

TO: All MUNFA Members

FROM: The MUNFA Executive Committee

DATE: July 24, 2017

SUBJECT: **CAUT Memorandum 17:17 – Protecting Research Confidentiality**

On July 6, 2017, CAUT distributed the attached Memorandum regarding Protecting Research Confidentiality and is being sent to you for your information.



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Memorandum 17:17

Date: July 6, 2017
To: Local, Provincial, and Federated Associations
From: David Robinson, Executive Director
Re: **Protecting Research Confidentiality**

On May 31, in a case where the Canadian Association of University Teachers (CAUT) intervened, Justice Marc St-Pierre of the Quebec Superior Court overturned an earlier order requiring a professor to reveal the names of subjects she had interviewed for a research project. Justice St-Pierre ruled that Professor Marie-Ève Maillé's promise of confidentiality to her research subjects met the four criteria of the "Wigmore" test for determining whether a communication is privileged.

Unlike communication between a lawyer and a client (solicitor-client privilege), there is no blanket protection in law against disclosure of information and communication related to academic research. This means that the identity of research participants and research records could be revealed through a warrant or by court order. However, the Maillé case highlights the framework for determining when research confidentiality cannot be breached by the courts or police. This determination is done on a case-by-case basis, by applying the *Wigmore Test* from the law on evidence.

The *Wigmore Test* is a legal assessment by the Court that considers the following:

1. Did the communication originate in confidence?
2. Is confidentiality essential to the full and satisfactory maintenance of the relationship between the parties?
3. Is this the kind of confidential relationship that the community wants to maintain?
4. Will the injury to the relationship by the disclosure be greater than the benefit that would be gained from using the information in the litigation/trial/hearing?

All four parts of this test must be satisfied, in order for the confidentiality to be protected by law. Courts will apply this test on a case-by-case basis – meaning that a finding of confidentiality for one researcher does not mean confidentiality for all. In order to protect research confidentiality, it is important that researchers ensure the following:

- All research documentation should state that confidentiality is integral to the project.
- The researcher should specifically address, as part of the research overview and protocol, why confidentiality is important for the quality of research.

- All recruitment literature and consent forms should specify confidentiality as a condition of participation.
- When interviewing human subjects, all interviewers should understand and explain to participants the need for confidentiality.
- All research materials should be stored in a secure place.
- Researchers should document how breaching confidentiality (or using non-confidential sources) will result in lower quality research, or the inability to recruit participants.
- Researchers should document how breaching confidentiality would affect future research in the field.

Even if all these practices are followed, Courts might still decide that there is a greater value to the public interest in breaching research confidentiality (point four of the *Wigmore Test*).

Please do not hesitate to contact the CAUT office if you require further information.