

Who Do You Trust?
**Protecting Research Confidentiality
to the Extent Permitted by Law**

Ted Palys
SFU/Criminology



Who Do You Trust?

1994

- Researcher
- REB
- University Administration

Moving On at SFU

- Granting agencies affirm appropriateness of “Ethics First” and “Law First” approaches
- TCPS affirms the need to avoid institutional conflicts of interest
- Judge Steinberg chastizes SFU for its “hollow and timid” defense of academic freedom
- SFU President Blaney follows Blomley/Davis recommendations

Towards TCPS2

- SSHWC works to develop national consensus on privacy and confidentiality
 - Dealing with ethics and law
 - Stronger affirmation of confidentiality
 - “Ethics first” and “law first”
 - Confidentiality certificates
 - In the interim ... Wigmore
 - “No more Ogdens”

TCPS2: Ethics and Law

- The ethical duty of confidentiality refers to the obligation of an individual or organization to safeguard entrusted information. The ethical duty of confidentiality includes obligations to protect information from unauthorized access, use, disclosure, modification, loss or theft. Fulfilling the ethical duty of confidentiality is essential to the trust relationship between researcher and participant, and to the integrity of the research project.

TCPS2: Ethics and Law

- The ideal is to be both ethical *and* legal
- However, if the two conflict, TCPS2 acknowledges the right of researchers in the last instant to take an ethics-first or law-first approach:
 - Researchers shall maintain their promise of confidentiality to participants within the extent permitted by ethical principles and/or law. (p.58)*

TCPS2: “No More Ogdens”

- TCPS2 affirms even more strongly the view that confidentiality should be protected:

5.1 Ethical Duty of Confidentiality

Researchers shall safeguard information entrusted to them and not misuse or wrongfully disclose it. Institutions shall support their researchers in maintaining promises of confidentiality. (p.58)

INTERPOL
 INTERNATIONAL POLICE ORGANIZATION
 WANTED
 SUBJECT: LIKA ROCCO MAGNOZZA
 Date of birth: 1986
 Place of birth: Toronto, Ontario, Canada

Debate over interview material could be key to Lika Rocco Magnozza murder trial
 By [Name] on [Date]

2017 Magnozza interview at centre of court battle
 By [Name] on [Date]

Lika Magnozza murder trial: Confidentiality rights of a research subject under discussion
 By [Name] on [Date]

SUN NEWS
 MICHEL BOFFEN: ORA AGENCY
 CONFIDENTIAL: The Sun's Lika Magnozza trial coverage is CONFIDENTIAL and should not be disclosed to the public. The Sun's Lika Magnozza trial coverage is CONFIDENTIAL and should not be disclosed to the public.

CAUT Bulletin

uOttawa criminologists go to court to protect research confidentiality



This document will be taken down as soon as possible upon court to preserve their confidentiality. The University of Ottawa criminologists are going to court to protect the confidentiality of research records they obtained in 2007.

Rock to CAUT (from CAUT Bulletin)

“The University of Ottawa recognizes its role ... in safeguarding entrusted information. However, the University does not consider that its role extends to the payment of legal costs if researchers decide to challenge the seizure of research records in the context of criminal proceedings.”

– Letter from U of O president Allan Rock to CAUT executive director James Turk

CAUT Bulletin

REB members deplore uOttawa's refusal to defend confidentiality



Five members of the Research Ethics Board of the University of Ottawa who signed the letter to university president Allan Rock. Clockwise from bottom left: Christine Poiré, Social Sciences & Humanities Research Ethics Board; Elizabeth Chabot, Health Sciences & Human Resources Ethics Board; Victoria Lapointe, Health Sciences & Human Resources Ethics Board; Jean-François Gauthier, Health Sciences & Human Resources Ethics Board; & Christine Poiré, Health Sciences & Human Resources Ethics Board.

Twenty members of the University of Ottawa's research ethics boards have written to university president Allan Rock protesting the university's refusal to support fees of its members' previous legal efforts to protect the confidentiality of their research records.

Rock to REB

- “The University of Ottawa places the utmost importance on the integrity of the research conducted by its professors and the critical role confidentiality plays in maintaining that integrity. ... Professors Bruckert and Parent have the full support of the University of Ottawa in their proactive and responsible efforts to safeguard the confidentiality of this research. ... With respect to payment of their legal fees, the University of Ottawa did in fact cover some of the initial legal costs related to this case.”

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-36-006329-125

DATE: January 21, 2014

IN THE PRESENCE OF THE HONOURABLE SOPHIE BOURQUE, J.S.C.

DR. COLETTE PARENT
and
DR. CHRISTINE BRUCKERT
Petitioners
v.
HER MAJESTY THE QUEEN
Respondent
and
LUKA ROGOO MAGNOTTA
Mis en cause

JUDGMENT ON A CERTIORARI APPLICATION TO QUASH A SEARCH WARRANT

UAAU University Affairs
Affaires universitaires

March 5, 2014

Quebec ruling supports confidentiality of researchers' interviews

Court case shows that researchers must design their confidentiality protocols to conform to Canadian law.

Natalie Samson



Police return Luka Magnotta to Canada in June 2012 after his arrest in Berlin. Photo courtesy of a police handout.

A recent ruling by a Quebec superior court has major ramifications for researchers who offer confidentiality to people they interview for their research.

THE GLOBE AND MAIL



Researcher's taped interview with alleged killer Magnotta off-limits to police

SEAN FINE - JUSTICE WRITER
The Globe and Mail
Published Wednesday, Jan. 22 2014, 8:00 AM EST
Last updated Wednesday, Jan. 22 2014, 8:55 AM EST

A judge has blocked Montreal police investigating a brutal killing from gaining access to a university researcher's taped interview with the alleged killer, a decision that expands researchers' rights to collect confidential information, much as journalists do.

The case involves Luka Magnotta, a stripper and porn actor whose alleged killing and dismemberment of 33-year-old student Lin Jun of China made international headlines. Parts of Mr. Jun's body were mailed across Canada. In 2007, five years before Mr. Jun's killing, Mr. Magnotta participated in a study by two University of Ottawa professors, Colette Parent and Christine Bruckert, on the sociology of sex work. An undergraduate student did an audio interview with Mr. Magnotta, who was one of 60 study subjects, and after the alleged killer's picture surfaced in the media, the student contacted Montreal police.

BULLETIN

Court upholds researchers' right to protect confidential information



©The Globe and Mail. Photo by Sean Fine for The Globe and Mail. All rights reserved. The photograph shows two women, Dr. Colette Parent and Dr. Christine Bruckert, who were involved in a study with researcher Luka Magnotta. Researchers across Canada won a major victory when police efforts to seize confidential research records were quashed in a precedent-setting Quebec court decision last month.



How Did They Do It?

- By invoking a researcher-participant privilege
- Three sources of privilege
 - Statute-based
 - Class
 - Case-by-case

The Wigmore Criteria

1.

- the communications must originate in a *confidence* that they will not be disclosed.

Criterion 1: It's Confidential

Ogden

- Submitted his research for Ethics review
- Explained in his proposal why confidentiality was crucial to the validity of the research
- Made clear to participants that their interactions were confidential and he would maintain that guarantee no matter what

Bruckert/Parent

- Submitted research for ethics review
- Explained why confidentiality was crucial
- Training of assistants emphasized confidentiality
- "Confidentiality and anonymity will be respected at all times;" no limitations

The Wigmore Criteria

2.

- this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

Criterion 2: It's Essential

Ogden

- Asked participants whether they would participate if not confidential; all said "no"
- Noted criminologist Richard Ericson testifies such research could not be done otherwise
- Community health nurse testifies re costs to HIV/AIDS community

Bruckert/Parent

- Confidentiality an essential part of SSHRC funding, REB approval
- Noted criminologist John Lowman testifies research with such populations impossible to conduct without confidentiality
- Participants would suffer harms from disclosure

The Wigmore Criteria

3.

- the *relation* must be one which in the opinion of the community ought to be sedulously fostered.

Criterion 3: It's Valued

Ogden

- The academic/research community
- Community of institutions faced with responding to the issue of euthanasia and assisted suicide
- The community of persons suffering from terminal illnesses
- Society at large

Bruckert/Parent

- Researcher-participant relationship important to academy and society
- Protects academic freedom, which is essential in a free and democratic society
- Researchers accountable to their institutions, professional standards
- Kudos to TCPS2

The Wigmore Criteria

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.

Criterion 4: Balancing the Scales

Ogden

- Research would provide the world with critical information about an important social issue
- That information would not exist if it were not for the pledge of confidentiality
- Society's ability to gain from research would be hampered if researcher promises cannot be trusted

Bruckert/Parent

- Criminal activity per se not a problem
- Valid data could not be gathered with a clear pledge of confidentiality
- Psychiatrist testified information unlikely to be of value for NCR assessment
- No more than a fishing expedition by Crown/police

Ethics-first will

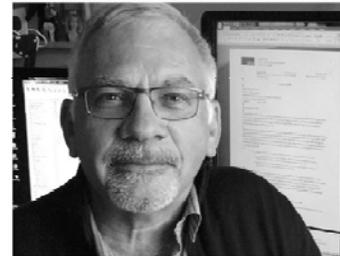
- pledge "strict confidentiality" or say "completely confidential"
- minimize risk through anonymization ASAP (if possible) and keeping secure in interim
- incorporate Wigmore when confidentiality is essential and disclosure would create harm
- defend to highest court possible

Law-first will

- pledge confidentiality "to full extent permitted by law"
- ensure information obtained will not be problematic if disclosed e.g., *MA v Ryan*
- incorporate Wigmore when confidentiality is essential and disclosure would create harm
- defend to highest possible court

CAUT **BULLETIN**

Complaint targets uOttawa for failure to defend confidentiality



Ontario: The Photo left is a copyright free work by the Canadian Association of Research on the University of Ottawa. Inset photo appears in reference to court proceedings.
A leading Canadian cosmologist has filed a complaint against the University of Ottawa for failing to fulfil its obligation to uphold federal granting council research policies.

U Ottawa to SRCR

- “Regarding Dr. Palys' allegation that the University of Ottawa has breached Article 5.1 of the TCPS 2, we do not believe this is accurate. Article 5.1 may state that institutions should support their researchers but it does not stipulate how this should be done. The article deals with the responsibility of researchers, not the responsibility of universities.”

U Ottawa to SRCR

- In reference to the TCPS2 sections on “Application” (of Article 5.1) and “Research Ethics and Law”:
 - “These passages set out important principles and practices relating to the researchers' duties to maintain confidentiality. What they clearly do not do is to direct institutions to provide financial support to researchers who are faced with a request to release research data to the authorities.”

U Ottawa to SRCR

- “I wish to stress that the University does support its researchers in their endeavours and absolutely strives to provide an environment where they can freely conduct their research. This is evident, for example, in the University's support of its Research Ethics Boards (REBs). The REBs have never been influenced or asked to deny approval of research done on sensitive topics and this type of research is not discouraged.”

SRCR to U Ottawa

- "In situations where safeguarding participant information may involve resisting an attempt to compel disclosure of confidential research information, institutional support consists of providing researchers with financial and other support to obtain the independent legal advice which makes that resistance possible or ensuring that such support is provided."

TCPS Interpretation

- "The researcher conducts research under the auspices of the institution. The REB is appointed by the institution as its vehicle for reviewing research projects to ensure their ethical acceptability. In granting its approval for a study, the REB engages the responsibility of the institution to support the researchers in their commitment to protect participant confidentiality."
- "Institutions should establish a policy that explains how they will provide that support. "

Next Steps?

- The granting agencies could require universities as part of their MOU to contribute to a "defence of research participants" fund
- Individual Universities could subscribe to an insurer such as CURIE to provide indemnification for researchers
- Is it time to continue discussion about the possible development of confidentiality certificates?