Ethical and Legal Strategies for Protecting Confidential Research Information

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A Challenge to Research Confidentiality

From 1992 through 1994, Russel Ogden, an MA student in Criminology at Simon Fraser University, conducted interviews with people who had attended the suicides and euthanasia of persons with AIDS. The University Ethics Committee had approved Ogden's research protocol, including his pledge to maintain in "absolute confidentiality" the identity of research subjects.

In 1994 after the Vancouver Sun ran an article reporting the death of an "unknown female," the Vancouver Coroner subpoenaed Ogden to appear at an inquest into the cause of her death. Ogden agreed to testify about his research findings, but refused to divulge the identity of any of his research subjects. He then became the first and only researcher in Canada we know of to be threatened with a charge of contempt for refusing to share confidential research information with a court.

When Ogden was subpoenaed, the SFU administration declined to provide legal counsel, did not attend the inquest, provided only $2000 on "compassionate grounds" toward legal fees that eventually totalled more than $11,000, and wrote a letter of "support" that was so tepid and misleading Ogden's lawyers decided not to submit it as evidence.

Ogden's lawyers mobilized the common law "Wigmore test" to assert that his communications with research subjects were privileged. Ogden won the case, and then sued the University to recover his legal costs. Judge Steinberg presided. He concluded that, as a matter of law, the university was not obliged to pay Ogden's legal fees. But his written decision included an obiter dictum that lambasted the University for its "hollow and timid" defence of academic freedom. Recognizing that ethics and law do not always

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1 We wish to acknowledge the contributions of many individuals, including Howard Becker, David Bell, Rick Coe, Rob Gordon, Paul Jones, Louise Kidder, Richard Leo, Robert Menzies, Russel Ogden, Patrick O'Neill, Gordon Roe, Susan Stevenson, Michael Traynor
lead to the same conclusions, Judge Steinberg urged the administration to reconsider its ethical stand on the payment of Ogden's legal fees.³

In the two years that elapsed between the trial and the decision, and after concerted pressure by SFU's School of Criminology for the University to support Ogden, a new President convened an internal inquiry into the university's handling of the case. The review was released in October 1998, ⁴ two months after Judge Steinberg's decision. It, too, pilloried the University for its failure to protect Ogden's research subjects and recommended that the university apologize to Ogden, reimburse his legal fees, and undertake to support graduate researchers should they encounter similar problems in the future. The President accepted all three recommendations. In retrospect, given the position on ethics and law articulated in the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans (the "Policy Statement")⁵ released in August 1998 the University had little choice. When judged by the principles laid out in the Policy Statement it was clear that Russel Ogden had acted ethically, but the university had not.

The Tri-Council Policy Statement and the Researcher's Ethical Obligation to Protect Confidentiality

The Tri-Council Policy Statement was generated through collaboration of Canada's three federal research-funding councils. To receive council funding, Canadian universities and university researchers must adhere to this code. Like every code of human research ethics we have seen, it cites the protection of the rights and interests of research subjects as its objective, and identifies the provision, respect and maintenance of confidentiality among its "fundamental" ethical principles:

**Respect for Privacy and Confidentiality:** Respect for human dignity ... implies the principles of respect for privacy and confidentiality. In many cultures, privacy and confidentiality are considered fundamental to human dignity. Thus, standards of privacy and confidentiality protect the access, control and dissemination of personal information. In doing so, such standards help to protect mental or psychological integrity. They are thus consonant with values underlying privacy, confidentiality and anonymity respected.⁶

Confidentiality is a fiduciary relation requiring the utmost degree of trust. It covers situations where persons share information with the expectation that it will go no further. Although all citizens enjoy a right to privacy, researchers have a special ethical obligation to protect the privacy of research subjects.

³ The Honourable Judge D. Steinberg, (19 June 1998), Reasons for Judgement in Russell Ogden v. Simon Fraser University, Provincial Court of British Columbia, No.26780 (Burnaby Registry). Available at http://www.sfu.ca/~palys/steinbrg.htm
⁴ Nick Blomley and Steven Davis, Russell Ogden Decision Review. A report to the President of Simon Fraser University. (October 1998). Available at http://www.sfu.ca/pres/OgdenReview.htm
⁶ Ibid., p.1-5.
If there is an increased risk to research subjects because of their participation, it is because the researcher has walked into their lives and asked them to share information about themselves, for little or no reward, that will help the researcher and, hopefully, society in general. Taking information from people for the broader social good without ensuring they are protected from harm would be exploitative and unethical.

Of course, it is more directly the anonymity of subjects that is the researcher's primary concern. The information subjects provide is not usually "confidential" — the whole purpose of gathering such data is to write about it in a public forum. The ethical obligation is for the researcher to ensure that no research subject can be identified on the basis of the information presented, unless specific arrangements to the contrary have been made.

While the Ogden case is apparently unique in Canada, an examination of US cases offers some hints as to what sorts of research scenarios, if any, might find their way into Canadian courts. The US experience shows that, although challenges to research confidentiality via subpoena are relatively rare they have touched a broad range of disciplines. Reported cases appear in the realms of medicine, pharmacology, anthropology, criminology, sociology, business administration, kinesiology, women's studies, psychology and economics. The most typical scenario occurs when two parties are engaged in high stakes litigation, and one cites and the other wishes to challenge the work of an independent researcher who has information relevant to the issues at law. Most often, the identity of particular research subjects, or acquisition of uniquely identifiable information is not an issue, although in some cases, that is exactly what has been sought. In other cases, assertive grand juries have subpoenaed researchers in the hope their field notes might yield clues as to where to lay charges. In one unreported case, the researcher was subpoenaed as part of a criminal trial; the researcher had observed a police interrogation (the police were his research subjects) and was thus a

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7 A 1996 volume Law and Contemporary Problems, 59(3) devoted to court-ordered disclosure of academic research identified about twenty relevant cases out of probably hundreds of thousands of research studies conducted during the period they refer to. See John Lowman and Ted Palys, 1999, Informed Consent, Confidentiality and the Law for a description of these cases, at http://www.sfu.ca/~palys/Conf&Law.html
8 Although "cases in the literature" are an unrepresentative subset of "all cases" involving assertions of research-subject privilege, this sampling limitation is non-problematic since we scan the US experience only to get some idea of the range of circumstances that have resulted in contested subpoenas, and to see how the US courts balanced competing interests across those situations.
9 See, for example, Dow Chemical Co. v Allen, 672 F. 2d 1262, 1274-77 (7th Cir. 1982), and Deitchman v. E.R. Squibb & Sons, Inc. 740 F.2d 556 (7th Cir. 1984). In both cases, the courts agreed that any identifying information should be protected.
10 An early example is Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388 (N.D. Cal. 1976). The most recent example is In re: Michael A. Casumano 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. In both cases, the courts agreed that any identifying information should be protected.
material witness. The lawyer for an accused subpoenaed the researcher to provide evidence about an interrogation.12

The traditional stance of social scientists to the arrival of a subpoena that threatens research subjects is to resist such intrusions at every turn.13 The struggle of U.S. academics to protect research information from grand juries and high stakes litigants stand as testimony of the fundamental value of academic freedom, i.e. when it comes to confidential research, ethics should not be subjugated to law.14 The Tri-Council Policy Statement codifies that approach by making defence of confidentiality to the full extent possible within law its minimum ethical standard:

The researcher is honour-bound to protect the confidentiality that was undertaken in the free and informed consent process, to the extent possible within the law. The institution should normally support the researcher in this regard, in part because it needs to protect the integrity of its own 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. The records of the REB and of the consent might be useful as part of this counter-argument, or may be requested by those seeking access. However, if the court issues a subpoena, legal appeals will probably be the only legal option open to the researcher to protect the confidentiality of the records.15

Many social science disciplinary research codes enjoin researchers to do the same thing: defend research confidentiality against third party attempts to use law to acquire confidential research information. But none of these codes explains how that can or should be done.

Researchers can maximize protection of confidentiality in two main ways:

1) Taking methodological precautions to protect research subjects from third party intervention by making it impossible to identify individual respondents, even if one wanted to. For example, in some types of research, one need never ask for or know subjects' names in the first place; when we must obtain that information, interview transcripts and field notes should be anonymized at the earliest opportunity.

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12 See Richard Leo, “Trial and Tribulations: Courts, Ethnography, and the Need for an Evidentiary Privilege for Academic Researchers.” (1995). American Sociologist, 26(1), 113-134. The case is unusual to the extent that the research subjects apparently did not object to the researcher testifying; they thought his testimony would help their cause. Given that research subjects have the right to waive privilege, law and ethics may not have been in conflict in this instance.
15 Tri-Council, supra note 5, p.3.2.
2) Anticipating the legal strategy to be used to assert evidentiary privilege and design one's research to maximize the chances of success by anticipating the language and decision-making processes of the courts. The design of Russel Ogden's research on assisted suicide exemplified this approach.

In regard to methodological precautions, researchers can consult a variety of methodology texts for advice, which we will not review here. Instead, this paper focusses on the second alternative: exploring how researchers can maximize legal protection of the research subject's right to be protected from the threat of court-ordered disclosure of information that would harm them.

We begin by outlining some legal and ethical principles that frame researchers' choices, and review the common law on privilege in Canada and the U.S. to show how researchers can design their research to maximize the legal protection of confidential research information. Then we outline ethical principles that should be considered in the unlikely event that a Canadian court orders disclosure of confidential information that could harm a subject. We conclude by proposing that universities and the Tri-Council should begin a campaign for statutory protection of research subjects along the lines of the confidentiality certificates that are currently available in the United States for research on sensitive topics such as drug use, criminal activities, and sexual behaviour.

The Legal Context

The Right of Every Citizen to Privacy

The supreme law of Canada is the Charter of Rights and Freedoms ("The Charter"). The Tri-Council Policy Statement alludes to its provisions regarding privacy when it notes:

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REBs should respect the spirit of the Canadian Charter of Rights and Freedoms, particularly the sections dealing with life liberty and the security of the person as well as those involving equality and discrimination. (p. i-8)
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Although "privacy" as such is not mentioned in the Charter, the Supreme Court of Canada has taken section 7 regarding "life, liberty and security of the person" and section 8, which protects the citizen from "unreasonable search or seizure," to mean that privacy is a fundamental right of all citizens in a democratic society. In R. v. Dyment the Supreme Court declared that “privacy is at the heart of liberty in a modern state,” and a value that, “is essential for the well-being of the individual.” In a recent legal opinion on these issues, Jackson and MacCrimmon note:


In its jurisprudence the Supreme Court views privacy as a personal right of the individual, based on autonomy, dignity, liberty and security interests. In *Dyment*, Mr. Justice La Forest, in identifying those situations where we should be most alert to privacy considerations, adopted the concept of “zones of privacy,” and identified three such zones: territorial, personal and informational. ... Informational privacy …

… “Derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit.” In modern society, especially, retention of information about one’s self is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, that situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. (*R. v. Dyment*, [1988] 2 S.C.R. 417 at 429-30)

In the later decision of *R. v. Plant*, the Supreme Court explored further the zone of informational privacy:

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that section 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. (*R. v. Plant*, [1993] 3 S.C.R. 281 at 293)

It is precisely these "intimate details of the lifestyle and personal choices of the individual" that are most in need of protection in research.

**Other Statutory Obligations to Protect Privacy**

Although we have not conducted a review of federal and provincial freedom of information and protection of privacy acts, researchers should be aware that this legislation may apply to the teaching and research materials of employees of post-secondary institutions. In our home province, British Columbia, these materials are currently exempt from the *Freedom of Information and Protection of Privacy Act*. However, the Special Committee that reviewed the *Act* in 1999 recommended that it be amended to apply its privacy provisions to teaching and research information of academics, while maintaining their exemption from the access provisions of the *Act*.19

**The Legal Obligation to Provide All Relevant Information to a Court**

While Sections 7 and 8 of the *Charter* reveal areas in which research ethics and law lead to similar conclusions, others hold the potential for conflict. For example, the *Charter* also guarantees rights of due process, part of which implies that all citizens involved in court action should have a right of "full answer and defence" for any actions, criminal or

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civil, in which they are involved.\textsuperscript{20} When researchers hold information that is relevant to a matter being adjudicated, they can be subpoenaed to provide that information.

If an accused's or litigant's right to full answer and defence was absolute, then all citizens (and hence all researchers) would be required to respond to all subpoenas with full testimony as the accused or litigant required, and the only way researchers could protect confidentiality would be to defy those orders. The right is not absolute, however, and must be balanced with other rights, such as the right all other citizens have to privacy and confidentiality. As Madame Justice McLachlin (now Chief Justice) explained in her minority decision in \textit{O'Connor}:

\begin{quote}
The \textit{Charter} guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process[].\textsuperscript{21}
\end{quote}

These "lawful interests of others" are defined in both statutory and common law.

\section*{Privilege in Canadian Law}

The notion of "privilege" pertains to rules of evidence and arises at trial with respect to a witness. As Jackson and MacCrimmon explain:

\begin{quote}
When information is privileged a witness may not be compelled to testify about the information and may not be compelled to disclose documents or other materials which contain the information. Under the privilege rules, relevant information is excluded in order to further social values external to the trial process such as fostering confidential relationships.\textsuperscript{22}
\end{quote}

Privilege is granted in the interest of public policy and the good order of society. Because privilege can interfere with the court's search for truth and may conflict with a defendant's or litigant's right to make full answer and defence, courts and legislatures grant privileges sparingly.

\section*{Statutory Privileges}

There are a few statutory privileges in Canada. Some of these are detailed in the \textit{Canada Evidence Act}, which demarcates, for example, privileges for "communications during marriage" (Section 4(3)), and the Queen's Privy Council and Ministerial privilege (Sections 37 to 39).

\textsuperscript{20} For example, see J. Sopinka, S.N. Lederman, and A.W. Bryant. \textit{The law of evidence in Canada}. (Toronto: Butterworths, 1992).


\textsuperscript{22} Jackson and MacCrimmon, \textit{supra} note 18, p.33.
A statutory privilege not mentioned in the *Canada Evidence Act*, but that is of particular interest to our discussion of protecting research subjects, was created by the *Statistics Act*. Statistics Canada researchers are required to take an oath of secrecy, and section 17b of the *Statistics Act* makes it an offence to violate that oath by releasing information that would identify any individual who participates in Statistics Canada research. Section 18 creates a statutory privilege protecting Statistics Canada research from court ordered disclosure:

Information is privileged

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

*Idem*

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

The logic of this privilege originates in the mandatory participation requirement of the census; Canadians are liable for fine and/or imprisonment if they do not participate. However, Statistics Canada now engages in numerous surveys that do not involve mandatory participation, and still enjoys the same privilege.

The legislative protection of the *Statistics Act* is a strong affirmation of the importance Parliament attaches to research confidentiality, at least at Statistics Canada. However, although Statistics Canada researchers routinely use it as the basis to guarantee unlimited confidentiality to research subjects — a confidence that, as far as we know, has never been breached — technically it is not "absolute." Any blanket assertion that one set of rights can *prima facie* supersede all others is contrary to Supreme Court jurisprudence that requires the balancing of conflicting *Charter* rights.23 As with any other legislation, the *Statistics Act* is subject to *Charter* challenge and would be balanced against whatever other *Charter* rights were being advanced in the case at hand. It is also unclear whether the *Statistics Act* would trump provincial mandatory reporting laws relating to child and elder abuse, which represent a problem for all researchers.

There is no comparable statutory protection in Canada of academic research subjects even though the ethical obligations of Statistics Canada and academic researchers are much the same. Academic and other researchers must assert privilege using common law.

**Privilege in Common Law**

There are two types of common law privilege — class and case-by-case — which are distinguished by the location of the onus of proof. With class privilege, the onus is on the parties seeking information to demonstrate why it should be divulged. When privilege is

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23 For example, see most recently *R. v. Mills* (Supreme Court of Canada, 25 November 1999, No.26358).
asserted on a case-by-case basis, the onus is upon the person claiming the privilege to establish why it should be recognized.

Class Privilege

The privilege attached to the lawyer-client relationship is the clearest example of a class privilege. As Cory J. stated for the majority in Smith v. Jones,

"The solicitor-client privilege has long been regarded as fundamentally important to our judicial system. ..."

"The privilege is essential if sound legal advice is to be given in every field. ... Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients. ... It is because of the fundamental importance of the privilege that the onus properly rests upon those seeking to set aside the privilege to justify taking such a significant step."

"The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitor-client privilege."

Class privilege is not absolute and, indeed, in Smith v. Jones was set aside, owing to a "public safety exception" which, in the opinion of the Supreme Court, warranted violating the confidence. In that case, an accused person revealed a plan to murder street prostitutes on a specific Vancouver stroll. The Court's decision in this instance is relevant because it viewed solicitor-client privilege as the, "...highest privilege recognized by the courts. By implication, if a public safety exception applies to solicitor-client privilege, it applies to all classifications of privileges and duties of confidentiality."

There is currently no class privilege for the researcher-subject relationship. One reason is that the circumstances in which it would be awarded or denied have never arisen. The only case where researcher-subject privilege was invoked was the Ogden case, and that was in Coroner's Court, which technically is not a court of law. Although Jackson and MacCrimmon, the authors of the most comprehensive legal opinion on researcher-subject privilege yet penned, believe the Ogden judgement would have withstood judicial review, they also believe it unlikely that the researcher-subject relationship will be granted class privilege, because:

"The Supreme Court has suggested that new class privileges will only be created for relationships and communications which are inextricably linked with the justice system in the way that solicitor-client communications are."

However, a minority in R. v. Gruenke were willing to grant a class privilege to the priest-penitent relation even though it did not meet this criterion. Further, as we explained

25 Ibid., at 51.
26 Ibid., p.15.
27 Jackson and MacCrimmon, supra note 18, p.119.
above, the researcher-subject relationship offers a unique and compelling case that may justify shifting the onus.

Case-by-Case Privilege

In lieu of statutory protection or recognized class privilege for research subjects, Canadian researchers must assert privilege on a case-by-case basis. The Supreme Court of Canada has recognized the Wigmore criteria as the appropriate test for examining any case-by-case claim to privilege, and stated that the door to establishing class privileges through common law is still open. Sopinka et al., note that:

> The utilization of Wigmore's criteria was again mentioned by Laskin C.J.C in Canada v Ontario, where he stated that the Slavutych case had established that the categories of privilege are not closed and that the Wigmore criteria are a satisfactory guide for the recognition of a claim of privilege.29

Most recently, in R. v. Mills, Justices MacLachlin and Iacobucci reaffirmed that view:

> Confidential relationships have a long history of being protected through the common law doctrine of privilege. The "Wigmore test" sets out the generally accepted criteria for determining whether, in a particular case, the communications at issue should be privileged and therefore excluded as evidence at trial.30

At this time, the Wigmore test is thus the appropriate mechanism to protect the identity of research subjects in court. Maximizing the legal protections available to research subjects thus means designing one's research protocols in anticipation of a defence of researcher-subject privilege by invoking Wigmore.

Designing Research in Anticipation of a Wigmore Defence

The Wigmore test lays out criteria to establish, "a privilege against disclosure of communications between persons standing in a given relation,"31 and thereby recognize an exemption from the obligation all citizens normally have to testify. The criteria require that:

1. The communications must originate in a confidence that they will not be disclosed;

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28 In R. v. Gruenke, [1991] 3 S.C.R. 263, Justices L'Heureux-Dubé and Gonthier stated: "[Some] authors express the view that it would be impractical and futile to attempt to force the clergy to testify, because often the cleric would refuse. … Compelling disclosure, or charging a cleric in contempt, it is further argued, places the presiding judge in the position of having either to force the breach of a confidence, or to imprison the cleric, both of which may arguably bring disrepute to the system of justice." We believe that the secular obligation of confidentiality in the research enterprise can be every bit as important as the sacred obligation is to the priest.

29 Sopinka et al., supra note 20, p.631.


(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and
(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.\textsuperscript{32}

The Wigmore criteria are always considered in the context of a “given relation[ship]”, e.g., lawyer-client, doctor/therapist/counsellor-patient, police officer-informant or, in this case, researcher-subject. The basis on which privilege is recognized lies less in the content of the communication itself than in the need to maintain the integrity of a socially valued relationship. Legal commentary on the Wigmore test indicates there needs to be clear evidence on each criterion in order for communications in a given relation to be recognized as privileged.\textsuperscript{33} Accordingly, we now consider each of the four Wigmore criteria in the context of the researcher-subject relationship, and the evidentiary requirements that might satisfy each criterion. In the process, we review Jackson and MacCrimmon's\textsuperscript{34} analysis of the evidence Ogden used in the process of employing the Wigmore defence, a defence they believe would have survived judicial review.

\section{1. The communications must originate in confidence}

The first criterion asserts that the people involved in the relationship must share the understanding that the communication in question was uttered in confidence. If a third person is present and their presence is not essential, privilege cannot be claimed.

The Supreme Court of Canada set a high standard for "an expectation of confidentiality" in its adjudication of the claim for priest-penitent privilege in \textit{R. v. Gruenke}. In that case, the Court concluded that the mere fact the statements at issue were made to a counsellor and pastor — persons with whom one might normally expect to have confidential communications — was not in itself enough to satisfy the first criterion of the Wigmore test. The Court wanted clear evidence that this communication (a confession) was uttered with a clear and shared expectation of confidentiality.

As Jones observes,\textsuperscript{35} \textit{M.(A.) v. Ryan} introduced a new nuance to the law regarding privilege, particularly with respect to what it takes to meet the first Wigmore criterion. The case involved a 17-year old girl, "M.", who was indecently assaulted by her psychiatrist, Dr. Ryan. After the assault, M went to a second psychiatrist, Dr. Kathleen

\textsuperscript{\textit{Ibid}}, p.3185; italics in original.
\textsuperscript{34} Jackson and MacCrimmon, \textit{supra} note 18.
\textsuperscript{35} Paul Jones, \textit{Legal Opinion on Issues of Privilege}. (1999) Paul Jones is Legal Advisor to CAUT; the opinion was undertaken at the request of the SFU Faculty Association, p.3. Reproduced in Appendix A of John Lowman and Ted Palys (1999), \textit{Going the Distance: Lessons for Researchers from Jurisprudence on Privilege}; available at http://www.sfu.ca/~palys/Distance.html
Parfitt, for treatment. Dr. Parfitt explicitly discussed the possibility that a court might, at some point, order disclosure of her therapy records. M made it clear that confidentiality was very important to her, and that she did not want the records revealed at any point to anyone, including a court. Dr. Parfitt stated that she would do "everything possible" to ensure no information was disclosed. The girl subsequently sued Dr. Ryan for damages, at which time Dr. Parfitt's records, but not her personal notes, were subpoenaed. At issue was whether the defendant’s right to secure records potentially relevant to testing the plaintiff’s case against him outweighed the plaintiff’s expectation that communications with her psychiatrist would be kept in confidence.

The British Columbia trial court decided against M. and Dr. Parfitt on the grounds that their discussions about the possibility of a court order to disclose implied recognition that confidentiality was limited, and hence not privileged. However, the BC Court of Appeal and the Supreme Court both argued that mere consideration of the possibility of court-ordered disclosure did not, in itself, undermine the expectation of confidentiality. Writing for the majority of the Supreme Court, McLachlin J. stated:

The communications were made in confidence. The appellant stipulated that they should remain confidential and Dr. Parfitt agreed that she would do everything possible to keep them confidential. The possibility that a court might order them disclosed at some future date over their objections does not change the fact that the communications were made in confidence. With the possible exceptions of communications falling in the traditional categories, there can never be an absolute guarantee of confidentiality; there is always a possibility that a court might order disclosure. Even for documents within the traditional categories, inadvertent disclosure is always a possibility. If the apprehended possibility of disclosure negated privilege, privilege seldom if ever would be found.36

Avoiding Waivers of Privilege

Notwithstanding the Supreme Court's recognition that one can discuss legal limitations to confidentiality without foregoing an "expectation of confidentiality," care should be taken in the process of informing subjects of such possibilities. The concept of a waiver of privilege appears often in the Supreme Court's decision-making regarding privilege. For example, in Ryan, the BC Court of Appeal disagreed with the trial court's reasons for rejecting privilege, but substituted its own: that M did not assert the claim immediately. The Supreme Court disagreed:

The appellant’s alleged failure to assert privilege in the records before the Master does not deprive her of the right to claim it. If the appellant had privilege in the documents, it could be lost only by waiver, and the appellant’s conduct does not support a finding of waiver.37

(p.3)

Part of maximizing legal protections of research confidentiality thus involves ensuring that no aspect of one's informed consent statement can be construed as a waiver of privilege. This is consistent with the Tri-Council's affirmation that, "the consent of the participants shall not be conditional upon, or include any statement to the effect that, by

36 M.(A.) v. Ryan, supra note 33, p.11.
37 Ibid., p.3.
consenting, subjects waive any legal rights." Just as solicitor-client privilege lies not with the solicitor, but with the client, so researchers are the guardians of the privilege, not its holder. A research subject can volunteer a waiver, but the researcher cannot make agreement to a waiver a pre-condition of participation in the research.

This cautionary note is essential because, following the Policy Statement's assertion that research subjects should be warned about "the extent of the confidentiality that can be promised," some researchers might use a warning about legal limits to confidentiality as an excuse to hand over information to a court without argument, and destroy their own and subjects' chances to claim privilege by making the informed consent statement an implicit waiver of privilege. For example, in Atlantic Sugar, Ltd. v the United States of America, respondents to an International Trade Commission questionnaire were told that the information would not be disclosed "except as required by law." Noticing this, the trial judge stated that the law (in the form of the US Customs Court) now "required" it, and, because that was precisely the eventuality for which confidentiality had been limited, the information was no longer considered confidential.

The Policy Statement's requirement that confidentiality be maintained to "the extent possible within the law" suggests that court-ordered disclosure should be fought all the way to the Supreme Court of Canada if necessary, or to the highest court possible if the Supreme Court refuses to hear the case. Of course, that still leaves open the question about one's response should the court order the disclosure of research subject identities, an issue to which we return at the end of our discussion of the Wigmore criteria.

Evidentiary Requirements

In anticipation of satisfying the evidentiary requirements of criterion one, researchers should make it clear to research subjects that their interactions are strictly confidential, and create evidence of the pledge that will satisfy a court. In particular:

(1) The proposal should unambiguously declare the researcher's and the University's intentions to do "everything possible" to maintain confidentiality;
(2) Researchers' actions should be consistent with that pledge (e.g., they should implement relevant methodological strategies to ensure that risks to confidentiality are minimized);
(3) One's informed consent statement should clarify that the subject's interactions with the researcher will be held in strict confidence; and

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38 Tri-Council, supra note 5, p.2.6.
39 See Sopinka et.al., supra note 20.
40 Tri-Council, supra note 5, p.3.2.
41 Atlantic Sugar, Ltd., v. U.S., 85 Cust. Ct. 128 (1980). The case is discussed by Michael Traynor on p.122 of "Countering the excessive subpoena for scholarly research," Law and Contemporary Problems, 1996, 59(3), 119-148, and is all the more provocative because it goes against the grain of many other US court decisions that protect confidentiality. We thank Mr. Traynor for supplying us with a copy of the decision.
42 Tri-Council, supra note 5, p.3.2.
A record should be kept\textsuperscript{43} of one's pledge of confidentiality and the subject's agreement to it in every applicable interview transcript, even when the transcript is anonymized, or in field notes.\textsuperscript{44}

2. Confidence must be essential to the relationship

The object of granting privilege is "to protect the perfect working of a special relation, wherever confidence is a necessary feature of that perfect working."\textsuperscript{45} The second criterion requires evidence that confidentiality is demonstrably a "necessary feature" of the relationship for which privilege is claimed.

In many kinds of research, the provision of confidentiality is an essential feature of the researcher-subject relationship. Perhaps the clearest example of this is criminological research on law enforcement and law breaking, especially when it concerns undetected or unreported law violations. What offender would talk openly and freely about undetected offences to a researcher if they thought the researcher might divulge that information to a court or anyone else? The same can be said for many other sensitive research areas where release of the information would create negative consequences for the subject (e.g., embarrassment, stigmatization, financial loss, loss of reputation, or loss of employment).

Evidentiary Requirements

Three types of evidence would be of use in court regarding criterion two, all of which were a part of Russel Ogden's defence of researcher-subject privilege in Coroner's Court: a) the communication is part of a research project; b) confidentiality is essential in research on sensitive topics; and c) confidentiality is essential to the specific study.

a) The Communication is Part of a Research Project

To establish that the communication is part of a research project, a proposal should receive formal ethics review. This identification of one's activity as "research" is a prerequisite to the claim and recognition of privilege. In one US case\textsuperscript{46} a sociologist's claim of privilege appears to have been viewed suspiciously because a research subject for whom he claimed privilege also happened to be a friend. Because he had not undergone university ethics review, one legal observer suggested that the courts, which were thoroughly unreceptive to the claim, may have seen it as one of convenience rather

\textsuperscript{43} This is not a recommendation for using signed informed consent statements, since the very existence of the statement may compromise confidentiality.

\textsuperscript{44} Mario Brajuha's participant-observer research on the "sociology of the American restaurant" illustrates the problem. A grand jury subpoenaed Brajuha, and asked to see his field notes. Although Brajuha had guaranteed confidentiality to "many" of his research subjects, he had not kept a record of those guarantees. This raised for the court the problem of establishing to whom he had guaranteed confidentiality, and hence identifying which parts of his field notes were privileged. See p. 41of Robert M. O'Neil "A researcher's privilege: Does any hope remain?" In Cecil and Wetherington, supra note 14, pp.35-50.

\textsuperscript{45} Wigmore, supra note 31, p.3211.

\textsuperscript{46} Scarce, supra note 11,
than being warranted for "real" research.\textsuperscript{47} The case highlights the difficulties that may befall researchers who occupy multiple roles in the lives of subjects (e.g., teacher and researcher; counsellor and researcher), and the need to manage any appearances of conflict of interest, as the Tri-Council advises.\textsuperscript{48}

\textbf{b) The Importance of Confidentiality in Research on Sensitive Topics}

The second type of evidence concerns the argument that, in many kinds of research on sensitive topics, confidentiality is essential for maintaining the researcher-subject relationship. In the Ogden case, Dr. Richard Ericson, an eminent criminologist, appeared as an expert witness and testified about the importance of confidentiality to conducting valid and reliable criminological research.

Authors of textbooks in research methodology and research ethics agree, the more clearly anonymous or confidential the data, the greater their probable validity, particularly when the topic under discussion is a sensitive one and where there can be negative repercussions for the subject (e.g., consequences at work, in his/her social group, possible incarceration, etc.).\textsuperscript{49}

Further evidence regarding the general importance of confidentiality to the researcher-subject relationship can be adduced from ethics policies and codes of ethics that assert the importance of confidentiality to the researcher-subject relationship. For example, the Tri-Council \textit{Policy Statement} asserts:

\begin{quote}
Information that is disclosed in the context of a professional or research relationship must be held confidential. Thus, when a research subject confides personal information to a researcher, the researcher has a duty not to share the information with others without the subject’s free and informed consent. Breaches of confidentiality may cause harm: to the trust relationship between the researcher and the research subject; to other individuals or groups; and/or to the reputation of the research community.\textsuperscript{50}
\end{quote}

\textbf{c) The Importance of Confidentiality to the Specific Study}

U.S. legal scholars warn, however, that general affirmations of the importance of confidentiality to the research enterprise are likely to be insufficient in court, particularly in the context of a case-by-case application of the Wigmore principles. The third type of evidence involves the importance of confidentiality to the study in question. Traynor, for example, advises that researchers should consider whether confidentiality is critical to undertaking the research, and then,

\begin{quote}
… should document the reasons requiring confidentiality. In many cases, confidentiality may be essential to protect data sources from an invasion of privacy, from embarrassment or distress, or from criminal prosecution, tax audits, or other government investigations, as well
\end{quote}

\textsuperscript{47} O'Neill, \textit{supra} note 44,  
\textsuperscript{48} Tri-Council, \textit{supra} note 5, Section 4.  
\textsuperscript{49} For example, see Kidder, \textit{supra} note 13; S. Sudman and N. Bradburn, \textit{Asking Questions}. (San Francisco: Jossey Bass, 1982).  
\textsuperscript{50} Tri-Council, \textit{supra} note 5, p.3.1.
as from litigation by others. The researcher who prepares a written memorandum at the inception of the research setting forth the reasons for confidentiality will be well-prepared to persuade a court that project could not have proceeded without the assurance of confidentiality.51

In the Ogden case, the evidence on the importance of confidentiality to his research came from two sources. The first emerged from the research itself. There were two parts to his research. One part involved asking people to report their attitudes regarding assisted suicide among persons with HIV/AIDS. The other involved interviews with people who had attended an assisted suicide. In Coroner's court, Ogden reported that the first group was roughly evenly divided as to whether the provision of confidentiality was essential to their participation. However, the second group would not participate in the research if Ogden did not guarantee their anonymity.

The second source of evidence on the importance of confidentiality to Ogden's research came from expert testimony of a community health nurse who specialized in caring for patients with AIDS. The nurse gave detailed testimony explaining why the preservation of confidentiality was particularly crucial within the community of persons with AIDS. For example:

It has taken us ten years to get to a place where we can provide a sense of trust in the relationship between client [with AIDS] and professional, whether it's a physician, a nurse, a social worker, or whatever. But we have worked extremely hard to develop that sense of trust. The way that we would develop that trust was by guaranteeing and providing confidentiality in our relationship with that person, in the research that we do, in the way that we record and document our interactions with people . . .

So, it's not just an issue of death and dying. It's an issue that we deal with in every aspect of a person's life. HIV, the disclosure of that kind of diagnosis, could result in someone losing their home, their job, their insurance, their health insurance, their life insurance. A whole number of losses can result from disclosure. Confidentiality is key to the relationship that we have with people that we are caring for.52

3. The relation must be one the community believes is socially valuable and should be fostered

The third criterion asks whether the community believes the researcher-subject relationship is one that should be sedulously fostered, i.e., whether there is reason to believe that the community values the researcher-subject relationship. A number of "communities" should be considered. In Ogden's case, there were at least three: (1) the research community; (2) practitioners and subjects involved in the research; and (3) the broader community of Canadians.

51 Traynor, supra note 41, p.121.
52 Transcript of Coroner's Inquest re: "Unknown Female." (1 June 1994; Case 91-240-0838) at 33-35.
The Research Community

Clearly, the research community believes its relation with subjects is worth fostering. As the Tri-Council Policy Statement states it:

> Research subjects contribute enormously to the progress and promise of research in advancing the human condition.53

Disciplinary codes of ethics offer further evidence confidentiality is a core ethical research principle and that protecting research subject rights is essential for the integrity of the researcher enterprise. For example:

**Canadian Sociology and Anthropology Association Code of Ethics** (Section 5.1)

Researchers must respect the rights of citizens to privacy, confidentiality and anonymity, and not to be studied. Researchers should make every effort to determine whether those providing information wish to remain anonymous or to receive recognition and then respect their wishes.

**American Sociological Association Code of Ethics** (Section 11)

Confidential information provided by research participants must be treated as such by sociologists, even when this information enjoys no legal protection or privilege.

**American Anthropological Association Statements on Ethics** (Section 1(c))

Informants have a right to remain anonymous. This right should be respected both where it has been promised explicitly and where no clear understanding to the contrary has been reached.

**American Political Science Association Code of Ethics** (Section 6.2)

[S]cholars also have a professional duty not to divulge the identity of confidential sources of information or data developed in the course of research, whether to governmental or non-governmental officials or bodies, even though in the present state of American law they run the risk of suffering an applicable penalty.

**American Society of Criminology Draft Code** (Section 19)

Confidential information provided by research participants must be treated as such by criminologists, even when this information enjoys no legal protection or privilege and legal force is applied.

Note that none of these codes foreclose the possibility of refusing to comply with a court order as a matter of professional principle. We return to this point later in a discussion of our responsibility to subjects and problems associated with *a priori* limitations of confidentiality.

Practitioners and Subjects Involved in the Research

Evidence pertaining to practitioner and subject communities is project specific. On reviewing Ogden's evidence on the third criterion, Jackson and MacCrimmon note how it

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53 Tri-Council, *supra* note 5, p.i.7.
demonstrated the value attached to Ogden's research, by policy makers, medical practitioners and persons afflicted with AIDS:

As to the community of institutions faced with responding to issues of euthanasia and assisted suicide it was argued that unless governmental and social institutions had reliable first-hand information provided by research like that of Mr. Ogden, they would be faced with developing strategies and policies to allow a principled and humane approach to the difficult ethical issues raised by assisted suicide and euthanasia in a vacuum. Again, not surprisingly, a number of health care institutions, government bodies and organizations had shown tremendous interest in Mr. Ogden’s research.

As to the third community of interest, the argument was that persons with terminal illnesses and their friends, families and care givers are faced with difficult and painful decisions. At present, they are forced to make these decisions on their own without guidance or support. Russel Ogden’s research clearly would have been of great interest and importance to this community. Mr. Johnson’s evidence had specifically pointed to the isolation in which this community was forced to function, and that Mr. Ogden’s research had provided a safe context for people to tell their stories so that lessons can be learned about this experience from those who are living it.54

The Broader Canadian Community

Regarding the broader community, there is abundant evidence again of the value that is placed on social science research. As Jackson and MacCrimmon describe:

[A]ddressing the interest of the community at large, Mr. Ogden’s counsel argued that the moral and ethical issues involved in euthanasia and assisted suicide were of great importance to Canadians generally. The debate surrounding the Sue Rodriguez case was but one example of the very broad public interest surrounding this issue. Furthermore, the public attention following the publication of Mr. Ogden’s thesis, both nationally and internationally, was evidence that the thesis raised significant interests of public policy.55

The academic role involves critically questioning and analyzing all aspects of society, including asking questions about why social arrangements, including law, are the way they are, and looking at the borders between pathological and normal, criminal and non-criminal, and stigmatized versus socially accepted. It is only by preserving and fostering the researcher-subject relationship that we can hope to provide understanding and knowledge the broader community needs on controversial and other socially relevant issues for its own long-term benefit. We have no right to ask some persons to pay the price for others’ benefit; it is unethical to treat people as simply means to ends, as the Tri-Council Policy Statement bluntly affirms:

Part of our core moral objection would concern using another human solely as a means toward even legitimate ends.56

The value attached to protecting research subjects by maintaining confidentiality is also evident in the one place in Canada where researcher-subject privilege has been codified

54 Jackson and MacCrimmon, supra note 18, pp.114-115.
55 Ibid.
56 Tri-Council, supra note 5, p.i-4.
in law, i.e. the Statistics Act. Although university researchers have not been afforded the same statutory protection for research subjects, our primary ethical obligations are the same.

The hundreds of millions of dollars that granting and contracting agencies spend annually on research is another indicator of the importance attached to the research enterprise, and the researcher-subject relationship on which much of it is based.

In sum, the preponderance of evidence suggests that confidentiality is essential to the "perfect working" of the researcher-subject relationship. Confidentiality may not be essential to every type of research with human subjects, such as social surveys regarding innocuous topics or where the respondent is truly anonymous. However, when it comes to sensitive research involving the collection of information that could cause subjects anything from embarrassment to serious harm, methodologists, field researchers, and federal legislation affirm that such research cannot be done without a guarantee of strict confidentiality.

4. Balancing potential injury to the researcher-subject relationship with the benefit to be gained by disclosing the confidential information for the specific case at hand

The first three criteria can be viewed as eligibility criteria for a particular assertion of privilege. Every indication is that the researcher-subject relation is capable of passing them comfortably. The essence of the Wigmore test lies in criterion four, however, which calls for a balancing of two competing social considerations. In this regard, the court must balance:

(1) The adverse impact on the relationship if confidentiality were to be violated; and
(2) The deleterious impact that non-disclosure would have on the particular trial in which the privilege is at issue.

The Adverse Impact of Violating Confidentiality

In the US, the research most likely to arouse the interest of a third party is that relating to corporations or business, even if only tangentially. Typically, two adversaries involved in high stakes litigation would refer to or hear about research that might be relevant to the dispute, and when one litigant cited the researcher, the other would subpoena the researcher in order to challenge his or her methodology and findings. Occasionally this has involved a quest for the identities of research subjects or information that would identify research subjects or tie identified research subjects to particular information.

Some of the US literature is misleading when it refers to the resulting claim as a matter of "academic privilege." We suggest the more appropriate term is "research-subject privilege" because, a) it correctly identifies the privilege as lying with the research
subject, *not* the researcher; and b) "academic privilege" conflates two sets of adverse outcomes that should be distinguished:

a) Situations where the personal interests of the *researcher* are at stake, such as having to reveal information before it is published, or having to spend large amounts of time responding to a subpoena;

b) Violations of privacy, i.e., where the personal interests of *research subjects* are at stake, and are contingent on the continuing anonymity of the data they provided.

A researcher's primary ethical responsibility is to be the guardian of the research subject's interests, including their interest in asserting privilege. Of course, the issues affecting subpoenaed researchers are important, as the following discussion shows.

### When Subpoenas Make Life Difficult for Researchers

Receipt of a subpoena or an order to disclose information to the courts has the potential of disrupting the normal flow of research and publication. At its worst, subpoenas can come at a time when the research is not yet ready for publication, leaving the researcher vulnerable to potentially career-damaging critique.\(^{57}\)

A subpoena can also pose a significant burden depending on the breadth of documentation that is sought, because of the time and resources it takes away from doing research. Some subpoenas are written very broadly. For example, when R. J. Reynolds Tobacco subpoenaed Dr. Irving Selikoff at the Mount Sinai School of Medicine to acquire information regarding "ongoing research" plus documentation for three published studies,\(^{58}\) they requested,

> … all documents related to the studies that describe, constitute, comment upon, criticize, review, or concern the research design, methodology, sampling protocol, and/or conduct of any of the studies; copies of questionnaires, answers to questionnaires, interview forms, responses to interviews, death certificates, autopsy reports, and other causes of death …; and data sheets, computer tapes and/or copies of computer discs containing all coded data … in as 'raw' a form as possible.\(^{59}\)

Similarly, when faced with six separate lawsuits regarding an intrauterine device (IUD) known as the Copper Seven, the manufacturer subpoenaed Dr. Malcom Potts, President of a non-profit institute that had done research on the effects of various IUDs. In its subpoena, the manufacturer demanded that Potts produce seventy-seven different categories of documents that covered all studies the institute had conducted regarding IUDs. Dr. Potts estimated that the documentation would total 300,000 pages and take his complete staff several weeks of full-time work to reproduce.\(^{60}\)

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\(^{58}\) *In re R.J.Reynolds*, 518 N.Y.S.2d 729 (Sup. Ct. 1987)

\(^{59}\) Wiggins & McKenna, *supra* note 57, p.69.

\(^{60}\) *Ibid*, p.70; p.76.
In each of these cases, the courts quashed the subpoenas. In the case of Mount Sinai and R. J. Reynolds, the subpoenas were quashed because they placed an "unreasonable burden" on the medical hospital.\textsuperscript{61} In the case of Potts, the court reasoned that, "the burden of producing the information outweighed the plaintiffs' need for it."\textsuperscript{62}

Transcripts of interviews and names of subjects — would be of benefit to them in the Department of Justice's anti-trust case against them. Cusumano and Yoffie claimed privilege, and although neither their invocation nor the court's adjudication was based explicitly on the Wigmore criteria, the balancing of considerations followed a distinctly Wigmore logic.

Notwithstanding the relevance that Microsoft had shown of the data and the billions of dollars that potentially were at stake, the District Court of Appeals ultimately quashed the Microsoft subpoena, stating:

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

\textsuperscript{61} Ibid, p.69.
\textsuperscript{62} Ibid, p.76.
\textsuperscript{63} Ibid, p.79.
\textsuperscript{64} For example, see \textit{Farnsworth v. Proctor and Gamble Co.}, 758 F.2d 1545, 1546-47 (11\textsuperscript{th} Cir. 1985).
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.65

**Deleterious Effects on Future Research**

We take the central message of these US decisions to be that academics themselves are not 'special,' but their relationships with and obligations to research subjects are because the research relationship that all society benefits from is fuelled by trust that the researcher will ensure subjects are not harmed by their participation. Thus, academics are subject to subpoena like any other witnesses or expert witnesses (i.e., there is no "academic privilege"), but necessary confidences should not be broken, and the courts should facilitate that protection (i.e., research-subject privilege should be respected).

This focus on protections for research subjects does not mean the courts have declared open season on researchers. The US Courts also have ensured that litigants with deep pockets are not allowed to harass, bully, or intimidate researchers or research institutions who produce research that benefits social understanding and the public good. Protection of the research enterprise is warranted because it is done in everyone's interest, including the courts. The courts would thwart their own long term search for truth if they were to cause the end of the empirical evidence that, with increasing frequency, plays an important role in the adjudication of competing claims in court.

For example, in one case, E. R. Squibb and Sons, Inc., manufacturer of the drug diethylstilbestrol (DES), was being sued by women who alleged that the DES their mothers had taken had caused them to contract adenocarcinoma of the vagina. The women cited research done by Dr. Arthur Herbst of the University of Chicago using a data base he had compiled of all cases of adenocarcinoma of the vagina contracted since 1940. The research showed a link between DES use of mothers during pregnancy and subsequent adenocarcinoma of the vagina among their daughters. Squibb subpoenaed Dr. Herbst for all data included in the registry. In the end, the courts agreed that Dr. Herbst should have to supply documentation so that the validity of his research and its conclusions could be challenged, but ordered also that the anonymity of the women in the data base should be maintained. As Judge Barbara Crabb explains,

Deitchman was a high stakes case in terms of money. It was also a high stakes case in another respect: the risk of serious harm to a significant research study. Not only did the district court and the court of appeals agree that Herbst's concern for the confidentiality of the registry was well-founded, even Squibb appeared to concede that the loss of

65 Cusumano and Yoffie, supra note 10, p.9.
confidentiality would affect the registry adversely and that "all society would be poorer ... [because] a unique and vital resource for learning about the incidence, causes[,] and treatment of adenocarcinoma would be lost."66

The Squibb case exemplifies the way US courts have, where possible, attempted to craft orders that acknowledge both sets of interests, with the terms of orders adjusted to minimize their impact on the long-term viability of research. The US courts generally weigh the balance in the researcher’s favour when:

(a) the subpoena is overly broad and/or gives the appearance of being a "fishing expedition" or part of a strategy of harassment;
(b) the person/organization issuing the subpoena has not demonstrated the relevance of the requested information to the litigation;
(c) the researcher is an independent third party with no interest in the dispute; and
(d) the issue on which the information is sought can be addressed through alternative evidence, or is of marginal use.67

Notwithstanding the considerable respect US courts have shown for academic freedom and the chilling effect on research if litigants could harass researchers, subpoena their correspondence with one another, and impede the fundamental process of independent and candid peer review, researchers should not assume that the courts understand what the deleterious effects of a subpoena or court order will be, and should not make vague statements about prospective effects. The more concretely one can articulate prospective effects, especially with direct reference to the research at hand, the more likely the court will take those interests into account in their decision-making.

**Canadian Jurisprudence on Privilege**

Although Ogden's case remains the only one in Canada where research-subject privilege per se was weighed against other social values, a consideration of how the Supreme Court has adjudicated other forms of privilege — such as the claims of therapist-client privilege that were a part of R. v. O’Connor,68 A. (L.L.) v. B. (A.),69 M. (A.) v. Ryan,70 and R. v. Mills71 — helps us anticipate the conceptual and legal filters through which a claim of research-subject privilege might be passed.

As we noted earlier, the adjudication of privilege involves a balancing of the rights of all persons involved in a particular court proceeding. As Madame Justice McLachlin stated in M. (A.) v. Ryan,

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67 See, for example, Crabb, *supra* note 66; Wiggins & McKenna, *supra* note 57; Paul M. Fischer, "Science and subpoenas: When do the courts become instruments of manipulation?" In Cecil and Wetherington, *supra* note 14, pp. 159-168.
70 Supra note 33.
71 Supra note 23.
While the traditional common law categories conceived privilege as an absolute, all-or-nothing proposition, more recent jurisprudence recognizes the appropriateness in many situations of partial privilege. The degree of protection conferred by the privilege may be absolute or partial, depending on what is required to strike the proper balance between the interest in protecting the communication from disclosure and the interest in proper disposition of the litigation. Partial privilege may signify that only some documents in a given class must be produced. Documents should be considered individually or by subgroups on a case-by-case basis.72

In this regard, Canadian Courts and US Courts operate on a similar logic. Privilege is not viewed as an all-or-nothing proposition, but as a balancing of competing interests. The balancing is usually achieved by "partial disclosure," which is done in the context of the facts of each case and the rights in conflict. In practice, "partial disclosure" involves keeping the door part open — regarding the research methodology and whether particular substantive conclusions are justified — and part closed. US courts almost always close the door to conceal the identity of individual subjects. They are, in short, highly protective of research-subject privilege. The model of partial disclosure involves sharing the information the academy produces accompanied by appropriate protections to ensure that volunteer research subjects and the long run integrity of the research enterprise are protected.

**The Right to a Fair Trial**

Jackson and MacCrimmon suggest that when courts balance competing interests the most difficult challenge to research-subject privilege will arise when the subjects' right to privacy is pitted against an accused person's right to a fair trial. The absence of any Canadian jurisprudence on research-subject privilege places us all in the role of speculators regarding what the courts might do if asked to weigh the maintenance of confidentiality in the researcher-subject relationship against the right of an accused to a fair trial. Much would depend on the particular facts of the case. In *R. v. O'Connor*, however, the Supreme Court had occasion to comment on how privilege would fare if pitted against the right of an accused to full answer and defence. Lamer CJ and Sopinka J stated:

> [I]t must be recognized that any form of privilege *may* be forced to yield where such a privilege would preclude the accused's right to make full answer and defence. As this Court held in *Stinchcombe* (at p. 340), a trial judge may require disclosure "in spite of the law of privilege" where the recognition of the asserted privilege unduly limits the right of the accused to make full answer and defence.73

We emphasize "may" in the preceding passage because the Court also has acknowledged that just as privilege is not absolute, nor is the right of an accused to full answer and defence. As Madame Justice L'Heureux-Dubé commented in her minority decision in *O'Connor*:

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72 *Supra* note 33.
73 *Supra* note 21, p.17, our emphases.
As important as the right to full answer and defence may be, it must co-exist with other constitutional rights, rather than trample them: *Dagenais*, *supra*, at p. 877. Privacy and equality must not be sacrificed willy-nilly on the altar of trial fairness.\(^{74}\)

More recently, in *R. v. Mills*, which again considered the privacy rights of sexual assault victims against the right of accused to subpoena therapeutic records in order to make full answer and defence, Justices MacLachlin and Iacobucci writing in the majority state:

> When the protected rights of two individuals come in to conflict, *Charter* principles require a balance to be achieved that fully respects both sets of rights.\(^{75}\)

Later, they say,

> The ability to make full answer and defence, as principles of fundamental justice, must therefore be understood in light of other principles of fundamental justice, which may embrace interests and perspectives beyond those of the accused.\(^{76}\)

Another factor that will influence the Court is whether the case is criminal or civil. In *M.(A.) v. Ryan*, Madame Justice McLachlin wrote:

> Just as justice requires that the accused in a criminal case be permitted to answer the Crown’s case, so justice requires that a defendant in a civil suit be permitted to answer the plaintiff’s case. ... This said, the interest in disclosure of a defendant in a civil suit may be less compelling than the parallel interest of an accused charged with a crime. The defendant in a civil suit stands to lose money and repute; the accused in a criminal proceeding stands to lose his or her very liberty. As a consequence, the balance between the interest in disclosure and the complainant’s interest in privacy may be struck at a different level in the civil and criminal case; documents produced in a criminal case may not always be producible in a civil case, where the privacy interest of the complainant may more easily outweigh the defendant’s interest in production.

In the case of research-subject privilege, another element that might influence the court is that subjects share information on a voluntary basis for the greater social good after being approached by a researcher. Most other claimants of privilege provide information for a tangible benefit: the police informant's charges are dropped, the penitent is absolved, and the patient is healed. In contrast, research subjects have little to gain by divulging private information — indeed the gain is primarily other people's — and in some instances, could experience serious harm if their identity is linked to the information they provide.

### If All Appeals Fail and the Court Orders Disclosure…

If all appeals fail and the court orders disclosure of confidential research material, the researcher is still faced with a choice: whether to comply. This choice will reflect decisions that the researcher must make at the outset when providing information to prospective subjects for informed consent. As these decisions will have to be made in

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\(^{74}\) *R. v. O'Connor*, *supra* note 21, p.56.

\(^{75}\) *R. v. Mills*, *supra* note 23, at 61.

\(^{76}\) *Ibid.*, at 73.
light of the Tri-Council *Policy Statement*, we first look at what it says about potential conflicts between research ethics and law, and then consider the researcher's ethical decisions if research ethics and the law of privilege conflict.

**Social Science Ethics Codes and the Tri-Council Policy Statement: Ethics and Law May Lead to Different Conclusions**

Earlier we quoted various North American social science ethics code sections on confidentiality. Some do not mention conflicts between ethics and law; others urge that confidential research information be kept confidential, even when there is no legal protection and legal force is applied. The American Political Science Association Code is the most explicit in its assertion that scholars, "have a professional duty not to divulge the identity of confidential sources of information … even though in the present state of American law they run the risk of suffering an applicable penalty."

Like many of its disciplinary counterparts, the Tri-Council *Policy Statement* recognizes that:

> [E]thical and legal approaches to issues may lead to different conclusions. The law tends to compel obedience to behavioural norms. Ethics aims to promote high standards of behaviour through an awareness of values, which may develop with practice and which may have to accommodate choice and liability to err. Further, though ethical approaches cannot preempt the application of law, they may well affect its future development or deal with situations beyond the scope of the law.

The *Policy Statement* is unequivocal that researchers **must** comply with laws on competence (p. 2.9) and conform to applicable laws on use of human tissues for research purposes (p. 10.2). In both cases, the requirement is designed to protect research subjects and is thus consistent with the primary mandate of research ethics. But nowhere does it say that researchers must comply with a court order to divulge confidential information, something that would threaten the researcher's primary ethical directive and research mission.

The *Policy Statement* section on confidentiality and law says, "researchers should indicate to research subjects the extent of confidentiality that can be promised, and hence should be aware of the relevant law." This statement is dangerously ambiguous. It could be taken to imply that law absolutely specifies the ethical limit to confidentiality. We doubt that this is the correct interpretation, for it would mean that the *Policy Statement* directly contradicts many social science ethics codes. When it comes to conflicts between ethics and the law of confidentiality, these codes say that, in the last instant, ethics should prevail. We suggest the *Policy Statement* is consistent with this view and does not impose

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an absolute subjugation of research ethics to the law of confidentiality, for if it did, it would infringe academic freedom. Of course, if researchers follow their conscience and disobey a court order, they must accept the legal consequences because, as the Tri-Council recognizes, "ethical approaches cannot preempt the application of law."  

**Should Confidentiality Be Limited A Priori?**

In 1995 after Russel Ogden's appearance in Coroner's Court, the SFU research ethics committee insisted that researchers warn potential research subjects providing information about offences that, although confidentiality would be promised to the full extent of the law, a court or other public body might order disclosure of the information. The warning was said to be necessary for informed consent. The operating assumption was that researchers would give up the information if subpoenaed, since the committee argued that in lieu of statutory protection of research information, a subpoena effectively was the full extent of the law.

But if informed consent is the issue, the committee should have required that researchers declare their intentions should a court order them to disclose subject identities, or link information to a subject. Warning research subjects about the legal limits to confidentiality without declaring whether the researcher will defy a court order likely creates a huge problem in all areas of sensitive social research where the researcher knows some or all subject identities. The mention of the risk of court-ordered disclosure accentuates it out of all proportion. This is particularly problematic in research on subcultures where "ratting" has a special symbolic significance, including police, prison guards and criminal offenders, or where the research involves key individuals in corporations and government. This was recognized by those at the US Law Enforcement Assistance Administration (LEAA) in their own development of statutory privileges to protect criminological research, and in the issue of how prospective subjects should be informed about the statutory protections that would now exist:

The original draft regulations proposed that the individual be advised that the information provided would be immune from legal prosecution. Again, LEAA was persuaded by the researcher panel that such a notification might be inhibiting in nature since, in most circumstances, an individual would be unlikely to be concerned about such a situation and for him or her to be routinely advised of "legal process" considerations would create a fear that would not normally be present.

The regulations, therefore, leave to the discretion of the researcher whether to advise the individual regarding the immunity provisions. The immunity protection, as discussed later, would, of course, still be there, whether disclosed to the individual subject or not.

In the case of field research with offenders, the Simon Fraser University limited confidentiality consent statement was like a neon flashing sign saying, "don't participate

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79 An indictable conviction for contempt of court (CCC s. 127) with a penalty not exceeding two years.
in this research." The warning invited the subject to ask, "Will you rat on me?" and in the interest of informed consent, the researcher must give an answer. Ironically, in these circumstances, the subject's main concern is that the researcher will provide evidence to a prosecutor, when in fact the main risk of court-ordered disclosure in Canada is from an order that would aid the defence, not the prosecution.

The common law of privilege leaves researchers in a difficult situation. The courts make their determinations after the fact, on the basis of a concrete set of case facts presented to them. Researchers must make research decisions ahead of time, often on the basis of general and sometimes vague expectations about what will happen when the research is actually done, and then live with those decisions. Considerations of free and informed consent mean that, where the risk of court order is addressed in a consent statement, researchers must declare whether they will comply with a court order, defy it or, if they don't know what they will do, say so.82

The irony of all this is that when it comes to confidential research information orders to divulge the identity of research subjects or reveal their particular responses are extremely rare. Indeed, the only instance we have found of a North American court ordering disclosure of identified research data came in the case of Atlantic Sugar v. The United States which, as we noted above, arose because of the researchers' a priori limitation of confidentiality. Apparently, the "subjects" in this case were corporate entities answering a questionnaire; we do not know if any of them were harmed by the revelation. Beyond this, we have not discovered a case where a violation of research confidentiality harmed a subject.83

Against the minuscule risk of disclosure has to be weighed a lengthy and substantial tradition of research on sensitive topics that may no longer be possible if researchers limit confidentiality a priori. Taking criminal offenders as an example, Friedson summarizes the value of the research this way:

One can, of course, survey those who have been apprehended and conveniently incarcerated, but one could hardly use conventional survey methods to find as yet unapprehended offenders and get them to answer questions. And it is information about the deviance that goes on in the everyday world that is critical for adequate public knowledge and evaluation of the laws and policies of a given time, and their consequences. Such information, collected, analyzed, and reported independently of law-enforcement agencies, is precisely the information that is critical to informed public debate and to intelligent reform of previously acceptable laws or policies, and to counterbalance the self-protective tendencies of established governmental institutions.84

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82 Jackson and MacCrimmon (supra note 18) have objected to this strategy on the ground that it precludes a researcher complying with a court order in the event that it would be ethical to do so. Our point is that if handing over the information were the ethical course of action, we would hand it over without the court needing to order us to do so. The only reason a court would be put in the position of having to order us to disclose information is because we believe that handing it over would be the unethical thing to do. That is precisely why the court order would be necessary in the first place, and why we would not comply with it.

83 If any reader knows of such a case, we would appreciate it being brought to our attention.

To be valid, reliable, and ethical, research that involves subjects disclosing information that could do them serious harm requires an unlimited guarantee of confidentiality. Without this guarantee, who could trust the results? Without it, how could we fulfill our ethical obligation to protect research subjects? Consequently, the only way to protect research participants and do valid and reliable research of this kind is to give an unlimited guarantee of confidentiality, and hope that the courts agree that privilege is merited. If the courts do not agree, it will not change the promise the researcher made.

Grounds for Violating A Confidentiality Agreement

Of course, the duty to uphold a promise of confidentiality is not absolute. Sometimes the duty to prevent a greater harm to a third party could outweigh the ethical responsibility to prevent harm to a research subject. But this is still not a reason to limit confidentiality a priori. To clarify this point, we use the term "heinous discovery" to refer to the revelation of serious prospective harm, and identify situations where it would be appropriate to violate a pledge of confidentiality rather than limiting it from the outset.

Heinous discovery includes, but is not limited to, situations coming under the umbrella of "the public safety exception" in law. The most recent example of the public safety exception in Canada is the case of Smith v. Jones mentioned earlier. Defendant Jones revealed to psychiatrist Smith that he intended to serially kill Vancouver prostitutes. When the psychiatrist petitioned the court to divulge this information, Jones's lawyer, who had referred Jones to Smith for a pre-trial assessment, argued that disclosure would violate lawyer-client privilege. The Supreme Court decided that preventing a serious and specific threat to prostitutes could take precedence over the interests served by the privilege. The Court did not require the confidence to be violated in these circumstances, but viewed it as permissible to do so, given the higher ethic involved. If this kind of revelation occurred in a research setting with an undetected offender, the researcher thus would be faced with an ethical rather than a legal choice as to whether to violate confidentiality.

Another form of heinous discovery involves information that could prevent the conviction of an innocent person. This is akin to the "innocence at stake" exception to police-informer privilege. To prevent wrongful conviction of a third party on a serious offence, a researcher might well decide to violate confidentiality.

But here is the important point. Having recognized heinous discovery as a reason to violate confidentiality, does it make sense to limit it? Consider the result had psychiatrist Smith told Jones, "This conversation is completely confidential, unless you tell me that you're going to kill prostitutes when you're released, in which case I'll have to report you." With confidentiality limited thus, Jones surely never would have revealed his plans to Smith, would have been released after serving a sentence for assault, and may well have become a serial killer. Ironically, the a priori limitation of confidentiality to account

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86 We have never heard or read of this happening to a researcher.
for the reporting of serious prospective harm would produce its own apparently unethical resolution: the death of the victim or, in Jones's case, many victims.

Limiting confidentiality *a priori* does nothing to prevent the prospective harm. Instead, it creates the unethical situation of retaining one's ethical purity by donning blinkers that prevent one from seeing someone else's misfortune. Accordingly, we do not believe it makes sense to limit confidentiality to account for heinous discovery that the researcher cannot reasonably anticipate.

**Anticipated Heinous Discovery**

However, if the researcher can reasonably anticipate learning about serious prospective harm, as would be the case if we could study the attitudes and actions of persons who had committed murders for which other persons had been convicted, the research would be of doubtful validity if confidentiality was limited. In this instance, the researcher should give an unqualified guarantee of confidentiality and keep the pledge, or not do the research at all.\(^{87}\)

**Summary of the Wigmore Strategy**

On the basis of Canadian and US jurisprudence, designing research in anticipation of invoking the Wigmore criteria involves several fundamental tenets:

1. Researchers should secure ethics approval as part of demonstrating their research is consistent with the canons of their discipline, the Tri-Council *Policy Statement*, and is indeed a "research" project.

2. If confidentiality is essential to undertaking the proposed research project, the application submitted to the REB should explain why. The application then provides clear evidence that the provision of confidentiality was part of a well-considered research plan. Once in the field, researchers are advised to ask prospective subjects if they would participate in the research if they could be identified. A record should be made of the response — provided, of course, the record itself does not jeopardize confidentiality.\(^{88}\) Such a record would provide further evidence that confidentiality was/is essential to the researcher-subject relationship in that project.

3. On the basis of the researcher's experience, colleagues' experiences and the extant literature, consider the range of challenges to confidentiality that might reasonably be

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\(^{87}\) We would make a similar argument in the case of research on offences, such as child abuse, that one is required to report. The solution to the problems posed by mandatory reporting laws may well be addressed by use of privacy certificates.

\(^{88}\) We mean "record" broadly. For example, the researcher could note the response anonymously or with a pseudonym in contemporaneous fieldnotes, or have a verbatim record in an anonymized interview transcript.
anticipated and consider whether the benefits of doing the research outweigh the interests that might reasonably be represented in any challenge to confidentiality.

4. If convinced that the research is worth doing and cannot be done without a guarantee of confidentiality, ensure that an unambiguous promise to that effect is made, and that the promise is maintained.

In light of the Ogden case in Canada and the existing jurisprudence in the United States, it seems likely that, in most circumstances, the courts will maintain confidentiality of subject identities. At worst, they will use very restrictive disclosure orders to minimize the impact of disclosure on researchers, research subjects and the research enterprise.

Where To Next? The Tri-Council's Obligations

The possibility of court-ordered disclosure in Canada exists in theory because there is a gap between the researcher's ethical obligations to research subjects and the legal protections that exist. The most appropriate way to fill this gap would be for federal and provincial governments to develop "privacy certificates" similar to those available to researchers in the US.

"Privacy certificates" were first developed in the US in 1970 when it became clear that the federal government could not conduct research on drug addiction among returning Vietnam veterans unless confidentiality could be guaranteed. Privacy certificates are currently available through the National Institute of Justice (NIJ) and National Institutes of Health (NIH). NIJ awards certificates only for research it funds. The NIH certificates are not restricted to the research it funds, but all research in which confidentiality is deemed essential, including:

- sexual attitudes, preferences, or practices;
- the use of alcohol, drugs, or other addictive products;
- illegal conduct;
- subjects that could damage an individual's financial standing, employability, or reputation within the community;
- a patient's medical record, the disclosure of which could lead to social stigmatization or discrimination.
- an individual's psychological well being or mental health;
- genetics.

Although there are problems with a government agency controlling the issuing of privacy certificates — since doing so effectively places academic freedom in the hands of the

state — they offer impressive protections. For example, Department of Justice confidentiality certificates contain the following clause:

Research or statistical information identifiable to a private person shall be immune from legal process, and shall only be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative, or administrative proceeding with the written consent of the individual to whom the data pertains.90

Similar legislation could be developed in Canada. Indeed, the Policy Statement insists that:

Researchers enjoy, and should continue to enjoy, important freedoms and privileges. To secure the maximum benefits of research, society needs to ensure that researchers have certain freedoms. It is for this reason that researchers and their academic institutions uphold the principle of academic freedom and the independence of the higher education research community.91

One thing researchers in Canada do not enjoy is a legal privilege commensurate with their responsibility to protect research subjects and, in the process, uphold academic freedom. However, the Policy Statement recognizes that ethical approaches may affect the future development of law. In this spirit, we encourage the Tri-Council to initiate a campaign for legislation to create privacy certificates, or some equivalent, in Canada. And we urge all Canadian universities, faculty associations, disciplinary associations and the Canadian Association of University Teachers to support the Tri-Council in this endeavour.

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