



Protecting Research Confidentiality: Towards a Research Participant Shield Law¹

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We take it as a given that researchers want to behave ethically. Furthermore, their research training, disciplinary codes, and university policies commit them to maintaining the highest ethical standards.

According to the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* (TCPS),³ one of the most important ethical principles involves maintaining research confidences. The TCPS holds that its principles reflect broadly shared “standards, values and aspirations of the research community,” and we have yet to find a research ethics code that does not include maintaining confidentiality as one of its core principles.

Pragmatically, pledging and maintaining strict confidentiality provides the foundation of trust and rapport that allows researchers to gather valid data to promote understanding of the human condition, and provide the basis for rational social policy. In some cases, information shared with a researcher may be so sensitive – and its disclosure so potentially damaging – that the fate of the individual may literally rest in the researcher’s hands. In such situations, both the researcher’s ethical obligations and the need for a solid bond of trust are clear. If people do not trust researchers, they will not share sensitive information, and the value of research to society will diminish.

In addition to their professional responsibilities, researchers have a commitment to the rule of law. For example, like all citizens, they have a responsibility to give evidence where it will help the courts in their

¹ This is a pre-publication draft of the paper that was published in CJLS, and hence may differ in minor respects from the one that was published.

² An earlier version of this paper was presented at the annual meeting of the National Council on Ethics in Human Research (NCEHR) in Aylmer, Québec in March, 2004 under the title, “Reconciling the Law and Ethics of Research Confidentiality.” We thank those who attended the meeting, and two anonymous reviewers for their comments on a subsequent draft of the paper.

³ Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, Social Sciences and Humanities Research Council of Canada, *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*. (1998) at i-5 (with 2000, 2002 and 2005 amendments), Online: Interagency Advisory Panel on Research Ethics <<http://www.pre.ethics.gc.ca/english/policystatement/policystatement.cfm>> Date accessed: 29 March 2006. [hereinafter *TCPS*], p.i-5.

Ted Palys and John Lowman

determinations of fact in criminal and civil proceedings. However, that obligation is not absolute. Various “privileges” – exemptions from the obligation to testify – are recognized in statute while others have been established in common law.

Only a handful of privileges are enshrined in law, such as those listed in section 10 of the *Canada Evidence Act*. Another example of a statute-based privilege that is particularly relevant to our discussion of research confidentiality is the *Statistics Act* provision protecting people who participate in Statistics Canada research:

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

...

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

“Common law” privileges – those recognized by the courts in the process of interpreting law – include “class” and “case-by-case” privileges. Solicitor-client privilege is an example of a class privilege recognized by the Supreme Court; recognition means that henceforth the privilege can be assumed, and the onus is on anyone wishing to have the privilege set aside to demonstrate why it should be. For all other confidential relationships, claims for privilege are evaluated on a case-by-case basis. The onus is on the person claiming the privilege to demonstrate why the privilege should be recognized in their particular case.

The case-by-case adjudication of privilege in common law does not occur until a situation has arisen in which a plaintiff or defendant seeks a court’s ruling on whether they can access information that the custodian regards as confidential. The privilege is not claimed until the challenge occurs. Consequently, in the current legal context, the only way for a researcher to protect confidential information from a legal challenge is to assert privilege at the point at which a challenge arises. This means that a claim of privilege will not happen at least until the research is underway, and more likely not until it is finished, if and when some third party asserts an interest in the information. The problem confronting researchers is that they must arrange their affairs with research participants ahead of time. From the outset, they must inform prospective participants about how the ethical obligation to safeguard confidentiality will be met. Researchers are left with a difficult dilemma, the resolution of which has huge implications for their participants. Can researchers be confident the courts will recognize, understand and support researchers’ ethical obligations? Or will they dismiss researchers’ claims in favour of the court’s interest in establishing the “facts” in a particular case? While law and ethics overlap, there is no guarantee they will coincide. As the *TCPS* acknowledges:

[L]egal 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. [A]lthough

ethical approaches cannot preempt the application of the law, they may well affect its future development⁴

In relation to research confidentiality, there are several situations where the ethics and law of confidentiality could conflict. The most visible of these occurs when third parties use subpoenas to pressure researchers to divulge identifiable information. This may occur in the course of criminal trials where a researcher is believed to have information that would facilitate a prosecution or defence, or in civil litigation where one of the litigants believes a researcher has information that would promote his or her side of the dispute.⁵ Researchers have an ethical duty to protect confidentiality against such third-party challenges.⁶

Another area where law and the ethic of confidentiality may conflict occurs in relation to mandatory reporting laws. When these laws provide no exemptions for research, they potentially create “no research” zones because, arguably, it would be unethical for researchers to ask directly about information they know they would report.⁷ This leaves researchers able to ask *around*, but not directly *about* some of society’s most pressing and distressing social problems where the need for accurate and valid information is often the greatest.

Problems Arising From Case-by-Case Analysis of Privilege in Common Law

Case-by-case claims of research-participant privilege require the researcher to invoke the Wigmore test,⁸ just as Russel Ogden did when the Vancouver Coroner threatened to charge him with contempt of court for refusing to divulge the names of two research participants he had interviewed about an assisted

³ *TCPS*, *supra* note 2.

⁵ For an overview of challenges that have occurred in the United States and Canada, see J. Lowman & T.S. Palys, “The Ethics and Law of Confidentiality in Criminal Justice Research: A Comparison of Canada and the United States.” (2001) 11 *Int’l Crim. Just. Rev.* 1. [hereinafter *Confidentiality in Criminal Justice Research*]

⁶ For example, the *TCPS*, *supra* note 2, asserts that, “The researcher is honour-bound to protect the confidentiality that was undertaken in the process of free and informed consent, to the extent possible within the law. The institution should normally support the researcher in this regard....”

⁷ See Social Sciences and Humanities Research Ethics Special Working Committee (SSHWC). *Reconsidering Privacy and Confidentiality in the TCPS: A Discussion Paper*. (2005) Online: <<http://pre.ethics.gc.ca/english/workgroups/sshwc.cfm>> Date accessed: 29 March 2006

⁸ See J.H. Wigmore. *A Treatise on the System of Evidence in Trials at Common Law, Including the Statutes and Judicial Decisions of All Jurisdictions of the United States, England, and Canada*. (Boston: Little, Brown and Company, 1905). For a discussion of the application of the Wigmore test to the researcher-participant relationship see T.S. Palys & J. Lowman. “Ethical and Legal Strategies for Protecting Confidential Research Information.” (2000) 15 *Can. J. of Law & Soc.* 39. [hereinafter *Ethical and Legal Strategies*]; T.S. Palys & J. Lowman. “Anticipating Law: Research Methods, Ethics and the Common Law of Privilege.” (2002) 32 *Soc. Method.* 1. [hereinafter *Anticipating Law*].

Ted Palys and John Lowman

suicide. Ogden asserted research-participant privilege by providing evidence that he met the four Wigmore criteria, and the Coroner accepted his argument.⁹

The respect the Coroner showed for the researcher-participant relationship and his recognition of a research-participant privilege is not unusual. An examination of documented cases of legal challenges to research confidentiality in North America reveals that the courts generally have gone out of their way to ensure that research participants are protected.¹⁰ Indeed, by incorporating the requirements of the Wigmore criteria into research procedures, the researcher substantially reduces the chances of being forced to identify a research participant to the point that the likelihood appears minuscule.

Given this track record, one might wonder what the problem is. Although North American jurisprudence suggests that a strong defence of research confidentiality can be mounted using the Wigmore test, the case-by-case after-the-fact analysis of privilege it involves poses at least five problems.

An uncertain privilege may be no better than having no privilege at all

The first three Wigmore criteria ask whether the communications involve an understanding between researcher and participant that their communications are confidential, whether confidentiality is essential to those communications occurring, and whether the relationship – researcher-participant in this case – is a socially valued one that the courts should preserve. Researchers can gather data relatively easily reflecting on the first two criteria,¹¹ and there is bountiful evidence suggesting a positive answer to the third.

Upon concluding that the first three criteria are met, the court then considers whether the loss to the research enterprise if a disclosure were to occur would create a greater injury than the benefit to be gained by having the confidential information made available to the court. It is this fourth criterion that creates the uncertainty, because the particular legal elements that will enter into the balancing of interests only become known when a specific legal action is initiated and a subpoena issued. But at the beginning of our research how can we anticipate just what the legal situation might be against which our own situation would be compared? And even if we can make a good guess about the possible threat – as Russel Ogden did when, in his original proposal, he noted that if anyone were to be interested in challenging his research confidences it would likely be the Coroner – who can say whether the judge who makes that decision will come to the same decision the researcher did before commencing the research? The court record to date gives grounds for optimism, but there are no guarantees the courts will protect research confidences. Consequently, researchers are forced to consider what they would do if, in the last instant, the court ordered disclosure of confidential information that could harm a research participant. The researcher would face much the same kind of dilemma that New York Times journalist Judith Miller faced when she spent 85 days in jail

⁹ *Inquest of Unknown Female* (1994). “Decision 91-240-0838” Vancouver Regional Coroner, Burnaby, B.C. [hereinafter, *Inquest*]

¹⁰ *Anticipating Law*, *supra* note 9; J. Lowman & T.S. Palys. “Subject to the Law: Civil Disobedience, Research Ethics and the Law of Privilege.” (2003) 33 *Soc. Method.* 381. [hereinafter *Subject to the Law*].

¹¹ See *Ethical and Legal Strategies*, *supra* note 7.

“to preserve the time-honoured principle that a journalist must respect a promise not to reveal the identity of a confidential source.”¹²

One of the basic principles of natural justice is that law should be known in advance. In the case of common law analysis of privilege, we know in advance that the Wigmore test is likely to be used. But, depending on the circumstances, we do not know if the privilege will be recognized, and it is in that sense that the law of confidentiality is made after the fact. That puts researchers in a very difficult position because, if research participants are to be given a confidentiality assurance they can trust, they need to know before they provide sensitive information that their names will not be divulged to anyone, a court included.

In *Jaffee v Redmond*¹³ the U.S. Supreme Court recognized the difficulties that after-the-fact determination of privilege creates when it considered the U.S. Court of Appeals’ argument that psychotherapist-patient privilege should be qualified by a balancing of considerations reminiscent of Wigmore criterion number four:

We reject the balancing component of the privilege implemented by that court and a small number of States. Making the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation “must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”

Although the Wigmore test provides a mechanism to protect those who provide identifiable data in confidence, and although U.S. courts have generally protected confidential research information in the past, as did the Vancouver Coroner, we cannot be sure that Canadian courts will follow suit. The most reliable way to impress upon the courts the value of research confidentiality, and offer some certainty to research participants that their confidences are safe, is to enshrine the protection of research confidentiality in a statute.

The desire to comply with the law may create pressures to limit confidentiality in a way that jeopardizes research and threatens academic freedom

The uncertainty of what Canadian courts will do when faced with an assertion of privilege has led some researchers and REBs to promise to maintain confidentiality unless a legal authority orders the information to be disclosed.¹⁴ The rationale for limiting confidentiality by law makes subservience to law

¹² S. Edwards, “Freed Reporter Talks to CIA Leak Inquiry” *Vancouver Sun* (1 October 2005) A15.

¹³ *Jaffee v. Redmond*. 518 U.S. 95 (1996).

¹⁴ See J. Lowman & T. S. Palys. “Ethics and Institutional Conflict of Interest: The Research Confidentiality Controversy at Simon Fraser University” (2000) 2. *Soc. Practice: A J. of Clin. & Applied Soc.* 245. [hereinafter *Institutional Conflict of Interest*].

Ted Palys and John Lowman

absolute, so that researchers can do no more than alert prospective participants to the possibility of a court order for disclosure, and the researcher's intention to comply.¹⁵ James Ogloff – former President of the Canadian Psychological Association, Chair of CPA's Committee on Professional Ethics, and at one time the Chair of the Simon Fraser University ethics committee – took this argument a step further when he explained:

The fact is that as a researcher and as a member of the Committee on Ethics I simply do not believe that I would be upholding my duty to prospective participants were I to lead them to believe that somehow their confidentiality could be protected – or that the University could somehow fight to protect their confidentiality should the research records be demanded by court order.¹⁶

The idea that there is not even a defence to be made flies in the face of the evidence. It is correct with respect to statutory law in Canada, but ignores common law. Worse, it invites a research form of *caveat emptor* surrendering research-participant rights without even fighting the battle in court. This approach is not consistent with the standards subsequently articulated in the TCPS, which affirm that the researcher is, at minimum, "honour-bound" to protect confidentiality "to the extent possible within the law."¹⁷ It suggests a dim view of the value the judiciary would attach to the research enterprise, surrenders participant rights that are not the prerogative of the researcher to surrender, and conveniently absolves researchers and their institutions from having to spend the time and resources necessary to assert research-participant privilege using the Wigmore test.

With confidentiality made impossible, the emphasis is placed on informed consent, and justified as an ethic respecting research subject autonomy. As Ogloff explains:

My first obligation - as stated in the Canadian Code of Ethics for Psychologists - is to the respect for dignity of persons. I believe that the principle that underlies this is one of respect for the individual autonomy of our participants. As a result, the position I take is really quite simple: We must provide prospective participants with the necessary information in the informed consent process to ensure that they can make a reasonable decision of whether to participate in our studies.¹⁸

Certainly researchers must provide enough information for research participants to make truly informed consent. But informed consent is not an end in itself to the exclusion of other ethical principles, and it should *never* be used to justify abandoning research participants before even getting to court. The *caveat*

¹⁵ See B. Clayman. "The Law of the Land" *Simon Fraser News* (30 October 1997) 5.

¹⁶ J. Ogloff, unpublished emailed memorandum of 18 December 1997 to other members of the Simon Fraser University Research Ethics Review Committee and Lowman and Palys articulating his view of the committee's then-policy of requiring researchers to limit confidentiality. [Hereinafter *Unpublished Memorandum*]. For a similar statement to therapists advocating they limit confidentiality, see J. Ogloff "New threats to confidentiality safeguards." (1996) *Psynopsis*. Online: <<http://www.cpa.ca/Psynopsis/safeguar.html>> Date accessed: 29 March 2006.

¹⁷ *TCPS*, *supra* note 2.

¹⁸ *Unpublished Memorandum*, *supra* note 15.

emptor approach effectively argues that it is ethical for a researcher to violate confidentiality as long as s/he warns prospective participants about limitations to confidentiality. It creates a situation where researchers can hand information over to the courts without even putting up a fight. Such a strategy is a perversion of research ethics, a place where “ethics” morphs into “liability management” according to the unabashed self-interest of the researcher (who still gathers the data, writes the articles, and basks in the fame), his or her institution (who still collects the overhead and enhances its reputation) and society in general (which benefits from the knowledge produced). In the process, researchers abdicate their fiduciary duty by downloading to the research participant – who among all those involved is the most vulnerable and least likely to understand the legal issues involved – the risk of court-ordered disclosure. Surely this is a form of exploitation of the research participant that would violate one of the TCPS’s prime directives: “Part of our core moral objection would concern using another human solely as a means toward even legitimate ends.”¹⁹

The question that *caveat emptor* ethics raises for researchers who would limit confidentiality is, “Where does ‘ethical dialogue’ with the participant about legal realities cross into ‘liability management and exploitation’?” What is the *ethical* justification for gathering information you know you would give up solely because a court orders you to do so? Researchers should consider not asking for this information or not recording it in a form that would allow it to be accessed by a third party. However, such strategies will not be an option for researchers who know the identities of their research participants, as they can be subpoenaed to disclose what they know in addition to what they record or write.

A further problem with any form of *a priori* limitation on confidentiality is that it impedes the university’s mandate to investigate all aspects of society, as well as the ability of researchers in non-university agencies and institutes to contribute to social debate regarding society’s most controversial and pressing social issues. Why would any criminal offender provide information about their past crimes if they knew the researcher would hand it over to a court? Why would any corporate whistleblower tell a researcher about questionable corporate practices if they knew their employer could obtain a court order to identify them? Why would people attending a community outreach programme tell researchers about risky sexual practices if they thought the information could be used against them to lay charges or deny benefits? A research shield law would go a long way to resolving these dilemmas.

Researchers who place ethics first must consider defying the law in order to be ethical

The traditional approach to research confidentiality in social science disciplines that engage participants *in situ* – political science, sociology, criminology and anthropology, for example – is to resist third party challenges even to the point of defying a court order for disclosure if it were to come to that.²⁰ In most cases

¹⁹ TCPS, *supra* note 2.

²⁰ In Criminology, see *e.g.*, M. Wolfgang “Criminology: Confidentiality in Criminological Research and Other Ethical Issues.” (1981) 72 *J. Crim. L. & Criminology* 345. Even now, the code of ethics of the Academy of Criminal Justice

Ted Palys and John Lowman

this will involve the assertion of a common law privilege, but even when the researcher takes care to anticipate all the legal requirements of such an assertion, and even though the courts have been very respectful of the rights of research participants in such situations,²¹ one never knows ahead of time what the courts will decide. Researchers should not have to defy the courts to be ethical, but are forced to entertain that possibility given the current state of law.

A research shield law would help resolve that problem by changing the burden of proof; instead of promising ethical behaviour and hoping the courts will support them, researchers and their participants would be guaranteed protection, subject only to being trumped by a Charter challenge or some equally compelling argument – with the onus on the person(s) mounting the challenge to make their case.

Researchers who place ethics first must consider defying the law in order to be ethical

Although the *TCPS* urges researchers and their institutions to exhaust all legal means to protect research-participant confidentiality, its admonition in this regard may not be compelling. Experience in the United States, where challenges to research confidentiality have been more numerous than in Canada, shows considerable variation in institutions' responses to such challenges. In several cases from the early 1970s to the late 1990s, Harvard University has been exemplary in its response – and has won important legal victories.²² In contrast, the University of California at Berkeley gave poor legal advice to Richard Leo when research confidentiality was challenged in his research on police interrogation,²³ as also was the case with the State University of New York at Albany when Mario Brajuha was subpoenaed and asked to testify about his research on “the sociology of the American restaurant.”²⁴ In other cases, the University of Georgia Medical School²⁵ and Washington State

Sciences asserts that, “Confidential information provided by research participants should be treated as such by members of the Academy, even when this information enjoys no legal protection or privilege and legal force is applied.” (Section B-19). Online: <http://www.acjs.org/pubs/167_671_2922.cfm> Date accessed: 29 March 2006.

²¹ See *Ethical and Legal Strategies*, *supra* 7.

²² *Richards of Rockford v. Pacific Gas and Electric* 71 F.R.D. 388 (N.D. Cal. 1976); J. Carroll & C. Knerr, “Confidentiality of Social Science Research Sources and Data: The Popkin Case.” (1973) 6. *Pol. Sci. Q.* 268; *In re Michael A. Cusumano & David B. Yoffie [United States of America v. Microsoft Corporation]*, No. 98-2133, (1st Cir. 1998) Online: <<http://www.law.emory.edu/1circuit/dec98/98-2133.01a.html>> Date accessed: 29 March 2006.

²³ R. Leo. “Trial and Tribulations: Courts, Ethnography, and the Need for an Evidentiary Privilege for Academic Researchers.” (1995) 26 *Amer. Sociologist* 113. [hereinafter *Trial and Tribulations*]

²⁴ *In re Grand Jury Subpoena Dtd. January 4*, 750 F.2d 223 (2nd Cir. 12/13/1984); M. Brajuha & L. Hallowell, “Legal Intrusion and the Politics of Field Work: The Impact of the Brajuha Case.” (1986) 14 *Urban Life* 454.

²⁵ See *R.J. Reynolds Tobacco Co., v. Fischer*, 427 S.E.2d 810, 811 (Ga. Ct. App. 1993); P.M. Fischer, “Science and Subpoenas: When Do the Courts Become Instruments of Manipulation?” (1996) 59 *L. & Contemp. Probs.* 159.

University at Pullman²⁶ did such a poor job they actually undermined the efforts of their own researchers to resist subpoenas.²⁷

Traynor²⁸ has suggested that universities should have policies in place to ensure a quick and effective response to any subpoena. He observes that too many researchers delay contacting legal authorities in the hope their problem will disappear, and often end up undermining their own case because of a lack of understanding of what an assertion of privilege would entail, and how it is dealt with as part of legal process. Canadian institutions do not seem to be any better prepared, with the exception of Kwantlen University College described below.

There are other complications. First, subpoenas challenging research confidentiality are relatively rare. Like earthquake preparedness, they may be placed on the back burner until a crisis arises.

Second, few lawyers have the specialized legal knowledge *and* understanding of the research enterprise to mount an effective legal defence. The literature is still developing – especially in Canada relative to the United States where by far the most cases have occurred.

Third, university administrations and their legal counsel have conflicting responsibilities. Concerns about costs may conflict with an institution's resolve to defend academic freedom when it comes to committing the funds to fight a subpoena. Kwantlen University College's assurance to Ogden in 2004 that it will stand by his research on assisted suicide if and when challenges to confidentiality arise came with a commitment to set funds aside for such an eventuality. This undertaking is a stark contrast to Ogden's initial experiences at Simon Fraser University – where liability and image management were the bigger priorities for the university administration when they initially considered the issue²⁹ – and again at Exeter University, where liability considerations and institutional conflict of interest conspired to destroy Ogden's Doctoral research.³⁰ Hopefully university administrations in Canada will adhere to the TCPS principle that any ethics review administration "has the appropriate

²⁶ *In re Grand Jury Proceedings. James Richard Scarce*, 5 F.3d 397 (9th Cir. 09/17/1993); R. Scarce. "(No) Trial (But) Tribulations: When Courts and Ethnography Conflict." (1994) 23 *J. Contemp. Ethnography* 123; R. Scarce. "Good faith, bad ethics: When scholars go the distance and scholarly associations do not." (1999) 24 *L. & Soc. Inq.* 977.

²⁷ It is noteworthy that three of these four cases (Leo at Berkeley; Brajuha at SUNY-Albany; and Scarce at Washington State) involved graduate students. Ogden's experiences at SFU and Exeter arose when he was a graduate student as well. The TCPS (*supra* note 2) neither makes a distinction between the ethical responsibilities of graduate students and faculty members, nor in its admonition that research confidentiality should be defended.

²⁸ M. Traynor. "Countering the Excessive Subpoena for Scholarly Research." (1996) 59 *L. & Contemp. Probs.* 119.

²⁹ See *Ogden v. Simon Fraser University* [1998] B.C.J. 2288 Burnaby Registry No. 26780.

Online: <<http://www.sfu.ca/~palys/steinbrg.htm>> Date accessed: 29 March 2006.; See also N. Blomley & S. Davis, *Russel Ogden Decision Review: A Report to the President of Simon Fraser University* (British Columbia: Simon Fraser University, 1998). Online: <<http://www.sfu.ca/~palys/ogden.htm>> Date accessed: 29 March 2006.

³⁰ K. Lemon "Secret Files, Subpoena and Suicide" (2005) 2 *The Peer Review*. Online: <<http://thepeerreview.ca/view.php?aid=14>> Date accessed: April 3, 2006

Ted Palys and John Lowman

financial and administrative independence to fulfil its primary duties,”³¹ and where legal counsel for the university cannot serve as the “legal” member of the institution’s REB.³² This principle should extend to the legal counsel for the researcher who is defending research-participant interests.

Fourth, many community researchers are based in agencies that have small or no budgets to allow them to deal with legal conflicts, which makes them vulnerable targets for intimidation, even though they are doing research that gathers evidence that contributes to our understanding of controversial phenomena, and have the same ethical obligations as academics toward their participants.

Once again, the difficulty of ensuring the availability of a quick and effective legal response would be resolved by the creation of a research shield law, because it would place the onus on the person challenging the research confidence to show why the privilege should be set aside, instead of requiring the researcher to demonstrate why the privilege should be recognized.

After-the-fact protections leave researchers and their participants a target for over-zealous prosecutors and attorneys

Notwithstanding how willing researchers and institutions are to defend research confidentiality, and how willing courts have been to protect research participants, after-the-fact common law protections leave researchers and research participants vulnerable to attack by prosecutors and plaintiff attorneys.

The only documented case of a researcher in Canada being subpoenaed and asked to divulge information that would identify a research subject involved Russel Ogden.³³ From the point of view of mounting a common law claim of privilege, Ogden’s methodological and ethical approach was exemplary. He appeared at the inquest and cooperated with the Coroner in the provision of general information arising from his research, but refused to share any information that would identify his participants. When challenged, he mounted an appropriate legal defence and won evidentiary privilege for his research participants. At the same time he avoided a charge of contempt of court that could have landed him in jail.

Ogden has continued his research on assisted suicide and is now studying the consensual “deathing” industry. Part of this research involves scrutiny of social reactions to those involved in consensual death, as occurs when persons are charged with crimes such as “counselling suicide” or “aiding and abetting a suicide,” a violation of section 241(b) of the *Criminal Code* of Canada. When such charges were laid against a Vancouver Island woman, Ogden attended the preliminary hearing early in 2003 to observe and take notes. Outside the courtroom the Crown prosecutor informed Ogden that he was a “person of interest” in the case because of his presumed research-related knowledge, and subsequently subpoenaed him, apparently in the vague hope that he might have information that could aid the prosecution.

Shortly thereafter, a subpoena arrived. It was almost ten years after Ogden received the Coroner’s subpoena. Ogden sent a letter to the Crown that asked for the specific reason for the subpoena, stated his intention to have it quashed, and asked the Crown to withdraw it because of its impact on his research.

³¹ *TCPS*, *supra* note 2.

³² *Ibid.*

³³ See *Inquest*, *supra* note 8; see also *Institutional Conflict of Interest*, *supra* note 13.

Although the subpoena was later withdrawn, it had two direct impacts on the research: (1) notwithstanding the trust inspired among research participants by his earlier defence of participant confidentiality in Coroner's Court, the new subpoena indicated to members of the deathing community that Ogden was a target of legal authorities, thereby making them more skittish about being seen talking to him or participating in his research; and (2) because prospective witnesses are not allowed to hear the testimony of others until they have given theirs, it meant even the observational component of Ogden's research was interrupted. No longer could he attend and take notes about the preliminary hearing.

Two of Ogden's colleagues notified other researchers about the subpoena in an effort to mobilize resistance. An open letter was sent to a national ethics listserv that encouraged the three granting council Presidents to support Ogden's resistance to the subpoena and press for the development of statute-based protections for research confidentiality so that it would not happen again. When it was clear that any effort by the Crown to subpoena Ogden would be an uphill battle, the Crown withdrew the subpoena, saying simply that he no longer believed that Ogden's testimony would be required.

In light of the damage this second subpoena did to his research even though it was withdrawn, Ogden contacted British Columbia's Attorney-General (AG) seeking a research exemption from processes of subpoena and search and seizure. The AG responded by saying he has no jurisdiction to provide such an exemption; an amendment to the Criminal Code would be needed. The British Columbia AG referred Ogden to the federal Minister of Justice. After Ogden sent him several letters in late 2003 and early 2004, the Minister responded that the issue was not in his jurisdiction, because Ogden's research was "health research," and offered to pass his letter to the Minister of Health. The Minister of Health confirmed receipt of the letter, but had not replied as of the time of Canada's February 2006 election when the Liberal government was voted out of office.

Approximately a year after the first Vancouver Island subpoena arrived – at about the time Ogden's letter was being passed from the Minister of Justice to the Minister of Health – a new Crown attorney assigned to the case again subpoenaed Ogden. Apparently, the subpoena was a fishing expedition, much like the first a year before. Ogden responded with the same diligence and intensity, this time aided by legal counsel for Kwantlen University College, where he is now a faculty member. Kwantlen's willingness to stand behind Ogden's research sent a clear message that such fishing expeditions would not be tolerated³⁴ and, again, the Crown withdrew the subpoena. But the damage was done. The message to prospective research subjects is that Ogden is a marked man, and that he can expect this kind of harassment as long as there is no research-participant shield law.³⁵

³⁴ After Ogden's negative experiences at Simon Fraser University and Exeter University, Kwantlen University College deserves recognition for being the first institution to understand what is at stake for the research enterprise and to rise to the challenge.

³⁵ The description above of Ogden's second and third subpoenas is based on a 17 March 2005 email communication.

Ted Palys and John Lowman

Post-hoc protections are not enough

Although the Wigmore test is helpful insofar as it provides a means for claiming privilege and the track record so far is a positive one, the concerns above combine to suggest that basing the protection of research participants on post hoc protections alone is highly problematic. Perhaps a controversial case such as Ogden's might come along, go all the way to the Supreme Court, and result in the establishment of a class privilege. But it may not. Even in the United States where many such cases have been heard and participant interests protected, a research-participant class privilege has not been established.³⁶

The reconciliation of potential conflicts between ethics and law over research confidentiality will more likely have to occur in legislation. The remainder of this paper discusses what statute-based protections for research confidentiality might look like.

Although there are no statutes protecting university researchers in Canada from court-ordered disclosure, researchers at Statistics Canada and those who participate in their research are protected. Similar protections are in place for U.S. Census Bureau research participants. But beyond the census, U.S. researchers also are eligible to apply for certain statute-based protections under the Common Rule. As the history and legal basis of these protections is described elsewhere,³⁷ we begin with a summary of the different statutes that currently exist, and then identify some of the principles that statute-based protections for research participants would need to fulfil in order to pass political muster and survive legal challenges.

Existing Statute-Based Privileges for Research Confidentiality

Two different approaches to statute-based protections for research confidentiality can be distinguished: (1) categorical statutory protection of the sort that protects government census institutions; and (2) protection certificates granted on a case-by-case basis.

Categorical Statutory Protection

An example of categorical protection is the privilege provided to Statistics Canada researchers and their participants via the *Statistics Act*. Originally enacted to protect census information that Canadian citizens are compelled to provide the government, this is now a categorical privilege in the sense that it protects all Statistics Canada research participants. And it is strictly adhered to. For example, in 2003 the Chief Statistician refused to comply with a Department of Justice Canada directive to Statistics Canada to open up

³⁶ This is in part because the U.S. Supreme Court has yet to hear a case involving a claim of research-participant privilege, and it is only that Court that can create a binding recognition of privilege, as they did in *Jaffee v Redmond* for the therapist-client relationship; the highest level courts involved in adjudications regarding research participant privilege have been District Courts of Appeal. Also, the advent of Confidentiality Certificates and Privacy Certificates has likely had the effect of dissuading third party challenges to the research that they protect.

³⁷ *Confidentiality in Criminal Justice Research*, *supra* note 4.

individual-level data from the 1906 census to interested researchers.³⁸ We have yet to find a case in which Statistics Canada's privilege has been challenged, or where any Statistics Canada researcher has been disciplined for violating a confidence.

A similar statutory confidentiality protection for non-agency research could be created by: (a) an amendment to the *Statistics Act* that expands the privilege, responsibilities and penalties that currently apply only to Statistics Canada employees and their research participants; (b) an amendment to section 10 of the *Canada Evidence Act* that adds "individual-level or otherwise identifiable information obtained in duly approved research" to the list of inadmissible sources of evidence that already appears in that section;³⁹ or (c) altogether new legislation that creates a privilege for research participants as various authors have suggested.⁴⁰ Rather than protecting a category of research or research participants, the other two types of statutory protection define certain categories of research participants to protect, and then award certificates on a case-by-case basis to researchers who, on the basis of their meeting the relevant eligibility requirements, must apply for them.

Case-by-case Consideration: Confidentiality certificates

"Confidentiality certificates" provide the first kind of case-by-case protection. They have existed in the United States since 1970 for certain kinds of "health" research. The certificates are available on a project-by-project basis on application to the National Institutes of Health (NIH).⁴¹ Projects are eligible whether NIH funds them or not. The primary requirement for confidentiality certification is that confidentiality must be essential for the gathering of valid

³⁸ See 2002-2003 Annual Report of the Office of the Information Commissioner of Canada, particularly Chapter 1: 20th Anniversary Year in Review, B. Privacy vs Openness – Census Records. Online: <http://www.infocom.gc.ca/reports/section_display-e.asp?intSectionId=335> Date accessed: 29 March 2006.

³⁹ *Canada Evidence Act*, R.S.C. 1985, C-5. Section 10 of the *Act* states, "(10) Nothing in this section renders admissible in evidence in any legal proceeding (a) such part of any record as is proved to be (i) a record made in the course of an investigation or inquiry; (ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding; (iii) a record in respect of the production of which any privilege exists and is claimed; or (iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record; (b) any record the production of which would be contrary to public policy; or (c) any transcript or recording of evidence taken in the course of another legal proceeding."

⁴⁰ Articles that argue for the establishment of what has variously been described as an "academic privilege" or "researcher's privilege" include Leo, *Trial and Tribulations*, *supra* note 22; F. Levine & J.M. Kennedy. "Promoting a Scholar's Privilege: Accelerating the Pace." (1999) 24 *L. & Soc. Inq.* 967 [hereinafter *Promoting a Scholar's Privilege*]; R.H. McLaughlin. "From the Field to the Courthouse: Should Social Science Research be Privileged?" (1999) 24 *L. & Soc. Inq.* 927. [hereinafter *From the Field to the Courthouse*]; O'Neil, R.M. "A Researcher's Privilege: Does any Hope Remain?" (1996) 59 *L. & Contemp. Probs.* 35 [hereinafter *A Researcher's Privilege*].

⁴¹ L.E. Wolf, J. Zandecki & B. Lo. "The Certificate of Confidentiality Application: A View From the NIH Institutes." (2004) 26 *IRB: Ethics & Human Res.* 14.

Ted Palys and John Lowman

information. The list of examples where NIH recognizes this to be the case includes studies gathering information with respect to:

- sexual attitudes, preferences or practices;
- the use of alcohol, drugs or other addictive products;
- illegal conduct;
- information that, if released, could reasonably be damaging to an individual's financial standing, employability, or reputation within the community;
- information that would normally be recorded in a patient's medical record, and the disclosure of which could reasonably lead to social stigmatization or discrimination;
- information pertaining to an individual's psychological well being or mental health
- genetic information.⁴²

The protection offered by possession of a confidentiality certificate is considerable:

Certificates of Confidentiality (...) protect identifiable research information from forced disclosure. They allow the investigator and others who have access to research records to refuse to disclose identifying information on research participants in any civil, criminal, administrative, legislative, or other proceeding, whether at the federal, state, or local level. Certificates of Confidentiality may be granted for studies collecting information that if disclosed could have adverse consequences for subjects or damage their financial standing, employability, insurability, or reputation. By protecting researchers and institutions from being compelled to disclose information that would identify research subjects, Certificates of Confidentiality help achieve the research objectives and promote participation in studies by assuring confidentiality and privacy to participants.⁴³

Certification brings with it the following guarantee:

Research or statistical information identifiable to a private person shall be immune from legal process, and shall only be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative, or administrative proceeding with the written consent of the individual to whom the data pertains.

There has only ever been one legal challenge to confidentiality certificates, which came shortly after they were developed. The court upheld the certificates and referred to their protection as "absolute,"⁴⁴ although, in theory, they would be open to a constitutional challenge. Researchers who receive one are expected to treat their data in the strictest confidence. However, presumably in recognition of the differing ethical sensibilities that researchers may bring to the situation, certain "voluntary disclosures" are permissible as long as participants are made aware of any limitations the researcher imposes as part of the consent process. NIH lists the following possibilities:

⁴² See National Institutes of Health. "Certificates of Confidentiality Kiosk." (2004) Online: <<http://grants.nih.gov/grants/policy/coc/index.htm>> Date accessed: 29 March 2006

⁴³ *Ibid.*

⁴⁴ *People v. Newman*, 32 N.Y. 2d 379, 298 N.E. 2d 651, 345 N.Y.S. 2d 502 (1973).

Case-by Case Consideration: Privacy Certificates

“Privacy certificates” administered by the U.S. National Institute of Justice (NIJ) take a slightly different approach to protection of confidential research information.

There are three major differences between privacy and confidentiality certificates. First, while confidentiality certificates deal with “health research,” including health research where information about illegal behaviour is sought, NIJ privacy certificates are intended for criminological research only. Second, while confidentiality certificates are available to any researcher regardless of whether they are funded by NIH or not, privacy certificates are available only for research projects funded by NIJ. Third, while confidentiality certificates represent NIH’s assurance of confidentiality, privacy certificates are a researcher-designed statement of the specific procedures by which confidentiality will be maintained. Once NIJ approves those plans they have statutory protection. In this way, not only are protections of confidentiality guaranteed, but also there is a statement on record about how that objective will be achieved. As NIJ explains:

[M]uch of the research conducted by the National Institute of Justice (NIJ) involves collecting data on individuals through direct observation, interview or survey, case records, crime reports, and other administrative records. These activities raise a number of ethical and legal concerns about harm or embarrassment to individuals that must be addressed before the research may be conducted. NIJ and recipients of NIJ funding are subject to the statutory and regulatory confidentiality requirements of 42 USC §3789g and 28 CFR Part 22. Both 42 USC §3789g and 28 CFR Part 22 provide that research and statistical information identifiable to a private person is immune from legal process and may only used or revealed for research purposes.

The regulations at 28 CFR Part 22 require all applicants for NIJ support to submit a Privacy Certificate as a condition of approval of a grant application or contract proposal that contains a research or statistical component under which personally identifiable information will be collected. The Privacy Certificate is the applicant's assurance that he/she understands his/her responsibilities to protect the confidentiality of research and statistical information and has developed specific procedures to ensure that this information is only used or revealed in accordance with the requirements of 42 USC §3789g and 28 CFR Part 22.⁴⁵

Researchers face potentially severe penalties for violating these provisions. Identifiable information is immune from legal process and cannot be admitted as evidence “in any action, suit or other judicial, legislative, or administrative proceedings.” As far as we know, privacy certificates have never been legally challenged although, presumably, they could be subject to a constitutional challenge – for example, in the event that a person’s innocence is at stake.

⁴⁵ National Institutes of Justice. Privacy Certificate and Confidentiality Requirements of NIJ Funding.” (2003) Online: <http://www.ojp.usdoj.gov/nij/funding/humansubjects/hs_11.html> Date accessed: 29 March 2006

Criteria for Prospective Protections

Both categorical and case-by-case styles of statutory protection have proven highly effective to the extent that they have rarely been challenged in court – and as far as we can ascertain, never successfully. To help develop criteria for the design of statute-based research confidentiality protections in Canada, we next consider the respective advantages and disadvantages of case-by-case and categorical approaches.

Whose Privilege Should It Be?

U.S. commentators have tended to describe the desired protection as a “researcher’s privilege” or “academic privilege.”⁴⁶ While statutory protection of research subjects will almost certainly function to enhance academic freedom, there is a fundamental problem with this characterization of the evidentiary privilege we are seeking to establish. First, there is little or no justification for a *researcher* evidentiary privilege in law. A review of legal cases in which research confidences were challenged and a claim of privilege invoked shows that, while courts were willing and often went out of their way to extend protection to research participants, they were willing to protect researchers only to the point of ensuring they were not victims of harassment, or to ensure that academic freedom was not otherwise being undermined.⁴⁷

Second, the ethical duty to protect research confidentiality is grounded primarily in the obligation to protect participants who voluntarily share information with researchers, not for the protection of researchers or their interests, even though those, too, may be socially valued. This was the primary weakness of the proposed *Thomas Jefferson Researcher’s Privilege Act* that died on the order paper when Bill Clinton finished his U.S. Presidency; its main purpose was to protect researchers’ intellectual property,⁴⁸ and only indirectly protected the people who provide research information. Intellectual property is worth protecting, but that is a different issue.

When it comes to criminal and civil proceedings, researchers have the same duty as anyone else to share information with the courts - as long as it is practical and feasible for them to do so, their academic freedom is not compromised in the process, and providing information does not violate their promise of confidentiality. As with lawyer-client privilege, where privilege in common law is designed to protect the client, *not* the lawyer, so research-participant privilege should protect the research participant, not the researcher.⁴⁹ This approach is consistent with the growing body of privacy-protection legislation that requires persons whose identities are associated with written materials – and not simply those who compile or manage the materials – to consent to the release of those materials.

⁴⁶ For example, see *Trial and Tribulations*, *supra* note 22; *Promoting a Scholar’s Privilege*, *supra* note 39; *From the Field to the Courthouse*, *supra* note 39; *A Researcher’s Privilege*, *supra* note 39.

⁴⁷ See *Confidentiality in Criminal Justice Research*, *supra* note 4; See also *Anticipating Law*, *supra* note 7.

⁴⁸ See <<http://thomas.loc.gov/cgi-bin/query/z?j106:I12786;j106TELEPHONE.html>> Date accessed: 29 March 2006.

⁴⁹ See *Law of Evidence*, *supra* note 3.

Towards a Research-Participant Shield Law

For all these reasons, any research shield law should be formulated to protect research participants indicating that the privilege is theirs, not the researcher's.

What Areas of Research Should a Shield Law Protect?

The U.S. model with respect to both NIH certificates of confidentiality and NIJ privacy certificates links them to certain areas of research – and, in the latter case, also with a source of funding. The problem with these approaches is that they do not extend protection to all the kinds of research in which confidentiality is a prerequisite to collecting valid and reliable data. Both the success and limitation of confidentiality and privacy certificates are evident in the way U.S. researchers have been arguing for more of the same – indicating both that the protections are seen positively, and that the major problem with their constitution is how they leave out entire domains of research that have the same ethical obligations as the protected areas of research. While the problems and prospects of third party challenges in the areas of health and criminological research are very real, there are other areas of research – such as business, anthropology, political science, and computing science – where confidentiality often is vital to the gathering of valid data, where third party challenges have been encountered, and hence where protection is needed. All researchers who share the ethical obligation to protect the confidentiality of their research participants where confidentiality is essential for the collection of valid data should be eligible for protection.

Ethical obligations regarding confidentiality exist whether the research is funded or not. As a corollary of the principle that protections should follow the ethical obligation, research should be eligible for shield law protection irrespective of whether it is funded or not, regardless of the source of funding, and regardless whether it is done by researchers in universities or other social agencies, institutes or organizations.

On what basis should certificates be granted?

There is a simplicity and elegance to the Canadian *Statistics Act's* categorical privilege that is appealing because it recognizes that confidentiality is integral to research, requires no bureaucracy to administer, and thereby circumvents any concerns one might have of administrative bodies – whether embedded within the State apparatus or academia – using their discretion in a way that curtails academic freedom.

Dealing with the privilege in this way also makes it more accessible to researchers working outside of the university context – in agencies, institutes and other research organizations – who have the same ethical obligations to their research participants, thereby allowing for more complete and comprehensive debate regarding controversial social issues.

And while the categorical privilege it would confer is not in theory absolute – any law is open to *Charter* challenge or an over-riding ethical and legal principle such as the “innocence at stake” exemption – it creates a level of comfort that should satisfy both researchers and those who participate in their research, because it places the burden of proof on those who would seek to have the privilege set aside. However, the comprehensive nature of this protection is also its weakness, since it may leave the protection more open to

legal challenge. No matter how important the principle of maintaining confidentiality may be to certain types of research, the fact is that confidentiality is not *always* necessary for research to proceed, nor is maintaining it also always the “ethical” thing to do.⁵⁰ Without any requirement for a case-by-case analysis of research proposals, one can also imagine that in some situations a challenge could be made as to whether the activity can even be considered “research” – as opposed to what the TCPS designates as “quality assurance” and “program evaluation,” for example – which may be taken to undermine the validity of the claim should the confidence be challenged. Such issues may make the courts more likely to question a categorical privilege than one that involves some kind of case-by-case consideration of research proposals before certification occurs.

The key consideration of a case-by-case analysis is whether confidentiality is essential to the achievement of the research objectives. Such an analysis is consistent with Wigmore criterion two – confidentiality must be essential to the interaction for it to be considered privileged. Indeed, the creation of a case-administered shield law can be seen as asking a duly constituted authority to consider the importance of confidentiality to the research prior to carrying it out rather than after the fact, as is the case with a common law analysis.

A case-by-case certification process could begin by: (a) the researcher affirming in a proposal that confidentiality is essential to his or her particular research project; and (b) a Research Ethics Board (REB) or agency responsible for administering the certificates accepting that affirmation. In the case of a categorical privilege, a court might well ask whether confidentiality really is essential to all the research included in the category. Making the determination of the need for confidentiality *before* the research takes place makes it that more likely that a court would protect information provided under the auspices of a confidentiality certificate.

That said, it also should be noted that this same balancing of considerations would occur if a hypothetical Canadian confidentiality certificate were to be challenged, just as it would if a class privilege were to be challenged. In this sense, the creation of new bureaucratic process to review confidentiality applications on a case-by-case basis may offer so small a legal advantage that it is far easier to write a research shield law to protect a categorical privilege and confront exceptions only if and when they arise.

Who Should Administer These Protections?

If a single body is to be made responsible for conferring confidentiality certificates, who should appoint it, and to whom should it be accountable? The U.S. confidentiality- and privacy-certificate models have the weakness of lodging the power to allocate certificates with a government agency, thereby placing academic freedom in the hands of the state. The system of ethics regulation created by the advent of the TCPS has already been criticized as a unilateral seizing of the country’s research apparatus by the state.⁵¹ For the

⁵⁰ SSHWC. *Social Sciences and Humanities Research Ethics: Privacy and Confidentiality*. (1 June 2005) Annual Congress of the Canadian Federation of the Humanities and Social Sciences; University of Western Ontario; London, Ontario. Online: <<http://www.sfu.ca/~palys/London2005.pdf>> Date accessed: 29 March 2006

⁵¹ T. Palys. *Research Decisions: Qualitative and Quantitative Perspectives on Research*. 3d ed. (Toronto: Thomson Nelson, 2003).

same sorts of reasons, the administration of confidentiality certificates should not rest solely with the state. A semi-autonomous body should award certificates on the basis of the research applicant's ethical obligation to maintain confidentiality, not its connection to some state institute or ministry.

The question remains as to which arm's-length agency should administer confidentiality certificates. One would hope that REBs could be entrusted with the task of identifying socially valuable projects in which confidentiality is essential, but their record of safeguarding academic freedom is far from perfect⁵² and the TCPS as yet places little, if any, check on their power. Another possibility is for the task of awarding confidentiality certificates to be delegated to an independent body that is not linked directly to government.⁵³

Conclusions

In the U.S., when various legal authorities and persons engaged in civil litigation began to subpoena researchers in an effort to force them to reveal confidential research information, researchers resisted. Realizing the enormous threat to research that such challenges presented and the benefits to society that accrue from research that would be lost, the U.S. federal government created statute-based protections for health research in the form of National Institutes of Health confidentiality certificates, and for criminological research in the form of National Institute of Justice privacy certificates.

The first attempt in Canada of a legal authority to use a subpoena to forcefully acquire confidential research information did not occur until 1994, twenty-five years after the problem surfaced in the U.S. The subpoena directing Russel Ogden to testify and reveal confidential information to the Coroner in the *Inquest of the Unknown Female* occasioned a flurry of debate about what researchers can and should do to protect their research participants, and how to accommodate different perspectives on the interaction between ethics and law.⁵⁴ At this point, the TCPS recognizes that law and ethics may "lead to different conclusions," and it is now established that although researchers should make every effort to try and ensure that law and ethics do not conflict, some may choose "law" in the last instant and conform to an order for disclosure, while others may choose "ethics" and continue to assert a common law privilege.

In Canada, as far as we can ascertain, only one researcher has received an actual subpoena – and he has received three – to appear in court to answer questions that would involve a violation of research confidentiality. Ogden's experience may be a harbinger of things to come in Canada, and his experience may well already have had a chilling effect on various kinds of research. In the U.S., many researchers have confronted this threat. However, the U.S. experience shows that, for the most part, the courts have recognized the importance of research confidentiality, and have generally protected research participants.

⁵² See, e.g., SSHWC, *Giving Voice to the Spectrum*. (2004). Online: <<http://pre.ethics.gc.ca/english/workgroups/sshwc.cfm>> Date accessed: 29 March 2006

⁵³ However, this creates something of a legal conundrum as truly independent bodies with no direct link to government may lack the legal authority to administer what ideally would be an authoritative legal document.

⁵⁴ See also *Institutional Conflict of Interest*, *supra* note 13.

Ted Palys and John Lowman

In the one case involving a Canadian court where a judgment was rendered, a privilege was recognized on the basis of application of the common-law Wigmore test. But relying on common law to protect research confidentiality poses a series of difficulties for researchers in terms of the kind of confidentiality undertaking they can make.

The way to resolve these difficulties is to create a research-participant shield law. Through an examination of existing research shield laws in the U.S. and Canada, and after considering contemporary legal trends and researcher experience with those laws, we have identified three primary criteria to guide the writing of such a law:

1. The privilege created must clearly belong to the research participant, not the researcher.
2. The privilege should protect research participants in any area of research where confidentiality is essential for gathering valid data, regardless of who funds it and whether the researcher gathering the information is attached to a university or some other agency, institute or organization.
3. Confidentiality protection must be administered in a context that values and safeguards academic freedom and, outside the academy, researcher independence. Consistent with the existing TCPS provision regarding *institutional conflicts of interest*, any body that is delegated the responsibility for administering statute-based privacy protection should have the "appropriate financial and administrative independence to fulfil their primary duties,"⁵⁵ i.e. the protection of research subjects.

The need for a research-participant shield law is now being discussed in various quarters. The Canadian Association of University Teachers (CAUT) has taken a leading role in promoting its development, including communication with the parties responsible for developing confidentiality certificates in the U.S. In March 2005 SSHRC dedicated \$120,000 to fund a series of papers examining privacy and confidentiality in social sciences and humanities research, and CIHR is initiating a similar research program. We hope this paper helps to shape some of the discussions that will arise.

Résumé

La protection de la confidentialité des recherches est un principe intégral de toutes les sciences sociales, ainsi que des codes d'éthique de l'humanité. Mais que se passerait-il si une juridiction exigerait l'accès à des informations confidentielles sur des recherches, tant dans le cas de litiges au civil, que pour des affaires criminelles ? Au Canada, seules les informations provenant des recherches de "Statistics Canada" jouissent de ce privilège relatif à la preuve -- une juridiction ne peut exiger une divulgation. Tous les autres chercheurs devront faire appel à la "Common Law" afin de protéger des recherches confidentielles. Ils leur appartiendraient, pour chaque cas, d'apporter la preuve de la nécessité de garder confidentielle toute information sur ces recherches, avec le risque malheureux qu'une juridiction n'ordonne leur divulgation. Cet article décrit cinq problèmes découlant de l'état de la juridiction.

Les protections juridiques couvrant la confidentialité de la recherche ont encore beaucoup de chemin à parcourir avant de résoudre ces problèmes. Mais comment se présenteront ces protections ? Qui aura à les gérer ? La deuxième partie de cet article examine les protections juridiques couvrant les privilèges relatifs à la preuve, y compris la *loi sur les statistiques* et la *loi canadienne sur la preuve* du Canada, ainsi

⁵⁵ TCPS, *supra* note 2.

Towards a Research-Participant Shield Law

que les "certificats de confidentialité" (pour certains type de recherches de santé) et les "certificats de vie privée" (pour certaines enquêtes criminelles) des États-Unis, dans l'optique d'établir des critères permettant l'établissement d'une loi protégeant la recherche canadienne.

Abstract

Protecting research confidentiality is an integral principle of all social sciences and humanities ethics codes. But what if a court were to want access to confidential research information, either in pursuit of civil litigation or a criminal case? In Canada, only Statistics Canada research information enjoys an evidentiary privilege - a court cannot compel its disclosure. All other researchers would have to turn to common law to defend confidential research. The onus would be on them to prove on a case-by-case basis that confidential research information should remain confidential, thereby creating the possibility that a court might order its disclosure. The first part of the article identifies five problems arising from this current state of law.

Statute-based protections of research confidentiality would go a long way toward resolving these problems. But what would these protections look like? Who would administer them? The second half of the article examines statute-based protections of evidentiary privilege, including the Canadian *Statistics Act* and *Canada Evidence Act*, and US "confidentiality certificates" (for certain kinds of health research) and "privacy certificates" (for certain kinds of criminological research), with an eye toward formulating criteria that a Canadian research shield law might emulate.

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