

[Ethics] Déjà Vu: Ogden Subpoenaed Again

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An Open Letter To:

Marc Renaud, President, Social Sciences and Humanities Research Council
Tom Brzustowski, President, National Science and Engineering Research Council
Alan Bernstein, President, Canadian Institutes for Health Research

From: Ted Palys & John Lowman
Subject: Déjà Vu: Ogden Subpoenaed Again

Russel Ogden, an internationally renowned expert on assisted suicide, has been subpoenaed again. He was first subpoenaed in 1994 to appear before a Coroner's Court. He successfully defended academic freedom from the Court's threat using the common law "Wigmore test" to assert research-participant privilege. The second subpoena arrived at his home on January 8th this year and calls on him to appear on March 19th "to give material evidence for the prosecution" in the preliminary hearing of 72 year old Evelyn Martens on charges of counselling a person to commit suicide and aiding/abetting a person to commit suicide. Today's Vancouver Sun reports that other charges are pending.

Ogden was attending Marten's hearing as part of his research but now, as a prospective material witness, he can no longer continue his court observations. Worse, participants in his longitudinal research may withdraw as they wait to see how the case unfolds. Others may decline to provide information for fear that association with him will make them objects of the prosecutor's attention. In fact, Ogden's entire research program is in jeopardy now that he is squarely in the prosecutor's sights as a prospective witness in this and who knows what other cases.

Ogden's second case dramatically illustrates the threat that the courts pose to academic freedom in Canada. The mere fact of the subpoena will have a chilling effect on Ogden's research regardless of how the court ultimately deals with it.

The scene is reminiscent of the United States in the 1970s during the Nixon years when grand juries and other legal authorities first tried to co-opt researchers as witnesses for the prosecution. U.S. researchers resisted and they, their universities, their disciplinary associations and federal funding agencies campaigned for statutory protections for research confidentiality. Federal authorities understood that certain kinds of sensitive research on important social issues could never be done with researchers and their participants wondering when the next subpoena would arrive. They understood that the justice system itself would lose out because it would lose the potential for the expert testimony that is the essential foundation of legal decisions and social policies.

The U.S. government responded by creating statutory protections in the form of "confidentiality" and "privacy certificates" making certain kinds of sensitive health and criminal justice research immune to the courts. Statistics Canada researchers enjoy the same kinds of protections under the Statistics Act.

Have Canadian academics learned anything in light of the U.S. experience? Apparently not. The SFU Research Ethics Policy Review Task Force, Chaired by the late Ellen Gee, recommended that SFU initiate a campaign for confidentiality certificates here in Canada. What has SFU done? So far, nothing, but we hope that will change. And, of course, SFU should not have to bear this burden alone.

In 1998 the three granting councils saw fit to impose the Tri-Council Policy Statement on Canadian universities in the name of protecting research subjects. The Policy Statement recognises that "legal and ethical approaches to issues may lead to different conclusions" and says that "though ethical approaches cannot pre-empt the application of the law, they may well affect its future development." The question now is: how much are the granting councils prepared to walk their talk? Where is their responsibility in ensuring that the law develops in such a way that conflicts between ethics and law are minimised?

Three years ago we published an article on the ethics and law of research confidentiality in the Canadian Journal of Law and Society (URL) that ended by urging the councils to pick up the baton and press for research confidentiality certificate legislation in Canada based on the U.S. model. As far as we know, they have done nothing to this end. Perhaps Ogden's latest subpoena will convince them to chart a different course.

Ogden's first subpoena might have been written off as a fluke. But this second one shows that Ogden's research is a target. Now is the time for every member of the academic research community to do what they can to support Ogden's fight to prevent the courts and the state from co-opting researchers as agents of law enforcement and witnesses for the prosecution. This open letter is a formal request to the three granting councils to provide the requisite funds for a lawyer so that Russel Ogden is not left on his own once again to defend academic freedom and the integrity of the research enterprise.

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