
One Step Forward, Two Steps Back: Draft TCPS-2's Assault on Academic Freedom

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Contents

| | |
|--|----|
| 1. Preamble | 2 |
| 2. One Step Forward | 3 |
| 2.1 Proportionality and Delegation..... | 3 |
| 3. Two Steps Back | 4 |
| 3.1 Ethics and Law: Draft TCPS-2's "Law of the Land" Doctrine Infringes Academic Freedom | 4 |
| 3.1.1 When Law and Ethics Lead to Different Conclusions | 4 |
| 3.1.2 When Legal Force is Applied | 8 |
| 3.1.3 And the Threat Is? | 10 |
| 3.1.4 <i>Caveat Emptor</i> Ethics | 11 |
| 3.1.5 Anticipating That Which Cannot be Anticipated | 11 |
| 3.2 Still Waiting for Checks and Balances on REB Authority..... | 17 |
| 3.2.1 Draft TCPS-2's "Welfare" Principle Entrenches Ethics Creep | 17 |
| 3.2.2 Why Do REBs Have Discretion to Differ But Researchers Do Not?..... | 18 |
| 3.2.3 REB Accountability | 19 |
| 4. Concluding Remarks..... | 20 |

1. Preamble

The first version of the *Tri Council Policy Statement: Ethical Conduct for Research Involving Humans*¹ (hereafter TCPS-1) created problems for many social science researchers who felt that:

- (i) Given the mostly uneventful history of ethics regulation of social science research² in Canada prior to 1998, TCPS-1 was a non-proportionate intervention to problems that, by and large, did not exist outside the biomedical realm;
- (ii) The ethical principles that TCPS-1 touted as “transcending disciplinary boundaries” did nothing of the sort; instead they accepted positivistic/biomedical/experimental assumptions as universal and imposed these on other forms of research that ask different kinds of research questions and seek a different kind of relationship with research participants;
- (iii) In the process, TCPS-1 gave license to REB members to impose the document’s putatively transcendent ethical principles on social science research paradigms where they do not apply;
- (iv) TCPS-1 gave REBs extensive control over researchers without appropriate checks and balances on their power, which some REBs abused; and
- (v) Because of the aforementioned, the centralized research ethics control system ushered in by TCPS-1 threatened academic freedom in various ways for reasons that had little to do with ethics.³

One might argue that because TCPS-1 was the federal government’s first attempt at creating a national system of ethics regulation, there were bound to be “bugs” that would need to be identified and addressed. The Interagency Advisory Panel on Research Ethics (PRE) and the Secretariat on Research Ethics (SRE) were aware of these difficulties and took steps to

¹ Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, Social Sciences and Humanities Research Council of Canada (1998). *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*. Online at <http://www.pre.ethics.gc.ca/english/policystatement/policystatement.cfm>

² The first formalized social science “codes” and “statements” of ethics in disciplines whose research involved human participants were produced in the 1960s and 1970s in such disciplines as psychology, sociology, anthropology and political science. University review committees for social science and humanities research involving human participants first appeared in Canada in the 1970s. In justifying the creation of TCPS-1 and Draft TCPS-2, neither the Granting Agencies nor PRE/SRE have ever identified any “scandalous” or unethical social science research in Canada that warranted intervention, or was believed symptomatic of some larger problem. In the case of social science research, the absence of any problem suggests that the system of ethics review already operating was adequate.

³ See, for example, Social Science and Humanities Research Ethics Working Committee (hereafter, SSHWC) (2004). *Giving Voice to the Spectrum*. Ottawa: PRE. Available online at <http://www.pre.ethics.gc.ca/english/workgroups/sshwc/SSHWCVoiceReportJune2004.pdf>. Note that one of the authors of the current document – Palys – was a member of SSHWC. The views expressed herein may or may not be shared by other members of that committee.

address them by creating various expert committees to identify problems and make recommendations. Such considerations suggest that it is really the *second* edition of the TCPS — the one produced after a decade of experience with the first — by which the federal government’s intervention into research ethics should be judged. If the *Draft 2nd Edition of the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*⁴ (hereafter “Draft TCPS-2,” or simply “the draft” or “the draft policy”) is to be that test, then there is cause for alarm: in the process of taking us one step forward, it takes us two steps back and poses a significant threat to academic freedom in Canada.

2. One Step Forward

2.1 Proportionality and Delegation

In relation to the social sciences, Draft TCPS-2 is an improvement over its predecessor in one major respect: It reaffirms the need for a proportional approach to ethics review. However, similar affirmations that appeared in TCPS-1⁵ resulted in the exact opposite: ethics creep.⁶ The mechanism of “delegated review” that replaces “expedited review” encourages REBs to reserve their attention for “the most ethically challenging or high-risk research” (lines 402-403) that warrants full REB discussion. But is that enough?

The draft policy opens with a discussion of types of research that do not require ethics review and offers many examples. TCPS-2 should do the same to explain what it means by “a proportional approach” and include examples of social science research that should be delegated or made routine - e.g., all minimal risk research - in order to avoid the paternalism and excessive micromanagement that TCPS-1 allowed, if not encouraged, in REB evaluation of social science research.

Some discussion of this issue has already appeared in the academic blogosphere. Schrag⁷ offers the following observations and suggestions regarding “proportionality:”

Unfortunately, [Draft TCPS-2] does little to ensure “a proportionate approach to ethics review” or even to consider what that means. There’s nothing in the statement to suggest that ethics boards are uniquely suited to uphold ethical standards, or that they are necessary for all kinds of human subjects research. So why must all research pass through an REB? While the idea of proportionality recurs throughout the document, when we get to its actual application (p. 63) we find only two levels of review: delegated REB review of minimal-risk research, and full REB review of everything else. A two-speed transmission is not very proportionate.

⁴ Interagency Advisory Panel on Research Ethics (2008). *Draft 2nd Edition of the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*. Ottawa: PRE/SRE. (Hereafter Draft TCPS-2). Online at http://www.pre.ethics.gc.ca/english/pdf/newsandevents/TCPS_Dec_4_en.pdf

⁵ Article 1.6 of TCPS-1 asserts, “The REB should adopt a proportionate approach based on the general principle that the more invasive the research, the greater should be the care in assessing the research.” (p.1.7)

⁶ Haggerty describes ethics creep as “... a dual process whereby the regulatory structure of the ethics bureaucracy is expanding outward, colonizing new groups, practices, and institutions, while at the same time intensifying the regulation of practices deemed to fall within its official ambit.” See Haggerty, K. D. (2004). Ethics creep: Governing social science research in the name of ethics. *Qualitative Sociology*, 27(4), 391-414.

⁷ See Schrag, Z. (22 January 2009). “Canada considers a new TCPS” at <http://www.institutionalreviewblog.com/2009/01/canada-considers-new-tcps.html>

Giving Voice to the Spectrum called for "different approaches to ethics review that would allow REB blanket approval of programs of research based on the overall ethics strategy of the researcher (or team of researchers), within specified parameters" as well as "exemptions from review for social science and humanities research that involves standard practice in the discipline involved."

Along these lines, a more proportionate system would allow for several levels of review, e.g.,

1. No review--for activities even a middle-schooler can do (e.g., conversations with family members)
2. Researcher certification--for activities where the key thing is to be sure the researcher is familiar with professional standards. The draft itself suggests that this is appropriate for much interview research.
3. Departmental committee review.
4. Delegated review.
5. Full board review.
6. Full board review plus outside consultation--for the riskiest research.

In addition to reducing REB workloads, the more decentralized process that Schrag recommends would help ensure that such research is being reviewed by persons who are familiar with the disciplinary standards and methods employed, and would be in the best position to judge whether proposals are indeed consistent with those standards. Schrag's suggestions would give real meaning to the notion of "proportional" review of social sciences and humanities research and would seem to do a better job of balancing the need for ethical scrutiny with the need to safeguard academic freedom. If PRE has a better way of achieving proportionality, it should introduce it in its second draft of TCPS-2, and it should facilitate a further round of feedback on Draft 2.

3. Two Steps Back

While the delegated review provisions, if implemented, hold potential for creating a more balanced approach to ethics review of social sciences and humanities research, other aspects of Draft TCPS-2 promise to make matters far worse.

3.1 Ethics and Law: Draft TCPS-2's "Law of the Land" Doctrine Infringes Academic Freedom

3.1.1 When Law and Ethics Lead to Different Conclusions

The relationship between ethics and law has been the subject of much controversy in Canada, and raises fundamental questions about the conflicts of interest that arise when governments are involved in the creation of ethics policies. Draft TCPS-2 recognizes the importance of ensuring there is space in Canada's research enterprise for critical research but appears not to realize that one object of such critical research may well be Canadian government policies, including law. Much critical research in disciplines such as criminology, political science, anthropology and sociology involves studying individuals and social groups whose sympathies, objectives and interests are sometimes at odds with the state. Any government-sponsored and

imposed ethics policy such as TCPS-2 must ensure not only that it does not discourage critical research, but also that its requirements do not allow it to become an instrument of state repression.⁸ Draft TCPS-2 makes several references to the importance of critical research, but then creates problems for this research in its treatment of potential conflicts between ethics and law. Because it implies that when there is a conflict law must always prevail, Draft TCPS-2 embodies a doctrine that represents a significant threat to academic freedom.

Different codes of research ethics have dealt with potential conflicts between ethics and law in several ways. In Criminology, there has been recognition that, without a certain degree of independence from the State, the discipline cannot properly evaluate criminal justice policy and provide advice about how policy makers and criminal justice personnel can do their jobs more effectively and fairly. Without the protection of confidentiality to prevent criminological research from being co-opted for law enforcement purposes, much field research on crime and policing would be impossible. Research that has the potential to be critical of criminal justice policy and personnel could become much more difficult to conduct. The confidentiality standard that many criminologists subscribe to is captured by the *Code of Ethics of the Academy of Criminal Justice Sciences*, which states that, “Confidential information provided by research participants should be treated as such by members of the Academy, even when this information enjoys no legal protection or privilege and legal force is applied” (Ethical Standard 19).⁹

The *Code of Ethics of the American Sociological Association* (ASA) used to incorporate the same sentence, but in its most recent edition removed the phrase “and legal force is applied.” Some researchers wondered whether this implied a lessening of sociology’s commitment to maintaining confidentiality.¹⁰ A response by the current and former Chairs of the ASA Committee on Professional Ethics¹¹ explained that, in that last instant when and if ethics and law part company, different researchers might choose to make their final allegiance to ethics or law. ASA’s intent was to formally recognize that freedom of choice.

The *Code of Ethics of the Canadian Psychological Association* is more explicit about the interaction of ethics and law, stating that the principle of “respect for society” requires that psychologists:

Familiarize themselves with the laws and regulations of the societies in which they work, especially those that are related to their activities as psychologists, and abide by them. If those

⁸ This seems to be recognized in Chapter 8 in the section on “Protection of research participants in authoritarian countries,” which states that, “When copies of field material are provided to participants in countries with authoritarian regimes, researchers should concern themselves with commitments concerning anonymity and confidentiality of participants to ensure that human rights of the participants and the ethical principles set out in this Policy are not compromised” (lines 3092-3102). While the authors of TCPS-2 may not consider Canada to be an “authoritarian regime,” criminologists and other researchers often deal with marginalized, stigmatized and deviant populations who do not share PRE’s perspective, have felt the effect of state and police power, and whose history, life and views need to be understood.

⁹ See the Academy of Criminal Justice Sciences code online at http://www.acjs.org/pubs/167_671_2922.cfm

¹⁰ See Lowman, J., and Palys, T.S. (1999). Confidentiality and the 1997 ASA *Code of Ethics*: A Query. *Footnotes*. (February) 27: p.5.

¹¹ Iutovich, J., Hoppe, S., Kennedy, J., and Levine, F. (1999). Confidentiality and the ASA *Code of Ethics*: A Response from COPE. *Footnotes* (February) 27: 5.

laws or regulations seriously conflict with the ethical principles contained herein, psychologists would do whatever they could to uphold the ethical principles. If upholding the ethical principles could result in serious personal consequences (e.g., jail or physical harm), decision for final action would be considered a matter of personal conscience (standard IV.17).¹²

TCPS-1 dealt with the situation by recognizing that:

[L]egal and ethical approaches to issues may lead to different conclusions. The law tends to compel obedience to behavioural norms. Ethics aim to promote high standards of behavior 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 the law, they may well affect its future development or deal with situations beyond the scope of the law. (p.i.8)

Because of references at other points in TCPS-1 to “limits” to confidentiality, SSHWC’s first national consultation found that the section was causing confusion about the policy’s position regarding the relationship between ethics and law. After an extensive national consultation, SSHWC recommended the following clarification of the wording:

If the laws or regulations that are applied to one’s research seriously conflict with the ethical principles contained in this policy statement, researchers will do whatever they can to uphold the ethical principles. Ethical approaches cannot preempt the application of the law, but they may well affect its future development or deal with situations beyond the scope of the law. Nonetheless, if upholding the ethical principles could result in serious personal consequences (e.g., jail or physical harm), decision for final action would be considered a matter of personal conscience. Researchers should consult with colleagues if faced with an apparent conflict between abiding by a law or regulation and following an ethical principle, unless in an emergency, and seek consensus as to the most ethical course of action and the most responsible, knowledgeable, effective, and respectful way to carry it out.¹³

This approach is rooted in the wording and concepts of the several disciplinary ethics codes noted above. It prioritizes compliance with ethical principles, as would seem appropriate in an *ethics* policy, while also respecting the academic freedom of “law of the land” researchers who prioritize compliance to law over their allegiance to ethics should ethics and law conflict with each other. SSHWC’s recommended wording also is consistent with the Granting Agencies Presidents’ 2000 ruling that researchers must be permitted the choice of conscience when ethics and law conflict.¹⁴

For reasons that are not explained, Draft TCPS-2 rejects SSHWC’s wording, preferring instead an approach that makes ethics absolutely subservient to law.

The draft section in Chapter 2 on ethics and law begins with the non-contentious advice that researchers should be “aware” of “applicable laws” (lines 587-588; line 592). It recognizes that “Legal rules and ethical principles are not always consistent” (line 598), which is a more tepid statement than TCPS-1’s recognition that, “legal and ethical approaches to issues may

¹² CPA (2000). *Canadian Code of Ethics for Psychologists* (Third Edition), p.30. Available online at <http://www.cpa.ca/cpsite/userfiles/Documents/Canadian%20Code%20of%20Ethics%20for%20Psycho.pdf>

¹³ See SSHWC (2008). *SSHWC Recommendations Regarding Privacy and Confidentiality*. Available online at http://pre.ethics.gc.ca/english/workgroups/sshwc/Privacy_Confidentiality.cfm

¹⁴ See <http://www.sfu.ca/~palys/TCPSFAQ.pdf>

lead to different conclusions” (p.i.8). Then, instead of recognizing that some researchers would uphold ethical principles even if that means violating law, Draft TCPS-2 says that researchers should “do their best to uphold ethical principles while complying with the law” (lines 601-602). Taken literally, this means that while researchers are expected to do their best to uphold ethics, they *must* comply with law. If implemented, this doctrine will violate the academic freedom of the many researchers who, like us, hold the opposite view: one *must* do what one believes to be ethical while doing one’s best to uphold law.

Draft TCPS-2 asserts elsewhere that it articulates “an agreed on set of principles” (line 34) and identifies “core principles that transcend disciplinary boundaries” (line 35). However, the resolution of potential conflicts between ethics and law is a clear example of an issue over which there is considerable controversy, with no single agreed upon position that transcends disciplines.¹⁵ Indeed, researchers *within* disciplines hold different views and several disciplinary ethics codes explicitly acknowledge that variability, which in itself should have alerted PRE to the fact that its law of the land resolution is not “an agreed on set of principles” and does not “transcend disciplinary boundaries.”

In an invited response to PRE’s law of the land approach¹⁶ we explained our various legal and ethical reasons for feeling ethically obliged to take a different approach to research confidentiality, one that places ethics above law in the unlikely event that the two should ever conflict.¹⁷ Even though we personally disagree with PRE’s law of the land approach - and from our perspective believe it to be unethical - we nonetheless recognize the academic freedom of researchers to follow that doctrine. In contrast, Draft TCPS-2 effectively outlaws the “ethics-first” approach that we asserted in opposition to PRE’s limited confidentiality logic.

By imposing a specific resolution to a highly controversial issue and denying researchers’ ability to make a choice of conscience, Draft TCPS-2’s law of the land doctrine infringes

¹⁵ For example, see Iutovich, J., Hoppe, S., Kennedy, J., and Levine, F. (1999). Confidentiality and the ASA Code of Ethics: A Response from COPE. *Footnotes* (February) 27: 5; Adler, P.A., and Adler, P. (2002). Do University Lawyers and the Police Define Research Values? In W.C. van den Hoonaard (Ed.) *Walking the Tightrope: Ethical Issues for Qualitative Researchers*. Toronto: University of Toronto Press, 34-42; Palys, T., and Lowman, J. (2002). Anticipating Law: Research Methods, Ethics and the Common Law of Privilege. *Sociological Methodology*, 32, 1-17; Lindgren, J. (2002). Anticipating Problems: Doing Social Science Research in the Shadow of the Law. *Sociological Methodology*, 32: 29-32; Stone, G. R. (2002). Above the Law: Research Methods, Ethics and the Law of Privilege. *Sociological Methodology*, 32: 19-27. Lowman, J., and Palys, T. (2003). Subject to the Law: Civil Disobedience, Research Ethics and the Law of Privilege. *Sociological Methodology*, 33(1), 381-389; Scarce, R. (2005). *Contempt of Court: A Scholar’s Battle for Free Speech from Behind Bars*. Lanham, MD: Altamira Press; Palys, T., and Lowman, J. (2006). Protecting Research Confidentiality: Towards a Research-Participant Shield Law. *Canadian Journal of Law and Society*, 21(1), 163-185; Piron, F. (2006). “Réponse à l’article ‘Protecting research confidentiality:’ towards a Research-Participant shield law”, de Ted Palys et John Lowman. *Canadian Journal of Law and Society*, 21(1), 187-196; Lowman, J., and Palys, T.S. (2006). The Ethics of Research Confidentiality: A Response to Piron. *Canadian Journal of Law and Society*, 21(1), 197-198.

¹⁶ Jones, D, and Interagency Advisory Panel on Research Ethics. (2007). Interface of Law and Ethics in Canadian Research Ethics Standards: An Advisory Opinion on Confidentiality, Its Limits, & Duties to Others. *McGill Health Law Publication*, 1, 101-115.

¹⁷ Lowman J. and Palys, T. (2007). “PRE’s Opinion on the Interface of Law and Ethics: The Law of the Land in All But Name” *McGill Health Law Journal* 1:117-122. Also see Lowman, J. and Palys, T. (2007). “Strict Confidentiality: An Alternative to PRE’s Limited Confidentiality Doctrine.” *Journal of Academic Ethics* 5: 163-177.

academic freedom and would even require some researchers to violate their disciplinary ethics code. It also violates its own dictum that:

It is equally important that ethics review be appropriate to the disciplines, fields of research and methodologies of the research being reviewed. This means that REBs must understand the discipline and methodology under review and be able to assess the research on its own terms (lines 175-178).

If PRE cannot tolerate an alternative approach that is consistent with disciplinary standards, what hope is there that REBs will respect the ethics-first perspective? PRE should explain why it rejected SSHWC's proposed wording and chose instead to try to impose the law of the land doctrine on the Canadian academic research community.

3.1.2 When Legal Force is Applied

The implications of TCPS-2's law of the land doctrine are most easily seen in relation to third party challenges to confidentiality, which is one area where "Legal rules and ethical principles are not always consistent."

Chapter 5 on Privacy and Confidentiality starts by asserting how strongly Canadians hold privacy rights, and argues that these are protected by Canada's *Charter of Rights and Freedoms*. The reference to a "duty" of confidentiality underscores the strength of the obligation. This would be the ideal point in the chapter for TCPS-2 to emphasize the importance of the research enterprise to our collective well-being and to make the point that much socially valuable research could not be conducted without respondents feeling secure that their participation in research will not come back to harm them in terms of their employability, reputation, eligibility for insurance benefits, exposure to criminal or civil proceedings, possible incarceration, and so on.

Instead of *strengthening* confidentiality by making as strong as possible a statement about its vital role in research, the remainder of Draft TCPS-2 Chapter Five proceeds to *undermine* confidentiality by cataloguing its putative limits. The problems begin with Article 5.1, which states that, "Researchers must maintain confidentiality of personal information about research participants, subject to any legal and ethical duties to disclose confidential information" (lines 1554-1556). This wholesale embracing of the law of the land perspective was confirmed as being the "correct" interpretation of Draft TCPS-2 by PRE member James Lavery at a meeting at UBC on February 2nd, 2009 discussing the draft policy.

Professor Lavery has been a proponent of this highly controversial position in his past debate with Russel Ogden over the appropriate approach to attempts by courts to obtain confidential information collected in research on assisted suicide. Professor Lavery has been quite open that he would give information to a court —on 2nd February he reaffirmed "I'm not going to jail." In contrast, Professor Ogden holds that he would not undertake any research unless he was prepared to offer an unlimited promise of confidentiality and, having made the promise, his ethical duty to maintain confidentiality would force him to disobey a court order, thereby risking imprisonment for contempt of court. However, while Professor Ogden recognizes Professor Lavery's academic freedom to follow the law of the land perspective, Draft TCPS-2 would infringe Professor Ogden's academic freedom by effectively "outlawing" his

ethics-first approach. If PRE's "First Principles" of "multi-disciplinarity and inclusiveness" and embracing a "diversity of approaches"¹⁸ are to be more than hollow catchphrases, one would expect every member of PRE, Professor Lavery included, to feel ethically obliged to champion Professor Ogden's academic freedom to pursue the ethics-first perspective, regardless of whether they personally follow the law of the land approach.

Instead of undermining confidentiality by stressing its limitations, TCPS-2 ought to reaffirm the importance of confidentiality and assert how much the integrity of research is based on protecting participants. One has to wonder what Canadian courts would make of Draft TCPS-2's limitations to confidentiality should a claim of research-participant privilege ever come before them, given that the limitations suggest that confidentiality is not really very important. It could make it very difficult for researchers to assert research-participant privilege on a case-by-case basis using the "Wigmore test,"¹⁹ which specifies the criteria the Supreme Court of Canada has recognized as being appropriate for evaluating claims of evidentiary privilege. An attorney for the party seeking a disclosure could produce as evidence Draft TCPS-2 Article 5.1 to establish that researchers limit confidentiality in all sorts of ways. Given these limitations, the attorney could argue that researchers' "duty" of confidentiality is not really a duty at all, in which case the courts should feel free to access whatever confidential research information they want.

In order to protect research participants, Draft TCPS-2 should stand up for their rights, not give them away.²⁰ A far superior approach to Draft TCPS-2's list of putative "limitations" is the Canadian Privacy Commissioner's position in a speech he gave concerning the application of the *Personal Information Protection and Electronic Documents Act (PIPEDA)* to health research in Canada. The Commissioner clearly understands the social value of research, and was prepared to allow access to personal/identifiable information for research purposes as long as researchers are prepared to accept the ethical obligations that go along with that privilege and adhere to an ethic of strict – i.e. unlimited – confidentiality:

All this liberal interpretation [to enable health research involving personal information and identifiable data] on my part comes with an absolutely inflexible requirement: the information used for health research must remain strictly within the confines of the research project and it must be used in a manner that cannot in any way harm the individual to whom it pertains.

Under no circumstances whatsoever can it find its way to the individual's employers, insurers, relatives or acquaintances, governmental or law enforcement authorities, marketers or any other third parties. And the individual must not be contacted as a result of this information by anyone

¹⁸ See <http://www.pre.ethics.gc.ca/English/aboutus/FirstPrinciples.cfm>

¹⁹ For a description of how Canadian researchers could – and in our opinion, should – use the Wigmore test to defend research confidentiality, see Jackson, M., and MacCrimmon, M. (1999). *Research Confidentiality and Academic Privilege: A Legal Opinion*. Online at <http://www.sfu.ca/~palys/JackMacOpinion.pdf>; Palys, T. and Lowman, J. (2000). "Ethical and Legal Strategies for Protecting Confidential Research Information." *Canadian Journal of Law and Society*, 15(1): 39-80; O'Neill, P. (2002). Good Intentions and Awkward Outcomes: Ethical Gatekeeping in Field Research. In W. van den Hoonaard (Ed.) *Walking the Tightrope: Ethical Issues for Qualitative Researchers*. Toronto: University of Toronto Press, 17-25.

²⁰ Bolas and Sundelson (1995) argue that is exactly what psychoanalysts and psychotherapists did in the United States. See Bolas, C., and Sundelson, D. (1995). *The New Informants: The Betrayal of Confidentiality in Psychoanalysis and Psychotherapy*. New Jersey: Jason Aronson.

other than his or her own physician, or other primary health care provider, as the case may be. I will regard any breach whatsoever of this condition as an extremely grave violation of the Act.²¹

It is disconcerting to realize that the Privacy Commissioner has a better understanding of the vital importance of confidentiality to research than does PRE.

3.1.3 And the Threat Is?

Draft TCPS-2's treatment of confidentiality is out of touch with actual Canadian research experience. In the social science and humanities, for example, a substantial proportion of research involves data gathered anonymously. Another substantial proportion deals with "identifiable personal information" that is de-identified as soon as possible through the severing of identifiers and/or creation of anonymized interview transcriptions. Yet another substantial proportion involves information that is personal but of no particular interest to anyone other than the researcher and participant. Even in that smaller proportion of studies where a source of sensitive information is identifiable, it still requires some third party to know of its existence and find it worth their while to assert a legal right to acquire it.

How common is it that third parties seek confidential research information of any kind, let alone that produced by social scientists? Of the hundreds of thousands of studies in Canada over the past few decades that collected personal information about one or more participants, we are aware of only one researcher who has ever received a subpoena from a third party seeking the disclosure of confidential research information, and he has received three. Three subpoenas in the history of all types of research in Canada.

How many times was the subpoenaed researcher ordered to disclose information? **Not one.** In the first case, which involved a subpoena issued by a Vancouver Coroner, the researcher invoked the Wigmore criteria to assert researcher-participant privilege on a case-by-case basis, and won. In the case of the second and third subpoenas issued more than a decade later – both involving the same charge of aiding and abetting a suicide,²² but issued a year apart as the case proceeded to trial – the Crown withdrew the subpoenas when it was clear that the researcher and his university would resist the threat to research participants.

In the light of this record and what Draft TCPS-2 says about the importance of considering the probability of a harm occurring,²³ why does the draft policy sell research participants and research confidentiality short for a "risk" that has never materialized in hundreds of thousands of research projects? This anticipation of minute risk is precisely the sort of problem that SSHWC documented when it sought feedback about problems with REBs under TCPS-1, i.e., REBs forcing researchers to anticipate and act on minuscule risks that reside in the minds of REB members, but not in the real world. Ironically, because its numerous limitations

²¹ Radwanski, G. (2003). *Research ethics board* (speech). Online at http://www.privcom.gc.ca/speech/2003/02_05_a_030507_e.asp

²² The researcher was not the one charged. He observed the trial as part of his research. The Crown knew of his research and hoped he might shed some light on the case. Although both subpoenas were eventually withdrawn, the mere issuance of the subpoenas had an adverse effect on the research because, as a prospective witness, he was not permitted to listen to the testimony of other witnesses.

²³ For example, at lines 439-441 Draft TCPS-2 states, "An explanation of "risk" should clarify risk as the combination of the probability of harm and the magnitude of harm."

on confidentiality could provide evidence that confidentiality is not really that important to research, TCPS-2 could be the biggest threat to the defence of research confidentiality in a court room if the draft policy's language is adopted.

Given the historical record and the nature of social science research, the pledge that social science researchers should make most of the time is simply that the information participants provide will be kept "strictly confidential," period. In that small proportion of projects where: (a) the information being obtained is sensitive and could harm the participant if disclosed; (b) the sources of the information are identifiable and will remain that way; and (c) there is some specific scenario where a lawful threat to confidentiality is likely to be raised, then and only then should researchers be required to articulate any legal and/or ethical limitations they might impose on their pledge, assuming they make any.

3.1.4 *Caveat Emptor Ethics*

The TCPS should vigorously assert the rights of participants and the social benefits of research, and in several places Draft TCPS-2 does just that. However, one is left wondering whether the real effect of Draft TCPS-2's limitations on confidentiality will be to facilitate a "*caveat emptor*" approach that protects researchers *from* research participants should a legal problem arise rather than protecting research participants from that problem.

Draft TCPS-2's limitations on confidentiality would allow researchers and universities to evade the responsibility of protecting research participants by saying: "Sorry, but we told you that confidentiality is limited, so don't complain to us about how our release of your information has harmed you." Draft TCPS-2 allows and even encourages such unethical tactics.



3.1.5 *Anticipating That Which Cannot be Anticipated*

Another situation in which Draft TCPS-2 imposes limitations on research confidentiality appears in Chapter 3 "Free and Informed Consent." The draft policy breaks new ground, albeit in a very confusing way, by attempting to guide researchers through the ethical issues that arise when researchers make "incidental findings ... that may have important psychological, social, health-related or other implications for the participant, but they are not the focus of the research itself" (lines 890-895). The implication is that if the "events" relate to the focus of the research, then the researcher can anticipate them. However, given that incidental findings concern "unanticipated discoveries" (line 891) that are "not the focus of the research itself" (line 895),

Draft TCPS-2 sets researchers an impossible task by requiring them to anticipate the unanticipated by requiring them to inform participants what they will do if they make incidental findings.

Draft TCPS-2 provides several examples of incidental discoveries, but these serve only to create further confusion about the ethical issues involved. The example of the “incidental” discovery of child abuse is problematic not only because of the ethical dilemma of how to deal with such information — a matter on which researchers disagree²⁴ — but also because the information received could bestow an obligation on the researcher under laws requiring the reporting of children in need of protection. Given that the researcher’s reaction might be very different if the abuse was in the past or in the present, its nature, etc., what exactly are they expected to tell the participant?

How High the Bar?

A further problem with the section on incidental findings is that it gives no indication of the degree of seriousness that might justify a researcher limiting or violating a guarantee of confidentiality. In *Smith v Jones*,²⁵ the Supreme Court of Canada established a test for clarifying the circumstances in which it is permissible for a lawyer to violate a promise of confidentiality to a client. Because lawyer-client privilege is, according to the Supreme Court, the “highest privilege” recognized by the courts, “By necessary implication, if a public safety exception applies to solicitor-client privilege, it applies to all classifications of privileges and duties of confidentiality.”²⁶ But, in the research realm, who should decide where to set that bar? Can it be set lower for a researcher’s pledge of confidentiality than for a lawyer’s? Because of the fundamental importance of confidentiality to certain types of research, and because of the social value of research, we strongly believe that it should not. Indeed, in some instances, the bar should be set higher.

Draft TCPS-2 lets researchers set the bar for reporting anywhere, and seems to allow them to do anything once the decision to report an incidental finding has been made. It ignores the responsibilities that go along with having a “duty” of confidentiality and instead confirms informed consent as the only principle that matters, thereby further inviting and endorsing a *caveat emptor* ethic. In contrast, for lawyers, the Supreme Court ruled that:

There are three factors to be considered: First, is there a clear risk to an identifiable person or group of persons? Second, is there a risk of serious bodily harm or death? Third, is the danger imminent? Clearly if the risk is imminent, the danger is serious.

These factors will often overlap and vary in their importance and significance. The weight to be attached to each will vary with the circumstances presented by each case, but they all must be considered. As well, each factor is composed of various aspects, and, like the factors

²⁴ For an alternative to the approach taken in Draft TCPS-2 see: Palys, T. and Lowman, J. (2000) “Ethical and Legal Strategies for Protecting Confidential Research Information.” *Canadian Journal of Law and Society*, 15(1): 39-80; and Lowman, J. and Palys, T. (2007) “Strict Confidentiality: An Alternative to PRE’s Limited Confidentiality Doctrine.” *Journal of Academic Ethics* 5: 163-177.

²⁵ *Smith v. Jones*, [1999] 1 S.C.R. 455. Online at <http://scc.lexum.umontreal.ca/en/1999/1999rcs1-455/1999rcs1-455.html>

²⁶ *Ibid.*, at par.45.

themselves, these aspects may overlap and the weight to be given to them will vary depending on the circumstances of each case. Yet as a general rule, if the privilege is to be set aside the court must find that there is an imminent risk of serious bodily harm or death to an identifiable person or group.²⁷

Further, if a decision to disclose is made, the Court reminds us that choices have to be made about exactly what information to disclose and to whom given that the person holding the confidential information has enduring obligations to ensure that any disclosure is minimal and adversely affects the rights of the owner of the information as little as possible.

Draft TCPS-2 says nothing about what a researcher should do if they make incidental findings that are not related to their research, but nevertheless come to light only as a result of a participant's involvement in the research. Surely if the finding is not even part of the research, then it is not protected by the researcher's guarantee of confidentiality in the first place. By way of analogy, a lawyer's guarantee of confidentiality to a client does not cover the entire corpus of their interactions, but only the case at hand.

Opening a Second Door to Caveat Emptor Ethics

Article 3.4 of Draft TCPS-2 requires a researcher to (a) "develop a plan for handling incidental findings ... and submit their plan to the research ethics board" and (b) "Advise potential participants of the plan for handling incidental findings in order to obtain free and informed consent" (lines 904-908). The draft continues, "...social science researchers embarking on questions of a personal nature should inform prospective participants of the legal obligations they are under to reveal information concerning certain types of abuse" (lines 914-916). Why should they be forced to limit confidentiality this way in situations where the personal information has nothing to do with "abuse?" And of course abuse is not the only circumstance in which Draft TCPS-2 envisions potential "incidental findings" and disclosures. Instead of protecting research confidentiality by severely restricting the circumstances in which disclosure might occur, PRE opens a second door to the *caveat emptor* approach by allowing researchers to limit confidentiality in very broad ways as long as they warn research participants about the limitations in the process of acquiring informed consent.

REBs and the Infinite Hypothetical

By giving the impression that there is only one way to approach the ethical problems that may be posed by incidental findings, and by citing an example that would require all researchers who ask "questions of a personal nature" to include warnings regarding legal reporting obligations – which are, after all, only one type of possible "incidental finding" – the draft policy also condones REB abuse of power by encouraging "what if" scenarios that REBs have sometimes forced researchers to consider regardless of the degree of risk involved. SSHWC's *Giving Voice to the Spectrum*²⁸ revealed that this is one of the ways that REBs impeded field research under TCPS-1. In its current form, Draft TCPS-2 likely will cause even greater problems for many social scientists as they negotiate their way through the REB review process.

²⁷ *Ibid* at par. 77-78.

²⁸ SSHWC (2004), *supra* 3.

For example, consider what could happen if a Muslim student submitted an application to an REB to interview other Muslim students about their encounters with non-Muslims in Canada. Can the REB argue that these university-age Muslims fit the demographic profile for possible terrorist activity? Can they require the student to put in a caution that, if her subjects tell her anything about terrorist involvements, she will feel obliged to report this to an authority? Criminologists at SFU sometimes encountered precisely this kind of problem when REB members, none of whom had any experience doing criminological research, sometimes brought outlandish stereotypes to the review process.

TCPS-1 opened the door to REB abuse of power, with no checks or balances other than the appeal process. Through its open-ended definitions of “welfare” (see below) and requirements regarding “incidental findings,” Draft TCPS-2 opens the door wider by offering rogue REBs even greater discretion, with no corresponding mechanism of accountability.

TCPS-2 Should Respect and Encourage Ethical Diversity

Draft TCPS-2’s imposition of a requirement to inform participants of any prospective reporting of incidental findings imposes an ethical choice about which reasonable persons might disagree, given the ethical conundrum it involves. Take, for example, the possibility of “incidentally finding” child abuse in research about coaching children’s sports. At the time of securing consent, the draft policy requires a researcher to say something like the following to each coach: “Even though my research is about coaching and I will treat what you say as confidential, if you tell me about situations where you abuse children, I will have to report you.”

Notwithstanding the way this approach appears to violate the principle of respect for participants — it treats all persons who have any contact with children as possible abusers — the ironic ethical consequence of treating informed consent as an absolute value rather than balancing it with other ethical principles is the harm-perpetuating consequence of Draft TCPS-2’s imposed limitation on confidentiality. If the researcher declares that he/she will report all incidents of child abuse, the chances are that any child abuser would not divulge that piece of information, with the result that the abuse continues. As abuse is not the focus of the research, an alternative ethical approach would be to say nothing. That way the researcher maintains respect for the participants’ integrity unless there is some concrete reason to do otherwise and would allow him/her to deal with the ethical dilemma of “incidental discovery” of child abuse at the point of discovering it unwittingly. Why is Draft TCPS-2 prohibiting this approach?

One complaint SSHWC heard during its consultations with social science and humanities researchers across the country involved the extent to which some REBs engaged in research micromanagement and would impose their own “right answers” in situations where the researcher had proposed another resolution that was also consistent with policy. If PRE imposes its preferred ethical solutions on the Canadian research community instead of recognizing and allowing for variations of ethical opinion, it is repeating the problem instead of dealing with it. With PRE setting the precedent, we should not be surprised when some REBs do the same. There need to be checks and balances not just on REBs, but on PRE, too, in order to prevent further inroads of the “ethics-czar” complex that continues to bedevil the application of TCPS-1.

At least REBs have to justify their decisions. By contrast, Draft TCPS-2 too often imposes “right answers” that do not reflect the diversity of the research enterprise, and offers no explanation for its recommended changes. To facilitate feedback, PRE should have provided an annotated draft. Because of its failure to do so the first time around, PRE should produce an annotated second draft TCPS-2 explaining why it is recommending certain changes and inviting a second round of commentary.

How Common Are “Incidental Findings” in the Social Sciences?

Then there is the matter of the likelihood of incidental findings being made. Can PRE provide any examples of incidental findings in social science research that resulted in a researcher violating confidentiality? If it cannot, why does Draft TCPS-2 not walk its own talk by considering the degree of risk that is driving its approach to incidental findings?

Is it Ethical for PRE to Deny Responsibility for the Disclosures it Requires?

In view of the requirements it is imposing, the denial of responsibility that appears at the end of the Draft TCPS-2 section on the application of Article 3.4 is unfair and legally dubious:

Incidental findings should be considered part of the obligation of ongoing disclosure to participants of information that may be germane to their continued participation in the research. The withholding or transmission of such information, particularly when it may have implications for the health or safety of the participant, may have legal consequences for the researcher. These are outside the scope of this Policy. (lines 924-929)

Is it ethical for PRE to wash its hands of responsibility for what happens when researchers follow the requirements that Draft TCPS-2 imposes? A duty of confidentiality imposes a heavy burden that is not easily discharged. Draft TCPS-2 is correct in saying that there are potential legal consequences for researchers who engage in “incidental reporting” because such reporting could be construed as violating the researcher’s fiduciary duty to the participant notwithstanding the *caveat emptor* approach that Draft TCPS-2 promotes.

An analogous case occurred in Georgia where a psychiatrist who was conducting an employment interview with a police officer felt he was obliged to tell the police officer’s superior about fantasies the officer had expressed of killing the Chief of Police. In the end it seems the fantasies were no more than fantasies, but the officer’s career was ruined; he was initially demoted to the dog pound and eventually fired. He successfully sued the psychiatrist and was awarded \$287,000 for damages.²⁹

A similar case³⁰ occurred in Canada at Memorial University of Newfoundland. A Professor of Social Work read a student’s essay that dealt with child abuse. The essay included what appeared to be the student’s autobiographical story of her own abuse of a child, which the Professor took to be a “cry for help.” In fact, the story was drawn from a textbook, but the student neglected to provide a footnote in the text even though the book was included in the list of references. Not aware that a footnote was missing, the professor believed that under

²⁹ The story is cited in SSHWC (2006). *Reconsidering Privacy and Confidentiality in the TCPS*. Online at http://www.pre.ethics.gc.ca/english/pdf/sshwc_printpackage_eng.pdf (see p.23).

³⁰ *Young v. Bella*, [2006] 1 S.C.R. 108. Online at <http://csc.lexum.umontreal.ca/en/2006/2006scc3/2006scc3.html>

provincial child welfare law she was required to send a “suspected ill-treatment” report to Child Protection Services (CPS). As a result of the report, the student’s name was placed in the Province’s Child Abuse Registry pending further investigation.

More than two years after the report CPS sought a meeting with the student, which was the first time she learned that the professor had reported her as a possible child abuser. As soon as CPS investigated the suspected abuse, the student produced the book from which the account came, at which point CPS “unfounded” the suspected ill-treatment report. However, it was a pyrrhic victory for the student, whose social work career prospects and reputation had been ruined behind her back as a result of the report. The student sued the Professor and University for negligence.

In upholding the jury’s award of \$839,400 to the student for damages, the Supreme Court of Canada emphasized the duty of care that a professor holds to a student, and agreed that the professor and university had acted negligently. A professor’s duty to a research participant is, surely, just as important, and should not easily be given away.

One notable element of the Georgia case is that the erroneous judgment was made by a psychiatrist, a person whose profession involves undergoing many years of training to be able to make judgments about a patient’s dangerousness, propensity for violence, and the like. Similarly, the Memorial University case involved experts in social work who were trained in the discovery of abuse. If trained professionals can make such completely erroneous judgments, why does Draft TCPS-2 require unqualified persons to make the same kind of judgments nonetheless, and then bear the entire responsibility for the outcome of any report they might make when it was TCPS-2 that compelled them to make the report in the first place?

While the broad “incidental findings” reporting requirement and accompanying violation of confidentiality outlined in Draft TCPS-2 may be consistent with standards in some medical and social work professions, it is *inconsistent* with professional standards across a wide variety of other research disciplines, and creates a much broader reporting requirement than any found in common law or statute. If anything, Draft TCPS-2’s blanket requirement for researchers to articulate their strategies for disclosure would appear inconsistent with the Supreme Court’s decision in *Smith v Jones*, given its clear message that when a duty of confidentiality prevails, any decisions to disclose should be made only in exceptional circumstances, after being considered on a case-by-case basis, and preferably in collaboration with colleagues when time permits. Any disclosure should be only to the minimal extent necessary to deal with or prevent any harm, and should be done with minimal infringement of the participant’s rights. SSHWC’s recommendations on this issue³¹ are consistent with this legal precedent. In keeping with its commitment to the principles of transparency, openness and accountability, PRE should explain why it spurned SSHWC’s advice and chose instead to impose these sweeping reporting requirements and limitations to confidentiality that do not transcend disciplinary boundaries, and instead would impose what appear to be practitioner-devised standards from the health sciences on the entire research community.

³¹ See SSHWC (2008), *supra* 13, particularly section 4.1.3.

If TCPS-2 creates a duty to report incidental discoveries, the granting councils imposing that policy ought to protect researchers from any legal consequences flowing from their compliance with that requirement.

3.2 Still Waiting for Checks and Balances on REB Authority

The second step backward that characterizes Draft TCPS-2 involves its failure to deal effectively with ethics creep and incidents involving REB abuse of power. SSHWC's *Giving Voice to the Spectrum*³² reported many examples of social science researchers facing REB ethics creep and experiencing infringements of academic freedom as a result of REB activity that had little or nothing to do with ethics. Why does Draft TCPS-2 spend considerable time outlining putative limitations to confidentiality for threats that have never occurred while doing nothing about REB policy violations and infringement of academic freedom that SSHWC documented?

Giving Voice included an analysis of the sources of these problems and made various recommendations about how to improve TCPS-1 to provide a check on REB power in those instances where an REB either violated the policy statement, or exceeded its authority and engaged in what SSHWC referred to as “epistemological imperialism,” i.e., REBs imposing methodological and/or ethical “right answers” in areas that have no single “right answer” — as is very often the case in Canada’s methodologically and ideologically diverse social science and humanities research community — and on which equally competent and ethical researchers might differ. As SSHWC suggested:

The TCPS should more explicitly affirm the necessity of academic freedom for a healthy research enterprise; remove reference to “responsibilities” that do not bear directly on the task of ethics review; state that it is unethical for REB members to infringe academic freedom; and indicate that REB decisions can be grieved using whatever mechanisms exist at the researcher’s institution, when and if an REB strays beyond its mandated domain.³³

Draft TCPS-2 ignores all of these alternatives. The phrases “academic freedom” and “freedom of inquiry” appear zero and one time respectively (the latter at line 295), while REB mandates are expanded. Below is a partial review of elements of Draft TCPS-2 that promise to make matters worse for social science researchers instead of improving them.

3.2.1 Draft TCPS-2’s “Welfare” Principle Entrenches Ethics Creep

Traditionally the purpose of “research ethics” has been to protect the research participant. Draft TCPS-2 expands this mandate to “the full range of concerns that form the basis of an individual’s decisions.” Draft TCPS-2 defines “Welfare” to involve:

... all concerns regarding the individual’s physical, social, economic and cultural environments, including the welfare of those who are important to the participant. One key aim of this Policy is not only to safeguard the well-being of the individual research participant, but to do so in a way that preserves and respects the broader values with which that individual identifies (lines 59-64).

This inflated definition of “welfare” appears again in Chapter 2 with the statement that, “Research in certain disciplines, such as epidemiology, genetics, sociology or cultural

³² SSHWC (2004), *supra* 3.

³³ *Ibid*, p.19.

anthropology, may present risks that go beyond the individual and may involve the interests of communities, societies or other defined groups” (lines 444-447).

One of the main criticisms of TCPS-1 was the extent to which it promoted “ethics creep,” i.e., the expansion of bureaucratic surveillance and regulation into areas not intended by the policy. Why would Draft TCPS-2 now legitimize this micromanagement by broadening the concept of “welfare” to include not only the individual research participant but also everything of concern in that person’s life world? It would appear that researchers are now supposed to consider participants, their families, their work places, their political affiliations, their communities and any other matters “regarding the individual’s physical, social, economic and cultural environments” an REB deems relevant. Such an open-ended construction invites REBs to intervene in research and impose the personal ethics and preferred epistemological positions of their members. It also may spell the end to critical research unless TCPS-2 very explicitly extols the value of such research in the process of explaining when the concept of “welfare” applies.

The Draft TCPS-2 concept of “welfare” is another example of taking what might be a reasonable principle in one area of research without considering whether it “transcends disciplinary boundaries.” Draft TCPS-2’s expanded conception of “welfare” may be reasonable in two contexts, both of which are noted as examples in the draft policy: (1) genetic research where the knowledge the researcher gains about, say, genetic propensities for disease has direct implications for the person’s family members; and (2) some research involving Indigenous peoples, where considerations of collective rights may be relevant to how the researcher proceeds.

But do these same considerations apply to the vast majority of research projects? Do they apply to the scores of survey-based studies that are conducted by social scientists of all stripes? Do they apply to the interview-based studies a criminologist might conduct with judges, police officers or prisoners? Concern for the welfare of *research participants* is a core ethical principle that transcends disciplinary boundaries. Concerns “regarding the individual’s physical, social, economic and cultural environments, including the welfare of those who are important to the participant” (lines 60-61) are *not* core principles, do not “transcend disciplinary boundaries,” and should be discussed only in those chapters where they are clearly relevant, e.g., in chapter 9 in relation to research involving Indigenous peoples and in chapter 13 in relation to human genetic research. To make this broad concept of welfare a core principle is to invite REB caprice in deciding when and how these considerations should be invoked.

3.2.2 Why Do REBs Have Discretion to Differ But Researchers Do Not?

Draft TCPS-2 does not clarify whether the role of the REB is to ensure that researchers have reached reasoned ethical decisions, or whether it is to impose the REB’s preferred solution to a particular ethical question. Absent this clarification, it encourages the latter.

Given Draft TCPS-2’s recognition that ethics are based on values that vary, it would be a violation of academic freedom and professional standards for REBs to impose their interpretation of what is “ethical” in a given situation on a researcher who has given due

consideration to the ethical principles involved and, while still operating within the spirit of those principles, has chosen a different course. Considerations of academic freedom must mean that REBs are restricted to the former function and not given license to pursue the latter. However, towards the end of “Guide to the Policy,” Draft TCPS-2 states that REBs may differ because of the discretion they exercise in the interpretation of the policy’s guidelines (lines 185-193). This creates a blatant double standard that offends the principle of fairness to which Draft TCPS-2 otherwise aspires. Why is there no commensurate recognition that researchers’ ethical approaches also may differ?

If Draft TCPS-2 is to ensure that REBs respect academic freedom, it should acknowledge that variability among researchers is at least as likely as variability among REBs. The role of REBs ought not to be to impose “ethical right answers,” but to ask whether the resolution the researcher proposes is consistent with the policy’s ethical principles and disciplinary standards. As long as a researcher respects disciplinary standards and operates within the broad parameters outlined in TCPS-2 – assuming Draft TCPS-2’s excesses are reined in so that the principles and standards that remain really do “transcend disciplinary boundaries” — an REB should not have the power to impose its preferred ethical solution on researchers. TCPS-2 must model that restraint; it should respect academic freedom by recognizing that there is more than one “right answer” to some ethical questions instead of micromanaging research ethics by imposing PRE’s version of “ethical right answers” — as it does with respect to the ethics and law controversy and its approach to “incidental findings.” If TCPS-2 imposes PRE’s preferred solutions to these difficult ethical problems, especially when those solutions do not “transcend disciplinary boundaries,” it will give REBs even greater license to infringe academic freedom than some already have.

3.2.3 REB Accountability

The principles established in Chapter 6 regarding REB Governance are, for the most part, reasonable: freedom from institutional conflict of interest; qualified members; no member conflicts of interest. However, TCPS-1 articulated these same principles. And yet, in at least one post secondary institution at the time of writing, the President still appoints the REB Chair and the Vice-President of Research still attends REB meetings as a non-voting member. A researcher at the institution in question has drawn attention to these violations of TCPS-1’s institutional conflict of interest provisions; nothing has been done. It seems those who have power are reluctant to relinquish it, and do not like the basis and exercise of their authority being questioned.

At SFU, past REBs have made decisions about qualitative research even though no Board member — let alone the two required by TCPS-1 — was qualified to evaluate it. In the case of one application, although one of the two community REB members was a former politician who had engaged in a widely reported disagreement with one of the applicants over a certain aspect of criminal justice policy that she had instigated, that member nevertheless participated in the evaluation of the proposal to conduct research that might produce results that would discredit that policy, despite the researcher objecting that the REB member was in a conflict. The REB then held up the research for eight months without providing any specific reasons as required by policy.

The inventory of researcher concerns compiled by SSHWC in *Giving Voice to the Spectrum*³⁴ suggests that these are not isolated situations. Unfortunately, TCPS-1 did not provide any mechanism for researchers to seek redress in these circumstances. Short of the appeal mechanism, it provided no mechanism for holding REBs accountable for abuses of their power.

Similarly, Draft TCPS-2 provides no accountability mechanism beyond the appeal procedure outlined in Chapter 6. The appeal committee's options are either: (a) to deny the appeal; or (b) to return the application to the REB that denied it in the first place. This process offends the principle of fairness that should characterize ethics review because the original REB is in an obvious conflict of interest.

The proposed appeal process also is highly inequitable: an REB can say "no" in five minutes, while the appeal process can take a year or more,³⁵ during which time the REB continues to function — and may continue to contravene policy — while the researcher is unable to proceed. Even when the outcome favours the researcher, which it has in every case we have observed or in which we have been involved at our university, the general effect on researchers is for them to avoid controversial areas of research because of the impediments that an REB can create. If PRE values "multidisciplinarity and inclusiveness" and embraces a "diversity of approaches" as its "First Principles"³⁶ affirm, it will see this as a tremendous loss not only to the research enterprise, but to the people of Canada who benefit from the insights and understanding that research provides. There needs to be some kind of mechanism short of the appeal process to hold an REB accountable when a researcher alleges that an REB is violating policy.

4. Concluding Remarks

This submission expresses concern about the manner in which Draft TCPS-2 imposes principles that do *not* "transcend disciplinary boundaries." Instead, Draft TCPS-2's ethical imperialism infringes academic freedom by absolutely subjugating ethics to law, institutionalizes opportunities for REB micromanagement and ethics creep, and fails to provide any checks and balances on REB power, notwithstanding SSHWC's documentation of abuse of this power by various REBs across Canada.

³⁴ *Ibid.*

³⁵ We have been involved in several appeals and have observed several other situations where researchers have complained about their treatment by an REB. In each of the formal appeals, the REB was judged to have acted inappropriately – being improperly constituted; not following policy; ignoring conflicts of interest of REB members. However, in relation to our own research, we won the battle but lost the war. Although our appeal of the REB decision to stop our research was ultimately successful, the process took 18 months by which time the field research opportunity that spurred the proposal had vanished. The research was never carried out. In the case of a student's Master's Degree research, the appeal process took 8 months. The university paid "damages" to the student by waiving two semesters of tuition fees, but this hardly compensated the real impact of the delay on the student's personal life and career.

³⁶ *Supra* 18.

Instead of protecting personal information and asserting the rights of research participants to privacy and confidentiality, Draft TCPS-2 spends more time detailing all the ways in which a research participant's privacy rights can be abrogated. The only requirement is that researchers must inform the "autonomous individuals" who participate in research about these limits in the interests of "informed consent." Given that the risk in Canada to date of the limits that Draft TCPS-2 outlines is precisely zero, PRE's limited confidentiality doctrine appears to be less about "respecting autonomy" and "informed consent" than it is about protecting researchers *from* research participants when researchers fail or refuse to protect them. This leaves the impression that Draft TCPS-2 is prepared to allow and even endorse liability management — "*caveat emptor*" — dressed up as ethics. Research participants deserve far more, and Canada's research community should be held to a much higher standard.

For at least three reasons PRE/SRE should change its plan to prepare a "final" draft of TCPS-2 for submission to the Presidents of the three granting agencies and release a second draft for further consultation:

- 1) PRE's strategy is that of an ethics deity imposing its own "right answers" rather than fulfilling its mandate to educate, promote discussion, respect disciplinary and methodological diversity, build consensus, and cultivate a culture of research ethics in Canada.
- 2) Draft TCPS-2 contains no annotations explaining PRE's rationale for the policy changes it proposes, as might be expected of a body that claims it operates according to the principles of "openness, transparency and accountability."
- 3) The controversial issues raised by Draft TCPS-2 are so fundamental that at least one more round of drafting and consultation is required to avoid TCPS-2 from becoming a significant threat to academic freedom in Canada. It is much more important to get it right than to do it quickly.