Published in *Sociological Practice: A Journal of Clinical and Applied Sociology*, 2000, 2(4), 245-255.

Ethics and Institutional Conflict of Interest: The Research Confidentiality Controversy at Simon Fraser University

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Abstract. This paper describes the lengthy controversy at Simon Fraser University over academic freedom and the ethics and law of research confidentiality that began when the Vancouver Coroner subpoenaed criminology graduate student Russel Ogden to testify at an inquest. There were two parts to the controversy. The first concerned the SFU administration's failure to mount a legal defense of Ogden's undertaking to keep "absolutely confidential" the identities of participants in his study of assisted suicide and euthanasia of persons with AIDS. The second concerned the threat to academic freedom created by the administration's subsequent imposition of "limited confidentiality" on researchers according to its "Law of the Land" doctrine of research ethics. We examine these controversies and the institutional conflict of interest underlying them in light of the ethical principles for research with human subjects laid out in various disciplinary ethics codes and, after the fact, by the Tri-Council Policy Statement, the research ethics code created by Canada's three federal research-granting agencies.

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"We are an open, inclusive university whose foundation is intellectual and academic freedom…
We are a university where risks can be taken and bold initiatives embraced…
We will engage all our communities in building a robust and ethical society."
(SFU *Values and Commitments*, 2000)

One would hope that all universities share these commitments, which appear in Simon Fraser's newly adopted statement of *Values and Commitments*. Whether Universities live up to such grand rhetoric is another matter. For a period, SFU did not. This paper describes that period, when the administration's position in a controversy over academic freedom and the law and ethics of research confidentiality made SFU anything but a place "where risks can be taken and bold initiatives embraced."

The story begins with SFU graduate student Russel Ogden's MA thesis reporting the results of interviews with people who had assisted in the suicides and euthanasia of persons with AIDS (Ogden, 1994). In 1994, when the Vancouver Coroner subpoenaed him to give evidence at an inquest, Ogden became the first and, to this date, apparently the only researcher in Canada to have faced the prospect of a contempt of court charge for refusing to divulge the names of one or more research participants or information that could be linked to them.

There are two components to the lengthy controversy over research confidentiality that unfolded after Ogden received the subpoena. The first involved the SFU administration's decision

not to mount a legal defense of Ogden's ethical undertaking to keep "absolutely confidential" the identities of research participants and information that could be linked to them. The second concerned the administration's subsequent imposition of "limited confidentiality" on researchers according to its "Law of the Land" doctrine of research ethics (cf. Clayman, SFU Vice President Research, 1997; Gagan, SFU Vice President Academic, 1999). We examine these controversies in light of the ethical principles for research with human subjects laid out in various disciplinary ethics codes and, after the fact, by the *Tri-Council Policy Statement*, the national research ethics code created by Canada's three federal research-granting agencies (Medical Research Council, et. al., 1998). The 80-page *Policy Statement* should resolve the ethics controversy at SFU and establish appropriate procedures for dealing with third-party attempts to obtain the names of research participants or information linked to them. Also, it should end the institutional conflict of interest that has contaminated the administration of research ethics at SFU.

Institutional Conflict of Interest

As well as establishing an ethical framework for research, the *Policy Statement* outlines principles that should govern ethics review procedures. Of particular interest is section 4C, which prohibits institutional conflict of interest in the administration of research ethics review:

> The REB [Research Ethics Board] must act independently from the parent organization. Therefore, institutions must respect the autonomy of the REB and ensure that the REB has the appropriate financial and administrative independence to fulfil its duties. Situations may arise where the parent organization has a strong interest in seeing a project approved before all ethical questions are resolved. As the body mandated to maintain high ethical standards, however, the public trust and integrity of the research process require that the REB maintain an arms-length relationship with the parent organization and avoid real or apparent conflicts of interest. (*Tri-Council Policy Statement*, p. 4.2)

Although the *Policy Statement* contextualizes the problem as one in which the interests of a university administration might lead it to *promote* certain research, the history of conflict over academic freedom in Canada (e.g., Horn, 1999; Tudiver, 1999) and elsewhere (e.g., Strathern, 2000) has shown that university administrators also may *impede* certain types of ethical research. The situation we describe at SFU is such a case: perceived image and liability management considerations contaminated the administration of ethics policy and posed a serious threat both to research participants and to academic freedom.

The SFU Ethics Policy

During the events described below, SFU's Ethics Policy embodied the very institutional conflicts of interest the newer *Policy Statement* seeks to avoid. The Vice President Research (hereafter “VP-Research”) appoints and chairs the University Research Ethics Review Committee (hereafter “the Ethics Committee”) or can delegate the Chair. From September 1993, when Dr. Bruce Clayman became the VP-Research, until February 1998, he chaired the committee. He stepped down from the committee in 1998, citing his institutional conflict as the reason. However, his resignation did not remove the appearance of conflict, because he still appointed members of the committee, chose the Chair and would hear appeals should there be any.

Like all disciplinary research ethics codes, the SFU ethics policy aspires to protect research participants:

> The purpose of ethics review of research is to consider the risks to physical and psychological well-being, and the cultural values and sense of propriety of the persons who are asked to participate … A research proposal must demonstrate that appropriate methods will be used to protect the rights and interests of subjects.

However, the "Rationale" of the policy also opens the door for other, potentially conflicting interests to contaminate that process:

> When researchers are employed by the University, the institution may, in some circumstances, be liable for research conducted by these researchers. In the interests of protecting them and itself, the University provides insurance protection for those research proposals which receive ethics approval.

With these words, the appearance of institutional conflict of interest is built right into the policy. The conflict occurs because the university's actions are sometimes designed to protect the university *from* research participants and researchers, in the name of preventing negative publicity and reducing the University's liability. That is exactly what happened in Ogden's case.

Russel Ogden: SFU's Darling

Ogden's groundbreaking research on assisted suicide and euthanasia illuminated a highly controversial practice to which no third party normally would ever be privy. As is the case with any research on sensitive topics, and particularly that involving information about violations of criminal and civil law, Ogden believed it would be ethical to do the research only with a commitment to strict confidentiality, as SFU's ethics policy and the norms and standards of his discipline require. When he submitted his proposal for ethics review, Ogden made it clear he intended to provide "absolute confidentiality." The Ethics Committee approved his proposal.

By the time Ogden defended his thesis in 1994, assisted suicide and euthanasia, and especially the Sue Rodriguez case,[1] were fueling front-page stories across Canada. When the media looked for experts, Ogden was the obvious choice. National and international newspapers interviewed him. As part of its efforts to generate informed public policy, a federal government Special Senate Committee invited him to testify about his research. The university media and public relations unit facilitated broad media coverage as the university bathed in the light Ogden's research had thrown on it (Mason, 1994).

Russel Ogden: SFU's Pariah

One local newspaper interview came to the attention of the Vancouver Coroner, who was conducting an inquest into the death of an "unknown female." The Coroner had already subpoenaed three journalists to attend the inquest and subsequently ordered Ogden to appear because his research involved two persons who provided information about the "unknown female." Ogden appeared, but refused to reveal the identity of any of his participants, whereupon the Coroner threatened to take action against him for contempt of court.

When Ogden received the subpoena, he and his supervisor, Dr. Simon Verdun-Jones, approached the university for help. The university gave Ogden $2,000 on "compassionate

[1] *Rodriguez v. British Columbia (Attorney General)*, 1993, 85 C.C.C. (3rd) 15 (S.C.C.). Suffering from Lou Gehrig's disease (ALS), Rodriguez fought all the way to the Supreme Court of Canada for the right to have someone assist her death at the time of her choice.

grounds" towards his legal defense, which amounted to approximately $11,000. But that was it. No one involved in ethics administration at the university ever appeared in or made any kind of submission to Coroner's court to defend academic freedom or the University Research Ethics Committee's decision to approve Ogden's undertaking to maintain in absolute confidentiality the identity of his research participants. At Ogden's request, the VP-Research wrote a letter to Ogden regarding research confidentiality, but it was so misleading that Ogden's lawyers decided not to enter it into evidence.

Ogden's legal argument was that his research met the Wigmore criteria[2] (Wigmore, 1905), a common law test Canadian courts use to adjudicate claims of testimonial privilege (Sopinka, Lederman & Bryant, 1992). Aside from the sweeping protections provided by sections 17 and 18 of the *Statistics Act* for Statistics Canada researchers, the common law provides the only mechanism for researchers in Canada to assert privilege in the event they are subpoenaed. The test also may be used in the U.S., from whence it originates (Lempert & Saltzburg, 1982; Nelson & Hedrick, 1983; Traynor, 1996).

When he subjected Ogden's carefully planned research protocol to the Wigmore criteria, the Coroner agreed that Ogden's confidences should be respected. Recognizing that without a public interest privilege research on euthanasia and assisted suicide would not be possible, the Coroner released Ogden "from any stain or suggestion of contempt" (*Inquest of Unknown Female*, 20 October 1994; oral reasons for judgement of the Honourable L. W. Campbell, 91-240-0838, Burnaby, B.C., p.10). An independent legal opinion (Jackson & MacCrimmon, 1999) concludes the Coroner's decision would have withstood judicial review.

SFU Introduces "Limited Confidentiality"

The Ogden case created difficult ethical and legal problems to work through. The University ethics policy did not anticipate the potential risk of compulsory revelation of confidential research information in court, nor did it limit confidentiality in any way. While the Coroner was still considering Ogden's argument for absolute confidentiality, the VP-Research put limitations to confidentiality on the Ethics Committee's agenda.

> 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 (Ethics Committee Minutes, September 9, 1994).

In November 1995, a new screening question was added to the ethics review application form asking: "Does information to be obtained from subjects include information on activities that are or may be in violation of criminal or civil law?" Applicants who were unable to collect information anonymously and answered in the affirmative were required to tell participants:

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[2] The party asserting privilege must satisfy four criteria: "(1) The communications must originate in a *confidence* that they will not be disclosed; (2) this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties; (3) the *relation* must be one that in the opinion of the community ought to be sedulously *fostered*; and (4) the *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation." (Wigmore, 1905, p.3185; see Palys & Lowman, 2000, for a discussion of the criteria in the research context.)

> Any information that is obtained during this study will be kept confidential to the full extent permitted by law... It is possible 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.

The VP-Research outlined three justifications for use of this consent statement (Clayman, 1997):

1. Because researcher-participant privilege is not recognized in Canadian statutory law, there is no point in challenging a subpoena.

2. Researchers are "not above the law of the land." The University cannot condone law breaking because it must respect the Rule of Law. Consequently, the university cannot approve an unlimited guarantee of confidentiality because it implies that a researcher would deliberately break the law by refusing to comply with a court order to disclose confidential information.

3. Research participants must be warned of every risk, no matter how remote. Therefore, in the interest of informed consent, it is necessary to warn prospective participants of the legal limits to confidentiality.

We refer to this as the "Law of the Land" approach to resolving potential conflicts between research ethics and law.[3] Rather than the University and researcher using ethical criteria to determine the outcome should a court order the revelation of research participant names, the Law of the Land approach abrogates this professional responsibility by making law the limit of ethics.

In its SFU rendition, limited confidentiality was particularly problematic throughout the period the university administration took a subpoena to be the limit of the law. Once warned of the risk of subpoena, neither the University nor the researcher would have to expend time and legal fees protecting research participants in court. And therein lies the conflict of interest. This *caveat emptor* strategy downloads ethical responsibility and liability to research participants, who are put in the position of having to police the information they provide and make legal determinations few of them are equipped to make. This is hardly "ethical" or conducive to the foundation of trust that is necessary for much field research in criminology and other disciplines, especially when the researcher knows the identity of the participant.

Ethics Administration in Action

From January 1992 through October 1997 the Ethics Committee met as a whole on eight occasions, not much more than once a year.[4] Throughout this six-year period, during which time somewhere between 1000 and 2000 ethics applications were processed, the Office of the VP-Research dealt with all but two of them. Apart from signing the approval letter, the VP left the actual processing of applications and interactions with applicants to an administrative assistant who had no formal research training or experience. Ethics at SFU had been reduced to a bureaucratic checklist, including the limited confidentiality provisions — precisely the kind of "formulaic" application of ethics principles the *Policy Statement* (p. i.9) warns Research Ethics Boards to avoid. In the process, an institutional double standard took root.

SFU researchers are expected to follow the ethics policy and are subject to disciplinary action if they do not. Meanwhile, the Ethics Committee departed from the policy repeatedly. For

[3] For a U.S. version of this doctrine, see Comarow, 1993.
[4] As of November 1997 when this was pointed out, the Ethics Committee began meeting monthly.

example, the controversial limited confidentiality statement was introduced at a meeting that fell short of a quorum. The Committee also delegated to the Faculty of Business Administration the power to conduct its own ethics reviews, although there is no provision in the ethics policy allowing the committee to delegate this power, and no other unit in the University enjoys the same freedom.[5] For long periods, the committee was not constituted according to the criteria laid out in the policy. Questions arose as to whether the appointment of members adequately reflected the range of disciplines involved in human research at SFU. From 1988 through 1997, certain key disciplines, such as sociology and political science, were not represented on the Committee; psychology was over-represented. Only one committee member had any experience with qualitative field research and none were female. The medical-experimental model of research became the sole paradigm for the Committee's decision making, even though ethical principles take on a different hue in the context of other methods and epistemologies.

In January 1994, the Ethics Committee began a process of revising the university ethics policy with the intention of presenting a new policy to the Board of Governors for approval in 1996. In 1995, the committee rewrote the section on confidentiality to institutionalize the "Law of the Land" doctrine. The VP-Research posted the Draft in place of the approved policy on the University's web page, ostensibly for comment. In 1996 the Tri-Council Working Group *Draft Code of Ethics* (the *Policy Statement's* precursor) was released for comment and the process of revising the SFU code was put on hold. However, the Ethics Committee's Draft Policy was not removed from the University web page, where it remained for at least two more years.

When challenged about the committee's right to impose limited confidentiality on researchers, the committee member who provided the wording for the limited confidentiality consent statement used the wording of the Draft Policy, not the actual policy, as the authority for the Committee's actions. In April 1998, following his own resignation as Chair, the VP-Research appointed that member Chair of the Committee.

In March 1998 the Ethics Committee member from the School of Criminology resigned in protest of the ethics administration process. Since then, the School has declined to have a member sit on the Committee until the institutional conflict of interest is removed from the research ethics policy.

Ogden's Suit Against SFU

After his successful defense of his research participants in Coroner's Court, Ogden brought suit against SFU, asserting that the university had a contractual obligation to support his ethical stand and reimburse his legal fees. The trial provided an opportunity to hear the testimony of the University President and VP-Research regarding the factors the university considered in its decision-making. Their testimony indicates that the ethical obligation to protect research participants from harm played no role whatsoever. The University did not defend academic freedom or the Ethics Committee's decision to approve Ogden's guarantee of absolute confidentiality. Instead, their primary considerations were limiting the University's legal obligation to Ogden — and, by extension, to anyone in a similar position in future — and avoiding the controversy that might arise if the media portrayed the University as challenging legal authorities or supporting euthanasia (Testimony of President John Stubbs and VP-Research Bruce Clayman in *Russel Ogden v. SFU*, pp. 11 and 66-67). They asserted that challenging a subpoena *is* challenging the Rule of Law. It would be two years before a decision was rendered.

[5] For documentation of these and other procedural irregularities in the administration of ethics at SFU, see Lowman & Palys (1998a).

The Controversy over "Limited Confidentiality"

On October 31, 1994 the Director of the School of Criminology sent a letter to the VP-Research, signed by the large majority of criminology faculty, exhorting the University administration to give Ogden unequivocal moral and legal support, and urging it to recognize, "the right and duty of researchers to give guarantees of confidentiality to those who participate in criminological research which focuses on behaviour that may be considered criminal under Canadian law." It would be four more years before the administration acceded to this request.

Use of the limited confidentiality consent statement began early in 1996 after the Ethics Committee posted its Draft Policy. As the Ethics Committee anticipated, and as the Research Ethics Policy Revision Task Force (appointed in 1998) subsequently confirmed, limited confidentiality had a marked impact on social science research at SFU. Sociologists, criminologists and others — particularly graduate students working with time restrictions — began to avoid field and interview research.

At the same time, resistance to the "Law of the Land" regime of research ethics intensified. It did so at a time when the administration was already in turmoil over other problems at the University. In 1997, President John Stubbs, who testified during Ogden's suit in Small Claims Court, resigned amidst the scandal resulting from the University administration's extensively and nationally publicized mishandling of a sexual harassment case. In that instance too, the administration's resolve to follow its own policies and procedures was thrown into question as it transpired that the panels hearing relatively serious harassment cases were not constituted according to university policy.

After Stubbs' resignation, there were renewed appeals to Jack Blaney, the President *pro tem* (and subsequently, President), to set up an independent review of the administration's decision not to pay Ogden's legal fees and of the Ethics Committee's authority to force researchers to use the limited confidentiality consent statement. In January 1998, the School of Criminology sent a letter to the President urging him to convene an independent inquiry into the Ogden case. A few months later, the President appointed Professors Nick Blomley and Steve Davis to conduct an inquiry. Also the President wrested from the VP-Research and Ethics Committee the task of revising the ethics policy. In April 1998, the President announced that he would appoint a University Research Ethics Policy Revision Task Force to convene hearings and prepare a draft research ethics policy complying with the *Policy Statement's* guidelines.

The Outcome of Ogden v. SFU

Ogden lost the suit. The court ruled that the university administration did not have a contractual obligation to defend him in court. But for the university, it was a Pyrrhic victory. Characterizing the administration's commitment to academic freedom as "hollow and timid," the decision contained a six-page *obiter dictum* outlining the fallacies of its arguments, both in law and ethically. With respect to challenging a subpoena, Judge Steinberg commented:

> 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 challenge in court. ... 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. The questions of the coroner to Ogden were a direct challenge to the academic freedom and privilege that were so necessary for the research that had been approved by the University. When, because of the possibility of bad publicity, the University turned its back on the researcher who was trying to uphold the standards that

> the University itself had set, it risked much harm to the reputation of the University and its ability to conduct this type of sensitive research. (*Russel Ogden* v. *Simon Fraser University, 1998*, p.24)

In their independent review, Blomley and Davis (1998) offered a similar indictment of the University administration:

> 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 to 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? (Blomley & Davis, 1998, p.11)

In the end, President Blaney accepted all three of Blomley and Davis' recommendations and: a) reimbursed Ogden's legal fees and lost wages; b) sent him a letter apologizing for the way he had been treated and acknowledging that his stand in the Coroner's Court was appropriate and principled; and c) assuming their research complies with university policy, guaranteed to assist any researchers who find themselves in the position of having to challenge a subpoena.

However welcome these developments were, they did not resolve the problems created by the limited confidentiality consent statement (Lowman & Palys, 1997, 1998b; Ogden, 1997).

An Ethical Catch-22: Disciplinary Standards

For some researchers the limited confidentiality consent statement created an ethical Catch-22. The SFU research ethics policy states that, "There is a professional responsibility of researchers to adhere to the ethical norms and codes of conduct appropriate to their respective disciplines." However, no North American social science code of research ethics absolutely subjugates ethics to law (cf. Lowman & Palys, forthcoming). Indeed, several codes, such as those of the American Sociological Association (ASA), the Canadian Psychological Association (CPA) and the American Political Science Association (APSA), recognize that, when ethics and law conflict, the researcher's primary allegiance should be to ethics.

In December 1997 and January 1998 we submitted two applications to the Ethics Committee. In the protracted debate that followed, we explained that we could not follow the Law of the Land doctrine because:

1. The view that a subpoena represents the limit of the law abrogates the ethical responsibility to do everything legally possible to protect research participants from harm. Researchers *can* use a case-by-case analysis in common law to assert privilege, as Ogden did. Worse, a court might interpret the limited confidentiality consent statement as a waiver of privilege.

2. The limited confidentiality statement falls short of providing informed consent. The SFU research ethics policy states that, "the subject will be fully informed, in advance, of the nature of information required and the subsequent use to be made of the information" including "what [personal] information is to be communicated to or withheld from others". Far from satisfying this requirement, the limited confidentiality consent statement provides information only about the *legal* limit of confidentiality. It says nothing about the researcher's *ethical* stand on this eventuality, because it assumes that law establishes the ethical limit. In the interests of informed consent, researchers must inform prospective participants if law sets the ethical limit to their guarantee of confidentiality.

3. It infringes academic freedom. Many social science ethics codes recognize that the researcher's primary professional obligation *in the last instant* is to ethics, not law. Consequently, in those very rare circumstances where law and ethics conflict, researchers should oppose compelled disclosure if it creates an ethical conflict. Researchers have a professional duty to know the law and use ethical criteria to shape and uphold their guarantees of confidentiality. If Universities value academic freedom their administrators have a duty to support researchers in this endeavor.

To get a sense of the kinds of situations researchers might encounter in Canada, we turned to the U.S. literature on clashes between ethics and law (see e.g. Bond, 1978; Crabb, 1996; McLaughlin, 1999; Nejelski & Finterbusch, 1973; Nelson & Hedrick, 1978; Traynor, 1996; Wiggins & McKenna, 1996). This literature reveals dozens of instances of grand juries, Congressional Committees and corporate litigants trying to obtain confidential research information. Far from being exceptional, the outcome in Ogden's case is consistent with much U.S. jurisprudence, including the landmark case[6] involving Professors Cusumano and Yoffie's research on the Internet browser wars. In fact, U.S. courts generally have protected research-participant names and/or information that could be linked to them (Palys & Lowman, forthcoming). We have found just three cases where researchers were ordered to divulge information about participant identities and/or information that could be linked to them and we have concluded that none of them constituted a situation where it would have been ethical to comply with the order (Lowman & Palys, forthcoming). In light of the Canadian and U.S. jurisprudence and our disciplinary ethical principles, we feel confident in telling research participants that we do not intend to yield information to a court.

When we submitted our applications to the Ethics Committee, we contacted the SFU Faculty Association about problems with the administration of the ethics policy. The Association approached the Academic Freedom and Tenure Committee of the Canadian Association of University Teachers, at which point, CAUT began a watching brief on research ethics at SFU.

Over a period of nine months we submitted five different consent statements to the Committee. None of them were approved. In August 1998, the *Tri-Council Policy Statement* was released. Two months later, the Chair of the Committee sent us a letter saying that the Committee was not prepared to approve our applications. By not providing any reasons for the decision, the letter fell far short of the basic requirements of due process. Instead, it asserted that the Ethics Committee's perspective on limited confidentiality is consistent with the *Policy Statement*, but provided no explanation of the relevance of this assertion to its decision under the SFU research ethics policy, the policy it was supposed to be following.

We appealed the negative decision. As the VP-Research was Chair of the Ethics Committee when we submitted our applications, the VP-Academic heard the appeal. We protested that the VP-Academic's consideration of our appeal violated the *Policy Statement* guidelines on administrative conflict of interest; i.e. the same conflict of interest that ostensibly had led the VP-Research to resign as Chair of the Committee in the first place.

The VP-Academic rejected the alternate appeal mechanism we suggested on the grounds that the University had not yet adopted the *Policy Statement*. And yet the "Appeal Decision" was based on his interpretation of this very same document, which he quoted as follows:

> 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

[6] *In re: Michael A. Cusumano and David B. Yoffie* [*United States* v. *Microsoft*], No. 98-2133 (1st Cir. 1998).

> support the researcher in this regard, in part because it needs to protect the integrity of its own REB [Research Ethics Board]. If [a] third party attempts to secure the research data by subpoena, it is legitimate for the researcher and the institution to argue the issue in court.... 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. (*Policy Statement*, p. 3.2)

Taken out of context, this statement may appear to support the Law of the Land perspective. The Appeal Decision claimed that the *Policy Statement,* "recognizes that no guarantee of confidentiality can ever be absolute, since the law recognizes several explicit categories of exceptions." On the basis of this interpretation, the VP-Academic directed that whatever informed consent statement be used, it must make clear that:

> The University can not and will not counsel its researchers to disobey the law, or support them in doing so; hence, there may be limits beyond which the confidentiality of personal information and its sources cannot be guaranteed. (Gagan, 1999)

But there is a crucial fallacy in the Appeal Decision's logic. Even mandatory reporting laws do not specify the limits to confidentiality. Rather, according to the *Policy Statement*, they provide examples of the identifiable public interests that might justify infringing confidentiality. Disciplinary ethics codes such as ASA's and CPA's specify what those public interests are — avoiding serious prospective harm to research participants or third parties — but like the *Policy Statement*, none of them make law the final arbiter.

Asserting Academic Freedom: Adhering to Disciplinary Ethics Codes

The SFU *Framework Agreement* defines academic freedom as "the freedom to examine, question, teach and learn, and it involves the right to investigate, speculate and comment without reference to prescribed doctrine...". The absolute subordination of ethics to law is a "doctrine," and hence its imposition on researchers is an infringement of academic freedom. Accordingly, we grieved the Appeal Decision on the grounds that it infringed our academic freedom.

Before a grievance conciliation panel could be convened, the VP-Academic suddenly resigned in circumstances that he never fully explained to the university community. Consequently, a new, acting VP-Academic represented the University administration at the hearing. The conciliation resulted in an agreement with the University that we would not use the Ethics Committee's limited confidentiality consent statement. In its place, it was agreed we would use a research protocol that does not make law the limit of our guarantee of confidentiality, as various disciplinary codes permit.

While the conciliation procedure solved the immediate problems related to our research, it did not resolve the problems that plagued the SFU Research Ethics Policy and the rest of the SFU research community. That was left to the SFU Research Ethics Policy Revision Task Force.

The Task Force convened a series of hearings and solicited submissions from interested parties on campus. After a year of deliberation, the Task Force circulated a Draft Policy that generated considerable controversy about interpretation of the *Policy Statement* and the appropriate procedures for ethics review at SFU. In February 2000, the Task Force tabled its proposed new policy at a meeting of the University Senate. But it clearly did not satisfactorily resolve the many contentious issues at the center of the ethics controversy at SFU, as Senate declined to adopt the Draft Policy. The task of writing the new policy has now been handed to a Senate committee. It appears it will be well into the year 2001 before SFU has a new research

ethics policy. However, a letter from the three granting councils clarifying their position on ethics and law should help resolve the controversy over the Law of the Land perspective.

Interpreting the *Tri-Council Policy Statement*

When a dispute about interpretation of the *Policy Statement* arose, no one from the Ethics Committee, the Task Force or the University Administration ever contacted the three granting Councils for a clarification. All of them assumed that their interpretation was the only one consistent with the policy and proceeded accordingly. Consequently, we wrote to the three councils requesting a clarification of their position on ethics and law.[7] On behalf of the three granting councils, the Natural Science and Engineering Research Council[8] clarified that the *Policy Statement* does *not*, in the last instant, subordinate ethics to law. Instead, they made it clear that law and ethics may lead to different conclusions and that when they do, the researcher must be left to decide the appropriate course of action:

> [T]he Councils, as agents of the Canadian government, expect all Council-funded research to conform both to the ethical principles set out in the *Tri-Council Policy Statement* (TCPS) and the relevant laws. At the same time we also recognise that, in rare instances, ethical and legal approaches can conflict… If there is a conflict, the researcher must decide on the most acceptable course of action. The principle of maintaining the confidentiality of research information is an important element of the TCPS. The onus is on the researcher to know the legal context of the research before starting his/her research activities, and to anticipate his/her options in the unlikely event of a court-ordered disclosure. It is also the researcher's responsibility, in consultation with the REB, to develop a free and informed consent process for recruiting research subjects, which takes into account that knowledge.

We hope this clarification of the *Policy Statement* spells the demise of the "Law of the Land" doctrine of research ethics, not just at Simon Fraser University, but across Canada.

Conclusion: Going the Distance

If researchers and universities are to protect research participants to the full extent possible within law, they must go the distance in court to defend the research enterprise. Canadian researchers who claim privilege on behalf of their research participants have to rely on common law. In the United States also, while federal laws protect some health and criminal justice research from court-ordered disclosure (cf. Palys & Lowman, forthcoming), most researchers have to resort to common law to assert privilege.

In the case of evidentiary privilege where claims have to be made on a case-by-case basis, the law is effectively made after the fact. Researchers, however, must make their decisions ahead of time. One cannot develop the trust required to do valid and reliable field research on crime, justice and other sensitive topics on the basis of a promise of confidentiality that may or may not be kept. Consequently, researchers have to have the courage of their convictions and use ethical criteria to make decisions about the degree of protection to give research participants. We can only hope that the courts will agree that our communications with research participants are

[7] Dated February 6, 2000. On line: T. Palys Homepage <http://www.sfu.ca/~palys/FAQquery.pdf> (date accessed: 14 June 2000).
[8] Dated April 27, 2000. On line: T. Palys Homepage <http://www.sfu.ca/~palys/TCPSFAQ.pdf> (date accessed: 14 June 2000).

worthy of being deemed privileged, as they have done in the U.S. in the past. If they do not, it will not change the confidentiality guarantee we made or our belief in the social value of such research. From an ethical point of view, then, contempt of court may turn out to be preferable to contempt of research.

The U.S. research experience underlines the folly of the Law of the Land perspective. Over the past forty years there have been dozens of cases of U.S. researchers receiving subpoenas from grand juries, congressional committees and high stakes litigants. Imagine the devastating effect on research in the U.S. if academics had capitulated to these pressures. Instead, the pattern has been one of sustained resistance by researchers, disciplinary associations and, often, the universities hosting the research. Canadian researchers, research ethics boards and university administrators have much to learn from that history.

And yet, in the U.S. as well there have been examples that parallel the “hollow and timid" approach SFU initially took in Ogden's case. At the State University of New York (Brajuha & Hallowell, 1986), the University of Georgia Medical School (Fischer, 1996) and Washington State University (Scarce, 1995), for example, researchers received lackluster or no legal support when they were subpoenaed. More than one university administration has forgotten the central role that academic freedom and ethics play in making the university research enterprise unique, formidable and credible (see also Strathern, 2000).

Epilogue: Ogden's Doctoral Research at the University of Exeter

In the fall of 1995, Russel Ogden moved to England and enrolled in the Sociology Doctoral program at the University Exeter. On June 10th 1996, the University approved the ethical protocol for his Doctoral research entitled, "Assisted death and AIDS: an international social investigation." Ogden's experience at SFU was well known to the Exeter Departmental Ethics Committee, which wrote:

> In the knowledge of the applicant's previous experience of the need to actively uphold the commitment to confidentiality given to research subjects, the members of the Committee express their personal support for the researcher in continuing to meet such commitments. They recognize that entry into commitments of this kind is integral to the pursuit of truth through sociological research, and accept the obligation to support and sustain those who do so (June 10, 1996).

In the ensuing months Ogden began working on the dissertation. As the worked progressed, Ogden sought to change his supervisor owing to problems getting feedback on work he submitted. The University prevaricated. In December 1997, the Guild of Students filed a grievance on Ogden's behalf, but the Department of Sociology refused to accede to Ogden's request for a change of supervisors. The University of Exeter Senate established a Committee of Academic Enquiry to hear Ogden's complaint.

The Enquiry was scheduled to proceed in July 1998, but was cancelled after the university decided it needed legal representation and, in particular, the sudden production of an ethics committee document regarding Ogden's research dated June 15th, 1996 not June 10th, the date on the Committee's letter that Ogden had received approving his research. This was the first time Ogden had seen this document, although the Chair of the Departmental Ethics Committee insisted that the original ethics report had “not been reviewed, rescinded or countermanded” (John Vincent, June 19, 1998). The June 15th document is similar to the letter of approval Ogden received, but omits the passage mentioning the ethics committee's decision "to accept the obligation to support and sustain" researchers endeavoring to maintain strict confidentiality.

Ogden argued that this change effectively rescinded the committee's assertion that it and, by extension, the University of Exeter, had an *obligation* to support researchers who are faced with the prospect of preventing compulsory disclosure of confidential research information. In a letter to Ogden, the University's Academic Secretary described Exeter's values and commitments thus:

> [Ethics approval] "does not, as a matter of law, expressly or impliedly oblige the University to provide a defence of the student's work to third parties or to participants. Nor does the process of ethical approval involve any obligation on the University to provide, or to pay for, any legal assistance or advance to the student in connection with that advice" (Philip Harvey, July 17, 1998).

This legal claim may or may not be true. But it misses the point entirely, as SFU officials did in their testimony in a Canadian Small Claims Court. The University's legal obligations are one thing, but it has crucial ethical obligations as well. If the University of Exeter will not defend its researchers' academic freedom and their research participants in court, who will?

In February 1999, Exeter suspended Ogden's student registration. His Department had recommended de-registration on the grounds that he failed to maintain supervisory contact. Ogden countered that his supervisor was not returning his thesis chapters and providing the required written feedback, as per university regulations. Since the issues of supervision were to be reviewed at the Academic Enquiry, the Dean of the Faculty of Postgraduate Studies exercised his prerogative to suspend Ogden rather than de-registering him. In March, the University offered Ogden £14,365 to withdraw his complaint and sign a gag order. Ogden declined the offer because it did not resolve the issue of principle: would the university defend research participants and academic freedom in court? Also, it did not compensate the damage he felt that mal-administration had done to his Doctoral program.

Held in September 1999, Exeter's Senate Academic Enquiry upheld Ogden's main complaints and concluded:

> We find that the ethical approval of Mr. Ogden's Ph.D. research was mishandled and demonstrated serious incompetence and subsequent mismanagement by the Department… this put the University at risk and potentially undermined Mr. Ogden's research.

Also, it found that:

> … the supervision of Mr. Ogden's research was inadequate in that the frequency of supervisory meetings fell short of the Department of Sociology's published guidelines (University of Exeter, 1999)

However, on December 1, 1999, the solicitors for the University of Exeter wrote to Ogden to tell him that the University does not owe him any compensation, and that the administration is,

> … satisfied that they have fulfilled their obligations to Russel Ogden as a Ph.D. student and there is nothing in the Academic Enquiry's Report that gives them reason to change their view...

Although the Enquiry found that "procedures for ethical approval in the Department **and** the University were deficient" the University of Exeter has not clarified whether it will support researchers in court to defend academic freedom and the integrity of the research enterprise. To this extent, Exeter most surely is not a university where risks can be taken and bold initiatives embraced, at least not in research on sensitive topics. Research on assisted death and AIDS is much the worse for it.

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