

# Grievance

*Re Ethics Applications: Managing Prostitution: A Study of*

**Owners and Managers of Escort Services, Massage Parlours and Body Rubs**

Submitted by J. Lowman on December 1, 1997, revised February 26, 1998

**And: Sex Work in Off-Street Venues**

Submitted by J. Lowman and T. Palys on February 24, 1998

The grievance concerned two research projects that were held up for eighteen months because the University Research Ethics Review Committee and the VP Academic (Dr. David Gagan) refused to approve our research protocol. We suggested that these decisions were unjustified, and that our academic freedom was infringed in the process. The grievance concerned the appeal decision.

This document includes, a) the text of the Appeal Decision; b) the grounds of the grievance; and c) the resolution.

## THE APPEAL DECISION

In the matter of the appeal of Professor J. Lowman, School of Criminology, and Dr. T. Palys, School of Criminology, against a decision of the University Research Ethics Review Committee under Policy R. 20.01.

### 1. The Issues

- (a) Each appellant has defined a research project that involves human subjects from whom confidential - possibly incriminating - information will be sought. Possession of this information, which pertains to the sex trades and sex trade workers, could lead to third party demands, possibly court-ordered, for its revelation and the identification of sources.
- (b) In responding to the appellants' requests for project approval by the University Research Ethics Review Committee (URERC), the Committee has insisted that its principal responsibility is to protect the rights and interests of the human subjects of research. In the Committee's judgement, appropriate protection in these two projects is a "statement of limited confidentiality" which formally advises potential subjects of the possibility that sensitive information confided to the researchers could be the subject of legal action that might lead to the identification of sources under court order. Subject participation would be predicated on this forewarning of limited confidentiality.
- (c) The appellants argue that the URERC's ruling is detrimental to their research and inconsistent with the standards of their discipline, Criminology. The success of each

project and the norms of research in the discipline require absolute confidentiality - that is, adherence to the principle of researcher-subject privilege - in order to secure subject participation.

(d) The appellants argue further that researcher-subject privilege exists until it is successfully challenged in a court of law, specifically by the application of the Wigmore Test which the courts apply on a case by case basis. The appellants recognize that researcher-subject privilege has not been tested by Canada's highest courts, but cite the recent decision of a lower court in the Ogden case in support of their argument.

(e) The appellants assert that should they be called on, under judicial compulsion, to reveal the sources of confidential research data, they will make a principled decision not to do so.

(f) On the basis of these arguments the appellants reject the URERC's requirement that research subjects' participation should be conditional upon their acceptance of an explicit statement of limited confidentiality.

(g) The URERC has attempted to negotiate a confidentiality statement with the appellants that meets the appellants' needs and also recognizes the possibility, however remote, that a university researcher may be required, after lengthy legal challenges, to reveal his/her sources of sensitive information given the unpredictability of the outcomes associated with the application of the Wigmore Test. So far the URERC and the appellants have failed to negotiate a workable compromise; hence the appeal at hand.

(h) Implicit in this debate is the unresolved issue of Simon Fraser University's institutional responsibility for promoting and protecting the academic freedom of its researchers, especially when that freedom is challenged by the rules of civil society or criminal investigation. Both parties look to the University for proactive guidance and/or support in this difficult matter.

## 2. Discussion

This matter now forms the substance of voluminous correspondence and documentary evidence that cannot be rehearsed here. The heart of the problem is that there is both an institutional and a national policy vacuum on the subject of researcher-subject privilege to which the URERC and its clients can refer in order to resolve this and related issues. For example, The National Council on Ethics in Human Research said in its report of its site visit to Simon Fraser University that SFU should

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

Currently, University Research Policy R20.01.4 (Ethical Policy Considerations) requires that "appropriate methods" be used to insure the protection of the "rights and interests" of research subjects in such matters as "privacy... confidentiality ... and, anonymity", but

fails to discuss appropriate methodologies, insisting only 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". R20.01 does not anticipate the likelihood of this information being revealed as the result of legal compulsion.

The recent Tri-Council policy statement *Ethical Conduct for Research Involving Humans* (August, 1998) addresses the issue of "respect for privacy and confidentiality" by calling attention to the conflict between legal and ethical imperatives which "may lead to different conclusions". (i.8) The policy statement then reviews (Section 3) the responsibility of researchers "not to share [personal] information with others without the subject's free and informed consent", but recognizes that no guarantee of confidentiality can ever be absolute, since the law recognizes several explicit categories of exceptions. Consequently, the Tri-Council policy statement constructs a methodology that tries to accommodate both ethical values and behavioural norms:

The researcher is honour-bound to protect the confidentiality that was undertaken in the free and informed consent process, to the extent possible within the law. The institution should normally support the researcher in this regard, in part because it needs to protect the integrity of its own [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. (3.2)

In the absence of institutional policy clarity, or a national consensus among researchers and lawmakers, the Tri-Council policy statement appears to be the most reliable guide to recent thinking on the issue of informed consent, confidentiality, and researcher/institutional liability.

### 3. Decision

In rendering this decision, I am mindful that a University Research Ethics Policy Revision Task Force (the Gee Committee) has been established to consult widely before recommending revisions to R20.01. This may take some time; and in the meantime it would be inappropriate, in my view, for an administrative decision to co-opt the Task Force's mandate or its freedom to suggest policy revisions, irrespective of the merits of individual cases, that will provide appropriate tests for all cases equally. However, the case at hand has been delayed for some considerable period of time, and it is unfair to the appellants to ask them to postpone their research decisions pending the enunciation of a revised policy. Consequently, my decision must be *sui generis*, and it will have to serve in the circumstances.

I therefore direct that:

- (a) the URERC will articulate an informed consent document to be freely accepted or rejected by prospective research subjects for these two projects

(b) whatever other information it may contain, this informed consent document must advise prospective research subjects that in all circumstances including third party intervention

- the researchers will use their best efforts to maintain the confidentiality of their data and its sources;
- the University is committed to the promotion and protection of the academic freedom of its researchers and will therefore use its best efforts to maintain the confidentiality of these data and their sources;
- the foregoing notwithstanding, 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.

This statement of informed consent will be submitted to me for my approval not later than March 31, 1999. The URERC may consult with the appellants on other aspects of this statement. I reserve the right to resolve any further disputes between the URERC and the appellants concerning the content of the proposed statement. Acceptance by the applicants of the statement I approve will constitute research ethics approval of their projects.

(c) Dr. Palys and Dr. Lowman have done the University and the Canadian research community an important service in compiling the extensive documentation on researcher-subject privilege that forms the substance of this appeal. This voluntary effort to engage their colleagues in a significant academic and ethical debate should be recognized in their School's biennial faculty review process, and I will so inform their Director.

Signed

David P. Gagan , Vice-President, Academic

Date: March 5, 1999

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## **GROUND OF GRIEVANCE**

1. Article 12 of the *Framework Agreement* establishes that the University has a duty of fairness. Prior to Dr. Gagan hearing our appeal, the Tri-Council *Policy Statement* made it clear that if ethics review is to satisfy the principles of procedural fairness and natural justice, it must occur at arms-length from the University administration. Although we recognize the *Policy Statement* will not formally come into effect until September 1999, we assume that the university follows the principles of procedural fairness and natural justice nonetheless. Article 6.2 of the *Framework Agreement* says, "should conflicts arise

between university policies and the express provisions of this Agreement, the latter shall prevail." At the outset, we asked Dr. Gagan to delegate the appeal to an independent panel so that we could receive a fair hearing. His refusal to facilitate a fair hearing violates Article 6.2 and 12 of the *Framework Agreement*. We believe the institutional conflict of interest has compromised the Appeal.

2. The Appeal Decision violates Article 1.2(c) of the *Framework Agreement*, which ensures "freedom from institutional censorship." By reserving the right to censor any consent statement the URERC might propose, Dr. Gagan went beyond the jurisdiction of an "appeal." On May 6, 1998 the URERC formally approved the clause in our consent statement saying that, "In the event that ... we are ordered to reveal confidential information by a court or public body, we will make an ethical decision not to do so." Dr. Gagan knows that this statement is consistent with our disciplinary ethics code. Also he knew that the URERC already approved two ethics applications employing consent statements containing this clause. Dr. Gagan acted on the institutional conflict of interest when he censored this clause for reasons related to liability and the image of the University. This kind of imposition is an excellent example of why the Tri-Council *Policy Statement* requires that university administrators remain independent of the *ethics* review process.
3. Article 1.2 of the *Framework Agreement* ensures the "right to investigate ... without reference to prescribed doctrine." To approve our ethics application, Dr. Gagan requires that we say,

... the University cannot and will not solicit or counsel its researchers to disobey a legal disclosure order and will not support researchers in their efforts to do so once all legal protections have been exhausted. At such time as all legal protections have been exhausted, you should be aware that the University, its governors, and its officers cannot and will not take further steps to prevent court-ordered disclosure. In these circumstances, information obtained during this study and/or the identity of its sources may be disclosed.

With this statement the University has declared its determination to absolutely subjugate ethics to law. However, both our disciplinary code and the Tri-Council *Policy Statement* recognize that ethics and law may lead to different conclusions. Stopping us from doing our research if we do not mention the University's prescribed doctrine infringes our academic freedom, a violation of Article 1.2 of the *Framework Agreement*.

4. For eighteen months we have documented the various ways the URERC has failed to comply with several SFU policies (R20.01, R60.01, A30.01) and the *Framework Agreement*. Because of these policy violations the University has prevented us from complying with University policy and stopped our research, even though that research is consistent with our disciplinary ethics code. By completely ignoring the various procedural issues we raised, and by labeling the enormous amount of time we had to spend seeking approval of our two research ethics applications "voluntary," Dr. Gagan abrogated his duty of fairness in formulating the reasons for his Appeal Decision. Our work in this regard was not "voluntary." Research is part of our job description; we are obliged to protect the rights and interests of the human subjects of research; and we are obliged to comply with University policy. As we show in Appendix A, both the Committee as a whole and the Chair in particular did not exercise due diligence in

adjudicating our ethics applications. In the process, the URERC has infringed our academic freedom. Consequently, we are seeking compensation for the damage the University, via its ethics committee, has done to our research in the process of stopping us from following university policy and our disciplinary ethics code. Dr. Gagan's Appeal Decision failed to deal with these issues.

5. The Appeal Decision mentions several of the reasons we object to the URERC's limited confidentiality consent statement, but it does not mention our primary *ethical* reason for refusing to use it. Dr. Gagan says, "the URERC has insisted that its principal responsibility is to protect the rights and interests of the human subjects of research." This is our primary ethical obligation as well. We cannot use the URERC's limited confidentiality consent statement because we believe it does *not* protect the rights and interests of research participants (see our Grounds for Appeal, item 1; see also our *History of Limited Confidentiality at SFU*).
6. To the best of our knowledge, no Court has ever ordered a Canadian researcher to divulge confidential research information. Consequently, we do not understand what risk Dr. Gagan is referring to in his proposed consent statement. Although our research clearly involves "minimal risk" as defined by the Tri-Council, both the URERC and Dr. Gagan refused to respond to our argument about invoking the consent alteration provisions contained in the *Policy Statement*. The URERC's and Dr. Gagan's selective use of the *Policy Statement* — invoking it when they find it convenient to do so, and ignoring it when it is not — is unfair.
7. The procedure Dr. Gagan devised to produce an informed consent statement made no provision for us to discuss the wording with him. This was unfair, because it gave no opportunity to resolve potential problems with his consent statement.
8. We cannot use Dr. Gagan's consent statement for the following reasons:
  - a) Most of our research subjects will not understand it.
  - b) We can find no evidence that the statement is correct when it says that confidential research information does "not have full protection of the law in Canada." True, it does not have statutory protection, but there is more to law than statute. In fact, if researcher/subject communications satisfy the four criteria of the Wigmore test (as we have argued they can, and as the CAUT legal opinion affirms is plausible), they may have full protection of the law in Canada.
  - c) The statement says if there is a court order, confidential information may be disclosed. This leaves open the possibility that it may *not* be disclosed. In the interest of informed consent, information must be provided about the circumstances in which confidential information will be disclosed, and/or when it will not. We are resolute that it will not, but Dr. Gagan censored our statement to that effect.
  - d) Even though no Canadian court of law has ever ordered the disclosure of confidential research information, the URERC has demanded that the risk be mentioned. However, in contrast to the consent statement proposed by the URERC, Dr. Gagan's version does not say that the degree of risk is minuscule. Indeed, it gives quite a different impression and

consequently misinforms our research subjects in a way that also would likely represent the kiss of death for our research.

e) The statement gives our research subjects the impression that, if a court orders disclosure of confidential information, it will be disclosed. That is not correct.

9. As we stressed throughout our negotiations with the URERC, and as we explained in our Appeal, by delaying two projects that took years to set up, "the URERC has seriously compromised our research, and perhaps damaged it beyond repair." By taking four more months to develop a consent statement, Dr. Gagan further compromised our research. First the URERC and now Dr. Gagan did not show due diligence in processing our ethics applications in a timely way.
10. Two of our graduate students — one engaged in research involving apparent violations of criminal law, the other involving apparent violations of criminal and civil law — have had their research ethics applications approved by the URERC using a consent statement that is also acceptable to us. Dr. Gagan was made aware of this, but he refused to let us use this statement.
11. The eighteen month delay we have experienced at the hands of the URERC and Dr. Gagan is not justifiable, has hindered and impeded our research, and has infringed our academic freedom.

Yours sincerely,

John Lowman and Ted Palys

School of Criminology

June 11, 1999

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## **CONCILIATION RESOLUTION**

(Conciliation Panel: Drs. Fizzell, Dyck and Weeks)

In the process of the conciliation (Step 3 of the SFU Grievance Procedure), the University authorized use of the following informed consent statement and gave Lowman and Palys each an extra research semester and a teaching relief to compensate for the time their research applications were held up:

The researchers will do everything possible to maintain the confidentiality of information obtained during this study and the anonymity of its sources. If an order is made by a court that the researchers provide information or reveal the identity of their sources, the university will provide legal representation until all available court processes have been exhausted to assist the researchers to maintain confidentiality of information and sources. Even then, the researchers will not reveal any confidential information and will never do so unless they

believe it is ethically proper, considering the circumstances, to reveal that information.