

PRE'S "INTERFACE OF LAW & ETHICS IN CANADIAN RESEARCH ETHICS STANDARDS: AN ADVISORY OPINION ON CONFIDENTIALITY, ITS LIMITS & DUTIES TO OTHERS": THE "LAW OF THE LAND" DOCTRINE IN ALL BUT NAME

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In 2007 the Interagency Advisory Panel on Research Ethics published its "Advisory Opinion on Confidentiality, Its Limits and Duties to Others". We argue that PRE's "limited confidentiality" perspective effectively promotes a "law of the land" doctrine of research confidentiality because it ignores the alternative "ethics-first" approach which suggests that a priori limitations on confidentiality rarely make sense.

PRE's limited confidentiality doctrine emphasizes hypothetical risks that have never materialized as actual harms, and ignores the outcome of cases in which research confidentiality has been challenged in various kinds of legal proceedings. By misreading the jurisprudence on the "public safety exception" to therapist-patient confidentiality in the process of applying it to research confidentiality, by encouraging role conflicts in a way that threatens to turn researchers into informers for police and other authorities, and by failing to acknowledge that there is an alternative to its limited confidentiality approach, PRE's advisory opinion could represent a significant threat to the integrity of the research enterprise and academic freedom in Canada. In the process of emphasizing putative limits to confidentiality, PRE says nothing about the important common law methods that can be used in court to defend a promise of strict research confidentiality. Indeed, it is ironic that North American courts have consistently attached a higher value to research-participant confidentiality than does PRE, which appears prepared to surrender confidentiality to hypothetical threats that have never materialized.

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We thank PRE and the editors of the McGill Health Law Publication for this opportunity to comment on PRE's advisory opinion.

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INTRODUCTION

After four and a half years of deliberation the Interagency Advisory Panel on Research Ethics (PRE)¹ has released its advisory opinion on confidentiality.² In the following commentary we argue that PRE effectively promotes a “law of the land” doctrine of research confidentiality³ and ignores an alternative “ethics-first” perspective⁴ that adheres to a code of strict confidentiality.

PRE’s rationale for limited confidentiality is based on an abstract analysis of law. In this sense it appears to fly in the face of the *Tri-Council Policy Statement (TCPS)* injunction that

[f]or meaningful and effective application ... ethical principles must operate neither in the abstract, nor in isolation from one another. Ethical principles are sometimes criticized as being applied in formulaic ways. To avoid this, they should be applied in the context of the nature of the research and of the ethical norms and practices of the relevant research discipline.⁵

We assert that the same is true of the analysis of the interface of ethics and law. In contrast to PRE’s abstract analysis of law, the ethics-first approach is based on an analysis of the law in action. As we attempt to show in the ensuing discussion, from this perspective, *a priori* limitations on confidentiality rarely make sense.

I

PRE MISINTERPRETS THE LEGAL IMPLICATIONS OF THE *TARASOFF*⁶ DECISION

As the *Tarasoff* decision makes clear, “under the common law, as a general rule, one person owe[s] no duty to control the conduct of another”⁷ or to warn any person endangered by another person’s proposed conduct. It is only when there is a “special relationship” that exceptions are made to this rule in common law. Consistent with this principle, there are only a handful of “mandatory reporting laws” such as those requiring reporting of child abuse and sexually transmitted diseases.⁸

Derek Jones’s⁹ prologue and PRE’s advisory opinion take the phrase “special relationship” to mean “professional”, but it was not the psychiatrist’s role as a *professional* that led to the court’s determination that the psychiatrist was liable; it was the particular *kind of knowledge* that psychiatrists possess and their training and putative *ability to predict propensity for violence* that bestows the duty. The psychiatrist’s job includes assessing a patient’s dangerousness, which is why psychiatrists have the power under civil commitment laws to lock up a patient if they are diagnosed as posing a threat to themselves or others.

Because it is the psychiatrist’s role in the prediction and prevention of violence that the court appeared to find determinative in the *Tarasoff* case, Applebaum and Rosenbaum,¹⁰ in an article that PRE

¹ The Interagency Advisory Panel on Research Ethics is a body of external experts established in November of 2001 by three Canadian Research Agencies—the Canadian Institutes of Health Research, the Natural Sciences and Engineering Research Council, and the Social Sciences and Humanities Research Council.

² Interagency Advisory Panel on Research Ethics, “Interface of Law & Ethics in Canadian Research Ethics Standards: An Advisory Opinion on Confidentiality, its Limits & Duties to Others” (2007) 1 *McGill Health Law Publication* 106.

³ See Bruce Clayman, “The Law of the Land” *Simon Fraser News* 10:5 (30 October 1997), online: Simon Fraser University <<http://www.sfu.ca/mediapr/sfnews/1997/Oct30/opinion2.html>>; James Lindgren, “Discussion: Anticipating Problems—Doing Social Science Research in the Shadow of the Law” (2002) 32 *Sociological Methodology* 29; Florence Piron, “Réponse à Palys et Lowman” (2006) 21:1 *C.J.L.S.* 187; Geoffrey R. Stone, “Discussion: Above the Law—Research Methods, Ethics, and the Law of Privilege” (2002) 32 *Sociological Methodology* 19.

⁴ See e.g. Social Sciences and Humanities Research Ethics Special Working Committee (SSHWC), “Reconsidering Privacy and Confidentiality in the TCPS: A Discussion Paper” (February 2006), online: Interagency Advisory Panel on Research Ethics <http://pre.ethics.gc.ca/english/pdf/sshwc_consultation_eng.pdf>.

⁵ Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, Social Sciences and Humanities Research Council of Canada, *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* (2005 with 1998, 2000, 2002 and 2005 amendments), online: Interagency Advisory Panel on Research Ethics <http://www.pre.ethics.gc.ca/english/pdf/TCPS%20October%202005_E.pdf> at i.2 [TCPS].

⁶ *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976) [cited to Cal. 3d].

⁷ *Ibid.* at 435.

⁸ TCPS, *supra* note 5 at 3.1. The TCPS also mentions “intent to murder” but we know of no such law in Canada. We asked Derek Jones, PRE’s Executive Director, what the TCPS is referring to, but he did not know either.

⁹ Derek Jones is an ex officio member of PRE and Executive Director of its supporting Secretariat.

¹⁰ Paul S. Appelbaum & Alan Rosenbaum, “*Tarasoff* and the Researcher: Does the Duty to Protect Apply in the Research Setting?” (1989) 44 *American Psychologist* 885 at 893.

cites, argue that the *Tarasoff* duty to protect (*not* the "duty to warn" that Jones's prologue and PRE's advisory opinion refer to) would apply *only* in a clinical research setting; it would not apply to researchers in general because most researchers do not have the training to assess adequately the validity of any threat. To impose a duty to protect, courts would have to look at more than just the discipline of the researcher (for example, sociologist versus psychologist); they would have to also consider what form of psychology the researcher practised:

Social and experimental psychologists without clinical training should fall outside the requirements of the duty to protect, as should relatively untrained research assistants who collect data. Thus one can envisage a variety of research situations to which the duty to protect should not apply.¹¹

If Applebaum and Rosenbaum's analysis is correct, any extrapolation of *Tarasoff* to non-clinical research settings is just one more example of the insidious nature of biomedical ethical imperialism that is contaminating research ethics in Canada.

In addition to these problems, PRE's imposition of what it sees as a ubiquitous acceptance of a "duty to warn" distorts the situation even within the psychiatric and psychotherapeutic communities themselves, in which critics outline how *Tarasoff* has changed psychiatrists from caregivers to "the new informants"¹² and agents of law enforcement.¹³ In this light, the wholesale importation of the psychiatrist's duty to protect into the research setting encourages and exacerbates the conflict of roles that the TCPS specifically warns researchers to avoid.

II

LIMITING CONFIDENTIALITY MAY ENCOURAGE ROLE CONFLICTS

The TCPS says that researchers

should separate their role as researcher from their roles as therapists, caregivers, teachers, advisors, consultants, supervisors, students or employers and the like.... Researchers should disassociate their role as researcher from other roles, in the recruitment process and throughout the project.¹⁴

Further, the TCPS says that "[r]esearchers should avoid being put in a position of becoming informants for authorities."¹⁵

PRE's strategy of limiting confidentiality so that researchers can protect third parties implies that researchers should assume a police function. For example, if a researcher studying the effects of solitary confinement in prisons informs prospective prisoner research participants that any revelation of a plan to escape will be reported to the prison authorities, the researcher not only effectively rules out receiving information that could throw important light on the effects of solitary confinement, but also actively embraces a police function.

III

PRE'S BOTTOM LINE: CONFIDENTIALITY IS NOT ABSOLUTE

Because it recognizes the potential for duties and values to conflict, PRE says that "confidentiality should be respected save in narrow and exceptional circumstances that may justify limited infringements, such as disclosure or reporting to protect human 'health, life and safety' or to advance other 'compelling and specifically identifiable public interests.'"¹⁶

Because confidentiality in law is not absolute, PRE argues that "[r]esearchers and research ethics boards (REBs) should anticipate and address foreseeable limits on confidentiality early in the design of the research, to enable informed choices of participants...."¹⁷

¹¹ *Ibid.*

¹² Christopher Bollas & David Sundelson, *The New Informants: The Betrayal of Confidentiality in Psychoanalysis and Psychotherapy* (Northvale, N.J.: J. Aronson, 1995).

¹³ Paul B. Herbert, "Psychotherapy as law enforcement" (2004) 32 *Journal of the American Academy of Psychiatry Law* 91.

¹⁴ *Supra* note 5 at 2.8.

¹⁵ *Ibid.* at 2.4.

¹⁶ *Supra* note 2 at para. 3.

¹⁷ *Ibid.*

IV

FALSE DICHOTOMIES MAKE FOR FALSE CHOICES

The TCPS holds that exceptional reasons such as the need to protect health, life, and safety *may* justify limited infringements of confidentiality. In these circumstances, what are the researcher's obligations? "On the one hand, society respects and values privacy and confidentiality. On the other hand, society cherishes and values other interests, like the protection of health, safety, and human life."¹⁸

But what if the purpose of research confidentiality is to gain reliable information for the purpose of protecting health, safety, and human life? The irony of imposing *a priori* limitations on confidentiality is that they may deprive society of the very information that might help the protection of health, safety, or human life.

In opposition to "limited confidentiality", the "ethics-first" perspective holds that because the public interest in the collection of accurate information about certain social phenomena is sufficiently great, and because confidentiality is often indispensable to the gathering of accurate information, the need to maintain confidentiality may outweigh other foreseeable public interests—even the duty to obey a court order to divulge information.

V

CONFIDENTIALITY AND INFORMED CONSENT

PRE argues that:

Responding in part to leading Canadian legal decisions that confidentiality is seldom unlimited or protected absolutely, many researchers and REBs indicate in the informed consent process with participants that confidentiality will be protected 'within the limits of the law'.¹⁹

There are at least two problems with this approach beyond the fact that it fails to recognize those researchers who indicate in the informed consent process that confidentiality will not be violated, even under legal pressure.

First, by saying that "confidentiality is seldom unlimited or protected absolutely" PRE distorts the cases it cites. Another way of characterizing these cases is to say that confidentiality is "rarely challenged" and "almost always maintained". Moreover, in articulating the test for a public safety exception to lawyer-client privilege, *Smith v. Jones*²⁰ clarifies that a violation of lawyer-client privilege is *permissible*, but *not* a duty. The word "must" is only used in the decision to describe what a court "must" do to protect public safety in the event that confidentiality is challenged. However, the decision does *not* bestow a tort duty on therapists or lawyers to violate confidentiality to protect third parties.

Second, because there are disagreements about what it means to protect confidential information "within the limits of law", the promise to protect confidentiality to the "extent possible within the law"²¹ does not give research participants the information they need for informed consent. Are the "limits of the law" restricted to statutes, or should the common law be included? For researchers to fulfill their ethical obligation to protect confidentiality within the limits of the law, surely it *must* include the common law. Why does PRE ignore common law protections for confidential communications?

According to the Supreme Court of Canada the Wigmore test²² is the appropriate mechanism to adjudicate claims of evidentiary privilege on a case-by-case basis,²³ and yet neither the TCPS nor PRE talks about how researchers could—or, in our opinion, *should*—design their research to anticipate the Wigmore test.²⁴

¹⁸ *Ibid.* at para. 4.

¹⁹ *Supra* note 2 at para. 32.

²⁰ *Smith v. Jones*, [1999] 1 S.C.R. 455.

²¹ TCPS, *supra* note 5 at 3.2.

²² See John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States, England, and Canada* (Toronto: Canada Law Book, 1905) at para. 3185.

²³ *Slavutych v. Baker*, [1976] 1 S.C.R. 254 [*Slavutych*]. See also John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992).

²⁴ Ted S. Palys & John Lowman, "Ethical and Legal Strategies for Protecting Confidential Research Information" (2000) 15 C.J.L.S. 39.

More problematically, PRE paves the way for a *caveat emptor* approach²⁵ that surrenders research-participant rights without even fighting the battle in court because it absolves researchers and universities from the responsibility of resisting subpoenas.

VI

INFORMED CONSENT AND LIMITS ON CONFIDENTIALITY: FROM MANTRA TO FETISH

If researchers prepare their defence of confidentiality in anticipation of the Wigmore criteria, the only interest that is likely to override research confidentiality is a defendant's innocence.²⁶ We cannot find a single case, however, where a researcher was subpoenaed on the ground that a defendant's innocence was at stake, although it is theoretically possible. In light of this, PRE's implied argument that the threat of court-ordered disclosure is a "reasonably foreseeable risk" defies the empirical record. How does one assess the likelihood of a risk that has not materialized as an actual harm in hundreds of thousands of research projects?

With its focus on specifying limits rather than trying to defend confidentiality, PRE turns the mantra of informed consent into a fetish.

VII

WHEN ETHICS AND LAW CONFLICT: COURT-ORDERED DISCLOSURE

PRE cites the TCPS statement that "ethics and law may lead to different conclusions",²⁷ but offers no advice to researchers about how they should proceed if they truly believe that acting ethically would mean refusing to comply with a law or judicial order. At least two researchers, both in the United States, spent periods in jail rather than violate research confidentiality.²⁸ In this regard many researchers believe they have much the same responsibility as journalists to protect their sources—the most recent of many examples being that of American journalist Judith Miller,²⁹ who spent 85 days in jail in 2005 for refusing to name a White House source who leaked the identity of a CIA agent.

In contrast to PRE's abstract analysis of limitations to confidentiality, the "ethics-first" perspective is based on an analysis of research confidentiality and law in practice. Consequently, as advocates of that approach, we are able to specify exactly what the "very exceptional cases" would be in which we would place ethical considerations above law. After 25 years conducting criminological research, and after considering the legal cases on record, we have yet to find a situation in which a third party's desire for confidential research information is more compelling than the ethical obligation to protect research participants.

Further, on the basis of the actual court record, we do not anticipate a court ordering the disclosure of confidential research information.³⁰ No Canadian court has ever ordered a researcher to divulge confidential research information. In the United States, where dozens of researchers have been subpoenaed, courts ordered researchers to disclose confidential information in only three cases.³¹ Two of these cases involved grand juries—we do not have grand juries in Canada—and in the third case the court ordered disclosure of information *precisely because the researchers limited confidentiality*.³²

²⁵ See Ted S. Palys & John Lowman, "Protecting Research Confidentiality: Towards a Research-Participant Shield Law" (2006) 21 C.J.L.S. 163.

²⁶ Michael Jackson & Marilyn MacCrimmon, "Research Confidentiality and Academic Privilege: A Legal Opinion" (1999), online: Simon Fraser University <<http://www.sfu.ca/~palys/JackMacOpinion.pdf>>.

²⁷ *Supra* note 5 at i.8.

²⁸ See Samuel Popkin in Bud Schultz & Ruth Schultz, eds., *The Price of Dissent: Testimonies to Political Repression in America* (Berkeley: University of California Press, 2001) at 339. See also Rik Scarce, "(No) Trial (But) Tribulations: When Courts and Ethnography Conflict" (1994) 23 *Journal of Contemporary Ethnography* 123.

²⁹ Steven Edwards, "Freed Reporter Talks to CIA Leak Inquiry" *Vancouver Sun* (1 October 2005) A15.

³⁰ *Slavutych, supra* note 23.

³¹ John Lowman & Ted S. Palys, "The Ethics and Law of Confidentiality in Criminal Justice Research: A Comparison of Canada and the United States" (2001) 11 *International Criminal Justice Review* 1.

³² *Atlantic Sugar, Ltd. v. U.S.*, 85 Cust. Ct. 128 (1980).

VIII

IF ETHICS AND LAW CONFLICT, THE RESEARCHER MUST DECIDE

In defence of limited confidentiality, PRE cherry-picks evidence that supports its doctrine and ignores other evidence that, instead of imposing one ethical point of view, recognizes ethical diversity. For example, PRE says that “limited duties to warn have since [*Tarasoff*] been recognized in Canadian professional codes of practice.”³³ It cites a part of the Canadian Psychological Association’s code of ethics that supports its position, but ignores the section affirming that when ethics and law part company, researchers must follow their ethical conscience:

IV.17 [Psychologists should] [f]amiliarize themselves with the laws and regulations of the societies in which they work ... and abide by them. If those 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.³⁴

This section of the Canadian Psychological Association’s code provides clear support for the “ethics-first” perspective. Indeed, the three granting councils have already endorsed this position:

[T]he Councils, as agents of the Canadian government, expect all Council-funded research to conform both to the ethical principles set out in the Tri-Council Policy Statement (TCPS) and the relevant laws. At the same time we also recognise that, in rare instances, ethical and legal approaches can conflict.... If there is a conflict, the researcher must decide on the most acceptable course of action.³⁵

In other words, according to the three granting councils that authored it—the Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, and the Social Sciences and Humanities Research Council of Canada, to whom PRE reports—the TCPS does recognize the right of researchers to refuse to obey a court order to disclose confidential research information should their conscience so dictate. Curiously, PRE did not cite this letter.

CONCLUSION

PRE’s mandate is to “promote high ethical standards of conduct in research involving humans” and to “recognize the diversity of approaches used in research involving humans”.³⁶ Why, then, would it promote *a priori* limitations to confidentiality? Its limited confidentiality doctrine emphasizes hypothetical risks that have never materialized as actual harms and ignores the actual outcome of cases in which research confidentiality has been challenged. Indeed, by failing to acknowledge that there is an alternative to its limited confidentiality approach the PRE advisory opinion represents a significant threat to academic freedom in Canada. It is ironic that the courts consistently attach a higher value to research-participant confidentiality and the fate of the research enterprise than does PRE, which appears prepared to surrender to a hypothetical threat that has never materialized.

In light of the granting councils’ 2000 ruling, we urge PRE to acknowledge that researchers have the academic freedom to follow an ethics-first approach to research confidentiality.

³³ *Supra* note 2 at para. 23.

³⁴ Canadian Psychological Association, *Canadian Code of Ethics for Psychologists* (2000), online: Interagency Advisory Panel on Research Ethics <http://www.pre.ethics.gc.ca/english/pdf/links/Canadian%20Code%20of%20Ethics%20for%20Psychologists%20_2000.pdf>.

³⁵ Letter from Anne-Marie Monteith, NSERC Research Ethics Officer, to Drs. John Lowman and Ted Palys (27 April 2000), online: Simon Fraser University <<http://www.sfu.ca/~palys/TCPSFAQ.pdf>>.

³⁶ PRE Terms of Reference, online: Interagency Advisory Panel on Research Ethics <<http://pre.ethics.gc.ca/english/aboutus/termsofreference.cfm>>.