ultimately successful in court proceedings, there is no adverse effect on the welfare and rights of research subjects. In the event that an issue of disclosure does arise, and assuming Lowman and Palys are right in their confident prediction that a court or other body will accept their claim of privilege, in the interim and until there is a determination of that issue, research subjects may experience fear and insecurity that their confidential information will be disclosed, notwithstanding the researcher's best efforts to maintain it. The personal accounts of Richard Leo and Steven Picou illustrate the pressures and anxieties they experienced when faced with court-ordered disclosure. If they, as professionals with the credentials of academia, experience such feelings, how much more so would potentially vulnerable research subjects who typically have to await the outcome of a claim to privilege knowing that they are dependent upon the strength of the arguments and resources of the researcher.

Lowman and Palys' argument under the third of the *Tri-Council Policy* requirements for informed consent alteration is that their research could not be practically carried out because “our prospective subjects interpret SFU's Limited Confidentiality Statement as meaning that

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the University expects us to divulge information if a court so orders, without contesting the order in court.” We have already expressed the opinion that the receipt of a subpoena does not mark the boundary of confidentiality and that it is not only appropriate but necessary that the researcher and the University use every legal means to challenge the subpoena. This understandable concern of research subjects should therefore be directly addressed in the Informed Consent Statement and in the communication with research subjects to make it very clear that information will not be handed over without a legal fight.

However, our main concern with the argument that the Tri-Council provision for altering or waiving informed consent provisions provide an ethical window justifying no mention of the risk of court-ordered disclosure is that from our reading of these provisions they seem to contemplate very different research scenarios. The *Tri-Council Policy Statement*, in explaining the rationale for these provisions, states:

Under Article 2.1(c), the REB should exercise judgement on whether the needs for research justify limited and/or temporary exception to the general requirements before disclosure of information relevant for researcher subjects’ meaningful exercise of free and informed consent. In such cases, subjects may be given only partial information or may be temporarily led to believe that the research has some other purpose because full disclosure would be likely to colour the responses of the subjects and thus invalidate the research. For example, social science research that critically probes the inner workings of publicly accountable institutions might never be conducted without limited recourse to partial disclosure. Also, some research in psychology seeks to learn about human responses to situations that have been created experimentally. Such research can only be carried out if the subjects do not know in advance the true purpose of the research. In some research, therefore, subjects may be told in advance about the task they will be asked to perform, yet given additional information, perhaps as part of the consent process or as part of the manipulated experimental conditions, that provide subjects with a different perspective on some aspect of the task or experiment and/or its purpose. Another scenario, in questionnaire research, embeds questions that are central to the researcher’s hypothesis within distracter questions, decreasing the likelihood that subjects will adapt their responses to their perceptions of the true objective of the research. For such techniques to fall within the exception of the general requirements of full disclosure for free and informed consent, the research must meet the requirements of Article 2.1 (c).

(Tri-Council Policy Statement 2.2)

From reading this it would not seem that withholding information from research subjects about the risk of court-ordered disclosure fits within any of these scenarios, and therefore we are not convinced that Professors Lowman and Palys’ argument is consistent with the ethical

spirit of the *Tri-Council Policy Statement*.

8. A Model, not a Template, for Informed Consent

In our opinion the principled way to deal with the issue of what research subjects should be told about the risk of court-ordered disclosure is not by seeking to avoid the issue by invoking concepts of minimal risk, but rather to set out realistically what the risk is. There is no magic formula for doing this, but we can offer some suggestions. For most research projects it may be enough to advise research subjects along these lines:

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There is a slight risk that a court or other legal body might order that we disclose information that we have gathered during the course of this research. In the United States this issue has arisen, for example, in lawsuits brought against drug and tobacco companies whose products are claimed to be responsible for causing health hazards where the people bringing the lawsuit have relied upon research findings to support their claim. In these kinds of cases the courts have held that, to ensure a fair trial, it is necessary that the companies have access to the information underlying the research findings. However, the American courts have endeavoured to protect the confidentiality of sensitive information to the greatest extent possible consistent with ensuring a fair trial. This approach is similar to that taken by Canadian courts to protect confidential information within relationships such as therapist-patient. In Canada, no university researcher has yet been ordered to hand over confidential information obtained during their research. In the one case where this issue has arisen, when at a Coroner's Inquest a subpoena was issued to a researcher at Simon Fraser University, the researcher successfully argued that his research was legally "privileged" from disclosure. The most likely case in which a court would order a researcher to disclose confidential information would be where that information was relevant to show a person's innocence of wrongdoing.

Given the nature of the research that we are undertaking in this project and the kind of information that we will be seeking from you, we believe that the risk of court-ordered disclosure of confidential information is very small. However, in the event that we did receive a subpoena or some other form of legal process calling upon us to disclose confidential information we would challenge the subpoena in order to protect your confidentiality. The University, as part of its commitment to promote academic freedom, and protect the interests of those who participate in research, will support us in challenging the subpoena by paying for legal representation. This commitment extends to appealing any decision ordering disclosure where there is a meritorious basis for the appeal.

Although we believe, as does the Ethics Review Committee, which has approved this project, that the risk of court ordered disclosure is very small, if you have any questions or concerns we would encourage you to raise them with us and we can provide you with further information in order that you can make an informed decision as to whether you wish to participate in this project.

This wording should not be seen as a template to be applied in a formulaic manner and the Ethics Review Board should be vigilant in its review of research protocols to assess whether there are special risks associated with the research project. In such cases the language of the consent form should reflect the special risks and a more detailed explanation may be appropriate.

We realize that one potential problem with an informed consent statement along these lines is that the longer it becomes and therefore the more useful it is for providing the informational

platform for informed consent, the more that it is likely to overshadow everything else in the informed consent statement. It might be suggested that this could have the result of psychologically elevating the risk in the research subjects' minds even though the language of the document is designed to allay their fears. It is our view that the proper way to address this concern is to recognize that obtaining informed consent should never be seen as a low hurdle easily cleared by an agile researcher. To the extent that providing full information may raise psychological barriers to the conduct of certain kinds of research, the response is to take extra measures to explain and discuss with research subjects their legitimate concerns.

9. Recognizing the Cultural Context of Research

In considering the wording of informed consent statements, there may be other relevant considerations. One of these is the cultural setting of research, the implications of which has best been expressed by Professors Lowman and Palys in their third submission to the Task Force. They write:

The SFU research ethics policy says that one of the purposes of ethics review is to consider the 'cultural values and sense of propriety of the persons who are asked to participate in/and be the subjects of research.' In our brief to President Blaney . . . regarding problems with the limited confidentiality consent statement, we suggested that it compromised criminological research because of the specific cultural value that prison guards, police officers and career criminals attach to "ratting" (informing on each other).

Notwithstanding what an informed consent statement might communicate from our point of view, "expectation of confidentiality" is also defined by what research subjects believe a statement says. The primary reasons that courts order the disclosure of confidential information are for the correct disposal of litigation or a defendant's right to a fair trial. However, when our subjects hear the limited confidentiality consent statement, they are concerned about a different eventuality: the pressure will be put on us to divulge their names *so that they can be prosecuted*. The URERCs consent statement is like a large flashing light above a sign saying "don't participate in this research".

Because of their lifestyle and cultural values, our research subjects believe the URERC's statement is not a guarantee of confidentiality of any kind, and they react accordingly ("Why would I talk to you when I know you will rat on me?"). Since research/participant privilege is partly the subjects' privilege, and because the participants' understanding of a communication is relevant to the Courts determination as to whether it originated in confidence, we must take our subjects' definition of the situation into account, as must the URERC, in designing a consent statement. Indeed, the *Tri-Council Policy Statement* requires researchers and universities to incorporate research participants into its ethics decision-making process.

We suggest that, because of the specific sub-cultural values of offenders, prison guards

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and police, the drafting of ethics policies should be careful to follow the Tri-Council's directive to "accommodate the needs of specialized research disciplines" (*Policy Statement*, i.2) such as criminology.

(*Going the Distance, Lessons for Researchers from Jurisprudence on Privilege* at 20-21.)

In our opinion, these are important considerations. For one thing, in the event that court ordered disclosure became an issue Professors Lowman and Palys' arguments would help establish why confidentiality, in the particular context of this kind of research, was a necessary prerequisite for gaining access to important information without which the research could not be possible. This was precisely the burden that Russel Ogden was able to meet, and Lowman and Palys are suggesting that the same level of confidentiality would be necessary to conduct other forms of criminological research in which self-disclosed law violation is either the principal subject or an important element.

The main point that we would draw from Professors Lowman and Palys' observations about the cultural context of certain kinds of criminological research is that they indicate the need for greater rather than lesser communication about the risk of court ordered disclosure. If a particular group of research subjects (for example, career criminals) bring to their perception of the wording of a consent statement that refers to the risk of court ordered disclosure a "take" that sets off flashing lights, based on a misunderstanding of the kinds of situations in which a court might order disclosure, surely the way to address this is to provide more information about the realistic scenarios in which disclosure might occur. It would be appropriate in this further communication to explain that the scenario in which disclosure might be sought would be one in which information about a particular individual was relevant to establish an accused person's innocence. Such an explanation might actually fit into the cultural context of the research because career criminals would have no difficulty in understanding the value of ensuring that innocent people are not sent to jail.

This preferred approach of extending rather than truncating the communication, where mentioning the risk of court ordered disclosure could jeopardize the possibility of securing the participation of research subjects, is in keeping with the provisions of the *Tri-Council Policy Statement* that emphasize the importance of collaboration with research subjects and an open subject-centred perspective on research. We have in mind the following provisions:

A Subject-Centred Perspective

.... In many areas of research, subjects are participants in the development of a research project and collaboration between them and the research in such circumstances is vital and requires nurturing. Such collaboration entails an active involvement by research subjects, and ensures both their interests are essential to the project or study, and that they will not be treated simply as objects. Especially in certain areas of the humanities and social sciences this collaborative approach is essential, and the research could not be conducted in any other way....

A subject-centred approach should, however, also recognize that researchers and research subjects may not always see the harms and benefits of research projects in the same way. Indeed, individual subjects within the same study may respond very differently to the information provided in the free and informed consent process. Hence, researchers and REB's must strive to understand the views of the potential or actual research subjects....

Rushing the free and informed consent process or treating it as a perfunctory routine violates the principle of respect for persons, and may cause difficulty for potential subjects. The time required for the free and informed consent process can be expected to depend on such factors as the magnitude and probability of harms, the setting where the information is given... and the subjects situation (for example, level of anxiety, maturity or seriousness of disease).

(i.7 and 2.8)

10. Recognizing Philosophical and Methodological Diversity and Avoiding Systemic Exclusion

There are two further interrelated concerns that Professors Lowman and Palys have raised with regard to the wording of the current informed consent form, both arising from the *Tri-Council Policy Statement*. They are the need for ethics review policies to respect philosophical and methodological diversity in research and to ensure the policies do not create or perpetuate systemic exclusion for certain groups of research subjects. Thus the *Tri-Council Policy Statement* cautions that:

REBs should be aware that there are a variety of philosophical approaches to ethical problems and that debate between various schools of thought both informs ethical decisions and ensures an involving context for ethical approaches. Some approaches are traditional but others, such as feminist analysis, are centred on context, relationships of power and allocations of privilege that perpetuate disadvantage and inequality. Hence, the approach may help to correct the systematic exclusion of some groups from research.

(i.9)

Lowman and Palys rely upon this statement to support the following argument:

Any imposed *a priori* limitation of confidentiality would not permit us the latitude to follow our philosophical and ethical position and thus does not comply with this requirement. Further, the limitation of confidentiality that has been imposed at SFU denies unlimited confidentiality only to research subjects who are being approached regarding law-breaking activities. Because it would be unethical to do such research without a guarantee of unlimited confidentiality, persons considered “law-breakers” would become “systematically excluded” from research. This further violates the section of the Policy quoted above, in addition to violating the Tri-Council cardinal principle that the human dignity and worth of *all* persons is to be respected.

(Informed Consent, Confidentiality and the Law at 26)

With all respect to Professors Lowman and Palys, we do not believe that the *Tri-Council Policy Statement* supports their argument that it will be unethical to do research into law-breaking without “a guarantee of unlimited confidentiality.” As we have pointed out, the *Policy Statement* expressly acknowledges that there may be legal limitations to the degree of confidentiality that can be promised. However, we believe that Professors Lowman and Palys are right in pointing to the unanticipated consequence that an inflexible and formulaic approach to informed consent could have on the systemic exclusion of groups who may already be marginalized. Here again, however, we do not believe that this provides either a legal or ethical justification for minimizing the need for mentioning the risk of court ordered disclosure; rather it reinforces the need for Ethics Review Boards to encourage the development of informed consent statements that are alive to and address the context in which research is done and the importance of not creating or perpetuating systemic exclusion.

11. Informed Consent – A Case Study

We believe that it may be helpful to the development of both policy and practices in relation to informed consent statements to consider a case study, referred to by Professors Lowman and Palys, that raise some of the issues with which we have been dealing and allow us to consider the way in which our recommendations would address those issues.

The case relates to a research project conducted at the University of Toronto which, like Russell Ogden’s research, dealt with the issue of euthanasia and assisted suicide in

HIV/AIDS patients. The research was undertaken by a graduate student at the University of Toronto under the supervision of Professor Bernard Dickens and the research protocol for this project is set out in Appendix D of *The History of Limited Confidentiality at SFU*. The information sheet given to research subjects contained the following statements describing the measures that would be taken to preserve confidentiality and the risks of court-ordered disclosure:

Study Purpose

The purpose of this study is to develop a theory of decision-making by persons with HIV/AIDS regarding personal decisions for or against euthanasia or assisted suicide.

Study Procedures

If you are interested in participating in the study, you can contact the investigators directly at the number provided below. If you decide to call the investigator, **YOU MUST NOT IDENTIFY YOURSELF**. You must either decide on a false name (pseudonym) to use at all times throughout the study, or simply do not use any name in your discussions with the investigators. This is for your own protection, so that the investigator will not know who you are.

...

Risks and Benefits

Because of the nature of the proposed study, some of the participants may have had previous involvement in acts of assisted-suicide or euthanasia. These are currently criminal acts under Canadian law. Although the audio-tapes of interviews will be destroyed, and no names will appear anywhere on the transcripts, it *may* still be possible to recognize the participant, or someone else involved in the criminal activity, from information in the transcript. The transcripts would be turned over to authorities **only** as part of a formal court order, e.g. as part of a coroner's or criminal investigation. Under those circumstances, the study investigators have no legal privilege that allows them to withhold transcripts from the authorities. This is the main risk of participating in the proposed study. There is no way of determining how likely it is that this would occur. If you have not been involved in any of these activities, this risk does not apply to you.

This risk will be explained to you on three occasions before you consent to be interviewed: once in this information sheet, once in the initial phone conversation, and once immediately prior to beginning your interview.

...

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In order that your name does not appear anywhere in the study records, you will be asked on three separate occasions to give your verbal consent to participate in the study. In addition, you will be reminded several times before your interview that you are free to stop the interview and/or withdraw from the study at any time.

(Appendix D, *The History of Limited Confidentiality* at 65-7)

Professors Lowman and Palys raise two principal comments on this approach to informed consent. The first is that the statement that the study investigators have no legal privilege is not an accurate reflection of the law. Reviewing this statement in the context of the legal/ethical Opinion that Professor Dickens himself has given to the Ethics Review Committee at Simon Fraser, this seems to be a statement that there is no “class” privilege for researcher-subjects. We agree with this conclusion. However, the statement does not take into account the possibilities for a case by case privilege such as that successfully argued by Russell Ogden and, therefore in our view, does not sufficiently describe the law. Nor does the statement sufficiently describe the steps that the researcher and the university will take to defend research confidentiality through legal challenges to a subpoena or court order.

The other comment made by Professors Lowman and Palys relates to the difference between research methodologists employed in this study and their own. They characterize the difference in this way.

For Dr. Dickens and his student, the way to deal with confidentiality issues is to de-personalize the research interaction, make the research a one-shot study, and give repeated warnings to the participant that, if a court should order disclosure of confidential research information, it will be disclosed. Our research model is different. We want to *know* participants as persons. Part of our research program involves developing long term networks of key participants; often, anonymity is not an option. Our research tradition is one that values trust and rapport, and the maintenance of responsibilities – such as protecting the rights and interests of research participants to confidentiality – that goes with it. Not only that, but in some instances we are also interested in the identity of our participants so that we can track information about them in different sources as part of a triangulation of different research methods. . . . Its design features – an aloof approach, a legalistic interaction, a one-shot study – have everything to do with the medical model, and incorporates none of the epistemological desiderata of field research.

(*The History of Limited Confidentiality* at 53-54)

In their second submission to the Task Force, Lowman and Palys expand upon this difference:

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A more quantitatively oriented researcher engaged in interview research might be more likely to undertake a one-shot case study, to take precautions so that the names of subjects are never known, and/or ensure that the names of subjects are never recorded. For more a more qualitatively oriented field researcher, however, these solutions are often impossible. Field research often involves researchers spending time with people, and getting to know them and their social milieu well, sometimes over a period of years. Often it becomes impossible to avoid knowing respondents' identities; obviously, the way one protects confidentiality in this case will be different than the resolution a hypothetical quantitative researcher would implement. At the same time, the issue is not as simple as a quantitative – qualitative split; those quantitative researchers who wish to maintain longitudinal databases, for example, or who wish to connect what would otherwise be disparate databases together, must face the same issues.

(Informed Consent, Confidentiality and the Law at 10 fn.14)

Professor Lowman and Palys' perceptive description of the differences in the research methodologies employed in the Toronto study, compared to say Russell Ogden's study, raises however the following paradox. To the extent that a research methodology requires researchers to get to know the research subjects and form a trusting relationship in order to obtain reliable information, the more this enables them to argue under the Wigmore Criteria that confidentiality is a necessary condition for the research. At the same time, because in the development of that relationship researchers come to know the identities of their research subjects, the risk that this identity may be disclosed is increased, in the event that the claim for privilege is ultimately unsuccessful in legal proceedings. The risk is also elevated in research methodologies such as those favoured by Professors Lowman and Palys, because by developing a trusting relationship with research subjects it is more likely that the researcher will come into possession of sensitive material.

In our opinion, these increased risks impose an increased obligation on the researcher to enter into a dialogue with the subjects to explain the risks, balanced by the means which will be taken to protect confidentiality, and the limits of that confidentiality. Our opinion is supported by the *Tri-Council Policy Statement*:

Free and informed consent lies at the heart of ethical research involving human subjects. It encompasses a process that begins with the initial contact and carries through to the end of the involvement of research subjects in the project. As used in this Policy, the process of free and informed consent refers to the dialogue, information sharing and general process through which prospective subjects choose to participate in research involving themselves.

(2.1(a))

12. Disclosure to Protect Public Safety

Thus far in our discussion we have dealt with the issues raised by the risk of mandatory reporting laws and court ordered disclosure. There is a third area which must also be considered, although the occasions in which it will arise are very rare, and for the overwhelming majority of research projects would not rise to the level of a material risk that needs to be explored with a research subject. We have referred to this area earlier in the Opinion as the “public safety” exception to privilege. As we explained, although the 1999 Supreme Court decision in *Smith v. Jones* was decided in the context of the solicitor-client privilege, the court emphasized that the “public safety” exception applies to all privileges. Professors Lowman and Palys, befitting the comprehensive scope of their examination of the issues, have addressed the public safety exception under the heading of what they refer to as “heinous discovery”. In *Informed Consent, Confidentiality and the Law* they presented the issue in this way:

One of the main objections to unlimited confidentiality is that there are circumstances when a researcher should disclose information about serious prospective harm, or “heinous discovery” ... For example, hearing “threats to someone's life” is a situation in which Dr. Horvath indicated he could imagine limiting confidentiality. But is this a reason to create an *a priori* limitation of confidentiality? For example, should a researcher limit confidentiality by saying, “I guarantee I will maintain confidentiality unless you tell me that you are going to kill someone, in which case I will feel ethically bound to inform the appropriate authorities”?

From the perspective of maintaining confidentiality using the Wigmore test, this statement would presumably satisfy criterion 1, because it specifies only a singular circumstance in which confidentiality would not be maintained. But consider the irony of limiting confidentiality *a priori* this way: it would likely result in the death of the intended victim, because the informed consent statement is effectively an admonition that, “If you're going to kill someone tomorrow, don't tell me.” Having limited confidentiality this way, it is unlikely that the researcher would discover the subject's intention to murder the third party. Ironically, then, the specific *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.

Consequently, we believe there is a key difference between violating a pledge of confidentiality and limiting it from the outset. Limiting confidentiality *a priori* does nothing to prevent the event, and creates the unethical situation of retaining one's ethical purity by donning blinkers that prevent one from seeing someone else's misfortune. Therefore, we cannot see how limiting confidentiality to avoid heinous discovery would be to anyone's ethical benefit.

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(Informed Consent, Confidentiality and the Law at 22-3)

As we pointed out in our earlier discussion of *Smith v. Jones*, the Supreme Court, in deciding that the psychiatrist was legally entitled to disclose to protect the public safety, left open the issue of whether there was a legal duty to disclose. As we pointed out also, such a duty has been imposed in certain situations in the United States and it is possible that in the future a similar duty may be imposed in Canada, and that therefore this possibility should be taken into account by researchers. In light of both the existing law and the possibility that the law may be further developed in the direction of imposing an obligation to disclose to protect the public safety, what are the legal and ethical responsibilities of researchers? Lowman and Palys have directed their minds to these responsibilities in light of the Supreme Court's decision in *Smith v. Jones*.

The court also advised that, in instances where public safety considerations warranted violation of a pledge of confidentiality, there are many ways a professional could handle the situation, not all of which involve reporting an individual to criminal justice authorities. Writing for the majority, Cory J. notes:

It is not appropriate in these reasons to consider the precise steps an expert might take to prevent the harm to the public. It is sufficient to observe that it might be appropriate to notify the potential victim or the police or a Crown prosecutor, depending on the specific circumstances.

We would expect researchers in this situation to ensure that confidentiality would be preserved to the greatest extent possible, as long as the safety of the intended target was assured. In this regard, we suggest the decision to violate a confidence because of heinous discovery can be done in a more ethical and sensitive manner than the spectacle *Smith v. Jones* created, such that the confidence is minimally violated, i.e., only to the extent required to ensure the safety of the innocent third party. We also note that, if faced with this situation in our own research, the solution likely will have nothing to do with a court. The ethical dilemma would be ours to resolve at the time, on the basis of whatever course of action best maintained confidentiality, while ensuring also that an innocent third party is not killed.

(Going the Distance at 27)

As we have said, in the overwhelming majority of research situations it is extremely unlikely that a researcher would come across a scenario in which the public safety considerations of *Smith v. Jones* would be engaged. For the extraordinary case where this did come up, the Lowman and Palys analysis in which a researcher can justify violating confidentiality seems an ethical response. However, it is possible to envisage research projects where the

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possibility of heinous discovery or the public safety exception would be elevated to the level of a material risk requiring discussion as part of the informed consent process. Take, for example, a research project focussing on organized crime and the drug trade. If the research protocol envisages interviews with research subjects involved in the drug trade and could include disclosures of enforcement techniques for those who did not pay their debts or who otherwise breached their obligations, it is not at all far-fetched to anticipate that some informants, as a way to illustrate their enforcement strategies, might reveal the “next hit.” Obviously, this is not something that would flow out of an informant on the first interview, but given a long and continuing research relationship founded upon mutual trust, highly sensitive and potentially incriminating evidence could be revealed. If a researcher is involved in this field of research and the risk of a public safety scenario being revealed is significantly enhanced, we believe that a researcher should explain to research subjects the existence of the public safety exception and the legal and ethical responsibilities that it will place upon the researcher. At the present time there is no legal obligation to report, only an entitlement to do so. However, as an ethical matter, as Professors Lowman and Palys correctly point out, the researcher has a range of possible responses, from reporting to the police, warning the intended target, and other alternatives depending on the particular circumstances. It is of course difficult, if not impossible, to set out in advance what the researcher would do in any particular situation. If, for example, disclosure was made in the course of an interview that an identified person who had defaulted on his drug debts would be killed or badly beaten the next week, a researcher might be able to try and dissuade the subject from that course of action, or at least would have time to warn the intended victim if he knew where he was, although this could carry its own risk that the researcher themselves become the next “hit”! If the “hit” was to be carried out within the hour there likely would be no alternative except a call to the police.

Given these imponderables, the most honest statement that a researcher could make is that if in the course of the research they were told that somebody would be killed or seriously harmed they would have to do something about it, and that could include reporting the matter to the police. Envisaging such a discussion may seem rather improbable and the reality of this kind of research is that the only researchers who would be able even to contemplate this work would be those who have some entrée into the criminal world, likely through some prior research activity in which a high level of trust had been established. Given that level of trust,

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an ethical researcher could advise research subjects about the public safety exception, with the clear warning that they should not disclose anything that would place the researcher under a responsibility to violate the subject's trust, even though an argument could be made, along the lines of Lowman and Palys', that it was ethically justifiable to violate that trust.

13. “Doing Everything Possible” – The Researcher and the University’s Commitment

We have recommended that the informed consent statement include a commitment by the researcher and University “to do everything possible” to protect confidentiality, including challenging any subpoena or other legal process and, where there is a meritorious case, exhausting all legal avenues of appeal. Professor Lowman and Palys have argued that “this can only mean fighting court-ordered disclosure of confidential research information all the way to the Supreme Court of Canada, if necessary. (*Informed Consent, Confidentiality and the Law* at 33)

We have no problem with this statement if it is intended to be a clarion call for vigorous and assertive defense of privilege. However, a decision to appeal, either to a Provincial Court of Appeal or the Federal Court of Appeal and any subsequent appeal to the Supreme Court of Canada, is dependent upon a host of factors over and above a strong commitment to the principle at stake. Appeals are not freebies; neither in the sense of being available for the asking nor in financial terms. In most cases of appeals to the Supreme Court there is a need to obtain leave from the Court. Quite apart from this there is the important issue of whether there is a meritorious ground for appeal. While we may hear assertions by litigants (and sometimes their lawyers) that this case will be appealed all the way to the Supreme Court of Canada these are declarations of intent rather than law. Suppose, for example, that in a particular case a trial judge found against the claim for privilege because there is not a sufficient evidentiary record to support it. Proceeding with an appeal under these circumstances would likely not be successful and runs the risk of creating a bad precedent. This is precisely what happened in *Re Grand Jury Subpoena*. Even if there is sufficient evidentiary record upon which to assert a claim for privilege, the evidence that may come out in the course of the hearing in favour of disclosure may be so compelling (for example that the disclosure was necessary to establish the innocence of the accused) that no appeal court would likely interfere with that conclusion. These and other scenarios have to be taken into account in any decision whether an appeal should be taken, particularly if part of the reason for appealing is to establish a precedent that affords the greatest protection to researcher-subject confidentiality. The factual matrix of the individual case, the evidentiary record, and the cogency of the trial judge’s reasons are necessary considerations in making the decision whether an appeal should be mounted. And while lawyers cannot make these judgments in

isolation without consultation with their clients, their legal assessment of the likelihood of a successful appeal and the risks of establishing a negative precedent affecting other cases should not be trumped by unqualified calls to mount the barricades, or in this case, the steps of the Supreme Court of Canada.

14. A Promise to Disobey a Court Order to Disclose

At several points in their submissions Professors Lowman and Palys discuss whether subjects should be told what a researcher will do if faced with a court order to disclose confidential information. They argue that if it is necessary for a subject to be informed about the possibility that confidential information may be ordered by a court to be disclosed, it is also necessary for a researcher to tell the subject what they intend to do should the researcher receive such an order:

If Research Ethics Boards force researchers to warn prospective research subjects of the minuscule risk of a court order to disclose confidential research information, considerations of informed consent oblige us to also tell them what we intend to do should we receive such an order. In the process of trying to come to grips with this dilemma, the University has taken the position that it will not, under any circumstance or in any way, take a position that could be interpreted as supporting a researcher's decision to defy a court order. We find the idea that the university would never "support" a researcher troubling, to say the least. This *a priori* subjugation of ethics to law flies in the face of a centuries old tradition of civil disobedience on grounds of conscience and principle. The tradition begins with Socrates and continued with the likes of Henry David Thoreau, Mahatma Ghandi, and Martin Luther King.

(Going the Distance at 48)

Professors Lowman and Palys argue that a researcher should be permitted to promise to disobey a court order to disclose. They have suggested various wordings of such a promise. One wording would include a promise by the researcher "to do everything possible" when faced with a court order. Another draft consent statement included the following:

Because its overriding responsibility is to "protect participants" the Ethics Committee will do its utmost to defend confidential information should a public body or court request access to it. Because the University "supports the highest ethical standards" (R.60.01), it too will staunchly defend confidentiality in court. **In the event that these efforts fail, and we are ordered to reveal confidential information by a court or public body, we will make a personal decision not to do so.** (emphasis added.)

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(*Going the Distance* at 47)

The American Sociological Association appears to have adopted a similar position. In an E-mail, the chair of the ASA Committee on Professional Ethics stated that a researcher could promise absolute confidentiality if the researcher is willing to "accept the consequences". Lowman and Palys cite two examples in which the URERC has approved informed consent forms which contain such a promise. (*Going the Distance* at 45)

Professors Lowman and Palys suggest that a promise to disobey a court order is mandated by ethical principles. In *Going the Distance*, they state:

We believe that the secular obligation of confidentiality in the research enterprise is every bit as important as the sacred obligation is to the priest. Indeed, Statistics Canada reflects this reverence of confidentiality by requiring its researchers to take an oath of secrecy. The Statistics Act specifically forbids the courts from requiring Statistics Canada researchers 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" (Section 18(2)). Ethically, as far as we are concerned, university researchers do not owe their subjects any less than this guarantee. This does place us in a more difficult situation — we have the same ethical obligations as Statistics Canada researchers, but do not enjoy the same statutory protection — and therefore conclude that, until similar statutory protection is available for university researchers, the only ethical way to fulfil these obligations would be to disobey a court order.

(*Going the Distance* at 48)

In light of these weighty submissions it has been important for us to address the issue whether informed consent statements, having identified the risks of court ordered disclosure and the steps that the researcher and the university will take to protect confidentiality can also, legally or ethically, contain a promise to disobey a court order.

From a legal perspective, a promise to disobey the law may be misleading to the extent that a subject believes that it confers some legal recourse if the promise is broken. A promise to disobey the law is unenforceable as being contrary to public policy. It is also important to remember that a court order to disclose would only be made after the court has weighed and considered the costs and benefits and determined that the social good from disclosure outweighs the harm from disclosure to the subject and to the researcher/subject relationship. Furthermore, under our proposed framework the researcher and the university will have vigorously asserted the case to be made for the recognition of privilege and in a meritorious

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case will have exhausted the avenues of appeal, including an appeal to the Supreme Court of Canada.

From an ethical perspective, Lowman and Palys' proposal raises two issues: First, when is it ethical to disobey the law and second, even in instances in which disobedience is ethical, is a promise to do so ethical?

An extended analysis of the literature on civil disobedience is beyond the scope of this Opinion. We have, however, reviewed this literature in order to set out some of the factors that should be considered in an ethical decision to disobey the law.

We begin by acknowledging, as reflected in the *Tri-Council Policy Statement*, that ethics and law may lead to different conclusions. We agree with Professors Lowman and Palys that the ethical duty to keep information confidential is broader than a legal duty to do so in that, even if the information is not confidential according to the law, the researcher should take care to not to disclose the information. This is illustrated by the commentary on the duty of a lawyer not to disclose information from a client. The Task Force on Review of the Rules of Professional Conduct, The Law Society of Upper Canada (March 31, 1999) recommended:

2.03 (1) A lawyer shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

The commentary on this provision included:

This rule must be distinguished from the evidentiary rule of lawyer and client privilege with respect to oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

This does not mean, however, that a lawyer has an ethical duty not to obey a court order to disclose. Whether ethics would require disobedience to the law depends on the facts and context of the particular case.

The contextual nature of civil disobedience has been emphasized by commentators.

None of [the traditional grounds for a moral obligation of obedience (promise, social utility, gratitude, the natural duty to promote just institutions, fairness)] establish 'any

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single ground of duty to obey all laws, or all just laws, on every occasion of their application,' but the collection of them establishes 'multiple grounds for obedience in various circumstances', and there are some rare circumstances in which none of them provides a very forceful reason in support of a moral duty of obedience. In these latter circumstances, therefore, provided there are independent moral reasons of relatively substantial weight to do what is forbidden by the law, there may be overall moral justification for disobedience.

(Joel Feinberg, "The Right To Disobey, A Review Of Conflicts Of Law And Morality", by Kent Greenawalt (1989), 87 Mich. L. Rev. 1690.)

"Civil disobedience is an act of protest, deliberately unlawful, conscientiously and publicly performed." (Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* (1971) at 39). By definition it is an act that breaks the law and is one that is properly subject to normal punishment. Therefore it is not the case as suggested by Lowman and Palys that defying a court is an instance in which "they are respecting the law by going to jail." (*The History of Limited Confidentiality* at 47)

Commentators have distinguished political motivation for civil disobedience from moral motivation. Carl Cohen notes that political disobedience is "specifically addressed to the members of the community at large and intended to influence their subsequent conduct...the objective sought by the protest is the repeal or passage of legislation, the change of government or business policy, or the like....Its justification may depend upon the likelihood of its having such political consequences." (Cohen at 58)

Moral civil disobedience is not so much a device to change a law or policy "as it is a public statement of his [the disobedient's] inability to comply in good conscience....Moral civil disobedience is the protestor's response to a direct conflict between his personal ethical principles and some law of the state." While "[p]olitical civil disobedience is essentially a tactic...moral civil disobedience is the concrete outcome of some deep ethical convictions." (Cohen at 59). Minow sets out some examples:

Some have protested wars, the manufacturing of armaments, slavery, and racial segregation. Some have objected to particular taxes, employment practices, or economic oppression. **This first, basic argument justifies disobedience in the face of particular rules that seem to implicate individuals in immoral actions or coercion to violate their own beliefs.** Some who refuse conscription into the military may do so on the grounds that they wish no part in fighting a war; some refuse to pay taxes to a government engaged in a war because they seek to avoid complicity with the governmental policy. Adherence to competing, and compelling or even prior norms,

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such as religious beliefs, makes some conclude that disobeying the law is not only justifiable but at times obligatory.

(Martha Minow, "Breaking The Law: Lawyers And Clients In Struggles For Social Change" (1991), 52 U. Pitt. L. Rev. 723)

The position of Lowman and Palys seems to be founded on the importance of a moral obligation to keep a promise. In drawing an analogy with the obligation of priests to maintain the confidence of the confessional they state:

"We believe that the secular obligation of confidentiality in the research enterprise is every bit as important as the sacred obligation is to the priest."

(*Going the Distance* at 48)

Greenawalt emphasizes that promises have moral force; a "promise is widely regarded as the clearest way in which people voluntarily assume moral obligations"

[There is a] common assumption that any undefective serious promise does carry substantial moral force and that breach of even the most clearly unconditional promise can sometimes be morally appropriate. If I foolishly say, "On absolutely no account will I fail to be there" and then find myself in the unexpected position of having to choose between showing up and saving ten lives, I should save the ten lives."

(Kent Greenawalt, *Conflicts of Law and Morality* (1987) at 64)

Whether the moral obligation to keep a promise by a researcher to keep information confidential can ever be equivalent to a priest's religious obligation not to disclose what took place in the confessional would depend on the context. Theoretically, it is difficult to see an analogy. Religious groups seem to come within Walzer's definition of secondary associations with claims to primacy in particular areas of social or political life. (Michael Walzer, *Obligations* (1970) at 10-16.) The privacy of the confessional poses a predictable conflict with the law. "People who promise to support such organizations are aware that their group loyalty may require violations of law." Greenawalt at 87 This point is reflected in the following quotation set out by the Supreme Court in *Gruenke*:

Most clergy will not testify concerning confidential communications regardless of whether there is a statutory privilege. They are bound by an overpowering discipline that dictates the strictest standards of conduct concerning the maintenance of the inviolability of the confidential communication made to them in their ministerial capacity. . . . Therefore, in a state without the privilege, a clergyman facing contempt charges for refusing to testify would have little trouble making the decision about what to do. He would refuse, face contempt charges, and imprisonment. The pressure from an institutional standpoint would reinforce his determination.

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(Reese, Confidential Communications to the Clergy (1963), 24 Ohio St. L.J.55 at 81)

The decision to disobey the law involves a weighing not only of the moral obligation to obey the law, but also other

"...strong moral obligations that outweigh those imposed by the legal system, and that constrain them to disobey certain laws under certain circumstances...When the claim is made, therefore, that moral considerations compelled or justified disobedience of law, that claim needs to be closely examined in the light of the facts and principles that bear on the act in question.

(Cohen at 102)

The decision requires a balancing of the moral and ethical obligations for and against a duty to obey the law in the specific case.

Carl Cohen identifies two main patterns of justification of civil disobedience: Higher-law justification and utilitarian justification. Civil disobedience may be justified by appeal to a "law higher than any man-made law--a 'divine' or 'natural' law whose authority is supreme." (at 105) Under the utilitarian pattern, "the justification will rely upon some intelligent weighing of the consequences of the disobedient act." (at 120) Researchers may justify disobedience of a court order to disclose applying this latter pattern of reasoning. Utilitarian justification requires an understanding of the actual context of the disobedient act. Cohen sets out a series of questions that guide analysis of the act. (paraphrase)

1. What is the background of the case? How serious is the injustice? How pressing is the need for a remedy?
2. What are the negative effects, both short and long term, of the deliberate disobedience? What are the costs to others who are not to blame for the wrong protested? What are the long term consequences on respect for law, democracy, the administration of justice?
3. What are the positive effects of the disobedient protest?

(Cohen at 124-128)

Careful balancing must be done in each case. A promise ahead of time to disobey a court order means that researchers are giving up any personal ability to weigh the social costs and to decide that the court's balancing in this case is the right one. As an example, if the Supreme Court of Canada having heard and considered all of the arguments in favor of

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extending privilege, and having acknowledged the significance of the harm that might be done to future research if confidentiality is not maintained, nevertheless determines that disclosure is necessary in order to avoid a serious miscarriage of justice, must not a researcher take the Court's reasons into account in making an ethical judgement about whether to obey that order? Furthermore, in a case such as this, what would be the ethical foundation for a researcher to disobey the court order, based as it is on the need to avoid that miscarriage of justice?

In our opinion while it may be ethical in limited cases to disobey an order to disclose, it is not ethical to promise unconditionally ahead of time to do so, since most commentators seem to agree that there are circumstances in which a researcher would be ethically obligated to obey a court order. An ethical decision to disobey the law ethically must be made in the context of the individual case and after the researcher has weighed all factors including the reasons of the court.

Similarly, the University cannot make a promise ahead of time to support a researcher who defies a court order, although it could provide legal or other help in the individual case. Promotion of research is not the only goal of the university and ethically cannot be pursued at the expense of all other goals, such as promoting respect for the Rule of Law, preventing the conviction of the innocent or preventing harm to individuals.

Some Concluding Comments

We have been conscious in preparing this Opinion that many of the issues that we have addressed have only recently risen on the Canadian legal and ethical horizon. Indeed, Professor Lowman and Professor Palys' submissions to the Task Force represent the main corpus of Canadian academic commentary on these issues. These distinguished scholars offered their opinions and interpretations on the application of the law of privilege to the researcher-subject relationship, an area to which few Canadian lawyers (or law professors) have given even the most cursory attention. Their work has been in every sense pioneering and as with most pioneers they had little to guide them. We have in this Opinion reviewed many of their arguments; some we have found compelling; others more problematic; and in matters of legal interpretation we may be permitted to respectfully disagree with some of their conclusions. On the ethical issues, as lawyers and law professors, we have no monopoly to pass definitive judgments. We can and have offered our analysis of a number of ethical questions, particularly as they intersect with legal principles. We would emphasize that the issues raised in this Opinion, lying as many of them do at that intersection, are enormously challenging ones. The new ethics policy at SFU should be cognizant of these challenges and its policies should encourage university researchers, whether established scholars or graduate students, to rise to these challenges. The more they are able to do so, if and when disclosure of confidential research becomes an issue, the better equipped they and the University will be, to provide the Courts with the best evidence and the most cogent arguments to protect the confidentiality of their subjects, consistent with the objectives, interests, and values of the University.

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All of which is respectfully submitted

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