The History of Limited Confidentiality at SFU

A Submission to the SFU Ethics Policy Revision Task Force

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How Important is Research Confidentiality?

We start our *History of Limited Confidentiality at SFU* by reviewing a case, decided within the last week, that pitted one of the most powerful corporations on earth, Microsoft Corporation, run by the wealthiest person on earth, Bill Gates, against two researchers from two of the world's most prestigious universities – Harvard and MIT. It is also the most recent case available regarding the protection of confidential research information from court-ordered disclosure and exemplifies many of the themes that pervade *History of Limited Confidentiality at SFU*.

The US Department of Justice is prosecuting Microsoft Corporation for allegedly violating anti-trust laws by engaging in unfair competitive practices. One area of Microsoft's practices being looked at is their effort to become dominant in the Internet browser market. Netscape got the head start with *Netscape Navigator*, and, at one time, held 80% of the market, compared to Microsoft's *Internet Explorer*, at 20%. More recent figures show a 50-50 split. The prosecution is arguing that Microsoft rose from 20% to 50% because of its predatory business practices; Microsoft argues it improved market share because of better business practice than Netscape, which made some significant blunders allowing Microsoft to increase its share of the market.

In the midst of this case Microsoft heard of a forthcoming book by Drs. Michael Cusumano (of MIT) and David Yoffie (of Harvard), entitled *Competing on Internet Time: Lessons from Netscape and the Battle with Microsoft.* As part of their research, Cusumano and Yoffie had interviewed 40 current and former employees of Netscape. Microsoft secured a prepublication draft of the book, and were titillated by what they saw. They wanted more, and subpoenaed Cusumano and Yoffie's tapes, notes, and transcripts, to get it.

We note first of all that MIT and Harvard did not abandon their researchers as SFU did to Russel Ogden – they appeared in court with their researchers to challenge the subpoena in the interests of preserving research confidentiality and academic freedom.

Most recently, the case was heard by the US Court of Appeals (First District), who, in their decision released last week, [1] note there is a huge amount at stake in this case – literally, hundreds of millions, if not billions, of dollars. And, as the court explained, there is much on the Microsoft side of the balance: Microsoft's need for Cusumano and Yoffie's research information was recognized as "substantial" in terms of its utility to their defense in the anti-trust case. The court notes also that Microsoft was specific in their request and not simply engaged in a "fishing expedition." And, as the court writes:

> The company, after all, is in the throes of defending a complex case of extraordinary importance to its future, and its primary defense is that Netscape suffered a series of self-inflicted wounds that dissipated its dominant position in the browser market. Lessons includes several quotations that suggest missteps by Netscape management during the browser war, and it is reasonable to assume that the notes, tapes, and transcripts include more evidence of this genre. Hence, Microsoft has made a prima facie showing of need and relevance.

It is also instructive to note that the legal position Microsoft's eight lawyers argued in trying to secure the information was to say that the communications between Cusumano and Yoffie and

[1] For a copy of the full decision, see *In re: Michael A. Cusumano and David B. Yoffie* [United States of America v. Microsoft Corporation], No. 98-2133, United States Court of Appeals For the First Circuit; the decision is available online at www.law.emory.edu/1circuit/dec98/98-2133.01a.html

their research participants were not "really" confidential, and hence could not be considered privileged, i.e., they did not arise in a confidence that they would not be disclosed. As will become clear, this is a central issue relating to our opposition to “limited confidentiality” at SFU.

Notwithstanding all that is at stake for Microsoft, and the utility that access to the researchers' transcripts, notes, and tapes would have for them, the US Court of Appeals (First District) sided with Drs. Cusumano and Yoffie and their research participants. As the court writes:

> Courts afford journalists a measure of protection from discovery initiatives in order not to undermine their ability to gather and disseminate information. ... Journalists are the personification of a free press, and to withhold such protection would invite a "chilling effect on speech," *id.*, and thus destabilize the First Amendment. The same concerns suggest that courts ought to offer similar protection to academicians engaged in scholarly research. After all, scholars too are information gatherers and disseminators. If their research materials were freely subject to subpoena, their sources likely would refuse to confide in them. As with reporters, a drying-up of sources would sharply curtail the information available to academic researchers and thus would restrict their output. Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of a similar level of protection for journalists and academic researchers.
>
> Given this mise-en-scène, it is unsurprising that several of our sister circuits have held that the medium an individual uses to provide his investigative reporting to the public does not make a dispositive difference in the degree of protection accorded to his work. … Whether the creator of the materials is a member of the media or of the academy, the courts will make a measure of protection available to him as long as he intended "at the inception of the newsgathering process" to use the fruits of his research "to disseminate information to the public.”
>
> This case fits neatly into the architecture of these precedents. The sole purpose of the respondents' interviews of Netscape personnel was to gather data so that they could compile, analyze, and report their findings anent management practices in the Internet technology industry. Thus, the respondents are within a group whose pre-publication research merits a modicum of protection. (p.6)

And later in the decision:

> Scholars studying management practices depend upon the voluntary revelations of industry insiders to develop the factual infrastructure upon which theoretical conclusions and practical predictions may rest. These insiders often lack enthusiasm for divulging their management styles and business strategies to academics, who may in turn reveal that information to the public. Yet, path breaking work in management science requires gathering data from those companies and individuals operating in the most highly competitive fields of industry, and it is in these cutting-edge areas that the respondents concentrate their efforts. Their time-tested interview protocol, including the execution of a nondisclosure agreement with the corporate entity being studied and the furnishing of personal assurances of confidentiality to the persons being interviewed, gives chary corporate executives a sense of security that greatly facilitates the achievement of agreements to cooperate. Thus, … the interviews are "carefully bargained-for" communications which deserve significant protection. …
>
> Considering these facts, it seems reasonable to conclude -- as the respondents' affidavits assert -- that allowing Microsoft to obtain the notes, tapes, and transcripts it covets would hamstring not only the respondents' future research efforts but also those of other

> similarly situated scholars. This loss of theoretical insight into the business world is of concern in and of itself. Even more important, compelling the disclosure of such research materials would infrigidate the free flow of information to the public, thus denigrating a fundamental First Amendment value. (p.9)

We only wish that Simon Fraser University's VP-Research and the University Research Ethics Review Committee valued research as much.

1) Liability Contaminates Research Ethics at SFU: A Preamble[2]

"A promise which may or may not be kept is no promise at all"

Bill Ehrcke (lawyer) talking to the Supreme Court of Canada
about the importance of confidentiality in relation to adoption law.

SFU Research Ethics Policy (University Policy R20.01), states that: "In general, the primary ethical concerns respecting research on subjects relate to: informed consent; deception, privacy, confidentiality; and, anonymity." The University Research Ethics Review Committee (referred to hereafter as "the URERC," or "the Committee") administers the policy. The policy does not limit confidentiality, privacy or anonymity in any way. Nor does it authorize the VP-Research or the URERC to make substantive changes to the policy.

On the agenda of the September 9, 1994 meeting of the URERC, the VP Research, Dr. Bruce Clayman, included the subject of "limited confidentiality." Under the heading, "limited confidentiality," the minutes of the meeting include the following statement:

> 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… (I)t was agreed that causing the researcher to provide limited confidentiality in appropriate cases would protect the subjects, the university, and the researchers.

At a meeting on November 23, 1995, the URERC decided to require researchers collecting information from subjects about their criminal or other law breaking activity to use what we refer to below as the "limited confidentiality consent statement," which reads:

> Any information that is obtained during this study will be kept confidential to the full extent permitted by law. ...However, it is possible that, as a result of legal action, the researcher may be required [*sic*] to divulge information obtained in the course of this research to a court or other legal body.

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

[2] For their comments on various drafts of this manuscript, we thank: David Bell, Brian Burtch, Dorothy Chunn, Bill Glackman, Robert Gordon, and Susan Stevenson.

"Wigmore criteria," the common law test used by the Supreme Court of Canada for establishing privilege of communication on a case-by-case basis (*R. v. Gruenke*, 1991).[3]

Stating that the researcher might be "required" to divulge information to a court makes it impossible to pass the first criterion of the Wigmore test,[4] which requires that a communication must arise in a confidence that it will not be disclosed. Because of the limited confidentiality statement warning about court-ordered disclosure, the court can simply say, "the research participant was told that a court might order the divulging of information, and it is ordering it now, so hand over the information." The limited confidentiality statement thus prevents the researcher from living up to the promise that information will be kept confidential "to the full extent permitted by law."

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

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

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

Over the past year we have written a series of articles[5] criticizing the regime of "limited confidentiality" introduced in response to the Ogden case as it was unfolding in the summer of 1994. The URERC's minutes state that one of the reasons the Committee introduced limited confidentiality was to "protect the university" (Minutes of the URERC, September 9, 1994). From the very beginning, therefore, limited confidentiality was compromised by the institutional conflict of interest that exists when an Ethics Committee attempts to protect the university as well as protecting research participants. Indeed, as a child of the Ogden case, we suggest that the

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[3] See also Sopinka, J., Lederman, S.N., and Bryant, A.W. (1992). *The law of evidence in Canada*. Toronto: Butterworths.

[4] A claim is considered to be privileged if it complies with the four "Wigmore criteria," which require that:
(1) the communications must originate in a confidence they will not be disclosed;
(2) confidentiality must be essential to the maintenance of the relation between the parties;
(3) the relation must be one which the community believes ought to be sedulously fostered; and
(4) the injury that would result from the disclosure of the communication must be greater than the benefit that would be gained by the correct disposal of litigation**.**

[5] John Lowman and Ted Palys, "A Law Unto Itself?" *Simon Fraser News*, November 27, 1997, pp. 5-6; Ted Palys and John Lowman, "Abandoning 'the Highest Ethical Standards:' Research Ethics at SFU," *The Bulletin*, April 1998, pp. 5-8; John Lowman and Ted Palys, "When Research Ethics and Law Conflict," *CAUT Bulletin ACPPU*, June 1998, pp. 6-7; John Lowman and Ted Palys, "The Liability of Ethics" *Simon Fraser News*, July 16, 1998, p.5; John Lowman and Ted Palys, "Ethics/Law Conflict Revisited," *CAUT Bulletin ACPPU*, September 1998, p.2.

institution of limited confidentiality had much more to do with liability management than it did with research ethics (see Blomley and Davis, 1998).

Furthermore, we suggest that the *a priori* limitation of confidentiality represents an unauthorized substantive change to the SFU Research Ethics Policy (R20.01). This is all the more troubling when one realizes that the procedure used to implement limited confidentiality was seriously flawed. For example, at the URERC meeting where the decision was made to introduce the limited confidentiality consent form template, there was not even a quorum present.

On top of all this, the change the Committee wrought violates, in a fundamental way, the Research Ethics Policy approved by the Board of Governors in 1992 and it does not comply with other university policies and agreements (e.g., A30.01; R60.01; *Framework Agreement*). And SFU-style limited confidentiality will likely not be permissible when the Tri-Council *Policy Statement* comes into full effect.

Dr. Adam Horvath is the current Chair of the URERC. In 1995 he was a member of the Committee, and provided the wording for the limited confidentiality consent-form template. In an article published on the web site of the VP-Research, [6] he claims that limited confidentiality has benign origins, and is merely a statement of risk, a necessary component of informed consent. His document represents the official history of limited confidentiality at SFU.

We suggest that the origins of limited confidentiality are far from benign. In this regard, we present evidence that directly contradicts some of Dr. Horvath's key claims, particularly his claim that, "at no time did the URERC suggest, or imply that the researcher should provide [confidential] information to the court or anyone else."

We begin our history of limited confidentiality with some comments about: (a) the purpose of University Research Ethics Policy (R20.01); (b) Russel Ogden, the Criminology graduate student who was effectively abandoned by SFU when he was subpoenaed to appear in Coroner's Court; and (c) the administrative culture of SFU, as exemplified by its reaction to the Ogden case.

R20.01: The University Research Ethics Policy

The University Research Ethics Policy (R20.01) was approved by the appropriate university authorities, and implemented in 1992. In section 2, "Rationale," the policy notes that, "There is a professional responsibility of researchers to adhere to the ethical norms and codes of conduct appropriate to their respective disciplines." In addition to that disciplinary sensitivity, section 4, "Ethical Policy Considerations," asserts:

> 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 in and/or be the subject of research. A research proposal must demonstrate that appropriate methods will be used to protect the rights and interests of the subjects in the conduct of research. In general, the primary ethical concerns respecting research on subjects relate to: informed consent; deception; privacy; confidentiality; and, anonymity.
> …
> Where research may involve invasion of privacy of a subject, the research proposal must contain provisions that the subject will be fully informed, in advance, of the nature of information required and the subsequent use to be made of that information. Each subject is to be given the freedom to

[6] http://www.sfu.ca/vpresearch/ethics/index.htm

> decide for himself or herself what information which is not already in the public domain or available to an ordinary member of the public and which relates to his or her physical and mental condition, personal circumstances and social relationships should be communicated to or withheld from others. No information shall be withheld from subjects nor should they be intentionally mislead regarding the procedures or purposes of research unless there is a valid methodological reason for doing so.

We note two important features of this policy: (1) it identifies a number of "primary ethical concerns," and hence a range of participant rights and interests that must be considered and maximized, including both informed consent and confidentiality; and (2) it contains no *a priori* limitation of confidentiality.

An Institutional Conflict of Interest

> "Procedural fairness and absence of bias are the two requirements of natural justice. The absence of bias requirement arises out of the right to be heard by an impartial tribunal, and is based on the premise that justice should not only be done but should be seen to be done. For this reason it is not necessary that actual bias be established. It is sufficient that there exists a reasonable apprehension of bias." (*Huerto v. Saskatchewan* [1995] 5 W.W.R. at 202)

We have written at length about the conflict of interest that exists when administrators are made responsible for decisions about research ethics.[7] The recent Tri-Council *Policy Statement* (Section 4C) expresses the same sentiment:

> The REB 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 [*Editorial comment: or disapproved, as is the case with the URERC's imposition of "limited confidentiality"*] 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)

Under SFU Policy R20.01 the VP-Research appoints and chairs the Ethics Committee (or can delegate the Chair). If the VP-Research delegates the Chair, he/she hears appeals of negative decisions; if the VP-Research elects to Chair the Committee, the VP-Academic hears appeals. This administrative structure will no longer be allowed once the *Policy Statement* comes into effect.

If there is any doubt about the Tri-Council's wisdom in this regard, we suggest that the institution of "limited confidentiality" at SFU is a classic example of the problems that can occur when a Research Ethics Committee does not operate at arms length from a University administration.

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[7] See, for example, Palys and Lowman (1997). *When Roles Conflict: Research Ethics at SFU*. Brief prepared for then-SFU President *pro tem* Jack Blaney regarding the Russel Ogden case, and issues arising therefrom. [see http://www.sfu.ca/~palys/conflict.htm]

Russel Ogden

Russel Ogden is a former SFU Criminology graduate student whose thesis research involved the topic of assisted suicide among persons with HIV/AIDS. He knew that reliable and valid research regarding such persons – who could conceivably be charged with murder if their identities were known – would require the trust and confidence of his research participants. His proposal to the 1992 Ethics Committee indicated that he was prepared to pledge "absolute" confidentiality, a pact consistent with the ethical principles outlined in R20.01. His proposal was given ethics approval by the University Research Ethics Review Committee.

Following completion of the research, in February 1994, Ogden was subpoenaed to appear before Vancouver Coroner's Court to ascertain whether he could throw light on the cause of death of an "unknown female." The Coroner thought that two persons who participated in Ogden's thesis research on assisted suicide and euthanasia in the AIDS community might have been present when the unknown female died. As far as we can ascertain, Ogden is the only Canadian researcher ever to have been asked by a court to divulge confidential information.

Because Ogden had promised absolute confidentiality to his research participants, he refused to divulge confidential information and was promptly charged with contempt of court. Although the URERC had approved Ogden's research protocol, the University administration declined to appear in Coroner's Court to defend academic freedom and the URERC's decision to approve Russel Ogden's research protocol (the University gave Ogden $2000 on "compassionate grounds," which he put toward the roughly $11,000 legal bill incurred by his defense of academic freedom and the SFU research ethics policy). The University left it almost entirely to Ogden to protect his research participants from the harm that would likely befall them should he disclose the confidential information they had provided under a promise of "absolute" confidentiality. In his defence, Ogden successfully argued that his communications passed the *Wigmore* test, which lays out the criteria required to establish, "a privilege against disclosure of communications between persons standing in a given relation" (see footnote 4)

The Administrative Culture at SFU

Over the past ten years a developing literature has charted the way western culture is more and more organized around the concept of "risk." In academe, there has been a gradual shift away from the old-style positivist conceptualization of "causality" to a more instrumental concern with probability and the calculation of risk. Risk logic has become a core component of state activity (unemployment, health and welfare insurance, etc.) and of the operation of civil society (insurance and various risk-reducing technologies related to health and crime). Policing and other social control institutions are now organized around risk logic, and much of their activity is devoted to producing information about risk.

Not surprisingly, as well as describing these developments the academic enterprise is also affected by them, and it is in these terms that we can begin to understand the administrative culture not only at SFU, but at Canadian universities in general. Being responsible for the dispensation of public monies, university administrators are concerned about spending those monies wisely, as obviously they should be. But sometimes, concern about risk can subvert other cherished academic values, not the least being academic freedom and the ethical obligations we have to research participants. We suggest that is precisely what happened at SFU when liability considerations began to contaminate the research ethics application procedure.

"Limited confidentiality" is the one unresolved issue remaining from the Russel Ogden case. Blomley and Davis (1998) assert that the University viewed the Ogden case primarily, "as a negative issue, the concern seemed to be that of limiting any legal obligation to Ogden and by *extension to anyone in the future in a similar position*" (emphasis added). The institution of "limited confidentiality," which occurred at the behest of the VP-Research represents the extension of what we might call the University's "Ogden risk logic" to all those engaged in criminological research who might find themselves subpoenaed.

Its defenders maintain that "limited confidentiality" is *only* about warning prospective research participants about risk. We think otherwise because:

a) The minutes of January 19, 1994 URERC meeting indicate that liability considerations, including liability "waivers," were openly discussed at a URERC meeting;
b) The minutes of the URERC's September 9, 1994 meeting, at which limited confidentiality was adopted, clearly state that one of the reasons for "limited confidentiality" was to "protect the university," thereby creating a real institutional conflict of interest;
c) "Limited confidentiality" does *not* protect research participants to the full extent permitted by law; instead, it actually exposes research participants to harm;
d) We have evidence that the URERC has *not* advised researchers that they have the option to fight a subpoena, and even defy a court order;
e) For properly informed consent, the researcher must tell the participant whether they and the university intend to vigorously resist court-ordered disclosure of confidential research information.

We contend that limited confidentiality was an extension of the same logic that administrators used to justify abandoning Mr. Ogden. It embodies the very same principles of liability- and image-management adopted by then-President Stubbs and Vice-President Clayman as displayed in their testimony in Small Claims Court when Mr. Ogden sued the university for his legal fees.

Consequently, we suggest that the damage done to the research enterprise at SFU by the administration's treatment of Mr. Ogden will not be complete until the University has abandoned the "limited confidentiality" consent form template that is still being used at SFU.

Our submission to the SFU Ethics Revision Task Force brings together all the documentary evidence we have been able to compile regarding the advent and implementation of limited confidentiality, and particularly of the limited confidentiality informed consent statement. The remainder of this submission describes the procedural irregularities that have characterized the process whereby the VP-Research and URERC unilaterally changed the SFU research ethics policy, and demonstrates the damage done to qualitative criminological research in the process.

The submission comprises seven sections. Section 1 describes the institutional conflict of interest that underlies "limited confidentiality" at SFU. Section 2 describes key SFU Research Ethics Policy procedures as a background for Section 3, which identifies the procedural errors that occurred during the institution of limited confidentiality for researchers studying self-disclosed criminal and other law-breaking activity. Section 4 discusses the meaning of "limited confidentiality," and the problems that occur when mandatory reporting requirements and court-ordered disclosure are conflated. In Section 5 we explain how, by imposing the policy of limited confidentiality, the VP-Research and URERC have exposed research participants to harm and infringed the academic freedom of researchers – actions that we believe stand in violation of SFU policies R20.01, R60.01, A30.01 and the SFU *Framework Agreement*. Section 6 describes the

URERC's and the University's response to two of our own ethics applications which, after a year of debate about limited confidentiality, the URERC refused to approve. Again, we suggest that the Committee's actions stand in violation of SFU policies R20.01, R60.01, A30.01 and the SFU *Framework Agreement*. Embedded in this discussion is the URERC's most recent twist to its "law of the land" regime: allowing unlimited confidentiality only when the researcher who proposes it agrees to shoulder sole responsibility and liability for maintaining it. In Section 7 we conclude by asking if there are two standards at SFU, one for researchers, and the other for administrators and the URERC.

Before we embark on this analysis, it is important to bear in mind what the 1992 SFU Research Ethics Policy says about URERC membership and the quorum for meetings.

2) R20.01. Research Ethics Committee Composition and Quorum for Meetings

URERC Membership (R20.01, section 5.b). *Standing Membership: The Vice President, Research or his/her delegate as Chair; the Director of University Medical Services; the University Safety officer; and six members of faculty appointed by the VP-Research.*

Quorum for Meetings (R20.01 section 5c). *The quorum shall consist of the Chair and four other members of the Committee.*

2.i) University Research Ethics Review Committee Minutes

We have examined minutes for all URERC meetings from January 19, 1994 through to October 7, 1998 (Table 1).[8]

Table 1: URERC Meetings 1992-1998

1992	1993	1994	1995	1996	1997	1998
None	Jul 15	Jan 19	Nov 23	June 11	Nov 25	Feb 3
	Oct 15	Sep 9		Dec 5	Dec 18	Feb 10
		Dec 2				Mar 3
						Mar 24
						Apr 7
						May 5
						Jun 2
						Jul 7
						Aug 4
						Sept 1
						Oct 7

[8] Minutes for the past year are posted on the URERC web site. Other minutes were obtained through Barb Ralph in the VP-Research's office, with the minutes of January 19th, 1994, also having gone through FOI/POP review. We have not yet been able to obtain the minutes of the two meetings held in 1993, although we do have correspondence relating to the ethics application that was discussed at these and the January 19th meeting (for discussion, see section 3.ii, below). We thank Ms. Ralph for her assistance.

When it comes to evaluating applications, R20.01 (section 6(f)) empowers the Chair to:

i. grant approval of the proposal on behalf of the Committee;
ii. circulate the request to the Committee or a sub-committee thereof for members advice before granting approval
iii. seek advice from outside the Committee, and
iv. call the Committee together, with or without advisors, to consider the request for approval and to reach a decision.

There is no record in any of the minutes from January 1994, onward of a sub-committee being struck to advise the Chair about particular applications. We do not know how often the Chair circulated applications to the Committee when granting ethics approvals, but former representatives on the URERC suggest he rarely did this.

From January 1992 to October 1997 there were eight meetings, an average of just under 1.5 meetings per year. Throughout this six-year period, during which time at least 1,000 and perhaps as many as 2,000 ethics applications have been processed, *the Office of the VP-Research* ***handled all but two*** *research ethics applications on behalf of the URERC without discussing the cases at Committee meetings*.

The monthly meetings from November 1997 onward began when we challenged the propriety of the URERC's decision-making. Over the past year, the minutes reveal that only three cases were discussed at Committee meetings, two of which were ours.

When it comes to evaluating research ethics applications and communicating with applicants, the Office of the VP Research effectively *is* the "University Research Ethics Committee." Committee members are rarely involved in the application approval process.

3) The Imposition of Limited Confidentiality: Procedural Issues

3.i) Limited Confidentiality and Liability

After many years as Dean of Graduate Studies (a position he still holds), Dr. Bruce Clayman became Vice President of Research in 1993. One of the responsibilities of the VP-Research is to implement R20.01, the policy on *University Research Ethics*.

Policy R20.01 gives the VP-Research the option of serving also as Chair of the URERC. Although, to our knowledge, he has never conducted any research with human subjects, Dr. Clayman exercised that option and became Chair of the Ethics Committee when his appointment as VP-Research began. He continued in that capacity until February 1998, when he resigned in recognition of the institutional conflict of interest that exists when an administrator, in this case, the VP-Research, also Chairs the Ethics Committee.[9]

[9] The resignation only partially resolved the institutional conflict, however, insofar as the VP-Research still appoints the Committee, and either the VP-Academic or the VP-Research hears appeals of the Committee's

In his first year as Chair of the URERC, two troublesome cases crossed Dr. Clayman's desk. Both were inherited from his predecessor, Dr. William Leiss. The first involved a research project on "Adaptive Response to Exercise and ACE-Inhibitor in Hypertensive Subjects," funded by Parke-Davis Pharmaceuticals. The second was the Russel Ogden case.

The university administration's decision-making with regards to Russel Ogden from March through July 1994, and particularly the decision that the university would not stand beside him in court, has been analyzed in detail by Drs. Blomley and Davis (1998), at the behest of SFU President Jack Blaney, in a report entitled *Russel Ogden Decision Review*. Before we review the importance of the Ogden case for understanding the impetus behind limited confidentiality at SFU, some comments on the URERC's processing of the ACE-inhibitor research are in order, because they provide concrete evidence of the contamination of SFU's research ethics review procedures by liability considerations.

3.ii) Liability Surfaces: The URERC Minutes of January 19, 1994

By the time the URERC held its meeting of January 19th, 1994, the Kinesiology ACE-inhibitor research had been under discussion by the URERC for at least six months. The minutes of the January 1994 meeting reveal that extra-ethical criteria were being considered as part of the ethics approval process. For example,

> The Acting Chair asked Dr. [name deleted] to describe what [name deleted] will do when the physician is away. The concern of liability and the use of waivers was also raised. If waivers are not used, why not? Dr. [name deleted] replied that [name deleted] perceived the Informed Consent form to be a form of waiver. The Chair questioned if having a physician two floors away could constitute negligence. …
>
> The Acting Chair indicated that the Informed Consent form does not constitute a waiver. If a waiver is not carefully worded, it could be challenged in a court of law. The Acting Chair said that the use of a waiver, in this experiment, needs to be discussed with the University's insurance officer."

We mention the case simply to make the point that, by the time the Russel Ogden case landed on the VP-Research's table, the URERC's intermingling of ethics issues with liability considerations was already established.

3.iii) The Influence of the Ogden Case on Limited Confidentiality

The first time the VP Research raised the issue of limited confidentiality with the URERC was on September 9, 1994, just after Russel Ogden appeared in Coroner's Court, but before the Coroner decided that Ogden's communications with his participants did, indeed, satisfy the Wigmore criteria. The Administration's reaction to Russel Ogden tells us much about the logic the VP Research brought to the URERC when he included "limited confidentiality" on the agenda of the September 9th meeting.

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negative decisions.

Blomley and Davis show the chronology of "the Russel Ogden decision" as follows:[10]

> To summarize:
>
> - The first request for University support for Ogden came on **January 17, 1994**, when Verdun-Jones spoke informally to Stubbs, although it appears that Verdun-Jones had advised Stubbs of the possibility of legal complications earlier.
> - Again on **February 14** Verdun-Jones discussed with Stubbs possible legal problems that Ogden might have.
> - On **March 18**, Stubbs received information that Ogden was probably going to refuse to reveal his sources before the Coroner's Inquest, if subpoenaed, and subsequently, on **March 27** advised Bruce Clayman, the VP-Research, and John Munro, the then VP-Academic, about Ogden's possible involvement in a Coroner's Inquest and informed them that "we will need to think about this."
> - On **May 12**, Verdun-Jones phoned Clayman to ask that SFU assist Ogden with his legal costs in preparation for the Coroner's Inquest.
> - On **May 13** Clayman sent an e-mail to Stubbs, Munro and Judith Osborne, the Associate VP-Academic, suggesting that the University offer Ogden $2000 "on compassionate grounds or possibly based on support for his academic freedom" and noting that Ogden's submission to the URERC included a "waiver letter."
> - On **May 24**, at a VPs meeting (present: Stubbs, Blaney, Munro, McDonald, Ward, Clayman) it was decided not to offer Ogden any support.
> - This was overturned on **May 25** following a conversation between Verdun-Jones and Stubbs when $2000 was offered.
> - On **May 25** Ogden received a subpoena to appear before the Coroner's Inquest on 1 June.
> - On **July 22**, SFU declined Ogden's suggestion that the University's lawyers contact Ogden's lawyer to obtain information about the brief that Ogden's lawyer was going to present to the Coroner's Inquest.
> - On **July 27** a VPs meeting confirmed the earlier decision to maintain funding at $2000.

In order to understand something of the administrative culture that was operative during that time period, the Blomley and Davis analysis of how the university administration framed the issue is worth reproducing at some length:

> The issues involved in the Ogden decision appear to have been framed in a particular way by the University. This shaped both the response that the University gave to Ogden, and the ensuing discussions concerning the decision. The question that the University appeared to pose centred on whether it had any legal obligations to assist Ogden. Moreover, the issue seems to have been framed somewhat negatively -- that is, as a potentially burdensome obligation.
>
> Viewed as a negative issue, the concern seemed to be that of limiting any legal obligation to Ogden and by extension to anyone in the future in a similar position. …
>
> It appears that there was no point at which the issues involved in the decision were framed positively as, for example, an opportunity for the University to explore through the courts the extent and the limits of academic freedom, to go to the defense of one of its

[10] The chronology is reproduced verbatim from Blomley and Davis's *Russel Ogden Decision Review*, but has been re-formatted with bullets and dates emboldened to enhance readability. One event we would add would be the June 29, 1994, so-called "letter of support" that Dr. Clayman wrote for Ogden, which was in fact the first expression of his "limited confidentiality" perspective. Of course, it offered no support at all, did not reflect the Ethics policy, and did not reflect support for Ogden's guarantee of absolute confidentiality, or the 1992 URERC's approval of it (see Blomley and Davis, 1998).

> researchers whose academic freedom was being put at risk or to protect the rights and interests of research participants in University approved research. In fact there is evidence that the University did not consider academic freedom or the protection of the rights and interests of research subjects as central issues in the decision and that for this reason there was very little discussion of them in the VPs meetings at which the Ogden decision was considered or in the emails that circulated among the administrators about the decision. Moreover, we cannot find any indication that the University obtained legal advice during the period at which the decision was made, roughly, March 27 to May 25, or even at a later date, about their obligations to Ogden, about the 'Wigmore criteria' that played such a central role in the Coroner's finding that the information that Ogden had gained in his research was privileged and need not be revealed, or, more generally, about academic freedom and the potential tensions between it and legal disclosure. In addition we do not find any analysis of the significance of R20.01 in the context of Ogden's 'waiver' letter, or any wider discussion of the ethical obligation to research participants to protect their rights and interests. We find it remarkable that such issues were not raised, especially the issues of the protection of the rights and interests of research participants and of academic freedom. The obligation to protect the rights and interests of research participants is laid out in detail in R20.01, the University's policy that contains the ethical principles that apply to research on human subjects.

Dr. Clayman has been a consistent supporter of the University's decision to effectively abandon Ogden's research participants when the Coroner subpoenaed Ogden in pursuit of confidential research information. Dr. Clayman's support of the decision was clearly evident in his "reconsideration" of the Ogden case at Dr. Blaney's behest in the fall of 1997, his "Law of the Land" article in the October 30, 1997, issue of *Simon Fraser News*, and, more recently in his September 24, 1998, letter in *Simon Fraser News*:

> In the specific case of Mr. Ogden, it should be noted once again that the university supported him both financially and with a statement of support. There remains a difference of opinion about the appropriateness of the degree of support, which was influenced by his own explicit acceptance of full responsibility for the consequences of his decisions. (24 September, 1998, p.2)

Independent observers, like Judge Steinberg (*Russel Ogden v. SFU)* and Blomley and Davis, leave a different impression. The University was "wrong" and "unethical" to conceptualize "the problem" entirely in terms of liability and public relations issues. According to Blomley and Davis, academic freedom and research ethics did not figure in the University's decision. [11]

The first URERC meeting after the series of Presidential Advisory meetings that culminated in the university's decision not to appear in Coroner's Court to defend the SFU Research Ethics Policy and academic freedom was only a few weeks later, on September 9, 1994. Dr. Clayman added the topic of "limited confidentiality" to the agenda.

[11] More recently, Dr. Clayman was interviewed for a November 16, 1998 article in *The Peak*, SFU's student newspaper. In it, author Erin Fitzpatrick noted:

> Despite his statement in support of academic freedom, Dr. Clayman still stands by SFU's earlier decision not to support Russel Ogden and says he "simply didn't agree" with the Blomley and Davis report. "I don't agree with the decision that we should pay his legal bills and I don't agree we owe him an apology."

3.iv) The URERC Minutes of September 9, 1994

The URERC was not properly constituted at the time of its September 9, 1994 meeting: The minutes indicate there were only three faculty members on the Committee – there should have been six – and only two attended the meeting.[12] The meeting went ahead anyway.

Under agenda item 4, "Limited Confidentiality Issues," the minutes say:

> The Committee reviewed the issues raised in the types of cases in which information gathered from subjects in a research project is about activities that are potentially in violation of criminal or civil law. The question was raised as to what the Ethics Committee can do to protect the interests of the subjects, the researcher and the University.
>
> 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.
>
> *Action*
> *A question #9 will be added to the checklist as follows: Does information to be obtained from subjects include information on activities that are or may be in violation of criminal or civil law? Yes or no.*
>
> *Requests for Ethics approval which give an affirmative answer to question #9 on the checklist will be provided to the full Committee for approval.*

We do not know how many ethics applicants have answered affirmatively to "question 9" since it was added to the application checklist. Apparently, there were several such applications from the School of Criminology. However, there is no indication in subsequent minutes that the URERC met to discuss any of these applications. We believe that these applications have not gone before the full Committee, as the Committee's own procedures required, but have been handled by the VP-Research on behalf of the Committee. Since October 1997 when we raised our objections to limited confidentiality, only three "question 9" cases were referred to the full Committee for approval. Two of those are ours, and the other is reported in the April 7, 1998 minutes. We know there have been others, but apparently the Committee did not review them.

A Real Institutional Conflict of Interest

According to R20.01, section 4:

> 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 in and/or be the subjects of research.

[12] The minutes provide the following information: Committee members in attendance: Clayman (VP-Research and Chair), Corrado (Faculty), Chapman (Faculty), Harmon (Health Services), Mayall (University Safety Officer); Committee members absent: Horvath (Faculty).

The minutes of the September 9th 1994 meeting show that, in the process of limiting confidentiality, the Committee expanded the formal objectives of ethics review to include *protection of the researcher and the University*. This decision exceeds the URERC's mandate as spelled out in R20.01 section 4. From the point the URERC decided to use the ethics review process to "protect the researcher and the university," a demonstrable conflict of interest has tainted URERC decision-making.

3.v) The URERC Minutes of November 23, 1995

This is the key meeting in terms of the "limited confidentiality consent statement." According to Dr. Clayman's account, "The university research ethics review committee approved a large number of proposed changes to the policy in 1995."[13] Given that the URERC met only once in 1995, Dr. Clayman must be referring to the meeting on November 23rd.

Six people attended that meeting, including two staff members of the Office of the VP-Research. The four Committee members were: Bruce Clayman, VP-Research and URERC Chair; Dr. Horvath (faculty); Dr. Wexler (faculty); and Dr. Hanson (faculty).[14] A Chair ***and*** *four* members are required for a quorum; ergo, *there was no quorum at the meeting where the limited confidentiality consent statement was instituted.*

Dr. Hanson (Philosophy) was a new appointee to the URERC, and this was his first meeting. Prior to the meeting, he was provided with a copy of the September 9, 1994 minutes, where the VP-Research had first broached the subject of "causing the researcher to provide limited confidentiality." We have attached a copy of Dr. Hanson's account of this first meeting (Appendix A).

It is important to put agenda Item 6 from the November, 1995 meeting, "Consent Form – 'Illegal' Activities" in context by noting that several agenda items relate to wording changes being proposed for input to the draft policy, which was the main subject of this meeting. Other proposed wording changes for the Draft Policy had also been discussed at the previous URERC meeting on December 2, 1994.

Item 6 also concerned wording changes for the draft policy. The November 25, 1995, minutes read:

> 6. Consent Form – 'Illegal' activities.
>
> This is a very sensitive issue. One Committee member will forward to the Chair an example of what is used by the Faculty of Education where disclosure is required by law. An example of wording to use when subjects report information about activities that may be in violation of civil or criminal law will be incorporated into the draft policy and the consent form.
>
> *Action: Dr. Horvath will supply wording used in psychological interviews.*

[13] Bruce Clayman, "The Law of the Land" *Simon Fraser News*, October 30, 1997.
[14] Three faculty members (Ogloff, Chapman and Corrado) and the Medical Officer (Harmon) and Safety Officer (Mayall) were absent.

Under Item 9, “Approval of Revised Policy R 20.01” the minutes conclude:

> After seeking Dr. Corrado’s opinion on the wording of the “illegal activities” paragraph on the Consent Form, the Chair will incorporate all these agreed upon changes and distribute the Draft Policy to the university community to seek out comments or concerns. The goal is to launch this policy in 1996.

We do not know if the VP-Research contacted Dr. Corrado, but we do know that Dr. Corrado resigned from the URERC at about this time (the next meeting was on June 11, 1996, at which time his resignation was recorded in the minutes). Dr. Corrado has since told us that both he and Dr. Harmon took the position that ***all*** wording changes that involved a major change in policy, such as the change from "confidentiality" to "limited confidentiality," needed to be discussed by the SFU community and approved by Senate and the Board of Governors ***before*** being put into effect. This is consistent with the account of Dr. Hanson, a participant at that meeting (see Appendix A).

The wording that was provided by Dr. Horvath shortly after the meeting, which is still used to this day, is as follows:

> Any information that is obtained during this study will be kept confidential to the full extent permitted by law. ...However, it is possible that, as a result of legal action, the researcher may be required [*sic*] to divulge information obtained in the course of this research to a court or other legal body.

For reasons we have already explained (see footnote 5) and as we elaborate below, we believe that this limited confidentiality statement is unethical and creates its own deception – stating that the researcher might be "required" to divulge information makes it impossible to live up to the promise made in the opening statement, i.e., that information will be kept confidential "to the full extent permitted by law." With liability thereby downloaded to the participant, and a victory in court made virtually impossible, it also gives both researchers and the university license to treat "receiving a subpoena" as the limit of the law.

3.vii) The URERC Minutes of June 11, 1996

In spring 1996, a “Draft Policy,” including a “confidentiality to the extent permitted by law” provision, was posted on the SFU web site, as if it were the university's ethics policy, and as if it were in effect. However, the URERC's self-initiated policy revision process was interrupted in 1996 when the Tri-Council Working Group (TCWG) released its first *Draft Code of Ethics* for research involving human participants, and Canadian universities were put on notice of this development. This was discussed at a meeting of the URERC on June 11, 1996, at which time, as the minutes show,

> It was agreed that the draft revised SFU policy R20.01, Research Involving human Subjects, will be put on hold pending review of [the TCWG's] *Draft Code*.

Contrary to the apparent wishes of the URERC, however, the draft policy was left on the university web page and continued to be implemented. We know the draft policy was still posted on the web page in October 1997. And although that version of the policy was removed from the university web site some time thereafter, the limited confidentiality requirement and associated informed consent template still appear on the site, and in the hard copy material available from

the Office of Research Services. It appears that the URERC has been following the draft policy since November 1995, and that it has survived the transition of the Chair from Dr. Clayman to Dr. Horvath. Indeed, in a communication to us in December 1997, Dr. Horvath, then a URERC member, quoted the draft policy to us instead of the real policy, in response to our suggestion that, by limiting confidentiality, the URERC had substantively changed the ethics policy.

The VP-Research thus appears to have been acting on his own when (we presume) he authorized the URERC's Draft Policy to appear *instead of* "the" Ethics Policy on the VP-Research web page. Given that a huge percentage of applications are dealt with in his office, at his instruction, the implication is that Dr. Clayman and his office staff were running ethics at SFU on the basis of the URERC's draft policy, apparently with no authority but Dr. Clayman's.

3.viii) The URERC is Not Authorized to Change the SFU Ethics Policy, and is Aware of That

As a point of fact, neither the VP Research nor the URERC are authorized to substantively change the SFU research ethics policy. The Committee's awareness that it does not have this authority is evident in the minutes of the URERC meeting of January 19, 1994. Under agenda item 2, "Student and Faculty Approval Letters," the URERC decided that a time limit should be added to letters of approval, with student approvals being effective for 24 months from the date of approval, while faculty approvals would be effective for 3 years from the date of approval. This relatively benign change is followed by an "Action" entry:

> The Director of Research Services will revise the current policy (and highlight the revisions) and circulate it to the committee members for their approval at the next committee meeting. Then, the revised, proposed policy will circulate to the Chairs of affected schools/departments/faculties (as examples: Kinesiology, Education, Psychology) for their feedback. Once the policy is finalized, the policy will be sent to the Board of Governors for approval. Once Board Approval is received, the new approval letters will reflect the time limits for students and faculty.

At the very least, limited confidentiality should have gone through this same process.

3.ix) The Change from "Confidentiality" to "Limited Confidentiality" is a "Substantive" Change

We argue that the change from "confidentiality" to "limited confidentiality" involved a substantive change to the ethics policy by the URERC. Drs. Horvath and Clayman have denied this, insisting that it is no more than a "procedural" change (although we wonder how this could be considered to be a more trivial change than the one regarding research time limits – see section 3.viii above).

Although we continue to believe it is virtually self-evident that the change from "confidentiality" to "limited confidentiality" constitutes a substantive change to the policy, there are at least three ways to determine empirically whether the change is "procedural" or "substantive." All assume that "procedural" changes should not have any significant material effect on the sorts of research that are approved by the Committee, while "substantive" changes would have a substantial effect.

If research that could be approved *prior* to the change could no longer be approved *after* the change, for example, then clearly the change is *de facto* "substantive."

a) The Committee's Minutes Anticipate a Substantial Impact on Research

One clear indication that the Committee's changes to the policy are substantial is evident in the Committee's minutes for the meeting of September 9, 1994, at which the Committee first discussed the limitation of confidentiality. The minutes state:

> It was recognized that limited confidentiality might even discourage the participation of some subjects, and conceivably even prevent the research from taking place at all due to lack of subjects. (Item 4: "Limited confidentiality issues," p.2)

This entry shows that the Committee anticipated their change would have a material effect on the research that could be conducted, i.e., that the nature of this change was substantive.

b) Research That Was Approved Before Cannot Receive Approval Now

The current version of R20.01 took effect on October 1, 1992, and does not limit confidentiality in any way. On March 9, 1993, Lowman submitted an ethics application to conduct a "case history of a Canadian pimp," a man who, amongst other things, ran several escort agencies. At that time, all proposals to the URERC required a signed agreement, "to maintain in strict confidence the responses of individual subjects." No *a priori* limitation of confidentiality was made. The application was approved on April 6, 1993 – less than a month later.

On December 1, 1997 a second research proposal was submitted to repeat the study with several subjects, including owners and managers of escort services, body rubs and massage parlors.[15] Again, the applicant (Lowman) agreed, "to maintain in strict confidence the responses of individual subjects." Roughly 48 weeks later, the URERC still refused to approve this proposal, despite its substantive similarity with the proposal submitted and approved in 1993. A second proposal, this one by Lowman and Palys to study sex work in off-street venues, was submitted on February 24, 1998. The URERC did not approve this proposal either, again because of problems related to the informed consent statement. Once again, the evidence is consistent with the view that the Committee's change to the policy was substantive, and not merely "procedural."

c) If the Change is Trivial, Then What Is the Problem?

A third way to address the question of whether the Committee's changes are merely "procedural" or "substantive" focuses on the basis of the disagreement that exists between the URERC and the two of us with respect to our two ethics applications that, after eight and eleven months of dialogue, were not approved. We suggest that the disagreement is rooted in the conflict between our belief that we are ethically obliged to provide confidentiality as R20.01 requires, while the URERC required us to *limit* confidentiality in a manner consistent with their decision at the meeting of November 23, 1995. If the difference between these two positions is a relatively trivial

[15] This proposal was reworked and resubmitted on February 26, 1998.

procedural one, then why were our proposals not approved? We suggest it is because the difference between our positions is not trivial at all – it is a substantive and substantial one.

3.x) The URERC has Become a Law Unto Itself

Having drafted a new policy, and without obtaining appropriate university approvals, Dr. Clayman and the URERC apparently proceeded to abandon the version of R20.01 approved in 1992, and to enforce their own policy instead. But did the URERC have the authority to impose its "limited confidentiality" doctrine on other researchers at SFU? We believe it did not. And although Dr. Clayman has never retracted his view that the changes the URERC wrought are nothing more than procedural, and that the URERC was thus authorized to make them,[16] the written record of that meeting gives a different view. At least three URERC members understood that approval from authorities beyond the Ethics Committee was required before any changes became "official."[17]

When we wrote our first brief in this lengthy debate to President Blaney in November, 1997, we had no idea how fitting its title – *SFU's Ethics Committee: A Law Unto Itself* – would turn out to be. In the present submission, *The History of limited Confidentiality at SFU*, we show that the URERC has, in its imposition of limited confidentiality, repeatedly violated policy and procedure. We close this section by noting that these violations are not limited to the regime of limited confidentiality. In the process of examining the archival evidence regarding the imposition of limited confidentiality at SFU, we became aware of other ways in which the VP Research and URERC have made unauthorized unilateral substantial changes to the research ethics policy.

- We made the point in Section 3.vii above that, even though it never sought, and hence never received, approval from appropriate university authorities, the URERC began treating its Draft Policy as if it were the real SFU Research Ethics Policy. Certainly this was evident in the placement of the Draft Policy on the web page of the VP-Research, so that researchers who downloaded ethics materials would receive the Draft Policy, not the real Policy. It was also evident when, in December 1997, we informed the URERC that its imposition of limited confidentiality was contrary to, and a substantive change to, the SFU Ethics Policy. Dr. Horvath actually quoted the limited confidentiality section of the Draft Policy to us to justify the Committee's use of the limited confidentiality consent form (see his December 1997 document, "Response to 'When Roles Conflict [etc.]'"). In Appendix C, we show several other comparisons between the real R20.01, and the URERC's Draft Policy, that are consistent with the view that the URERC has been implementing its own Draft Policy for some time, and, in many respects, has continued to do so.

- The URERC has enforced other provisions of the "Draft Policy" as if it were in effect. Recently, for example, Dr. Horvath sent a memo to Deans, Associate Deans, Chairs and Directors reminding them that research involving "*use of existing data that are not normally*

[16] In an article by Charlie Smith in the November 19-26, 1998, *Georgia Straight*, entitled "Ethics Policy Stalls Research," Dr. Clayman is quoted as stating that the limited confidentiality policy was approved through the "proper channels." We sent an e-mail to Dr. Clayman on November 19, 1998, asking whether he had been quoted correctly on that point and, if so, whether he would inform us what those "proper channels" were. To date, we have not received a response.

[17] See the memorandum from Dr. Phillip Hanson, a former member of the Committee (Appendix A) and Section 3.v of the current document, in which the views of then-members Drs. Corrado and Harmon are described.

available to the public" requires URERC approval. R20.01 does not include "existing data that are not normally available to the public." A more detailed discussion of this change is included in Appendix E.

- Under R20.01, the URERC does not have the authority to delegate authority for ethics review. However, at the behest of the VP Research, the URERC issued what is effectively a "research ethics application waiver" to the Faculty of Business Administration. Apparently, Business Administration researchers are no longer required to submit applications through the URERC, except in those cases where they deem an application to violate R20.01. As a faculty member from Business Administration was involved in the creation of the Draft Policy and attended the meeting where limited confidentiality was introduced, we wonder if Business Administration is following the actual policy or the Draft Policy. A discussion of this unauthorized change to the policy is included in Appendix F.

- At various times the URERC was improperly constituted because there was an insufficient number of faculty appointed to the Committee, and because there was no medical practioner assigned to the Committee (the policy requires that the Director of Health Services be appointed to the Committee). We drew these procedural problems to the attention of President Blaney (Appendix H), who dismissed our concerns. In light of the additional procedural problems that we have described in this submission, we anticipate that the President will re-evaluate the importance of these already demonstrated procedural transgressions.

As a whole, we believe the record shows that the VP Research has systematically disregarded university research ethics policy and procedure. In the case of limited confidentiality, the departure from policy has profoundly affected our academic freedom to engage in research.

4) What Is "Limited Confidentiality?"

From what we understand of the position espoused by Drs. Clayman and Horvath, limited confidentiality emerges from and is justified by two basic ideas. The first of these is that confidentiality is somehow "naturally" limited. The second is that the limited confidentiality consent statement is nothing more than a statement of risk, and that the role of the ethics committee is to ensure that prospective participants are warned of all risks that might affect them. We consider each of these justifications in turn.

4.i) Confidentiality is "Naturally" Limited

The URERC adopted a position statement at its meeting of June 2, 1998 which is the clearest statement of the view that confidentiality is "naturally limited." We had asked the Committee to decide what exactly it would do in the event that a researcher was subpoenaed. The statement they offered was the following:

> The Ethics Committee believes in supporting, within its means researchers, in the application of Policy R20.01 "University Research Ethics". We would attend court proceedings to defend the principals [*sic*] of confidentiality and support the Committee's decision to give ethical approval of the project. The Committee believes that any promise

> of confidentiality is naturally limited both on moral and legal grounds. (Minutes of the URERC meeting of June 2nd, 1998)

But in what sense is it "naturally" limited? Whenever we asked Dr. Horvath and Dr. Clayman about this issue, the examples they cite are examples that are subject to mandatory reporting, or at least what they believe are mandatory reporting situations. For example, in a recent article in the *Georgia Straight*,[18] Dr. Clayman is quoted as saying that the recently released Tri-Council *Policy Statement* supports the notion of limited confidentiality:

> Clayman said that the tri-council policy, which received very little media attention, stated that information disclosed in the context of a professional or research relationship must be kept confidential. However, he noted that the statement also acknowledges that the protection of privacy and confidentiality are not absolute: "Compelling and specifically identified public interests – for example, the protection of health, life, and safety – may justify infringement of privacy and confidentiality. Laws compelling mandatory reporting of child abuse, sexually transmitted diseases, or intent to murder are grounded on such reasoning; so, too, are laws and regulations that protect whistle blowers."

Similarly, in Dr. Horvath's history of limited confidentiality, posted on the university's web page,[19] the URERC Chair states:

> In what way does the URERC perceive the confidentiality between researcher and participant less than absolute? We are of the view that there are a number of circumstances (e.g. threat to someone's' life, certain dangers to minors, etc.) in which difficult case by case decisions have to be made to balance the moral and ethical issues involved. The URERC, for obvious practical reasons, does not intend to specify these issues *a priori* but simply note that there are circumstances when the commitment to hold information confidential is naturally limited by commonsense considerations.

The difficulty with these two statements is that, (a) they involve a change of subject; and (b) if they are really the authors' concerns, the URERC has adopted a peculiar and ineffective way of dealing with them. The "change of subject" is understood by distinguishing the topic of "court-ordered disclosure" in response to a subpoena, from "mandatory reporting" laws (e.g., which pertain to the discovery of child abuse and sexually transmitted diseases, and possibly intent to murder[20]). We believe these are very different situations, which call for very different responses with respect to the confidentiality issues involved.

Our writings to date have focussed on subpoenas and court-ordered disclosure of confidential research information. We continue to believe that the proper response of any researcher and university is to protect such intrusions vigorously in a manner that makes most effective use of the legal protections available to us. With respect to research where *mandatory reporting* laws might apply, we believe that researchers should first make every effort to acquire the equivalent of what, in the United States, are called "privacy certificates," which afford the researcher certain protections. Without such protection, *we would not do the research,* because of the potential harm to participants. Also, without the guarantee of unlimited confidentiality the information we are seeking about illegal activities would be unreliable. If we were merely going to hand over the

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[18] Charlie Smith, "Ethics Policy Stalls Research," *Georgia Straight*, November 19-26, 1998, p.12.

[19] Adam Horvath, "Response to Drs. Palys and Lowman's Communication, 'Rejoinder to Bruce Clayman'", October 6, 1998.

[20] Although the discovery that someone intends to commit murder is of obvious ethical concern, we have, as yet, been unable to locate any statute that actually compels reporting as a matter of law.

information to a court, why would anyone tell us anything of substance about their illegal activity?

We will not undertake research without a pledge of unlimited confidentiality. It would be exploitative, unethical and methodologically flawed.

The limited confidentiality consent statement assures confidentiality to the extent permitted by law. Although there are two types of potential legal "limits" to confidentiality, the limited confidentiality consent statement warns only about the "risk" of court ordered disclosure. Why is the risk of mandatory reporting disclosure not mentioned?

The URERC went so far as to add a new screening question (question 9 on form 1) dealing with the situation where the researcher might hear about violations of the law. But if the URERC is concerned about mandatory reporting requirements, why does it not screen applications for their exposure to situations in which mandatory reporting laws are most likely to be triggered? For example, one of the questions on the research ethics application screening form (Form 1) asks, "Will children be involved as subjects in your research?" Those who answer "yes" are told that they must incorporate a "consent form for the parent/guardian" (Form 3). But nowhere on Form 3 is there any mention of laws requiring researchers to inform legal authorities in the event that abuse is discovered.

And why does the Committee not also include a screening question that asks whether researchers might learn about sexually transmitted diseases? The answer "yes" would presumably need a consent statement that included a warning about the risk of disclosure created by venereal disease mandatory reporting laws.

But the Committee has done neither of these things. Instead, it has asked about violations of criminal or civil laws, only a handful of which have any mandatory reporting laws associated with them. The main possibility in this kind of research is a subpoena. This is usually a situation where a third party tries to engage the researcher as an informant in *their* battle, when *our* social role is simply to try and understand all aspects of society, to respect the human dignity of all persons,[21] and to respect "the cultural values and sense of propriety of the persons who are asked to participate in and/or be the subject of research."[22] We believe that courts will recognize our ethical obligation to protect the rights and interests of research participants to the full extent permitted by law. The policy of limited confidentiality effectively ends confidentiality. The limited confidentiality consent statement offers a barren promise. And although ostensibly designed as a warning about risk, it says nothing about mandatory reporting laws, i.e. the very situations that Drs. Horvath and Clayman cite when they say that research subjects must be warned that confidentiality is not "absolute." However, the limited confidentiality consent statement does protect the university from the liability of having to defend research participants in court. It is consistent with what the university did when the Coroner's Court subpoenaed Russel Ogden – doing what Blomley and Davis (1998) described as being "unethical" and "wrong." In terms of "protecting the University" (URERC Minutes, Sept. 9th, 1994) the value of limited confidentiality is that it prevents the University from having to defend the next researcher who is subpoenaed, and ordered to divulge confidential research information.

[21] The Tri-Council Policy Statement, *Ethical Conduct for Research Involving Humans*, cites this as "The cardinal principle of modern research ethics" (1998, p.1.5).
[22] The SFU Ethics Policy (R20.01) cites this as "the purpose of ethics review" (section 4).

4.ii) Is The Limited Confidentiality Consent Statement Merely About Risk?

Drs. Clayman and Horvath and another member of the URERC have told us on several occasions that the limited confidentiality informed consent statement is no more or less than a statement of information that prospective subjects must be told in order to decide whether to participate in the research. For example, in the review of the Russel Ogden case that Dr. Clayman undertook at the behest of then-President *pro tem* Jack Blaney, he explained that the limited confidentiality consent statement merely,

> provides suggested wording to be used to alert potential subjects about a risk to which they would expose themselves – under Canadian law – if they agree to participate in the research.[23]

He repeated the same sentence in his article, "The Law of the Land," published in *Simon Fraser News* at about the same time.[24]

In a brief filed at the time we started a series of meetings with the URERC on the subject of limited confidentiality, Dr. Ogloff, one of the Committee members, explained that,

> 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. The test that guides my answer to this query is what level of detail is necessary in the informed consent procedure for the person to make a reasonable decision. If the participant can ever say that 'but for the piece of information you withheld from me, I would not have agreed to participate," we have done the person a disservice, and have not respected his or her autonomy.

Dr. Horvath also entered the debate at that time, and described the limited confidentiality consent statement as "a simple statement of fact (of the limits of legal protection) that both the researcher and the voluntary participant MUST BE AWARE" (emphasis in original). He also added,

> Participants are entitled to know all the pertinent factors relating to the confidentiality of the data. This does NOT preclude a covenant by the researcher to protect the identity or information in the face of legal action beyond what is permitted by law. However, if such promise is made, the participant needs to know that she/he is dependent on the strength of the individual's promise as opposed to a legal contract enforceable in law. This is not a directive to "rat" or "squeal" [sic]; this is openness and transparency.[25]

More recently, in his history of limited confidentiality, Dr. Horvath explained that:

> The URERC's function, in brief, is to ensure that research is conducted in a manner commensurate with the highest ethical principles, and that the research participants are treated fairly, with due regard for their safety and dignity. It is of particular interest to the URERC that the volunteering research participants give consent to participate in the research project freely, and are informed, to the fullest extent possible, of the risks and consequences of their participation. This issue – informed consent – is of special

[23] Letter from Dr. Clayman to Dr. Lowman conveying the results of his review of the university's decisions in the Russel Ogden case, October 28, 1997.
[24] Bruce Clayman, "The law of the land." *Simon Fraser News*, October 30, 1997.
[25] Adam Horvath, Memorandum to Lowman, Palys, and Ethics Committee in response to Lowman and Palys briefs; undated (prepared for meeting of December 18, 1997).

> concern to the Committee, since the researcher often has access to more information with respect to various risks and benefits of the research than the participant, and such inequality can be construed as a difference in power between the researcher and the volunteer participant.[26]

We accept that prospective participants need to be warned about risks associated with participation. We accept that it is in participants' interest to be told about the possibility of subpoena. But why, then, has the URERC been so reluctant to provide them with all the information they need to make an informed decision about whether to participate? As we outline below (see Sections 6.iii and 6.iv), at the very least, participants need to be warned: (a) not only about how the researcher will maintain confidentiality, but also how the university will respond in the event that a researcher receives a subpoena; and (b) that acceptance of the limited confidentiality informed consent statement involves an effective waiver of the participant's right to claim privilege in court.

There is a checklist question related to research on criminal and civil offences, but not one for researchers who might run into child abuse, where mandatory reporting laws apply. If limited confidentiality is purely about risk, why would the Committee warn about court-ordered disclosure (which is highly unlikely), and not about mandatory reporting disclosure (where, for example, with respect to child abuse, the literature tells us we are dealing with a fairly pervasive phenomenon)?

We also wonder why the Committee would not pay heed to the evidence regarding court-ordered disclosure in the United States. These cases, which are summarized in a 1996 special issue of *Law and Contemporary Problems* devoted to the topic of court-ordered disclosure,[27] show that only a tiny proportion of cases involved researchers whose participants regularly engaged in criminal activity. The vast majority of cases were in other fields. For example:

1. In one case, a sociology graduate student was employed as a waiter while engaging in participant observation research to write a thesis on "the sociology of the American restaurant." One day he came to work and the building had burned down. When investigators found out about his research, and the existence of his field notes, they subpoenaed them in the hope they might contain information of use to their investigation.[28]

2. In a second case, an anthropologist was engaged in research with a First Nation in Alaska when, one day, the Exxon Valdez oil spill occurred off shore. Members of the First Nation were among those to bring suit against Exxon because of the impact of the spill. During the litigation, Exxon subpoenaed the anthropologist's field notes because they had inadvertently become a before-after research design that would allow them to evaluate the effects of the oil spill, and hence the merit of the claim.[29]

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[26] Adam Horvath, "Response to Drs. Palys and Lowman's Communication, 'Rejoinder to Bruce Clayman'", October 6, 1998.

[27] See Cecil, J.S., and Wetherington, G.T. (Eds.) (1996). Court-ordered disclosure of academic research: A clash of values of science and law. *Law and Contemporary Problems* (Special issue), *59*(3).

[28] *In re* Grand Jury Subpoena Dated Jan.4, 1984, 583 F. Supp, 991 (E.D.N.Y. 1984), and 750 F.2d 223, 225 (2d Cir. 1984); see O'Neill article in *Law and Contemporary Problems* special issue on court-ordered disclosure, 1996.

[29] *In re* the Exxon Valdez Re: All Cases. Misc. 92-0072 RV-C (S.D. Ala. July 1, 1993); see Picou article in *Law and Contemporary Problems* special issue on court-ordered disclosure, 1996.

3. In a third case, a medical school researcher decided to do a survey in which he evaluated whether even very young children could indeed recognize the "Joe Camel" logo [Joe Camel is a cartoon mascot for the tobacco company that manufactures Camel cigarettes.] He found that they could, and incurred the wrath of a tobacco company, who subpoenaed his records and sought the identities of all participants.[30]

4. In a fourth case, a university researcher had interviewed employees of several utility companies. The research itself proceeded with no problem. Shortly thereafter, however, a manufacturing company brought suit against one of the utility companies, and, having heard about the research and believing it might help them in their litigation, filed a deposition against the professor/researcher to gain the identities of the employees interviewed, and the content of their interviews. When the professor refused, the manufacturing company moved to force the professor's research assistant to supply the information.[31]

5. In a fifth case, a university medical researcher had created a data registry designed to track women with Hormonal Transplacental Carcinogenesis. His research produced results that were welcomed by those interested in such issues, but the database became of particular interest to a major chemical/manufacturing company who was being sued for numerous millions of dollars. The database was subpoenaed as part of other litigation in which the chemical company was involved.[32]

Given the track record in the United States, why would the URERC not feel obliged to compel researchers from such disciplines as Business Administration, Education, Psychology, and Kinesiology to warn prospective participants about, and limit confidentiality in anticipation of, the risk of subpoena?

One possibility is that Committee members may already limit confidentiality in their own work, and thought criminological field researchers should do likewise. Two pieces of evidence suggest that this is the case. The first is in the minutes for the URERC meeting of November 25, 1995, when the limited confidentiality consent statement was first adopted. The minutes say that, "One Committee member will forward to the Chair an example of what is used by the Faculty of Education where disclosure is required by law."[33] This implies that the limitation of confidentiality related to mandatory reporting laws is already common practice in Education.

The second piece of evidence comes from Dr. Ogloff's statement in anticipation of our meeting with the URERC on December 18, 1997. In it, he notes:

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[30] See *Fischer v. R.J. Reynolds Tobacco Co.*, No. 93-RCCV-230 (Ga. Super. Ct. Richmond County, Apr. 28, 1992); see also *R.J. Reynolds Tobacco Co. v. Fischer*, 207 Ga. App. 292 (1993); see Fischer article in *Law and Contemporary Problems* special issue on court-ordered disclosure, 1996.

[31] See *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. 388 (N.D. Cal. 1976); see also Wiggins & McKenna article in *Law and Contemporary Problems* special issue on court-ordered disclosure, 1996.

[32] See *Deitchman v. E.R. Squibb & Sons, Inc.* 740 F.2d 556 (7th Cir. 1984); see also Wiggins and McKenna article in *Law and Contemporary Problems* special issue on court-ordered disclosure, 1996.

[33] We must comment on the wording here, i.e., "where disclosure is required by law." This suggests either that the URERC has been confusing court-ordered disclosure with mandatory reporting for some time, or that the two have been considered equivalent for some time, i.e., that, in either case, researchers would be expected to comply with a subpoena without challenge.

> As a matter of fact, I have always warned my prospective participants of the possibility of having research records seized by court order – even when I worked in the United States where researcher/participant privilege has received some recognition in legislation.

We are left with the possibility that the limitation of confidentiality is common practice in psychology, also (Dr. Ogloff's disciplinary affiliation).

In any event, the considerations we have described above suggest that "limited confidentiality" is not about the possibility of running into mandatory reporting situations, and so it is *not* about warning research participants about all conceivable risks of disclosure of confidential information. So what *is* it about? The impression we are left with is that criminological field researchers were perceived as representing a special problem, and that it should be rectified through the ethics application process. Drs. Clayman and Horvath provide the answer when they say that researchers are "not above the law of the land."

4.iii) The Answer is in the Law – But What Is the Law on Confidentiality?

We agree that researchers are not above the law. However, we do not agree with Drs. Clayman and Horvath's static view of the law, or with the university's "hollow and timid" allegiance to academic freedom.[34] In this regard, we return to some of Dr. Clayman's and Horvath's statements over the past year about their "law of the land" approach to research ethics. Dr. Clayman was the most explicit in this regard. In his "Law of the Land" article that appeared in *Simon Fraser News* (on 30 October, 1997), Dr. Clayman stated:

> It was the belief of the committee that, since we live in a society governed by laws, enacted through democratic means, we are obligated to obey those laws or be prepared to suffer the consequences of violating them. It was also the opinion of the committee that researchers may not be prepared or able to bear the legal consequences of offering participants protection beyond that sanctioned by law. In any event, the university itself could not be placed in the situation of requiring one of its employees or students to refuse to comply with lawful process.
>
> I quote a committee member,[35] upon considering this issue: "As a public institution, it would be morally and ethically wrong to assume that our research activities are above the law of the land." Hence, the warnings to researchers and to potential subjects of these limits.
>
> Sometimes individuals choose to violate laws or policies as a means of changing what they consider to be bad laws or policies. In my experience, they are usually prepared to deal themselves with the consequences of such violations. In some cases, I personally have agreed with their positions and have supported them morally and financially. However, as noted above, I believe it would be irresponsible for the university to promote through its policies a position that encouraged or required our researchers to operate in

[34] "Hollow and timid" was a phrase used by Judge Daniel Steinberg of the British Columbia Provincial Court, in his decision in *Russel Ogden v. SFU*, to describe SFU's allegiance to academic freedom, as evidenced in its treatment of Ogden. See the full decision at www.sfu.ca/~palys/steinbrg.htm

[35] We believe that the "committee member" is Dr. Horvath, who was later appointed by Dr. Clayman as the Chair of the URERC following the latter's resignation from the Chair in February 1998.

> opposition to law. Individuals may make that choice for themselves -- and must then be prepared to take responsibility for their actions.[36]

These images of researchers resisting court-ordered disclosure as being "above the law" or in "opposition to law" are misguided. We respect law, including the legal right to challenge it. Dr. Clayman seems blind to this right.

The differences between our position and the Clayman-Horvath position on law was immediately evident to Dr. Phillip Hanson, a former member of the URERC, who wrote a memorandum (see Appendix A) in anticipation of our first joint meeting with the URERC on December 18th, 1997. He stated:

> Some – Bruce Clayman and Adam Horvath are on record – have argued from a rather narrow construal of the law of the land: roughly, the law as extant code. If one also views the university simply as a 'corporation' that provides facilities or infrastructure to its research 'clients' (a.k.a. faculty and graduate students), whose interests are distinct from its own, then it is this narrow 'reactive' view of the law that may well seem like the appropriate one – the one carrying the least risk to the university – to serve as a constraint on university policies. But one can, as John Lowman and Ted Palys do, think of the law more broadly and dynamically as encompassing not only code but also common law and precedents. And one can also have a different vision of the university, as an institution that embraces its faculty and graduate students as integral and essential constituents, societies in their wisdom having seen the value of an institution that proactively promotes and facilitates the pursuit of knowledge and understanding by its members.
>
> I myself think of the law and of the university in the latter way. And this has consequences for what morals I draw from the Russell Ogden case. His winning his case in Coroner's Court obviously establishes an important legal precedent here in Canada for researcher-participant confidentiality. Such precedents are very much in the interests of the research constituency at the university, and therefore, given my conception of the university, ought to be proactively pursued by the university itself. The university does not set itself above the law by upholding strict confidentiality. Rather, it constructively contributes to, helps to shape the law. That is how the law works. Nor does doing so require a policy that would expect researchers to break the law or stonewall the courts. Rather it requires a policy that upholds the value of research, even research into illegal activity, and is prepared to be persuasive about these values in a court of law.
>
> My preferred conception of the law and of universities also has consequences for the wording of consent forms. They shouldn't be worded in a way that legally undermines a researcher's potential to win their defense on grounds of researcher-participant confidentiality. That strongly argues going back to 'strict confidentiality.' On the other hand, nor should they be worded in a way that fails to protect the research participants through fully informed consent. Research participants need to be aware of the possibility that a researcher may be legally summoned to divulge information obtained in the course of their research. And of course the university wants to cooperate with the courts! But what does that mean? I think it should mean respectfully but vigorously defending in the courts the value of its research to society and the consequent value of researcher-participant confidentiality; in effect using court decisions to legally establish these values in society.

[36] Dr. Clayman made essentially the same statement in his reconsideration of the university's decision-making in the Russel Ogden case, in a memorandum to Dr. Lowman dated October 28, 1997.

Dr. Hanson left the Committee a few months later. Judge Steinberg of the BC Provincial Court also understood these issues, and explained the dynamic nature of law in his decision, *Russel Ogden v. SFU*:

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

In an article published in the July 16, 1998 *Simon Fraser News* entitled "A Vice-President Responds," Dr. Clayman discounted Judge Steinberg's decision by stating, "It is important to note that the judge's comments are his own personal views and have no legal status whatsoever." Personal opinion or not, we do not understand why Dr. Clayman would speak against this view, the legal “truth” of which strikes us as being self-evident.

The next to review the issues were Drs. Blomley and Davis (1998), who undertook an independent review of the university's decision-making in the Russel Ogden case. They painted the following picture of the University position, and the general philosophy of “limited confidentiality:”

> The University maintained that it would have been an attempt to place university research 'above' the law had Ogden refused to obey a court order to reveal confidential information obtained in his research or had the University argued in court that information gained in research is legally privileged. For this reason, the University thought that Ogden had an obligation to reveal any information that he gained in his research, had he been ordered to do so by the Coroner. Consequently, the University took the view that there was nothing for the University to defend at the Coroner's Inquest.
>
> Discussion:
>
> a) One way in which the limits of academic freedom can be determined is by the courts. Given its legally unsettled nature, the issue requires legal dispute. Ogden's actions at the Coroner's Inquest, we would contend, were an attempt on his part to determine through the courts the extent and limits of academic freedom and by doing so to defend the principle of academic freedom.
>
> b) It is incorrect to suppose that there is no legal protection relating to academic freedom and the confidentiality of information obtained from human participants in doing research. The Wigmore criteria provide some basis for such protection. These proved decisive in Ogden's defense before the Coroner's Inquest. For these criteria to be

operative, it should be noted, an undertaking of confidentiality must be in effect.

Dr. Clayman was reported in a November 16, 1998, article in *The Peak*, SFU's student newspaper, as having much the same dismissive reaction to the Blomley and Davis report as he did to the Steinberg decision. Author Erin Fitzgerald wrote,

> Despite his statement in support of academic freedom, Dr. Clayman still stands by SFU's earlier decision not to support Russel Ogden and says he "simply didn't agree" with the Blomley and Davis report. "I don't agree with the decision that we should pay his legal bills and I don't agree we owe him an apology."

We would reiterate the view that research confidentiality and academic freedom are worth saving and, indeed, President Blaney has accepted the report and acted on its recommendations. Furthermore, confidentiality is as important a "right and interest" of research participants, and hence as important to do our utmost to safeguard, as informed consent. The Tri-Council *Policy Statement* makes exactly that assertion, but, for reasons they have yet to explain, both Drs. Clayman and Horvath read it as supporting their notion of limited confidentiality.[37]

As we outline in greater detail elsewhere in this document (see Section 5.ii), our strategy regarding research confidentiality does not set out with the intention of coming into conflict with the law. We fully believe that, like Russel Ogden, we would be able to successfully defend research confidentiality and researcher-participant privilege in court, and it is that objective that we believe the university community must proactively work toward. It is *only* by that route that we can protect the rights and interests of research participants, and maintain our allegiance to the university's mission to do research about all aspects of society. We take this position because of our *respect* for law, fully confident that the courts will find in favour of our undertaking to maintain in confidence the identities of our research participants.

As it turns out, the greatest threat to our research participants comes not from the courts or other third parties, but from Dr. Clayman and the URERC's undermining of our ability to face that legal challenge head on, should it ever come to pass.

5) The Problems With Limited Confidentiality

The change from "confidentiality" to "limited confidentiality" was a huge step for Simon Fraser University to take. We saw that the URERC's own minutes acknowledge, "This is a sensitive issue." And its implications are broad. Next we suggested that the Vice President Research and the URERC did not have the authority to make this change, and that their attempts to do so were a procedural disaster. In the current section, we examine limited confidentiality in terms of its consistency with the University Research Ethics Policy (R20.01), and other policies and agreements at SFU.

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[37] See, for example, Dr. Clayman's statement in an article in the September 24, 1998, *Simon Fraser News*; and Dr. Horvath's letter (dated October 8, 1998) to us, as Chair of the URERC. We discuss the Tri-Council's position with respect to confidentiality, and limited confidentiality, in a separate document by Palys and Lowman entitled "Implications of the Tri-Council *Policy Statement* for Ethics Review and Research Confidentiality."

5.i) "Limited Confidentiality" Does Not Comply With The University Research Ethics Policy

The imposition of the limited confidentiality informed consent template does not comply with SFU Policy R20.01, as approved by university authorities in 1992. It violates that policy in several ways:

a) The limited confidentiality statement currently in use starts by promising confidentiality to the full extent permitted by law, but then falls short of this promise in at least two ways. Both problems arise from the accompanying statement that warns prospective research participants that a court might "require" disclosure of confidential information.

i) The first problem with the wording is that it would allow researchers merely to capitulate – indeed, it gives them license to do so – if a court orders them to disclose confidential information. As we have already explained, this is not protecting confidential information to the full extent permitted by law.[38]

ii) The second problem is that, by suggesting that confidentiality is limited, the URERC consent statement compromises our ability to pass the first criterion of the Wigmore test, i.e., that a communication originates in a confidence that it will not be disclosed. Because we believe that our research on law breaking cannot be done ethically without a guarantee of unlimited confidentiality, and because we have seen both the Vancouver Coroner and Judge Steinberg agree, we believe that we can establish researcher-participant privilege via the Wigmore test. Regardless of whether we win – and we believe that we can – it is the best option available to us and, under the Tri-Council *Policy Statement*, we will be honour bound to try.

(b) R20.01 says that, "There is a professional responsibility of researchers to adhere to the ethical norms and codes of conduct appropriate to their respective disciplines." It is not possible to do reliable and valid research on self-disclosed law violation without a guarantee of confidentiality. A promise that may or may not be kept is no promise at all. The limited confidentiality consent statement implies that researchers will capitulate should a court or other legal body order disclosure of confidential information. This is certainly the way our prospective research participants interpret the statement. On several occasions we informed the URERC that the limited confidentiality statement prevents us from following our disciplinary standard.[39] It is contrary to the disciplinary norms of Criminology, which recognizes that legal and ethical considerations may lead to different conclusions.

In Criminology, Marvin Wolfgang[40] has stated that, when legal force is brought against the researcher to divulge confidential information, the following ethic applies:

> The traditional research response to the charge of being an accessory is that he or she is a neutral, disinterested recipient of data collected only for scientific research

[38] According to the new Tri-Council *Policy Statement*, this would be unethical. As a minimal standard, researchers are "honour bound" to defend confidentiality at least to the "extent permitted by law."

[39] We informed the URERC of this problem prior to submitting our two ethics applications (see John Lowman and Ted Palys, "SFU's Ethics Review Committee: A Law Unto Itself." Brief to the Ethics Committee, November 17, 1997.

[40] "Criminology: Confidentiality in Criminological Research and Other Ethical Issues" *Journal of Criminal Law and Criminology* 72:1:345-361, 1981

> purposes. The purpose for obtaining the information is to aid the scholarly enterprise and to provide guidance for a rational social policy. Data obtained that could have direct untoward consequences to subjects are not the possession of the state but of science. Research [*per se*] is not designed to treat, help or harm individual subjects, and the social scientist is not a representative of any branch of government with an obligation to execute certain police or judicial duties. (p.351)

This is precisely the sort of logic that the US Court of Appeals followed in December 1998 when it denied Microsoft Corporation access to the confidential research materials of Michael Cusumano and David Yoffie (see p. 5, above).

In a subsequent section entitled, "What should a research center do if the police, prosecutor or court requests the files?" Wolfgang states:

> Our position is clear: we would not honour the request. We would make every effort, short of using aggressive force, to prevent the files from being examined or taken from the Center's premises. We would, if necessary, enter into litigation to protect the confidentiality of the records (pp.352-353).

He adds that, even if a researcher was to be charged as an accessory, or with contempt, "… we would still maintain a posture of unwillingness to reveal names." (p.353). We have not seen Wolfgang's research-ethical position on confidentiality challenged in either the Canadian or the US criminological literature. When it comes to the responsibility to protect confidential research information, it is the position we subscribe to. As researchers, our main ethical responsibility is to our research participants. This includes maintaining research information in confidence, and the anonymity of our sources, even when no legal privilege or protection exists, and even when legal force is applied. We believe this to be the accepted standard in the School of Criminology at SFU (as evidenced by the two petitions Criminology faculty sent to the University – one in 1994 and the other in 1997 – exhorting the administration to support Russel Ogden by paying his legal fees).

Because it directs researchers to follow their own disciplinary ethics codes it stands to reason that R20.01 cannot require any *a priori* limitation on confidentiality. Such limitation would risk contravening codes where conflicts between ethics and law are envisaged, and where an ethic of protecting the research participant, and thereby also protecting the integrity of the research enterprise, is paramount.

(c) The policy explains that one, "purpose of ethics review of research is to consider … the cultural values and sense of propriety of the persons who are asked to participate in and/or be the subject of research." The limited confidentiality consent statement does not comply with the policy because it fails to consider the value attached to confidentiality by prospective participants. In the case of criminology, field research may be conducted with participants who hold sub-cultural values that include strong moral injunctions against violating confidentiality ("ratting"). These populations include persons who engage in criminal activity, as well as those whose role involves locating, prosecuting and punishing those involved in criminal activity (e.g., police, prison guards). The "limited confidentiality" consent statement severely compromises our research on prostitution because it is the equivalent of hanging out a bright red flashing sign saying to prospective research participants, "don't participate in this research."

(d) R20.01 requires that: "Each subject is to be given the freedom to decide for himself or herself what information which is not already in the public domain or available to an ordinary

member of the public and which relates to his or her physical and mental condition, personal circumstances and social relationships should be communicated to or withheld from others." The limited confidentiality consent statement takes this freedom away from the subject, and puts it in the hands of courts and other public bodies.

(e) The URERC's justification for requiring researchers to use the limited confidentiality consent statement relates to its argument that prospective participants be informed of all information necessary for their informed consent. However, as it stands, the limited confidentiality consent statement falls short of providing the information necessary for informed consent. Surely the subjects should be informed that, if they participate in limited confidentiality research, they are effectively waiving their right to assert researcher-participant privilege using the Wigmore test (something the Tri-Council will not allow; *Policy Statement* p. 2.6).

In order to comply with R20.01, we felt we had no choice but to refuse to use the limited confidentiality consent statement the URERC was foisting on researchers.

5.ii) Researchers are Not Above The Law of the Land: The Law Requires Unlimited Confidentiality in Order to Establish and Maintain Privilege

As outlined earlier we advocate an approach to informed consent and research confidentiality that respects the law, and the challenges posed to us by law, and attempts to maximize the likelihood of a successful defence of researcher-participant privilege by anticipating the court's requirements ahead of time. In this regard, we note that the Supreme Court of Canada, in *Regina v. Gruenke* (1991), unambiguously recognized the Wigmore test as the appropriate common law test to adjudicate any claim for privilege (see also Sopinka et al, 1992).

When it comes to protecting confidential research information, the Wigmore test *is* the law of the land; i.e., part of the common law of the land. Russel Ogden protected a promise of absolute confidentiality using the Wigmore test. In order to protect confidential information to the full extent permitted by law, this is the standard to which researchers and the University must aspire.

The Wigmore test is applied on a case-by-case basis. In other words, the onus will be on us as guardians of the confidential information to establish that it should be privileged. In the case of a class privilege, the onus is on the person wanting the information to demonstrate that some factor outweighs the privilege, and that the information should be divulged.

Because the law is effectively written after the fact, we have to anticipate how the test will be applied, design our research protocol accordingly, and have the conviction that we meet the criteria of the Wigmore test, a court's opinion notwithstanding. If SFU really does support the highest ethical standards, we suggest that all research protocols should be designed this way. The four criteria are:

(1) The communications must originate in a *confidence* that they will not be disclosed;

Consistent with the requirements emerging from case law and published legal opinion, we suggest all researchers should unambiguously promise "unlimited confidentiality" to research participants – it is what the common law requires (see *R. v. Gruenke*, 1991). The URERC's policy of limited confidentiality undermines the possibility of asserting

researcher-participant privilege because it makes it clear that unlimited confidentiality is not being guaranteed, and hence makes it impossible for researcher to defend the rights of participants to the full extent permitted by law. Limited confidentiality effectively marks the end of confidentiality.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;

We do not expect research participants to provide us with information that could be used against them – in our case, information relating to unreported criminal activity – without a guarantee of unlimited confidentiality. A promise that may or may not be kept is no promise at all. Without this guarantee, we do not expect people to give us accurate information. Indeed, we think they would be unlikely to give us any information at all.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*;

We have no doubt that many expert witnesses would testify that unlimited confidentiality is essential to many kinds of research. Further, as in the Ogden case, compelling argument can be made that the community believes that the research enterprise, and the researcher-participant relationship on which it is based, is socially valuable, and ought to be sedulously fostered. Perhaps that is why, traditionally, Canadian courts have not pursued researchers for information.

The greatest danger to meeting the second and third criteria is posed by Dr. Clayman's and the URERC's continued allegiance to limited confidentiality, since the very existence of that policy is saying that confidentiality is not essential, and that the university community itself does not believe that the researcher-participant relations is one to be sedulously fostered.

(4)The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Given that the first three "eligibility" criteria are met, the crux of the Wigmore test is expressed in this fourth consideration. Researchers and Ethics Committees are in the disadvantageous situation of having to decide ahead of time whether any given proposal meets this criterion. The most recent US decision in this regard – the one involving Microsoft, Netscape, and two researchers from Harvard University and MIT reported at the beginning of this paper – is extremely heartening. By placing research confidentiality above Microsoft's needs, the US Court of Appeals was saying that, financially speaking, confidentiality is potentially worth many millions of dollars. We agree that the rights of research participants and the research enterprise is worth it, and have confidence that Canadian courts will place an extremely high priority on the needs of researchers to maintain confidentiality in order to maintain credibility.

When researchers self-consciously set out to satisfy the Wigmore test, they must use a promise of unlimited confidentiality to pass the first criterion.

We suggest that people will not (and should not be asked to) divulge personal information that could harm them if their identities were to be revealed. Unlimited confidentiality is a prerequisite for valid and reliable information. Research thus passes the second criterion, and assuming that

other researchers and the broader community value research in the way we do, it passes the third criterion, too.

As to criterion 4, to respect the law, one has to take the first criterion of the test – the communication must originate in the confidence that it will not be disclosed – very seriously indeed. Researchers must have the courage of their convictions. If we are to take the law seriously we *have to* promise not to disclose the information to anyone, including a court. The courts cannot have their cake and eat it too. If confidentiality is that important to the relationship, we cannot see how a court could then turn around and order that we divulge the information. That is precisely why the US Court of Appeals upheld the decision in favour of researchers Cusumano and Yoffie, and against Microsoft Corporation, when it attempted to obtain confidential research information.

5.iii) "Limited Confidentiality" is Inconsistent with other SFU Agreements and Policies

a) Limited Confidentiality Violates the SFU Framework Agreement

The university administration's and faculty association's allegiance to academic freedom is institutionalized in the *Framework Agreement*. The preamble, section 1.1, states:

> Recognizing that the University is committed to the pursuit of excellence in the advancement and dissemination of knowledge through teaching and research and to service to the local, national and international community, the parties to this Agreement are resolved to cooperate in promoting the attainment of these goals, abiding by the principles of academic freedom and dedication to the performance of professional obligations and responsibilities.

The articulation of what academic freedom means is given in the next section of the *Framework Agreement*, article 1.2:

> 1.2 Academic Freedom
> Academic freedom is the freedom to examine, question, teach and learn, and it involves the right to investigate, speculate and comment without reference to prescribed doctrine, as well as the right to criticize the University, Faculty Association and society at large. Specifically, academic freedom ensures:
> (a) freedom in the conduct of teaching;
> (b) freedom in undertaking research and publishing or making public the results thereof;
> (c) freedom from institutional censorship.
> Academic staff shall not be hindered or impeded in any way by the University or the Faculty Association from exercising their legal rights as citizens, nor shall they suffer any penalties because of the exercise of such rights. The parties agree that they will not infringe or abridge the academic freedom of any member of the academic community. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge.

We believe that the university administration, through the Ethics Committee it appoints, has violated Section 1.2 of the *Framework Agreement,* and Section III.1 of SFU Policy A30.01, by acting in a manner that infringes our academic freedom. It has done so in two ways:

(a) Because of the problems created by the limited confidentiality consent statement, and especially because it violates the disciplinary standards of criminology, we have not known how to guide graduate students through the ethics application process, and have been placed in a position where we are being ordered to tell our students to violate the ethical standards of their/our discipline; consequently the URERC has infringed our freedom in the conduct of teaching;

(b) By imposing "limited confidentiality" on research that, for legal, ethical, and methodological reasons, can only be done with a guarantee of unlimited confidentiality, the URERC has infringed our academic freedom.

b) Limited Confidentiality Violates Policy A30.01

a) Policy A30.01 (Code of Faculty Ethics and Responsibilities) asserts that faculty members, "have the obligation to defend the right of their colleagues to academic freedom." By imposing limited confidentiality on researchers, the URERC has infringed our academic freedom to conduct field research on unreported criminal activity.

b) A30.01 states that faculty members, "have a responsibility to abide by the rules and regulations established for the orderly conduct of the affairs of the University, provided that these rules and regulations do not infringe the academic freedom of faculty and students or the principles of ethical conduct as set forth in this policy." By changing R20.01 so that it makes valid and reliable criminological field research on unreported and undetected crime and other rule infractions impossible, the limited confidentiality consent statement has infringed our academic freedom to investigate all aspects of society.

c) Limited Confidentiality Violates Policy R60.01

a) Policy R60.01 (Integrity in Research and Misconduct in Research) begins by stating that: "Simon Fraser University supports and encourages the maintenance of the highest ethical standards in research and scholarship." The limited confidentiality consent statement does not comply with that foundation because, by limiting confidentiality and making it virtually impossible to protect confidential research information to the full extent permitted by law, it institutionalizes a lower standard.

b) R60.01 asserts that the, "Primary responsibility for high standards of conduct in research and scholarship rests with the individuals carrying out these activities." The limited confidentiality consent statement precludes researchers from living up to that responsibility by requiring them to adhere to a policy that institutionalizes less than the "highest ethical standards."

5.iv) The URERC Has Not Resolved the Contradiction Between "Limited Confidentiality" as per the Consent Form Template and the Agreement to Maintain "Strict Confidentiality" as per the Ethics Application Package

In order to obtain ethics approval, a researcher has to fill out a *Request for Ethical Approval of Research* in which they must pledge to "maintain in *strict* confidence the responses of individual subjects," (emphasis added). This expression of confidentiality is consistent with the text of R20.01, which does not limit confidentiality in any way.

As we have pointed out several times over the past year,[41] this agreement contradicts the "limited confidentiality" statement on the consent form template, which implies that a researcher will yield up information to a court or other legal body as soon as it asks. A researcher who would so readily yield confidential information is not, in our estimation, maintaining "strict confidentiality."

5.v) The Effect of Limited Confidentiality On Research in the School of Criminology

We had one ethics application refused for 8+ months and another application for 11+ months, and eventually rejected, because the URERC insisted that we use the limited confidentiality consent statement, or some variation of it, in our field research.

Several times since October 1997 we asked Dr. Clayman if the University intended to support graduate students should they be ordered by a court to disclose confidential research information. Without this information, we were unable to advise our students how to prepare their research ethics applications for submission to the URERC. This matter was finally resolved with the November 9, 1998 announcement by Dr. Clayman that the University would, in future, defend the academic freedom of graduate students in court. But this was not before the actions of the URERC literally had a significant impact on research in the School. As Blomley and Davis (1998) note:

> The University has obvious obligations concerning the integrity and efficacy of research and graduate training and maintaining the principle of academic freedom, all of which were compromised as a result of its decision to distance itself from Ogden and the Coroner's Inquest.
>
> A good deal of research involving human participants, especially in a field such as criminology, can only be carried out if the researchers can guarantee to their research participants that the information gained during the research will be kept in strictest confidence. To undermine this guarantee makes it impossible to carry out much of the research in certain fields like criminology. Minimally, the University has an interest in defending and clarifying the issue of academic freedom so that such research can be carried out. By having chosen not to do so, the University sends out a negative message to both faculty and student researchers and to prospective participants in research projects in fields like criminology. Apparently, the School of Criminology at SFU now sends materials about the Ogden decision and about unsettled issues relating to ethics policy to prospective graduate students in their acceptance package to provide them with an informed choice.

[41] See e.g. "A Law Unto Itself" (November 27, 1997, *Simon Fraser News*); "The SFU Ethics Committee: A Law Unto Itself," memo to the URERC, November 1997.

As this suggests, the Ogden decision and the imposition of limited confidentiality both had a significant impact on our teaching and supervision in Criminology. Limited confidentiality has already significantly changed the shape of our graduate program. We learned recently that some graduate students have actually changed their research topics to avoid a long approval process that would impede their progress in the program.

6) The Limited Confidentiality Consent Form Prevails: The URERC's Rationale

On December 1, 1997, one of us (Lowman) submitted a proposal to conduct research on owners and managers of off-street prostitution establishments. This proposal was revised and resubmitted on February 26, 1998. On February 24, 1998, we submitted a second and related proposal to conduct research on workers in off-street prostitution establishments. In order to avoid problems with mandatory reporting laws, we restricted both studies to establishments where only adults work. We refused to use the limited confidentiality consent statement for all the reasons we have described above. On October 14, 1998, a year after first raising our concerns about "limited confidentiality," we received a letter from the URERC announcing that our research applications and been rejected. On December 18, 1998, we submitted our grounds for appeal of the URERC's negative decision.

The package we received from Dr. Horvath, Chair of the URERC, on October 14, 1998 contained three items:

1) Adam Horvath's October 6, 1998 "Response to Drs. Palys and Lowman's Communication 'Rejoinder to Bruce Clayman.'" For the sake of convenience, we refer to this account as "The Official History of Limited Confidentiality at SFU."

2) Dr. Bernard Dickens' letter of September 29, 1998 to the URERC providing opinion "regarding confidentiality of research data and investigator's liability to subpoena."

3) A letter from Dr. Horvath dated October 8, 1998 (received October 14, 1998), written in his capacity as Chair of the URERC. This letter constitutes the Committee's negative decision regarding our two research applications, and states, "we see little profit in continuing the debate about the wording of the informed consent document."

Our *History of Limited Confidentiality at SFU* responds to item 1, Dr. Horvath's *Official History*. Also, we are in the process of preparing a response to Dr. Dickens so-called independent decision (item 2), and have included an outline of that commentary below (see Section 6.vii). As to the URERC's negative decision (item 3), we had one month from receiving it to file an appeal. We sent two requests to Dr. Horvath for information relating to the appeal (the second on October 23, 1998). He did not reply until November 10, just four days before our deadline to make notice of Appeal.

On November 13, 1998 we asked Dr. Horvath to convene an emergency meeting of the URERC

to reconsider our applications in light of the University's November 9, 1998, statement[42] regarding the defense of academic freedom for graduate students (and, by implication, faculty as well) and the Tri-Council Policy Statement. It should have been possible at that point to approve our two proposals as the University's announcement resolved the one remaining problem that was preventing their approval: whether the University will defend confidential research information from court-ordered disclosure. Dr. Horvath terminated our interaction on the grounds we had already filed our Notice of Appeal. We were thus forced into a potentially lengthy appeal procedure, and yet more work to win the right to do research that should have been approved a year ago.

Excerpts from all of these interchanges will be discussed below. We start by making several observations about Dr. Horvath's *Official History of Limited Confidentiality at SFU*. Then we turn to the URERC's reasons for refusing to approve our two ethics applications.

6.i) Dr. Horvath's Official History of Limited Confidentiality at SFU

We regard Adam Horvath's claims in his account of limited confidentiality (document #1 above) as extraordinary.[43] Here we focus on one of Dr. Horvath's key claims when it comes to limited confidentiality, whether "the limit of the law" marks the upper or lower "limit" of confidentiality, and whether the limit of the law is reached when a researcher receives a subpoena. Here is Dr. Horvath's account:

> …in 1994 the URERC chose to include a statement in the consent form that informs research subjects who are likely to reveal to researchers information about illegal activities, that Canadian law does not necessarily recognize researcher-client communication as "privileged", and therefore may require the researcher to disclose such information to the court. At no time did the URERC suggest, or imply that the researcher **should provide** such information to the court or anyone else. The point is, and was, that the participant has a right to KNOW that such court action may take place and the informed consent form (a document that may appear to the research participant as a legal contract[44]) is only as good as the researcher's willingness to stand up to such demands in court. (emphasis in original)

The first point to note about this logic is that an assumption about liability/responsibility is built into it; namely, that if a court action takes place, a promise of confidentiality is only as good as the *researcher's* willingness to stand up to such demands in court. Dr Horvath remains silent about the *University's* responsibilities should a court order the disclosure of confidential research information. This silence creates a situation by default in which the University has no

[42] On November 9, 1998 Bruce Clayman, as Dean of Graduate Studies, announced that, "where [a faculty or graduate student researcher's] academic freedom is challenged or compromised by an external body, the University has an obligation to provide legal advice, representation, and/or indemnification to him/her in defending against those actions."

[43] We regard the current document as a response to Dr. Horvath's document, which he has e-mailed to the "Interested Observers" e-mail list, placed on the URERC web site, and apparently submitted to *Simon Fraser News*. We request that the Committee place this document alongside his, so that visitors to the URERC web site can have access to both accounts, and choose for themselves which they believe is the more compelling.

[44] Here Dr. Horvath appears to be projecting onto research participants his own legalistic view of the consent statement.

responsibility to protect confidential research information in court, or defend academic freedom against the threat that a subpoena poses.

In their respective considerations of the Ogden case, first Judge Steinberg and then Drs. Blomley and Davis offer an alternative position. In their view – the correct one in our opinion – the University has a responsibility to defend academic freedom, to maintain the integrity of the research enterprise, and to protect research participants by asserting research participant privilege in court:

> If the rights and interests of research participants give rise to a duty on the part of researchers to protect these rights and interests, then *a fortiori* it gives rise to a similar obligation on the part of the institution that approved of and set the ethical guidelines for the research. Hence the University has a duty to assist researchers in carrying out their obligations to protect the rights and interests of research participants. In doing so it is not acting primarily to provide aid to the researcher, but to fulfill its obligation to protect the rights and interests of research participants. (Blomley and Davis, 1998, p.12)

Support from the University is not just a matter of principle, but a practical matter, as well. A researcher backed by his or her institution is much more likely to be successful at fighting court-ordered disclosure than a researcher on his or her own (which is why Russel Ogden's victory is that much more remarkable). To support this contention, we would note that a review of cases involving court-ordered disclosure of research information in the United States reveals that, when researchers are supported by their institutions, they fare better in court (see the special edition of *Law and Contemporary Problems* Vol. 59, #3, 1996).

Furthermore, the Tri-Council *Policy Statement* sets the *lower limit* of confidentiality this way:

> The situation may arise where a third party attempts to gain access to research records, and hence to breach the promise of confidentiality given by the researcher as part of a research project approved by the REB. By that time, the matter has passed from the hands of the REB. The researcher is honour-bound to protect 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 support the integrity of its own REB. If the third party attempts to secure the research data by subpoena, it is legitimate for the researcher and the institution to argue the issue in court.

Russel Ogden has shown that the extent possible within the law is "absolutely." The URERC consent statement, however, allows researchers who do not want to go through the inconvenience of trying to protect confidential information to this extent to take the unethical course, and capitulate should they receive a subpoena.[45] Worse, the consent statement could be tantamount to

[45] We note also that, for some researchers, particularly those engaged in consultative work from a more administrative perspective, a situation such as this may place them in an inconvenient conflict of interest -- Do they ally with the administrative authorities who pay them? Or with the research participants whose data supply grist for the mill? The dilemma is not unlike that faced by Dr. Nancy Olivieri at the University of Toronto and Toronto Hospital for Sick Children, who was threatened with legal action by a pharmaceutical company if she informed her research participants about the negative information she was accumulating regarding the effect of an experimental drug on the child patients who were receiving it. The Tri-Council is unequivocal about what to do in such a situation: researchers' obligations are to their research participants, and researchers are required to avoid administrative arrangements that would undermine that allegiance. The Clayman/Horvath approach of limited confidentiality heads this "problem" (i.e., ethical obligation) off at the pass by "informing" participants that their information will be surrendered

declaring open season on researchers, as it allows legal authorities to "require" confidential information whenever they see fit. We cannot ask research subjects to divulge sensitive information under these circumstances.

Then there is the matter of Dr. Horvath's claim that, "At no time did the URERC suggest, or imply that the researcher should provide such information to the court or anyone else." There are two conspicuous problems with this bold claim:

1) **Up to spring 1998, it is difficult to understand how Dr. Horvath can claim to have any idea what position the URERC took with applicants with regard to limited confidentiality as the Committee itself had virtually no contact with applicants**.

   Since Dr. Clayman assumed the Vice Presidency, he has invoked the prerogative given by R20.01 to "grant approval on behalf of the Committee." From October 1992 to November 1997, a period in which upwards of 1000 research applications were submitted, the Office of the VP Research handled all but 2 applications (see Section 2, above). In fact, Barb Ralph – who apparently has no formal training in research methods, research ethics or different disciplinary ethics codes – handled nearly *all* the URERC correspondence with applicants. She took her instructions from Bruce Clayman. There is a transparent institutional conflict of interest[46] contained in this arrangement.' It will have to cease in order for SFU to comply with the Tri-Council *Policy Statement* section 4 C, which requires that there be an arms-length relationship between a Research Ethics Board and the parent institution.

   And what position did the VP-Research transmit to her? Surely it is reasonable to infer he transmitted to Barb Ralph the University's position that researchers are "not above the law of the land." (see Section 4, above). We have already seen that the decision to place the URERC Draft Policy on the Web seems to have been taken by the VP-Research alone (see section 3.vii). The Office of the VP-Research processed close to 100% of the applications. From September 1994 when it introduced the policy of referring all potential limited confidentiality cases to the full Committee for discussion, to November 1997 when we challenged limited confidentiality, the URERC did *not* meet to discuss any of the cases where researchers answered "yes" to "question 9" on the ethics application checklist (i.e. "does information to be obtained from subjects include activities that are in violation of criminal or civil law?").

   We are privy to some of the correspondence between Ms. Ralph and School of Criminology researchers. It is obvious from her instructions, in which liability considerations are writ large, that she was following this "law of the land" policy. We sent one example of this correspondence to Drs. Clayman, Horvath and other members of the Committee, showing how liability considerations have contaminated the ethics application process (see Appendix B) but never received a response from Dr. Clayman or any member of the URERC to this memo.

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when asked. Such an approach is "ethical" only to the extent that it is an open assertion of the researcher's lack of ethics, of which participants should indeed be informed. This *caveat emptor* approach to ethics is a complete denial of the spirit of Policy R20.01, and the Tri-Council *Policy Statement*, both of which expect allegiance to the participant.

[46] The conflict occurs because extra-ethical criteria, such as liability considerations or the desire to appease funding bodies, can contaminate the ethics approval process. For further discussion of this conflict of interest see Ted Palys and John Lowman, "When Roles Conflict."

We suggest that, until recently, the University has never informed applicants of their options when it comes to resisting court ordered disclosure of confidential research information. *We challenge the Office of the VP-Research to produce <u>any</u> correspondence between September 1994 and the present to applicants (other than us) who answered "yes" to question 9* ("Does information to be obtained from subjects include information on activities that are or may be in violation of criminal or civil law?"*) demonstrating that they were informed they had the option to fight, and even defy, a court order to disclose confidential research information.*

2) According to the minutes from February to August 1998, the Committee considered only one case of limited confidentiality in addition to our two applications. **That applicant flatly contradicts Dr. Horvath's claim that, "At no time did the URERC suggest, or imply that the researcher should provide such information to the court or anyone else."** The case is mentioned in the April 7, 1998 minutes under the heading 6, "Graduate Student application:"

> The graduate student in the Department of Sociology and Anthropology appeared before the Committee to discuss and clarify the areas of concern noted in the Committee's correspondence to him. The Committee requested that he respond to several issues in written form.

The student in question had ticked "yes" to question 9 on Form 1. We happened to know this student's identity and sent him a copy of Dr. Horvath's October 6th "Response to Palys and Lowman," and asked him the following question about Dr Horvath's claim.

> Dear [student]:
>
> Here is Adam Horvath's October 6th reply to various arguments we [Palys and Lowman] have made about "limited confidentiality" at SFU. In particular, Dr. Horvath makes the following claim:
>
> "*At no time did the URERC suggest, or imply that the researcher should provide such information [i.e. confidential research information] to the court or anyone else."*
>
> Is Dr. Horvath's claim consistent with your experience when you met with the SFU Ethics Committee in April, 1998 to discuss your research ethics application?

Here is the student's reply (which he has given us permission to quote):

> John
>
> Dr. Horvath's account doesn't square with what the committee told me in my April 1998 meeting with them. They specified <u>no</u> circumstances to me in which I could or should not comply with a court order. In response to my repeated questions about the limits of limited confidentiality, I was bluntly told that: I must comply with a court order, any court order; I must do it promptly; I could not withhold any part of my data, even though I felt it had nothing to do with the court's interests and would be a breach of confidentiality in itself; and I could exercise no judgment about the validity of the court order.
>
> It was explicit that, in the opinion of the committee, there were no situations "in which difficult case by case decisions have to be made to balance the moral and ethical issues involved." So Dr. Horvath's argument that the URERC wants to pick its ground before fighting is disingenuous. They already have picked their ground, and it's on the sidelines.

If the Committee was not trying to give the impression that researchers, if ordered by a court to disclose confidential information, should just hand it over, it certainly is not the message this applicant received.

6.ii) A Twist: Ethical Researchers can Guarantee Unlimited Confidentiality if They Are Prepared to Pay For It

After several months of interaction with the URERC, the committee at one point offered a "compromise" resolution that would allow us to guarantee unlimited confidentiality in our consent statement, but only if we were prepared to take sole responsibility for maintaining confidential information in the face of a court challenge. We were very concerned about this proposal because it could be seized by the University and interpreted as a liability waiver, just as it did to Russel Ogden (see section 6.iv below for the specific wording we were expected to use). Presumably, this "waiver" could be used to deny us our rights to legal representation under article 17 of the *Framework Agreement*.

There were two aspects to this negotiation that are of interest here. The first element was the debate over whether, given the extremely low risk of being subpoenaed and our pledge to maintain it, we needed to even mention the possibility of a subpoena to our participants in our informed consent statement. The second pertained to the question of whether simply telling the participants about the prospect of a subpoena, and saying no more than that, was sufficient. The next two sections review these issues.

6.iii) Should The Remote Risk of Court-Ordered Disclosure Always be Mentioned in an Informed Consent Statement?

We began our negotiations with the URERC by saying that the Committee's imposition of limited confidentiality on all researchers who check screening item #9 is alarmist and redundant. It is alarmist in the sense that in all of Canada, there has only ever been *one* case in which a researcher has been subpoenaed and asked to supply confidential information, and there has *never* been a case in which a researcher has had to defy the law in order to maintain confidentiality. It is redundant to the extent that our pledge of unlimited confidentiality includes the possibility of going to jail if, after a series of appeals, the Supreme Court of Canada were to disagree with our stand, and we had to defy the order in order to maintain our *a priori* pledge.

In return, the URERC argued that research participants had a right to know about the possibility, so that they could decide for themselves if they could trust researchers to maintain their pledge. We were willing to compromise on this point, since we did not believe that mention of the possibility of court-ordered disclosure, in and of itself, would damage our ability to defend our research participants, assuming that we also told them that we would do, including defying court-ordered disclosure, if necessary, to protect confidential information.

6.iv) If Court-Ordered Disclosure Is To Be Mentioned, Then Participants Must Also Be Told What The Researcher, The Ethics Committee, And The University Will Do In Response

If it is important for participants to be told about the possibility of court-ordered disclosure, then it is also important for them to be told what will happen in the event a subpoena is received. On April 23, 1998, we offered the following informed consent statement for the URERC's consideration:

> R20.01 requires researchers to treat as confidential information provided by research participants. There is a very remote possibility that we will be asked by a public body to reveal confidential information. In the unlikely event that this does happen, our course of action would be as follows: Because our University research ethics policy does not limit confidentiality, and because our Ethics Committee has said that its "overriding obligation [is] to protect participants' interests and rights…" (March 26, 1998 guidelines) we will resist any attempt by a "public body" to obtain confidential information. *Because its overriding responsibility is to "protect participants" the Ethics Committee will do its utmost to defend confidential information should a public body or court request access to it. Because the University "supports the highest ethical standards" (R.60.01), it too will staunchly defend confidentiality in court.* In the event that these efforts fail, and we are ordered to reveal confidential information by a court or public body, we will make a personal decision not to do so.[47] (italics added)

The URERC agreed to let us use this statement, as long as we removed the two italicized phrases that refer to what the Ethics Committee and University would do in the event of a subpoena, and finished our statement with the following:

> In the event that we are ordered by a court or other public body to divulge information, we, the researchers, intend to maintain the confidentiality and anonymity of research participants.

This statement appears to us to have more to do with protecting the University from liability, and, in particular, waiving its responsibility under article 17 of the *Framework Agreement* (to provide faculty members with legal representation), than it has to do with protecting research participants from harm, or giving them sufficient information to make informed consent. This statement implies that, should a researcher be ordered to disclose confidential information, the Committee's expectation is that the researcher should either divulge the information, or they must take sole

[47] We take this position because the law is effectively written after the fact, while we must make our decisions ahead of time. The only legal device we have for defending confidential research information is the Wigmore test (see footnote 4). Prior to commencing our research, we have to decide whether our communications with research participants pass the test, otherwise we cannot give a promise of unlimited confidentiality. The fact that a judge might disagree after the fact will not change our conviction that the confidential information should not be disclosed, in which case we are ethically bound to defy a court order. Of course, this does not put us above the law, for as the Tri-Council *Policy Statement* points out, ethics cannot pre-empt the application of law (p. i.8). We would thus respect the law, and submit to whatever punishment is deemed appropriate. Someone who believes they are "above the law" is someone who thinks the law does not apply to them. We are keenly aware that the law *does* apply to researchers, and our first inclination is to work within the law by having the confidence of our convictions, considering the sage advice embodied in the Wigmore criteria, and designing our research so that it anticipates the challenges that will be made to it should we ever end up in court. Indeed, following the law, i.e., following Wigmore, *requires* us to offer unlimited confidentiality. If found in contempt, we would show our respect for law by going to jail.

responsibility for maintaining anonymity of research participants and confidentiality of research information.

We were prepared to follow the committee's requirement that we make a statement about the remote possibility of court-ordered disclosure, but refused to accept sole responsibility for asserting academic privilege and academic freedom in court. The university also has obligations in this regard, as the Blomley-Davis Report indicates. We refuse to make a statement under the guise of "informed consent" that could be interpreted by the University as a waiver of liability, as it did in the Russel Ogden case, should we be subpoenaed. For the Ethics Committee to have fostered such a situation is a violation of its responsibility to protect research participants and an abuse of its power over researchers.

We were gratified with the announcement from Dr. Clayman, as Dean of Graduate Studies, on November 9, 1998, regarding the university's pledge of support for graduate students, and the implicit statement contained therein with respect to faculty. The announcement goes beyond merely extending Article 17 of the *Framework Agreement* to graduate researchers by making some assertive statements regarding the defense of academic freedom. This announcement is a sign that SFU is in the process of taking a national leadership role with respect to academic freedom issues. With regard to our own research, given that the one sticking point was the URERC's insistence that we accept sole responsibility for maintaining confidentiality, we can only hope that our pending appeal of the URERC's negative decision will result in the approval of the unlimited confidentiality consent statement we submitted on April 23, 1998.

6.v) Dr. Horvath's Claim That There Are Only A Few Disgruntled Research Ethics Applicants

In his official history of limited confidentiality at SFU, Dr. Horvath claims:

> Ninety-nine percent of all research proposals submitted to URERC are approved very rapidly, with very minor tweaks or revisions. Only in a very few cases, there are serious concerns about risks the participants may expose themselves to, and the committee meets (usually with the researcher) to resolve these issues. During the past ten years, only a handful of cases needed such detailed review, and all but 3 of these have been successfully resolved to the satisfaction of everyone.

On February 3, 1998 we communicated to the URERC the problems experienced by a student in the School of Criminology in the process of applying for ethical approval (Appendix B). Like several other students, this person changed the nature of her research to accommodate what she perceived to be the unreasonable and capricious requirements of the assistant who actually handles nearly all ethics applications. When we pointed out the difficulty this student encountered, neither Dr. Horvath nor Dr. Clayman nor any other member of the URERC responded to this memo. We wonder whether Dr. Horvath includes this student among the three disgruntled applicants he mentions, or whether this is one of the "minor tweaks or revisions" he refers to. In any event, given that Dr. Horvath has had virtually no contact with research ethics applicants, since he did not become Chair until May, 1998, and the vast majority of these are dealt with by the VP-Research's office, we wonder how he can make such authoritative claims about the level of dissatisfaction that may exist.

If time permits, we hope to survey researchers in the School of Criminology to ascertain their perceptions of the ethics application process. Conversations to date with various faculty and

students suggest that there is widespread and deeply-seated dissatisfaction with the ethics approval process.

Many researchers we have talked to feel that the ethics application process, because it is so heavily coloured by the medical-experimental model, goes way beyond ethical considerations to the point that it has become an epistemological gatekeeper. The imposition of the limited confidentiality consent statement has significantly affected the nature of research in the School (see Section 5.v).

We believe these frustrations are not restricted to the School of Criminology.

6.vi) Further Procedural Irregularities: The URERC's Negative Decision on Two Research Ethics Applications

On October 14, 1998 we received a letter dated October 8, 1998 from Dr. Horvath saying:

> In light of the fact that the independent legal evaluation and the Tri-Council Policy Statement on Ethical Conduct for Research Involving Humans are both so clearly supporting the position the University Research Ethics Review Committee has taken, we see little profit in continuing the debate about the wording of the informed consent document.

This letter reports the URERC's "negative decision" on our two applications. Two reasons are given: a) the Tri-Council *Policy Statement*; and b) Dr. Dickens's "independent legal evaluation."

The first thing to notice about this decision is that it is not supported by any kind of rationale as per the criteria spelled out in R20.01. An unjustified decision is no more than an assertion of authority. It is difficult to appeal a decision that has no "reasons." Although the policy itself is deficient in this respect – it does not actually require that any reasons be given – the articulation of reasons in terms of the criteria spelled out in the policy is a requirement of procedural fairness.

As to the "reasons" Dr. Horvath *has* provided, we contest his claim that the Tri-Council *Policy Statement* supports what the URERC has been doing. The day before we received the URERC's "negative decision," we sent a memorandum to the Committee describing why use of the "limited confidentiality consent statement" will not make sense under the Tri-Council *Policy Statement* (Appendix G). Indeed, because it requires that Research Ethics Boards have an arms length relationship with the parent institution, the Tri-Council *Policy Statement* would not even permit the current Simon Fraser URERC to judge ethics applications.

After he received our comments regarding the Tri-Council *Policy Statement*, Dr. Horvath noted:

> In your correspondence of October 22, 1998, you make an argument based on the Tri-Council Policy Statement "Ethical Conduct for Research Involving Humans". This document has not yet been adopted by the University (November 10, 1998).

The URERC justified its negative decision to us by invoking the Tri-Council *Policy Statement.* Subsequently we pointed out that, under the Tri-Council *Policy Statement*'s consent alteration provisions, we would likely not have to mention the minute risk of court-ordered disclosure, and under its proportionate approach to ethics review, the URERC would not be justified in taking the

very intrusive position that it has. In response, the URERC turned around and stated that, “This document has not yet been adopted by the University” and refused to approve our research.

6.vii) Prof. Bernard Dickens's “Independent Legal Opinion”

From the time we initiated our discussion regarding limited confidentiality with the University Research Ethics Review Committee (URERC) in December, 1997, we encouraged the university to seek independent legal advice regarding how best to maximize the protection of research participants using the Wigmore test.[48] Our objective was to maximize protection of research participants in a manner that balanced the varying rights and interests of participants specified in the SFU Ethics Policy (R20.01), i.e., informed consent; deception; privacy; confidentiality; and, anonymity. Also, our goal was to do this in a way that accorded with other policies, such as research integrity (R60.01), faculty ethics (A30.01), and academic freedom (all of the above) and the SFU *Framework Agreement*. We felt our proposal achieved that balance, for reasons outlined in numerous memoranda filed over the past year.

Dr. Clayman, who was Chair of the URERC at the time we started this process, never did seek the legal advice we requested. The Committee's first formal recognition of the need to seek legal advice is noted in the URERC Minutes of March 24. Dr. McShane moved and Dr. Bowman seconded a motion that the Committee should initiate a request for legal advice through the VP-Research, "with particular emphasis on the Wigmore test." At the meeting of May 5, five months after we first raised the issue, Dr. Horvath announced that Dr. Clayman had approved a budget to seek legal advice. The responsibility of drafting the questions to be asked was charged to Drs. Horvath and Ogloff. This had not been done in time for the June 2 meeting (as noted in the Minutes), but they were ready for the meeting of July 7 (presented to the Committee by Dr. Ogloff), where they were amended following suggestions from Drs. Horvath and Black. The faxed response from the "legal consultant" is dated September 29; it was apparently considered at a meeting of the URERC on October 7, and we received it via inter-departmental mail on October 14. Dr. Horvath distributed the Dickens opinion to the "Interested Observers" e-mail list, on October 15 1998. It took ten months from the time the issue was first broached to receive what was supposed to be an independent legal opinion. Then, when we received it, we found that it was neither independent, nor was it based on an analysis of extant Canadian case law.

By way of summary, Dr. Dickens's opinion consists of two primary claims: a) if ordered by a court to reveal confidential information, researchers must disclose it because, b) although the Wigmore test is relevant to protecting confidential research information, researchers will likely not be successful using it. Dr. Dickens does not analyze the Ogden case in presenting arguments to support this opinion, and does not analyze any other Canadian cases where the Wigmore test was invoked. We asked for a *legal* opinion, but it is not what we got. Instead, we received a largely ethical opinion from Dr. Dickens tacked on to his personal opinions about the (lack of) value of the Wigmore test for defending confidential research information. His opinion represents the purest statement of limited confidentiality we have yet seen, and represents just about everything we oppose when translated into criminological field research of the type we are conducting.

The URERC’s decision to recruit Dr. Dickens is itself compromised by various kinds of apparent conflict of interest. Far from being an “independent” expert, Bernard Dickens is a distinct

[48] In their briefs to the URERC that same month, Drs. Hanson and Ogloff also suggested that the URERC should seek expert legal opinion.

stakeholder in the conception and application of limited confidentiality. We demonstrate this by describing the research protocols of one of Dr. Dickens's students. But first, some general points about the decision to obtain an opinion from Dr. Dickens, and about his view of research ethics and its implications for our discussion.

a) R20.01 section 6h says that, "The proceedings of the Committee shall be non-adversarial in nature." In its handling of legal advice, we do not feel the URERC has lived up to this expectation. The usual procedure with expert opinion is to seek the opinion and then make a decision. In contrast, in the URERC's case, the decision was made and then the opinion sought. Because of their close association with limited confidentiality and its initiation at SFU, there is a reasonable apprehension of bias in Drs. Horvath and Ogloff being placed in charge of writing "legal" questions without any input from the researchers who raised these issues and whose research proposal was then at the center of an ongoing debate with the Committee. Given the array of well-documented problems that have been associated with structural aspects of the URERC, and its lack of independence from administrative authorities, the Committee should have ensured that any request for legal opinion was balanced, and equally reflected the concerns of the various participants in the discussion. We are left with the impression that the exercise was little more than an effort to provide *post hoc* justification for doctrinal opinions, instead of an opportunity to assist us in our research.

b) Most of the questions the URERC posed the legal/ethics consultant are not *legal* questions, but *ethical* questions. We also note that Dr. Horvath did not send Dr. Dickens a copy of the SFU Ethics Policy, in which case, we do not understand how Dr. Dickens could be expected to provide ethical opinions conceptualized in terms of SFU's Research Ethics Policy.

c) The questions posed by the URERC did *not* address the issues we raised repeatedly for almost a year, and to which we required answers in order to get on with our research. We did not ask for an opinion about whether researchers can successfully invoke Wigmore.

We know it is possible; Ogden did it.

We sought legal opinion about how to design a research protocol that would maximize our chance of successfully protecting confidential research information from court-ordered disclosure. We provided reasons for believing why the URERC's limited confidentiality statement assured failure before we even started. One legal issue we raised repeatedly was whether the wording of the informed consent template, introduced by Dr. Horvath, undermined the ability of a researcher to defend confidentiality using the Wigmore criteria. We presented an independent legal opinion from Mary Marshall,[49] found on the internet, in which she outlined the need to make explicit pledges of unlimited confidentiality in order to maximize the likelihood that a communication would be protected by the Wigmore criteria. The logical implication was that the URERC's informed consent template did not effectively protect research participants to the full extent permitted by law. We asked the URERC whether it had reason to believe anything different. The Committee never responded to this opinion, and, never asked it of Dr. Dickens.

We would still like to see a thorough analysis of Canadian cases where the Wigmore test was invoked to see how best to design a research protocol to protect confidential research information to the full extent permitted by law; i.e. to the full extent allowed by the Wigmore test.

[49] See Mary Marshall (1992). "When is a secret not a secret?" at http://www.cookdukecox.com/newsletters/issue6-1992/secret.htm

d) We asked Dr. Horvath to describe the URERC's criteria for choosing Dr. Dickens to provide expert opinion. Dr. Horvath replied: "We were looking for the most qualified and knowledgeable expert in Canada to comment on our question." Yes, but expert in what field? Dr. Dickens is, no doubt, highly qualified and eminent in his main field – bio-ethics and law. But asking him to prepare an opinion relating to our criminological field research repeats the mistake the original Tri-Council Working Group made in creating its first (1996) draft, i.e., allowing persons who are trained in one epistemology and research model to impose their principles on other types of research.

The URERC minutes of September 1, 1998, show that the URERC made inquiries with a second expert – Timothy Caulfield of the University of Alberta. Apparently he was unable to provide an opinion. Dr. Caulfield's expertise is also in bio-ethics and law A search of the web revealed that some of his recent writings concern the ethics of cloning, and the marketing of bio-genetic information. Why would the Committee approach two different people with identical expertise in the bio-ethics area, but no expertise in qualitative social science field research?

e) In the one place where Dr. Dickens's opinion *is* relevant to the concerns we raised with the URERC about how best to maximize the protection of confidential research information, Dr. Dickens confirms our argument that the Wigmore criteria are relevant to the assertion of researcher-participant privilege in court. Indeed, *he confirms that it is the only protection we have should a court or other public body try to obtain confidential research information*.

f) In our opinion Dr. Dickens' analysis of the researcher-participant relationship and the probability of success in defending that relationship in court via the Wigmore criteria is fundamentally flawed. We think his analogy of the physician-patient relationship with the researcher-participant relationship is misleading, and that the latter is far more likely than the former to be deemed deserving of privilege. Although Dr. Dickens cites Wigmore's rejection of the possibility of physician-patient privilege – and by extension, asserts that the researcher-participant relationship would have no chance in court – he is not correct when he suggests that the basis of its rejection by Wigmore was on the basis of both criteria 2 and 4. In fact, Wigmore believed its failure to pass the test was solely under criterion 2, after which consideration under criterion 4 is irrelevant, and, in any event, cannot be considered until one knows the particular circumstances being balanced in any given situation.[50] Unlike the physician-patient relationship, the researcher-participant relationship clearly *passes* criterion 2.

In contrast to Dr. Dickens, we believe the relationship between the field researcher and the participant is more like the one between a journalist and source than between a doctor and patient. In most of the cases where claims to privilege of communication might be made, the person holding the privilege has something to gain by divulging personal information. The patient hopes to be cured, the lawyer's client hopes to beat the rap, and the penitent seeks absolution. In contrast, the research participant disclosing information about criminal activity in the name of "science" or "learning" has virtually nothing personally to gain, and much to lose by the disclosure. Confidentiality is essential to this relationship. We will clarify these issues in a separate article arguing that the Wigmore test has tremendous potential for protecting confidential

[50] Criterion 2 states that, "this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties." Criterion 4 states that, "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." (both quotes from Wigmore, 1905).

research information and perhaps even establishing researcher-participant privilege in common law.

g) Because Dr. Dickens rejects the possibility of winning in court out of hand, he does not report evidence that contradicts his argument, even though he is clearly aware of it (i.e. the special volume of *Law and Contemporary Problems* we mention in Section 4.ii). Dr. Dickens suggests researchers would never win a Wigmore-centered court battle over a court-ordered disclosure. We think otherwise. In fact, US courts have been highly respectful of the rights of individual research participants to having their confidentiality maintained. Indeed, as we described at the beginning of this document, the US Courts have once again shown their proclivity to protect the research enterprise by denying Microsoft Corporation any access to research records of David Yoffie and Michael Cusumano. While we recognize that US courts do not set precedents in Canada, these decisions nevertheless provide valuable evidence for making the case that researcher-participant communications pass criteria 2 and 3 of the Wigmore test.

h) Dr. Dickens' assertions regarding the ethical dicta that researchers "must" follow are doctrinal ethical assertions, *not* "legal" opinions. If imposed on our research, his subjugation of research ethics to law would involve a violation of academic freedom.

i) Dr. Dickens never addresses a key aspect of the question he was posed. The preamble to the question states "SFU Policy R20.01 requires researchers to treat as confidential information provided by research subjects." He never reconciles his doctrinaire subjugation of ethics to law with the requirements of the SFU Research Ethics Policy. Of course, that is not surprising, given that he apparently was never provided with a copy of the SFU policy.

j) Is Bernard Dickens giving an "independent" opinion? He cannot. He's very much a player when it comes to limited confidentiality – he is part-architect of a research protocol that takes a different position regarding confidentiality to that taken by Ogden, and illustrates well the differences that a field researcher and a medical-model researcher would take to this type of research. The protocol is that of one of Dr. Dickens' students (see Appendix D for a copy of the protocol). Dr. Dickens sits on this student's Ph.D. Committee and has co-authored at least one paper with him. The thesis concerns AIDS patients and euthanasia, and examines propositions emanating directly out of Russel Ogden's research. The student has corresponded with Russel many times over the past few years. Dr. Dickens also corresponded with Russel in 1996.

For Dr. Dickens and his student, the way to deal with confidentiality issues is to de-personalize the research interaction, make the research a one-shot study, and give repeated warnings to the participant that, if a court should order disclosure of confidential research information, it will be disclosed. Our research model is different. We want to *know* participants as persons. Part of our research program involves developing long term networks of key participants; often, anonymity is not an option.[51] Our research tradition is one that values trust and rapport, and the maintenance of responsibilities – such as protecting the rights and interests of research participants to confidentiality – that goes with it. Not only that, but in some instances we are also interested in the identity of our participants so that we can track information about them in different sources as part of a triangulation of different research methods.

The student research protocol developed under Dr. Dickens' supervision self-consciously differs from the undertaking of "absolute confidentiality" that Mr. Ogden used. Indeed, in this protocol,

[51] For example, one way we contact escort agencies is to find out who the owners are, and approach them with a request to participate in our research.

prospective research participants are, in our opinion, misinformed to the extent that they are effectively told there is no legal way of protecting confidential information from court-ordered disclosure. As Ogden's case shows, this information is NOT correct. The Wigmore test can be used to protect confidential research information. In any event, this researcher made it abundantly clear to participants that he would not go to jail to defend confidential research information.

We treat our ethical responsibilities very differently from this *caveat emptor* approach. Codes of ethics remind us to respect the human dignity of our participants, and to protect their interests. To us, it would be exploitative to ask people for information that could harm them and then turn it over to a court. To follow the ethical dicta laid out in R20.01 means that we should value the humanity and dignity of research participants and accept ethical responsibility to protect them from harm. The *caveat emptor* logic at the core of limited confidentiality does not meet the "highest ethical standards" that SFU Policy R60.01 (Integrity in Research and Misconduct in Research) requires us to adhere to.

Because Dr. Dickens was involved in developing this research ethics protocol, there is a reasonable apprehension of bias in his commenting on the matters currently before the URERC. Dr. Dickens already has an established position to defend. Part of what we find most disturbing about this opinion is the manner in which it completely fails to speak to us as field researchers. Its design features – an aloof approach, a legalistic interaction, a one-shot study – have everything to do with the medical model, and incorporates none of the epistemological desiderata of field research.

We are left wondering why the URERC did not fully apprise Dr. Dickens of how and to whom his expert opinion would be applied.

7) Conclusion

The Ethics Revision Task Force Mandate

The Ethics Revision Task Force is mandated to draft a new ethics policy. In the process, the Task Force has been asked to "review" current and past administration of the Research Ethics Policy. In this submission, we have identified a series of ways that the VP Research and the URERC have failed to comply with R20.01, R60.01, A30.01 and the SFU *Framework Agreement*. The Task Force is not mandated to recommend action to deal with problems created by administrators who do not comply with university policies, and the damage done by limited confidentiality in the process. The question is, who will deal with these problems?

Are There Two Standards at SFU, One for Administrators and the Other for Researchers?

We believe that the VP Research and the URERC have failed to comply with R20.01 in several ways:

- At the behest of the VP Research, the URERC "limited confidentiality." This change represents a substantive change to R20.01 without approval of the appropriate university authorities.
- In 1994, "limited confidentiality" was accepted in principle by an improperly constituted URERC.
- In 1995, there was no quorum at the URERC meeting where the limited confidentiality consent statement was accepted.
- The URERC was not constituted according to the policy at various times, in several ways. From 1995 onward, contrary to the requirement of the policy, no medical officer was appointed to the Committee. Sometimes, the required number of faculty representatives was not appointed to the Committee (see Appendix H).
- In 1994, at the behest of the VP Research, the URERC delegated to the Faculty of Business Administration the power to review its own ethics applications. The URERC is not authorized to delegate this power. Doing so represents a substantive change to R20.01.
- In 1998, the URERC expanded its power by requiring that researchers using secondary data sources submit applications for research ethics review. The VP Research did not intervene. The URERC is not authorized to create this requirement, which represents a substantive change to R20.01.

On December 2, 1998, the VP Research sent a memo to Deans, Chairs and Graduate Program Chairs a reminding them that:

> All projects undertaken by a faculty member or other SFU employee, graduate student or undergraduate student (outside a regular undergraduate course) requires the explicit prior approval of the University Research Ethics Review Committee (URERC). … Any faculty member or other SFU employee, graduate student or undergraduate student who undertakes research without such prior approval is in violation of SFU Policy R20.01 …and this constitutes misconduct in research as described in SFU Policy R60.01.

Policy R60.01 relates to "Integrity in Research and Misconduct in Research" and, depending on the severity of the "offense," the offender is "subject to a range of disciplinary measures up to and including dismissal or expulsion."

Given that the VP Research does not comply with R20.01, we wonder how, in good conscience, he can feel justified in reminding SFU researchers that they might be subject to disciplinary action if they do not follow the policy. We suggest that Dr. Clayman has lost the institutional moral authority to require others to follow R20.01 when he does not follow it himself.

Appendix A:
Dr. Hanson's Memorandum Regarding the URERC Meeting of November 23, 1995

To:	Dr. Bruce Clayman, Chair, and members of Ethics Review Committee	**Re:**	Issues on and relating to agenda, Dec. 18 meeting
From:	Dr. Philip Hanson Dept. of Philosophy	**Date:**	December 10, 1997

Attn. Barb Ralph: Please circulate this in advance to the committee and to any others who will be present at the Dec. 18th meeting

I regret very much being unable to attend the important meeting on Dec. 18th, but I will be out of the country. Having pondered the issues raised in the background documents provided, may I offer the following reactions for your consideration.

I should first say that though I was appointed to this committee in Sept. 1994, the first meeting that I attended was in October of that year. But I had been sent the minutes of the previous, Sept. 9th, meeting, at which a policy of limited confidentiality had been approved for subjects providing information for research into illegal activities. And I was present at a meeting in Nov. 1995 at which consent form wording as it bears on this issue was discussed. No particular wording was brought forward or approved at that time, but the principle of changing the wording was approved, and one of those present agreed to make available to the chair wording used in their discipline, and a key absent member was to have been consulted about the wording. My understanding, and this also seems to be reflected in the minutes, was that the proposed change of wording to these forms, together with various proposed amendments to R 20.01 were to be circulated to the university community for comments. My further understanding is that this process was, in fact, ongoing until about June '96 when it was put on hold. Because of a major Tri-Council initiative on codes of ethical conduct, it was decided by the committee that work on revisions would be suspended until it was clear what further effects the Tri-Council initiative would have on R 20.01.

It is worth noting that the Nov. '95 meeting was poorly attended, barely a quorum,[52] and on the issue of revisions to the consent form wording discussion was dominated by the one person on the committee who already had a strong and confident opinion on the matter. That person was not me.[53] Whereas most of the committee members come from departments whose members make extensive use of the offices of the Ethics Review Committee, I do not, and had been largely unaware of its procedures until my appointment to the committee, and had no basis in experience for strong opinions about policy matters. Why was I asked to be on the committee in the first place? Presumably because as a philosopher I know something about ethical theory. But *actually applying* ethical theory to concrete situations *also* requires a familiarity with the salient

[52] [Lowman and Palys note: It was not a quorum (see section 3.v, above). Dr. Clayman included Ellen Loosely as a Committee member to make up the quorum. However, Ellen Loosely is not a member of the Committee, as President Blaney has confirmed to us.]
[53] [Lowman and Palys note: It was, in fact, Dr. Horvath.]

complexities of those situations, a familiarity that I didn't as yet have with respect to the issues of informed consent and confidentiality. I say all this to underscore that the committee chair got rather limited, one-sided input from the committee that day, and I am partly to blame, because I was unaware at the time of, e.g., some of the legal ramifications of the consent form wording such as those underscored by John Lowman and Ted Palys.

There are so many issues entangled here: SFU's actions in the Ogden affair, the appropriateness of SFU's current policy on who chairs the Ethics Review Committee, the legality of the process by which the consent form was changed, the appropriateness of the new wording on the consent form, the relative weightings that should be accorded in our policy to protection of the research subject, protection of the researcher, protection of the research, protection of the university. Obviously, it is more than I can adequately address in this memo.

Some – Bruce Clayman and Adam Horvath are on record – have argued from a rather narrow construal of the law of the land: roughly, the law as extant code. If one also views the university simply as a 'corporation' that provides facilities or infrastructure to its research 'clients' (a.k.a. faculty and graduate students), whose interests are distinct from its own, then it is this narrow 'reactive' view of the law that may well seem like the appropriate one – the one carrying the least risk to the university – to serve as a constraint on university policies. But one can, as John Lowman and Ted Palys do, think of the law more broadly and dynamically as encompassing not only code but also common law and precedents. And one can also have a different vision of the university, as an institution that embraces its faculty and graduate students as integral and essential constituents, societies in their wisdom having seen the value of an institution that proactively promotes and facilitates the pursuit of knowledge and understanding by its members.

I myself think of the law and of the university in the latter way. And this has consequences for what morals I draw from the Russell Ogden case. His winning his case in Coroner's Court obviously establishes an important legal precedent here in Canada for researcher-participant confidentiality. Such precedents are very much in the interests of the research constituency at the university, and therefore, given my conception of the university, ought to be proactively pursued by the university itself. The university does not set itself above the law by upholding strict confidentiality. Rather, it constructively contributes to, helps to shape the law. That is how the law works. Nor does doing so require a policy that would expect researchers to break the law or stonewall the courts. Rather it requires a policy that upholds the value of research, even research into illegal activity, and is prepared to be persuasive about these values in a court of law.

My preferred conception of the law and of universities also has consequences for the wording of consent forms. They shouldn't be worded in a way that legally undermines a researcher's potential to win their defense on grounds of researcher-participant confidentiality. That strongly argues going back to 'strict confidentiality.' On the other hand, nor should they be worded in a way that fails to protect the research participants through fully informed consent. Research participants need to be aware of the possibility that a researcher may be legally summoned to divulge information obtained in the course of their research. And of course the university wants to cooperate with the courts! But what does that mean? I think it should mean respectfully but vigorously defending in the courts the value of its research to society and the consequent value of researcher-participant confidentiality; in effect using court decisions to legally establish these values in society.

Instead of

(a) "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."

a better wording might be

(b) "Any information that is obtained during this study will be kept in strictest confidence.... It is possible that as a result of legal action, the researcher will be summoned to divulge information obtained in the course of their research. The university is committed to the value of researcher-participant confidentiality and is prepared to vigorously defend it in the courts in connection with all research whose protocols have been approved by its Ethics Review Committee."

It seems obvious now that these differences in wording – the original wording, the wording now appearing on the forms as per (a) above, and the wording just suggested in (b) – have substantively differing potential consequences for the protection of research subjects, researchers, research, and the university. If R 20.01 is neutral between them – if they are merely 'procedural adjustments' – then R20.01 is surely in this respect badly deficient! In any case, my understanding of the intent expressed in the Nov. 95 meeting was that the proposed changes both to R20.01 and to the form-is were to be presented to the university community for their reaction, before being submitted to Senate for official approval. Since this process sadly got stalled due to the Tri-Council initiative, no changes are official yet.

Finally, a very brief comment on R 20.01's designation of the chair of the committee as 'the Vice-President, Research, or his/her delegate'. Lowman's and Palys' summary and conclusion about inherent problems with this policy in "When Roles Conflict" top of p. 8 speaks for itself. But in their recent Dec. 5th memo they seem to suggest that these concerns could be fully met within the current wording of R 20.01 if the VP-Research appointed a delegate. That does not seem right to me. A primary meaning of 'delegate' is someone sent and empowered to act for another'.[54] So the chair as a delegate of the VP-Research would still be acting in the interest of or under the authority of the VP. If the conflict of interest concerns are valid, then R 20.01 ought to be reworded so that, e.g., the chair is someone simply appointed, perhaps, by the VP but not as his/her delegate. There are some ensuing issues here, though, that need to be thought through. Who, exactly, is in the administration and who isn't? Who outside the administration would be willing to take on this rather large and onerous task, and under what conditions -- e.g., what kind of support staff, what kind of arrangements about reduced teaching load, etc.?

[54] [Lowman and Palys note: then we did not express ourselves well in the memo of December 5, 1997 – the VP's resignation did not solve the problem at all.]

Appendix B:
Memo to the URERC re
Liability-Based Decision Making

MEMORANDUM

Date: **February 3rd, 1998**

From: **John Lowman and Ted Palys**

To: **Ethics Committee and others**

Subject: **Ethics approval of research on persons who might engage in criminal activity: an example of how concerns about liability are contaminating the ethics application process.**

We understand that the mandate of the Ethics Committee is to administer the SFU Ethics Policy (R 20.01) and, in particular, to consider whether a given research proposal conforms to that policy. We believe that the Committee's decisions (or, at least, decisions that come under the Committee's purview):

(1) Fall short of the policy's desiderata (for example, by not appearing in Coroner's Court alongside Russel Ogden to defend the confidentiality/anonymity of his research participants, the Committee – or was it the University? – did not comply with the policy).
(2) Go beyond the boundaries of R 20.01 by: (a) limiting confidentiality without Senate approval, and (b) introducing non-ethical criteria to the adjudication of ethics applications. In the process, we believe the Committee has infringed academic freedom and undermined protection of the anonymity of research participants and confidentiality of the information they provide.

The purpose of this memorandum is to provide an example of how the Ethics Committee's revision of policy R20.01 played itself out in the course of a student seeking ethics approval for research involving perceptions of violence among young offenders. The case demonstrates how non-ethical criteria, particularly concerns about liability, have contaminated the ethics application process. We preface these remarks by noting that this case was never referred to the Ethics Committee as a whole for discussion. The approval decision described below was made exclusively by the Chair on behalf of the Committee.

1) Displacing Responsibility to the Research Participant. In the process of the student's application for ethics approval, there was an e-mail interchange between the supervisor and the Ethics Committee – or, at least, a correspondent representing the Ethics Committee's Chair – as to whether the limited confidentiality clause on the informed consent form template should be used in this instance (as the correspondent has no authority under R 20.01 we interpret her e-mails as emanating from the Chair himself). The student and her supervisor resisted using the limited confidentiality statement. Instead they proposed that the student would "only ask questions about the activities for which you [the participant] have already been caught/punished,"

and tell the participants that, “it is important that you do not talk about illegal activities or activities for which you or your friends have not been caught.” Ultimately, the Ethics Committee Chair approved the use of this wording in lieu of a statement about limited confidentiality.

When the student initially proposed the use of this wording, the Chair’s correspondent e-mailed the following response to the supervisor:

> I see that you try to get the point across to your youth subjects that you will ask questions about activities for which they have already been caught and punished. You clearly explain this in your statement to them. BUT you also state that, "It is important that you do not talk about illegal activities…" Why not? This is why the [limited confidentiality] statement that I copied to you is very important here. What if, through no solicitation of your own, they volunteer information for which you are obligated to relay to the authorities or are asked to at a later date by the courts? You promised these youths complete confidentiality, so what do you do? You may not be wanting or asking them this particular information, but the fact they are detained and are youths who have been charged with an offence, puts you in a situation where you must "cover" yourself legally.
>
> You should add the sentence, in your statement to youths, which follows the one "it is important … be caught. It is possible that, as a result of legal action the researcher may be required to divulge information in the course of this research to a court or other legal body. Therefore, it is imperative that you only answer the questions put to you and reveal nothing else." This way you have warned them and have legally followed your "promise" to confidentiality as far as you are legally bound.

Ethics application deliberations should be focussed exclusively on the rights and protection of research participants. But according to the statement quoted above, the purpose of adding the “limited confidentiality” statement was to “cover” the supervisor and the researcher “legally.” Far from protecting research participants, the statement “warning them” to talk only about certain incidents appears to have been interpreted by the Chair’s correspondent as a way of *displacing responsibility onto the research participant’s shoulders if they didn’t comply*.

2) Displacing Responsibility to the Researcher. In reacting to the suggestion that the “limited confidentiality” clause be added to the informed consent statement, the supervisor expressed reservations about the effects the growing list of legal prophylactics would have on the integrity of the interview:

> I feel that the extra warning you want her to add to her informed consent could create unnecessary fear, anxiety, and mistrust on the part of the youths or their parents.

The supervisor reminded the Chair’s correspondent that the youths were not being asked about any activities beyond those for which they had already been convicted, and hence did not see the need to include the "court action" clause on the consent form. The e-mailed response to these concerns reveals how, in this case at least, the ethics application process has become a mechanism to *transfer liability from the university to researchers and participants*:

> I now have it on record that you guarantee there will be no information volunteered/gathered by/from subjects which will prove that the clause which was requested to be inserted [the limitation of confidentiality on the informed

> consent form] is not required. I also have it on record that you, (your student) understand the implications involved with the legal issue.

This communication creates a “guarantee” where none was offered, and would seem to be saying: "We, the University, have covered ourselves, and we've given you the information that will allow you to cover yourselves, so now if it all blows up, you and the participants are on your own." We would like to know if a lawyer or any member of Ethics Committee was consulted before these “legal” opinions were transmitted to the supervisor and student.

If, as the Chair has said elsewhere, the purpose of limited confidentiality is to protect the research participant, how could he trade it away in this instance? He did this by interpreting the researcher’s instructions as making the participant liable for what they might say. What if these youths did not understand what the law means and volunteered sensitive information anyway? Although the Chair anticipated this possibility, once his concerns about liability were satisfied, he was no longer concerned about what impact such a disclosure might have on the research participant.

3) Consent, liability and research methods. In her research on adjudicated youth violence, the student intended to follow a feminist standpoint epistemology and method. In this approach, interview questions are not developed in advance, but emerge from the interview process in a manner that encourages an egalitarian participation of interviewees, thereby reflecting their priorities and concerns, not just those of the researcher. However, the student was told that, in order to receive ethics approval, she *must* submit interview questions in advance. As a result, she felt forced to compromise the feminist standpoint epistemology and method she had chosen to follow. Why were interview questions required in advance? Was it to help create a paper trail of the displacement of liability onto researchers and participants that was being accomplished via the ethics approval process? It certainly looks that way from the e-mails quoted above. Whatever the reason might have been, it meant that the Ethics Committee, in whose name the requirement was imposed, acted as an epistemological gatekeeper, a role that is consistent with neither the Ethics Policy nor with the ideal of academic freedom.

This particular case is perplexing for many reasons. In the process of discussing how to obtain informed consent, the Ethics Committee Chair treated the research participants more as risks to be managed than persons to be afforded the protections described in R 20.01. Informed consent was transformed into a series of all-inclusive risk-management clauses with the result that, in the event of a court action, the university can capitulate without a struggle on the grounds that it has fully met its legal obligations. According to a protocol imposed in the name of “ethics,” research participants who disclose information about certain illegal activities, and the researcher to whom they disclose it, can be left high and dry.

This case suggests that there are several problems with the ethics approval process. We are concerned that a variety of weighty decisions about ethics, liability, confidentiality and epistemology were made *without the application ever being referred to the Ethics Committee as a whole for discussion*. We believe that this is not an isolated case and that these are not the only problems characterizing the ethics approval process. Consequently, we suggest that it is time for an independent review of the entire ethics application process.

John Lowman and Ted Palys
School of Criminology

Appendix C:
Is the Ethics Committee following SFU policy R20.01 as approved by Senate in 1992, or its own draft policy, created in 1994-1996? Some comparisons.

R20.01 States:	Ethics Committee's Draft Policy States:	What the Committee Does:	Committee's Actions are Consistent With:
"There is a professional responsibility of researchers to adhere to the ethical norms and codes of conduct appropriate to their respective disciplines."	Nothing stated regarding disciplinary norms. Indeed, the Draft Policy gives complete control to the Ethics Committee: "The University expects all researchers to adhere to the principles, policy and procedures described herein."	The Committee has never asked us what disciplinary norms we are following. Nor have we seen any evidence of them doing so with any other cases with which we are familiar. Nor have they paid heed when we have informed them of our disciplinary norms. The URERC believes their own doctrinal beliefs supersede disciplinary standards.	Draft Policy
"A research proposal must demonstrate that appropriate methods will be used to protect the rights and interests of the subjects in the conduct of research. In general, the primary ethical concerns respecting research on subjects relate to: informed consent; deception; privacy; confidentiality; and, anonymity."	"Research protocols must include protection of the interests of the individual subject." But these "interests" are defined only in terms of informed consent: "Informed consent is the most basic requirement of research involving human subjects." There is no longer any mention of participant "rights" to confidentiality.	Emphasizes informed consent to the exclusion of other interests. Does not recognize participant rights to and interests in confidentiality.	Draft Policy

"Before consent is requested, the subjects should be fully informed about the nature of the research methods, the likelihood, nature and possible degree of bodily or psychological harm, the purposes and potential value of the experiments proposed and their right to withdraw during the course of the experiment."	"Normally, potential subjects should be informed of the following: [A lengthy list follows, including]: 6.4 Risk of criminal prosecution or other legal consequences."	Committee requires mention of the remote risk of a subpoena.	Draft Policy
"Standing Membership: The Vice-President, Research or his/her delegate as Chair; the Director of University Medical Services; the University Safety Officer; and, six members of faculty appointed by the Vice-President, Research."	Standing Membership: The Vice-President, Research or his/her delegate as Chair; the Director of University Medical Services; Manager, Occupational Health and Safety Officer; six members of faculty appointed by the Vice-President, Research; the Director of the Office of Research Services	For several years, and until recently, allowed the Director of the Office of Research Services to sit in on meetings, including "confidential" sessions.	Draft Policy
"Proceedings of the Committee shall not be adversarial in nature."	"Proceedings of the Committee shall not be adversarial in nature."	Creates adversarial situation by imposing doctrinal views that violate academic freedom and requires researchers to violate their own disciplinary codes.	Neither "Real" nor Draft Policy
Confidentiality is not limited in any way.	Notes that "All researchers should be aware that their ability to protect the anonymity and privacy of the participants is specifically limited by law."	In his memorandum of 18 December 1997, Dr. Horvath, when discussing our proposal involving unlimited confidentiality, makes direct reference to the Draft Policy when he states, "It seems to me evident that in this section of the policy document the institution acknowledges the fact that there might be limits to which this protection of privacy can be offered."	Draft Policy
"research involving human subjects" (hereinafter referred to as "research") - is broadly understood to include [cont'd…]	**Research involving human subjects** is broadly understood to include the following: physical, pharmacological [cont'd…]	In his memorandum of 15 September 1998 to all Deans, Directors and Chairs, Dr. Horvath states: [cont'd…]	Draft Policy

electronic or other kinds of observation in an experimental setting; physical and psychological experiments; surveys; and, field work for studies of cultural groups, national groups or ethnic groups.	and psychological experiments, surveys, electronic or other kinds of observation in an experimental setting, and, fieldwork for studies of cultural, national and ethnic groups; it also includes use of personal information on human subjects held in the records of the university or an external agency - see Data Analysis, below. **Data analysis** refers to the use in research of existing data, not normally available to the public, in institutional records, computerized form or data banks.	"As you are aware, all graduate students, undergraduate honours thesis students, and students conducting research in an independent study program are required to maintain from the URERC ethical approval of any research that involves human subjects *or involves use of existing data that are not normally available to the public* prior to conducting their study." (our italics)	

Appendix D:
Dickens' Student's Research Protocol

Euthanasia and Assisted Suicide In HIV/AIDS
Information Sheet for Prospective Participants

You have been given this information sheet because you indicated an interest in being contacted about further research when you enrolled in the HIV Ontario Observational Database (HOOD). Information sheets will be distributed to ALL HOOD enrolees who have indicated an interest in further studies, regardless of their views or health status. This Information Sheet is for a study of the experiences and decision making of persons with HIV/AIDS (PHA) concerning euthanasia and assisted suicide. Euthanasia and assisted suicide are controversial issues. This study is being undertaken to further understanding of these phenomena from the perspective of persons with HIV/AIDS.

The study aims to explore these issues by talking to persons with HIV/AIDS about their views and experiences. Specifically, the views and experiences of the following PHA are required: (a) those people who have participated in planning and/or carrying out acts of euthanasia and/or assisted suicide of others; (b) people who have made a personal decision in favour of E or AS for themselves; (c) people who have made a personal decision against E or AS for themselves; and (d) people who are undecided about E and AS for themselves. Each of these perspectives is important in developing an adequate theory of decision making regarding euthanasia and assisted suicide.

Study Purpose

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

Study Procedures

If you decide to participate in this study, you can expect the following procedures to take place:

- at this regularly scheduled appointment, your physician has informed you of the study, and provided you with this information sheet. Your physician will have no further involvement in the study and you will not be asked whether or not you have contacted the investigators to participate in the study. In this way, neither your doctor, nor any other clinic staff, will know whether or not you have decided to participate in the study;

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

- if you call, a brief statement will be read to you outlining the risks of the study and details of your potential involvement;

- if you are still interested in participating, you will select a time and place that is convenient and comfortable for your interview;

- before starting the interview, you will be reminded of the risks of participating and asked whether you will consent to be interviewed. You will then be told that you are free to withdraw from the study at any time;

- if you consent, you will be interviewed. All interviews will be tape-recorded. The interview should take between 30-60 minutes;

- after the interview, you will be given an opportunity to ask any further questions you may have about the interview;

- the audiotape of your interview will be transcribed (i.e. typed word-for-word) within two weeks of your interview;

- immediately after transcription, the audiotape will be destroyed;

- any identifying remarks that you might have made during the interview either about you personally or any other identifiable person or place (i.e. all proper names) will be removed from the transcripts;

- the transcript of your interview will be analysed.

Risks and Benefits

You will not benefit personally from participating in this study.

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

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

The other main risk involved in this study is that the discussion of euthanasia and assisted suicide may be emotionally upsetting for you. If this is the case you will be reminded that you are free to stop the interview at any time. If you become upset, but would like to continue the Interview, you will be given as much time as you need to continue the interview. You will also be given the names and phone numbers of clinic staff at the clinic you attend (i.e. at all four participating clinics) who are best trained to help you in the event that you are upset by your participation.

Other numbers for contacting emergency services at your clinic/hospital will also be provided.

Use of Existing Records

Even though health-related information about study participants exists in the HOOD database, none of this information will be used for the purposes of this study. Only information that is freely given during the interviews will be used in this study.

Informed Consent

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

Compensation

All participants will be given $20 to cover any expenses that may have been incurred by agreeing to participate in the proposed study. You will be given $20 even if the interview is not completed.

Dissemination of Results

The study results will be distributed to AIDS Service Organizations in Ontario and published in the peer review literature.

Appendix E:
The URERC Makes an Unauthorized Extension of its Power to include "Research Involving Personal Information On Human Subjects Held In Secondary Records That Are Not Available To The Public"

On 15 September, 1998, Adam Horvath, Chair of the University Research Ethics Review Committee (URERC), sent a communication to all Deans, Associate Deans, Chairs and Directors, announcing the following:

> As you are aware, all graduate students, undergraduate honours thesis students, and students conducting research in an independent study program are required to obtain from the URERC ethical approval of any research that involves human subjects *or involves use of existing data that are not normally available to the public* prior to conducting their study. (our italics)

Policy R20.01, the SFU Ethics policy approved in October 1992, defines "research involving human subjects" – i.e., the domain of research subject to ethics review – as follows:

> "research involving human subjects" (hereinafter referred to as "research") - is broadly understood to include electronic or other kinds of observation in an experimental setting; physical and psychological experiments; surveys; and, field work for studies of cultural groups, national groups or ethnic groups.

More recently, however, the URERC web page lists the domains of research subject to review as follows:

> You must submit an Ethics Application whenever you are contemplating conducting research involving human subjects, broadly understood to include the following:
>
> - physical, pharmacological and psychological studies;
> - surveys - this includes, but is not limited to, surveys conducted by administrative departments/staff where the opinions of participants are solicited;
> - electronic, photographic or other forms of observation;
> - fieldwork for studies of cultural, national and ethnic groups;
> - use of personal information on human subjects held in the records of the University or an external agency - this refers to the use of research of existing data, not normally available to the public, in institutional records;
> - computerized form or data banks.

One can see the list has expanded somewhat from the description in the actual policy. On October 2, 1998, we e-mailed Dr. Horvath the following query:

> [W]e were recently given a copy of a memorandum from you to all Deans, Directors, and

> Chairs (dated 15 September), in which you state that various groups of students are required to obtain ethics approval on research involving human subjects "or involves use of existing data that are not normally available to the public." With respect to this latter phrase, could you please indicate how that extension of the Ethics Committee's mandate arose, and just what sorts of materials you had in mind?

In a reply dated the same day, but received via inter-departmental mail a week later (9 October), Dr. Horvath stated:

> The statement "use of existing data that are not normally available to the public" is meant to clarify (for those who may be unclear) the kinds of research data which requires ethical review by the URERC. To my knowledge, clarification of this sort is the legitimate and necessary responsibility of an URERC. This particular interpretation seems to be in line with accepted practice and our (URERC) past thinking on this matter, thus, it appears that this item does not entail an extension of our mandate.

Minutes of the URERC's meetings dating back to 1992 indicate that the source of Dr. Horvath's "accepted practice" and "past thinking" must be the meeting of November 23, 1995 where this change was made in the Draft Policy, which the 1995 URERC approved, and then implemented without the authority of Senate and the Board of Governors.

Bruce Clayman chaired the November 23, 1995 meeting, which was attended by *only three* Committee members: Adam Horvath, Mark Wexler and Philip Hanson. Ellen Loosely and Barb Ralph also attended the meeting, but they are not URERC members. Three other faculty members, the SFU Safety Officer and the Director of Health Services were absent.

There was no quorum. Nonetheless, the VP-Research continued with his agenda. Under Agenda item 9, "Approval of Revised Policy R20.01," the following entry appears in the Minutes:

> Definitions
>
> In addition to covering research on human subjects directly, it was noted that SFU Policy also pertains to collection of data or data searches.
>
> Action: Define data sets.
>
> Action: A section addressing studies involving archival records procedures will be added to the Draft Policy. (URERC Minutes, 25 November 1995, p.3)

It would appear that this is the only mention in the minutes from 1992 to the present that bear on the extension of R20.01 to include research using personal information on human subjects from secondary sources not available to the public. We can compare the actual R20.01 with the Draft Policy on this issue, with respect to the definition of "research involving human subjects":

R20.01 As Approved in 1992	URERC's Draft Policy, Not Yet Approved
"research involving human subjects" (hereinafter referred to as "research") - is broadly understood to include electronic or other kinds of observation in an experimental setting; physical and psychological experiments; surveys; and, field work for studies of cultural groups, national groups or ethnic groups.	**Research involving human subjects** is broadly understood to include the following: physical, pharmacological and psychological experiments, surveys, electronic or other kinds of observation in an experimental setting, and, fieldwork for studies of cultural, national and ethnic groups; it also includes use of personal information on human subjects held in the records of the university or an external agency - see Data Analysis, below. … **Data analysis** refers to the use in research of existing data, not normally available to the public, in institutional records, computerized form or data banks.

The requirement noted in Dr. Horvath's reminder is thus clearly an assertion of the Draft Policy, which was never submitted to Senate or the Board of Governors for approval, but which Dr. Horvath continues to follow nonetheless. (See Appendix C for a table listing other ways the URERC has been following the Draft Policy instead of the policy approved by authorized university authorities.)

Appendix F:
The URERC Makes Another Substantive Change to the Research Ethics Policy by Giving the Faculty of Business Administration A Research Ethics Application Waiver

The URERC Meeting of December 2, 1994

At the URERC meeting of December 2, 1994, item 5 on the agenda involved "Delegation of authority for Ethics Request for the Faculties of Education and Business Administration." There is no further mention of the Faculty of Education beyond the item title, however, for reasons we were unable to ascertain from the minutes. All discussion and motions reported in the minutes focussed solely on the Faculty of Business Administration. In this regard, the minutes contain the following entry:

> Currently, the Research Liaison Officer in Business administration, Professor Mark Wexler, approves the Faculty of Business Administration Ethics applications when they are "red flagged" in other words they do not comply with the ethical policies of the University. If they do not comply, they are sent to the Office of the Vice-President Research for further review. The Chair [*Dr. Clayman*] suggested that the Committee "legitimize" what is being done in the Faculty of Business Administration.
>
> Motion: That the University Research Ethics Review Committee delegate authority to Professor Mark Wexler on behalf of the Faculty of Business Administration to give final approval of the Faculty's Ethics applications that are not "red flagged."
> The Motion was unanimously approved by the Committee.

The URERC is empowered to "establish its own operating and appeal procedures" (section 6f), but it is *not* empowered to delegate its authority to review ethics applications (the only power of delegation specified in R20.01 is the VP-Research's power to delegate the Chair). The Chair can approve applications on the Committee's behalf, but he did not have the authority to invite the URERC to delegate this power to a third party. When the VP-Research did this, the members of the Committee should have shown due diligence, and refused to allow such an obvious deviation from the policy.

Appendix G:
"Implications of the *Tri-Council Policy Statement* for Balancing the Interests of Informed Consent and Confidentiality"

John Lowman and Ted Palys
School of Criminology

Re Ethics Applications:

Managing Prostitution: A Study of
Owners and Managers of Escort Services, Massage Parlours and Body Rubs
Submitted by J. Lowman

Sex Work in Off-Street Venues
Submitted by J. Lowman and T. Palys

Attention: the University Research Ethics Review Committee:

The purpose of this memorandum is to bring various aspects of the Tri-Council Policy Statement, *Ethical Conduct for Research Involving Humans*, to the attention of the University Research Ethics Review Committee. In particular, we would like to draw the URERC's attention to the concept of "minimal risk" as it pertains to the Tri-Council's "proportionate" approach to research ethics. Also, we urge the URERC to consider the implications of the "consent alteration" provisions (Article 2.1(c)) of the *Policy Statement* for the much-debated "limited confidentiality" consent-form template that is still in use at SFU.

We hope these observations will persuade the Committee to re-evaluate its decision to continue forcing criminological and other researchers to use the "limited confidentiality" consent form template that warns prospective participants about the limits of confidentiality in relation to the risk of court-ordered disclosure of confidential research information.

Background

In our negotiations with Dr. Clayman and the URERC since last October, we have argued that considerations relating to informed consent, confidentiality, anonymity and academic freedom need to be balanced in the process of protecting research participants and providing confidentiality to the "full extent permitted by law." In lieu of a statutory researcher-participant privilege or a compelling Charter argument, we have to turn to common law to assert privilege. The Supreme Court of Canada (in *R. v. Gruenke*, 1991) has accepted the "Wigmore test" as providing appropriate criteria for establishing privilege on a case-by-case basis. The research protocol we originally submitted to the URERC was constructed with the Wigmore test in mind.

As we have explained to the Committee several times since then, the "limited confidentiality" consent-statement used at SFU since 1994 creates acute ethical problems for criminological and other researchers who want to maintain confidentiality using the Wigmore test.[55] To establish that a communication is privileged, it must meet all four criteria of the test.[56] The first criterion requires that the communication must originate in a confidence that it will not be disclosed. Because the consent statement supplied in the URERC's informed consent template (Form 2) says that, "the researcher may be required to divulge information obtained in the course of this research to a court or other legal body," the communication does not originate in a confidence that it will not be disclosed. If information is collected using this protocol, a court could say, "The information is not confidential because you told the research participant that a court might require it, and a court requires it now, so hand over the information." We still do not understand why the Committee believes it is ethical to thereby vacate participants' rights and interests in this area.

As far as we know, only one researcher in Canada (Russel Ogden) has ever been ordered to disclose confidential research information, and he successfully fought the order, i.e., no Canadian researcher has yet been put in the position of having to defy a court order in order to protect research participants. Given that the risk of court-ordered disclosure is so small, especially when the SFU informed consent statement compromises our ability to protect confidential research information to the full extent permitted by law (i.e. by employing the Wigmore test), why mention it at all?

In response to this question, the URERC has argued if there is *any* foreseeable risk associated with participation in research, the participant *must* be informed. By taking "foreseeable" to be synonymous with "conceivable" – which it deigns to be the case whenever Item 9 on Form 1 is checked – the Committee has imposed a rote formula for ethics decision-making that subordinates all other considerations to the requirements of informed consent.

We countered that no risks will be posed to our research participants because we will not disclose confidential information to a court, and believe it would be unethical to do the research if the situation were otherwise. We believe that court-ordered disclosure of confidential criminological research would cause considerable injury to the research enterprise, and that this injury would be much greater than the benefit to be gained by the correct disposal of particular litigation (Wigmore test, criterion 4). Consequently, we feel ethically bound not to disclose confidential research information, even if a court orders us to do so – a stand that is consistent with the ethical standards of our discipline, criminology (e.g., see Wolfgang, 1981) and the SFU Ethics Policy (R20.01). Because we are not above the law, we will accept whatever punishment might be meted out for contempt of court in the unlikely event that the case were to go as far as the Supreme

[55] Although the URERC has moved significantly on this issue since the departure of Dr. Clayman from the Committee, we note that, as of 11 October 1998, the URERC web site still indicates, on Form 2, that, without exception, researchers who check "yes" in response to item 9 on Form 1 (the ethics approval screening form) will be expected to provide an informed consent statement in which they are to limit confidentiality. Unmodified, this form makes it appear as though the limit of the law is the *maximum* extent of protection. We suggest that protection of confidentiality to the full extent permitted by law is the *minimum* ethical criterion, and that this is the position affirmed in the Tri-Council's (1998) *Policy Statement*.

[56] The Wigmore criteria are as follows: (i) the communications must originate in a confidence they will not be disclosed; (ii) confidentiality must be essential to the maintenance of the relation between the parties; (iii) the relation must be one which the community believes ought to be sedulously fostered; and (iv) the injury that would result from the disclosure of the communication must be greater than the benefit that would be gained by the correct disposal of litigation**.**

Court of Canada, and the Court did not support our *a priori* decision to provide unlimited confidentiality.

In response to this argument, the URERC asserted that we must nevertheless mention the risk of court-ordered disclosure in our consent statement because, "subjects have the right to assess the risk of the researcher reneging upon their commitments." In our letters of April 3rd, April 23rd, May 19th, and August 15th 1998 to the URERC, we pointed out that, by the same general logic, the Committee should require that prospective participants also be apprised of the risk of the University reneging on its responsibility to protect academic freedom and the SFU Ethics policy. But the Committee has not done this.

Now we realize that all these arguments will take on a different complexion once the *Tri-Council Policy Statement* takes effect, because of the proportionate approach to research ethics it advocates, the criterion of "minimal risk" it imposes on Research Ethics Boards, and the consent alteration provisions it provides in Article 2.1(c).

A log jam of criminology ethics applications is now developing because of the difficulties created by the "limited confidentiality" clause still appearing on the SFU consent form template. Although Universities are not expected to comply with the *Policy Statement* until December 1999, we now ask the URERC to evaluate its own policy of compelling researchers to include warnings about court-ordered disclosure in light of the philosophical principles laid out by the Tri-Council.

The Tri-Council's Proportionate Approach to Research Ethics: The Importance of "Minimal Risk"

In sharp contrast to the practice at SFU, the Tri-Council rejects the "formulaic" application of any research ethics policy. It advises REBs to take a "proportionate" approach, in which the level of intervention by REBs is proportionate to the level of risk faced by prospective research participants.

> A proportionate approach to ethics review thus starts with an assessment, primarily from the viewpoint of the potential subjects, of the character, magnitude and probability of potential harms inherent in the research. (p.1.7)

In cases of minimal risk, the degree of REB intervention is expected to be minimal. "Minimal risk" is to be defined from the perspective of research participants:

> The standard of minimal risk is commonly defined as follows: if potential subjects can reasonably be expected to regard the probability and magnitude of possible harms implied by participation in the research to be no greater than those encountered by the subject in those aspects of his or her everyday life that relate to the research then the research can be regarded as within the range of minimal risk. Above the threshold of minimal risk, the research warrants a higher degree of scrutiny and greater provision for the protection of the interests of prospective subjects. (p.1.5)

This approach highlights the differences between the Tri-Council *Policy Statement* and the approach maintained by the URERC during its regime of limited confidentiality, and an excellent example of this is evident in a proposal the two of us submitted to the URERC for Ethics Review.

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

From the perspective of participants, our interest in their worlds meets the Tri-Council's definition of "minimal risk" in every respect:

1. Our research poses much less risk to participants than they run in the course of their daily lives. Prostitutes and pimps run a daily risk of being arrested for their activities. Our research will not exacerbate this risk.
2. With respect to the likelihood of us being subpoenaed to testify, the risk to research participants is clearly minimal; in Canada, there has only ever been *one* case in which a researcher was subpoenaed and asked for confidential information.
3. If, however, we *were* to be subpoenaed, what is the risk a court would compel us to share confidential information? We believe the risk is minimal, and that a court would agree with our position, as it did in Russel Ogden's case. The Committee cannot provide us with a single Canadian case of a researcher being ordered to violate confidentiality. In the United States, there are a few dozen reported cases of courts ordering the disclosure of research information. However, only a handful of these cases involved requests for the identities of research participants. In the majority of these cases, the courts have recognized that confidentiality is essential to the research enterprise, and ordered that personal identifiers be severed from the records to be disclosed.[57] And the idea that, when faced with the balancing of considerations that is embodied in criterion 4 of the Wigmore test, a court might value prosecuting a prostitute or pimp more than the research enterprise is highly unlikely.
4. And finally, even if, in the most unlikely of situations, we were ordered by the Supreme Court of Canada to reveal information we had pledged would remain confidential, we would defy the order, and accept the consequences.

Each one of the outcomes in 2, 3 and 4 is highly unlikely in and of itself, and the joint probability of them all occurring in sequence would seem incalculably low. In sum, the risk to participants is minute.

According to the Tri-Council philosophy, therefore, it would seem both alarmist and excessive for the URERC to stubbornly *require* a researcher to utter warnings about the possibility of subpoena in our case, and probably in most other cases that come before the URERC. In the case of our prostitution research, the degree of risk hardly warrants the lengthy delay we have been subjected to.

Policy Statement Article 2.1(c): Consent Alteration Provisions

In following a proportional approach, the *Statement's* informed consent alteration provisions (Article 2.1(c)) explicitly state that the interests of informed consent should be balanced against "the needs for research" (something we have been saying to Dr. Clayman and the URERC from the outset):

[57] For a review of these issues, see Volume 59, Nos. 3 (1996) of *Law and Contemporary Social Problems*, a special edition on, "Court-Ordered Disclosure of Academic Research: A Clash of Values of Science and Law."

> Under Article 2.1(c), the REB should exercise judgement on whether the needs for research justify limited and/or temporary exception to the general requirements for full disclosure of information relevant for a research subject's meaningful exercise of free and informed consent. In such cases, subjects may be given only partial information … because full disclosure would be likely to colour the responses of the subjects and thus invalidate the research. (p. 2.2-2.3)

An REB can, "approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent … provided that the REB finds and documents that:

i) The research involves no more than minimal risks to the subjects;
ii) The waiver or alteration is unlikely to adversely effect the rights and welfare of the subjects;
iii) The research could not be practicably carried out without the waiver alteration;
iv) Whenever possible and appropriate, the subjects will be provided with additional pertinent information after participation; and
v) The waivered or altered consent does not involve a therapeutic intervention." (Article 2.1(c))

Under the new Tri-Council standards for full disclosure, a Research Ethics Board should not formulaically require that a certain class of researchers mention the minute risk of court-ordered disclosure of confidential information. Aside from situations where mandatory laws might apply, which for us pose mostly different problems, this argument can be applied to all research where the SFU "limited confidentiality" consent statement is currently required. Considering the five consent alteration criteria in relation to our research on prostitution reveals the following:

Criterion (v) does not apply because our research does not involve any therapeutic intervention. Also, criterion (iv) does not apply because we do not plan to deceive anyone.

Our research meets criterion (iii) because it cannot be practicably carried out using the current SFU consent form template. Our prospective subjects interpret SFU's limited confidentiality statement as meaning that the University expects us to divulge information if a court so orders, without contesting the order in court. Under these circumstances, we would not expect subjects to talk honestly about their undetected criminal activity. Indeed, if we limit confidentiality this way, most of our contacts will not talk to us at all. Nor would we want to talk to them in that circumstance: to gather data from voluntary participants without taking their rights and interests to heart is exploitative and unethical. Additionally, under a regime of *a priori* limitation of confidentiality, such as the one embodied in the SFU consent form template, our research results would not be valid.

As to criterion (i), we have outlined above the various ways in which our research is clearly "minimal risk" from the perspective of participants. Although we have faith the courts will support our decision to pledge unlimited confidentiality, the bottom line is that we are prepared to accept the sanctions of the court if the Supreme Court were to disagree. This position is consistent with the Tri-Council *Policy Statement*, which says, "legal and ethical approaches to issues may lead to different conclusions." Researchers who choose this course are not "above the law," for, as the *Statement* says, "ethical approaches cannot pre-empt the application of law"(p.i.8).

As to criterion (ii), would the omission of a statement about risk of court-ordered disclosure adversely effect the welfare and rights of our subjects? No. It would do just the opposite. It would

enhance our ability to use the Wigmore test to protect their right to privacy, confidentiality and anonymity.

According to the analysis above, we suggest that, when the Tri-Council guidelines come into effect in January 2000, limited confidentiality SFU-style, will become a thing of the past. We urge the URERC to abandon it now.

We Continue to Protest the Infringement of Our Academic Freedom

A year has passed since we first identified problems with "limited confidentiality" as encoded in the SFU consent form template warning about court-ordered disclosure of confidential research information, and still the URERC is forcing researchers who answer "yes" to Question 9 to use it. As to our own research, it is with considerable dismay that we note that one of our proposals dates back to December 1st 1997, and the other to February 24th 1998.

The ethics review process at SFU is supposed to be about protecting research participants from harm. Incredibly, although we have said that we will submit to incarceration rather than harm research participants by divulging their identities, and even though we have tried to accommodate the URERC's requirement that we mention the risk of court-ordered disclosure of confidential research information, neither of our proposals is approved.

Four months ago (letter to us dated June 23rd 1998) the Committee stated that it would treat with "the greatest urgency" the matter of finding a text or language for the informed consent procedure that would permit both our projects to proceed. And yet, here we are, a full two months after our most recent letter to the Committee (August 15th, 1998), and we have not received a response.

As we have already pointed out, the Committee's actions have severely compromised two research projects that took many years to set up. The delay may have made it difficult or even impossible to conduct these studies in the foreseeable future. Instead of spending the last eight months working on our research, we had to devote a substantial part of that time fighting for the right to do it. We regard the delay as an unwarranted infringement of our academic freedom.

Yours sincerely,

John Lowman and Ted Palys

Appendix H:
An Improperly Constituted Ethics Committee

July 31, 1998

Dr. Jack Blaney
President
Simon Fraser University
Burnaby, BC
V5A 1S6

Dear President Blaney,

Thank you for your letter of April 6, 1998 responding to our March 27, 1998 argument that the ethics committee at that time was improperly constituted, and had been since August 1995 when the Director of University Medical Services apparently left the Committee. In your letter of April 6, you reasoned that the Committee was properly constituted throughout the period we referred to. We ask you to reconsider this opinion on three grounds:

1) The Director of Medical Services

Section 5b of R20.01 requires that the Director of Medical Services be a member of the Ethics Committee. In your letter of April 6, you say that the position no longer exists and that, "Efforts to obtain another member from Health and Counselling Services were unsuccessful." However, the policy is quite clear that, "Questions of interpretation or application of this policy or its procedures shall be referred to the President, whose decision shall be final" (R20.01, "Interpretation"). When the VP Research realized that the Committee could not be properly constituted according to the requirements of the policy, did he refer the matter to the President, as the policy requires? Apparently he did not. Your letter of April 6 may resolve the problem from that point forward. But as of the time the Director of Medical Services left the Committee in 1995 until April 6, 1998 when you made the ruling, the Committee was *not* properly constituted.

We believe the specific absence from the Committee of the Director of Medical Services or equivalent is problematic because the Committee adjudicates kinesiology and other research proposals where research participants risk physical harm.

2) R20.01's Requirements Regarding Number of Faculty Members

Section 5b of the Policy requires that there be six members of faculty on the Committee. Barb Ralph has provided us with a list of, what is, to the best of her knowledge, the Ethics Committee's membership dating back to 1987. According to the information forwarded to us, there were only *five* faculty members on the Committee in 1992, 1993 and 1995, in which case the Committee was improperly constituted in these three years.

3) R20.01's Requirements Regarding Disciplinary Representation

Your letter of April 6 says that, "The Policy's advice concerning disciplinary coverage is reflected in the Committee's membership…" We suggest there is a problem with the disciplinary representation on the Committee.

Section 5b of the policy says that faculty members, "be drawn primarily from Departments or Faculties whose members frequently conduct research with subjects."

Although the policy does not define what "frequently" means, Dr. Munro's memo of April 17, 1998 requesting feedback on the "Research Ethics Policy Revision Task Force" draft terms of reference was circulated only to Faculties and Departments that had more than 10 ethics approval requests since January, 1994. Although a total of ten proposals over four years may fall short of the criterion "frequent," Dr. Munro's demarcation of relevant departments provides a useful benchmark against which to assess the membership of the Ethics Committee. He lists the Departments and Faculties that meet his criterion as: Communication, Criminology, English, Gerontology, Kinesiology, Linguistics, Political Science, Psychology, Resource and Environmental Management, Sociology and Anthropology, Women's Studies. Subsequently, Dr. Munro confirmed that the faculties of Education and Business Administration also should be included in this list.

According to the information provided by Barb Ralph, the majority of appointments were indeed from departments and faculties that frequently conduct research with subjects. So, in this one respect, it can be said that the VP Research followed the letter of the policy. But did he follow its spirit?

Over the past ten years, of the thirteen "frequent human research departments/faculties" identified by Dr. Munro, only five (Business Administration, Criminology, Education Kinesiology, Psychology) were represented on the Ethics Committee; the other eight were not represented at all. Now there are three psychologists on the Committee (two from the Department of Psychology and one from the Faculty of Education) one Kinesiologist, a faculty member from business administration and one from philosophy. As in the past, the medical-experimental model of research ethics dominates.

R20.01 recognises that, "There is a professional responsibility of researchers to adhere to the ethical norms and codes of conduct appropriate to their respective disciplines." Presumably, when there is not broad disciplinary representation on the Ethics Committee, some effort is made to appreciate the diversity of disciplinary ethics codes, as adjudication of applications should take into account the applicant's professional disciplinary responsibilities. In our experience, such information is not sought after, and the Committee does not consider different disciplinary ethics codes when adjudicating applications. An improperly constituted Ethics Committee is using improper procedure to impose its philosophy of research ethics on applicants from different disciplines.

We are troubled that several important traditions in social science – ethnography, feminist standpoint epistemology, participant-observation, participatory action research, oral history, etc. – have *never* been represented on the Ethics Committee by an active practitioner. Indeed, the only person representing *qualitative research traditions* to have been appointed to the Committee in

the last decade was Bob Menzies from Criminology, who resigned in protest of the Ethics Committee's troubling policy and procedural irregularities.[58]

When it comes to representation of different research regimes, R20.01 affirms that researchers should adhere to the ethics codes of their respective disciplines. If the Ethics Committee had been constituted in the spirit R20.01, so that a range of different research models with diverse understandings of ethics and ethics issues were represented, "limited confidentiality" might never have seen light of day.

Will the University Support Researchers (Including Graduate Students) in Court?

Although we appreciate that the university is about to embark upon a review of the Ethics Policy and its administration, and is reviewing the university's decision-making in the Ogden case, the fact remains that an improperly constituted Ethics Committee imposed on SFU researchers a regime of limited confidentiality that substantively changed the Ethics policy without Senate approval, infringed academic freedom, compromised informed consent, undermined academic privilege, and apparently continues to expose research participants to harm. Perhaps upwards of 200 research proposals will be considered by the Ethics Committee between now and March 1999, when the Ethics Task Force is expected to submit its report, and there may be many more before a new policy is in force. We believe it would be imprudent to wait until then to rectify non-compliance with the policy.

For much the same reasons that many harassment cases had to be discarded because they were adjudicated by an improperly constituted harassment panel, the actions of a series of improperly constituted Ethics Committees need to be mitigated, too. In the interest of researchers such as the student referred to in our "liability" memorandum of February 3, 1998, we urge the University to undertake that, should any researcher, graduate students included, be subpoenaed and asked to reveal confidential research information, the University will provide the legal advice, representation and/or indemnification necessary to protect that information.

As the current Ethics Committee is not properly constituted, we urge that a new Committee be appointed, with six faculty members from the eight Faculties and Departments which frequently conduct research with humans, but have not been represented on the Ethics Committee during the past ten years.

Yours sincerely,

John Lowman and Ted Palys

C SFUFA
Margaret Jackson, Director, SFU School of Criminology
Patrick O'Neill, Chair, CAUT Academic Freedom and Tenure Committee
Ellen Gee, Chair, SFU Research Ethics Review Task Force
Adam Horvath, Chair, SFU Ethics Committee

[58] As an aside, we would also note that Marilyn Bowman, appointed in March this year, is the only woman to have been appointed to the Committee in the past ten years.