

REPORT

on

PRINCIPLES FOR ALLOCATION OF LEGAL RESOURCES

at

KWANTLEN UNIVERSITY COLLEGE

by

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Table of Contents	<u>Page Number</u>
1.0 Terms of Reference	3
2.0 The Increasing Significance and Scope of Research	5
3.0 Conflicts between the Senior Administration and the REB	6
3.1 Role of the REB	6
3.2 Role of the Senior Administration	7
3.3 Recommendation regarding Part A of the Terms of Reference	9
4.0 Requests for allocation of resources to provide legal support regarding either a conflict between the research activities and the law or a claim for compensation for harm, loss or damage caused by a research activity	10
4.1 Types of Potential Conflicts with the Law	11
4.2 Risks of harm, loss or damage caused by research activities	12
4.2.1 Acknowledgement of Risk and Waivers of Potential Claims	13
4.3 Obligations of Kwantlen University College under the Collective Agreement with the KFA	16
4.4 Principles and factors to guide the senior administration's decisions regarding the allocation of Kwantlen resources when legal proceedings arise in relation to Kwantlen research activities	17
4.4.1 Statement of Principles of Academic Freedom	17
4.4.2 Research conducted in accordance with prior Legal Advice obtained by Kwantlen	19
4.4.3 Prior Disclosure by Faculty Member of Potential Legal Issue	21
4.4.4 Research conducted in accordance with an REB Approval and Legal Proceeding relating to Kwantlen's Ethical Standards and Requirements	22
4.4.5 Confidential Communications made to Researchers	23

4.4.6	Information subject to a Confidentiality Agreement	26
4.4.7	Intellectual Property Issues	28
4.4.8	Breach of Government Regulations or Municipal Bylaws	29
4.4.9	Factors Contained in the Guiding Principles established for the Officer of Research and Scholarship	30
	(a) Enhancement of the reputation of KUC	31
	(b) The research has or will likely provide a valuable or valued contribution to economic, social or cultural well-being of the communities served by Kwantlen	31
	(c) Enhancement of the quality of the education of Kwantlen's students	32
4.4.10	Cost-Benefit Analysis	33
4.4.11	Step-by-Step Evaluation Process	34
4.4.12	Carriage of Legal Proceedings	35
5.0	Identification of Potential Legal Issues Prior to Legal Proceedings Arising	35
5.1	Annual Statement of Current and Proposed Research	36
5.2	Co-ordinating all applications for research grants and research contracts through the Office of Research and Scholarship	38
5.3	Requiring Principal Investigators to identify known Legal Issues when submitting research grant applications or proposals	42
5.4	Requiring the REB to refer to the senior administration any potential legal issues identified during its review of a research proposal	43
6.0	Seeking Legal Opinion	44
7.0	Process when a Legal Opinion is Sought regarding Research	44
8.0	Policy entitled "Research Involving Human Participation"	47
8.1	Relationship between the Senior Administration and the REB	47
8.2	Definition of Kwantlen's Ethical Standards and Requirements	49
8.3	Decisions of the REB	51
8.4	Appeals	52
8.5	Composition and Training of the REB	53
8.6	Other issues relating to the REB	54
	CONCLUSION	54
	<u>Appendices</u>	55
	A. Terms of Reference	55
	B. Summary of Recommendations	58
	C. Selected Provisions from University Research Policies	64
	D. Tri-Council Policy Statement - Excerpt	66
1.0	<u>TERMS OF REFERENCE</u>	
	The Terms of Reference under which this Report has been prepared are attached to this Report as Appendix "A".	

The terms of reference request me to provide Kwantlen University College (hereinafter sometimes referred to as either “Kwantlen” or KUC) with a report about

“... the principles which should guide the senior administration’s decision making in the following circumstances:”

The circumstances referred to in the terms of reference are described in two parts, Part A and Part B.

Part A requests me to provide Kwantlen University College with a report about the principles which should guide the senior administration’s decision making:

When a conflict arises between the senior administration and KUC’s Research Ethics Board (“REB”) about potential legal issues associated with a pending or approved research program;

Part B describes two sets of circumstances where the senior administration may be asked to allocate financial or other resources on an extraordinary basis to provide support, particularly legal support, to a KUC faculty member or student in connection with an approved research program.

The first circumstance described in Part B refers to activities associated with an approved research program that have resulted in or may result in a conflict with the law of the jurisdiction in which the research is taking place or has taken place.

The second circumstance described in Part B requests a report about the principles that should guide the senior administration when a request is received for an allocation of resources to provide legal support regarding a research activity

... which involves or may involve activity creating a high risk of physical abuse, harassment, or some other form of serious mistreatment of the researcher by the research subject(s).

The risks described in this latter set of circumstances may be restated in somewhat broader terms in the following manner: What principles should guide the senior administration’s decision making when a request is received from a Kwantlen faculty member or student for an allocation of resources to provide legal support to a Kwantlen faculty member or a Kwantlen student in connection with the activities of a research program conducted under the auspices of Kwantlen University College.

A summary of all the recommendations contained in this Report may be found in Appendix “B” of the Report.

It is important to distinguish between research conducted under the auspices of Kwantlen University College and research that may be conducted by faculty members in their private capacity during week-ends, vacation periods and

other non-reportable time without the use of any facilities or resources of Kwantlen University College. This Report discusses only research conducted under the auspices of Kwantlen University College. This includes research by faculty members in their capacity as a Kwantlen faculty member and research by a Kwantlen student as a component of a student's degree, diploma, certificate or course in which the student is enrolled. It also includes research undertaken pursuant to a contract between Kwantlen University College and either a government ministry or agency, or a private entity.

In order to fulfill the mandate contained in the Terms of Reference, I have reviewed the *College and Institute Act*, R.S.B.C., 1996, c. 52, and several Kwantlen University College documents including:

- The "Principles of Academic Freedom" approved by the Board of Governors of Kwantlen University College, effective March 16, 2005;
- The Policy entitled "Research Involving Human Participation", effective 01 October 2002 and revised September 2004;
- The Collective Agreement between Kwantlen University College and the Kwantlen Faculty Association;
- Application forms, ethical guidelines and other documents prepared for use in relation to making an application to the Research Ethics Board (hereinafter referred to as the "REB") for approval of a research proposal;
- Minutes of the Kwantlen REB; and
- The Board of Governor's Policy 3-5 on "Financial Condition and Activities".

I also reviewed other documents that are referred to in my Report including:

- Various research policies and procedures of the University of British Columbia, the University of Victoria, Simon Fraser University and the University of Northern British Columbia; and
- The "Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans" (hereinafter sometimes referred to as the "Tri-Council Policy Statement") promulgated by Medical Research Council of Canada, the Social Science Research Council of Canada and the Natural Sciences and Engineering Research Council of Canada.

In order to obtain a basic understanding of how the Policy entitled "Research Involving Human Participation" has been applied, how various types of applications for research grants are processed, and how proposals for contract research are developed, I interviewed a broad cross-section of Kwantlen academic community including current and former members of the REB, Deans, Associate Deans, Department Chairs, Directors of Institutes, and faculty members who have submitted applications to the REB, as well as the Provost and Vice-President Academic and the Associate Vice President Research and Scholarship. I received one submission, by way of an e-mail attachment and I subsequently interviewed its author. Most of the interviews were face-to-face interviews. In some instances, when it was difficult to schedule an in-person interview, interviews were conducted by telephone. In a

few instances, it was not possible to arrange either an in-person interview or a telephone interview. In the latter instances, responses to specific questions were solicited by e-mail.

In order to prepare this Report, it was necessary to examine various issues relating to the Policy entitled “Research Involving Human Participation” and the functions, responsibilities and operation of the REB. I understand that another task force is being created to conduct an examination and review of research policies at Kwantlen including the Policy entitled “Research Involving Human Participation”. The text of my Report and some of the recommendations contained in this Report may inform that task force; however they are not intended to pre-empt the work of that task force.

2.0 THE INCREASING SIGNIFICANCE OF RESEARCH AT KWANTLEN

With the continuing development of Kwantlen as a regional university, research will likely become an increasingly significant aspect of the mandate of the University. The experience at other universities has been that the development of research activities requires the adoption of protocols and strategies in relation to research activities. Among some faculty members, particularly those who joined Kwantlen when the University’s mandate was almost exclusively teaching, the development of protocols regarding research activities may be perceived as implying an obligation to engage in research. This Report is not intended to convey such an implication.

Every institution, which engages in research, encounters a greater risk of potential conflicts between research activities and the governing law and a greater risk of legal liability for harm, loss or damage caused by research activities. In part, the increasing potential for conflict with the law arises from the increasing breadth of laws that impose limitations on various forms of activities. Another phenomena, which has become more prevalent in recent years, is the litigious nature of our society. It sometimes appears that anyone who feels that they have suffered some injustice, however slight, or who has suffered some harm to their person or damage to their property, is inclined to seek some form of legal redress. Therefore, it has become necessary for institutions, which engage in research, to develop protocols and strategies that will help to identify potential legal issues before they become actual legal problems. In many cases, this will enable the institution and the researchers to take precautions or make modifications to a proposed research methodology that will minimize the risk of potential legal issues becoming actual legal problems without stifling research initiatives or impairing the information sought to be gained by the research.

3.0 CONFLICTS BETWEEN THE SENIOR ADMINISTRATION AND DECISIONS OF THE REB

Part A of the Terms of Reference request me to provide Kwantlen University College with a report about the principles which should guide the senior administration's decision making

when a conflict arises between the senior administration and KUC's Research Ethics Board ("REB") about potential legal issues associated with a pending or approved research program.

During my interviews, I asked most, if not all, of the interviewees whether they were aware of any conflicts between the senior administration and the REB. None of the interviewees were able to identify such a conflict. If the respective roles of the REB and the senior administration are properly understood, it is unlikely, in my opinion, that many conflicts will arise. Nevertheless, if conflicts do arise, it will be worthwhile to have some principles in place that may guide the senior administration.

3.1 Role of the REB

Under the Policy entitled "Research Involving Human Participation", the responsibilities of the Research Ethics Board (hereinafter referred to as the "REB") are described in Paragraph 3 under the heading "Research Ethics Board Terms of Reference". Paragraph 3 provides:

3. Responsibilities

The REB is responsible for:

- a. reviewing research proposals;
- b. waiving the requirements for ethics review;
- c. approving proposals meeting Kwantlen's ethical requirements;
- d. advising researchers about measures that can be taken to ensure their project is ethically acceptable;
- e. initiating university college-wide education on research ethics; and monitoring ongoing research;
- f. rejecting proposals and terminating any ongoing research that ceases to meet ethical standards.

Under Paragraph 3, the principal decision-making responsibilities of the REB are limited to approving a research proposal that meets Kwantlen's ethical requirements, and rejecting a research proposal or terminating ongoing research that ceases to meet Kwantlen's ethical standards. It is not the responsibility of the REB to determine whether or not research activities described in a research proposal:

- (1) Conflict with the law of British Columbia or Canada or another jurisdiction where the research is proposed to be conducted except to the extent that it may be necessary for the REB to determine whether or not the proposed research methodology satisfies Kwantlen's ethical standards in relation to such matters as privacy and human rights; or
- (2) Subject Kwantlen to an unacceptable risk of legal liability for a claim for compensation for harm, loss or damage caused by the research activities.

The commentary in the Tri-Council Policy Statement relating to Paragraph 1.2, which deals with the authority of an REB, provides:

Institutions must respect the authority delegated to the REB. The institution may

not override negative REB decisions reached on grounds of ethics without a formal appeal mechanism as set out below. **Institutions may refuse to allow certain research within its jurisdiction, even though the REB has found it ethically acceptable.** [emphasis added by bolding]

The Tri-Council Policy Statement does not articulate the reasons why an institution may refuse to allow certain research even though the REB has found it ethically acceptable. However, the reasons may include either that the research conflicts with the law or the research subjects the institution to an unacceptable risk of legal liability for potential harm caused by the research activity.

Some members of the Kwantlen community, whom I have interviewed, have suggested that the responsibilities of the REB should be expanded to include such issues. I do not favour this approach for several reasons. First, it is unlikely that most members of REB will have the legal training or experience to fulfill these functions. Second, some members of the Kwantlen research community have already expressed a concern about the workload of the REB with its current responsibilities. Third, Part 3.2 of this Report discusses the responsibilities specifically assigned to the senior administration by the Board of Governors.

Part 5.4 of this Report recommends that if, in the course of its review of a research proposal, the REB identifies a potential conflict with the law or a potential legal issue, the REB should refer the issue to the senior administration for review. Under that recommendation, the REB does not have any responsibility to make a determination regarding a potential conflict with the law or potential issue of legal liability, the sole responsibility of REB is to refer potential legal issues to the senior administration.

3.2 Role of the Senior Administration

Under the *College and Institute Act*, R.S.B.C., 1996, c. 52, the President of Kwantlen University College, as the chief executive officer, is responsible to supervise and direct, subject to the bylaws of the Board, the administration of Kwantlen University College save and except to the extent that the Act delegates specified powers to the Education Council. It is implicit that the President and the senior officers who report to the President will, to the best of their ability, attempt to ensure that Kwantlen's activities, including research activities undertaken under the auspices of Kwantlen, are carried out in accordance with the law. This requirement is reinforced by the Statement of "Principles of Academic Freedom" which includes a statement of "... the requirement to operate within applicable provincial and national legislation."

Board of Governors Policy 3.5 - Financial Condition and Activities, approved by the Board of Governors effective 21 January 2007, places an obligation on the President to not cause or allow the development of circumstances that will

place Kwantlen in fiscal jeopardy. The preamble to this Policy provides:

With respect to the actual, ongoing financial condition and activities, the President shall not cause or allow the development of fiscal jeopardy or a material deviation of actual expenditures from board priorities established in Ends policies.

The members of the senior administration act on behalf of the President in discharging their responsibilities. With regard to research activities carried on under the auspices of Kwantlen:

- (a) When a potential conflict between the law and some aspect of research activity is identified, the senior administration should determine whether or not the research activity is likely to result in a conflict with the law. Unless the potential identified conflict with the law has previously been the subject of a legal opinion obtained by KUC, in most instances, the senior administration will be well advised to seek a legal opinion regarding whether not the research activity may be in conflict with the law; and
- (b) When a potential risk of legal liability for compensation for harm, loss or damage caused by a research activity is identified, the senior administration has an obligation to protect Kwantlen from fiscal jeopardy by determining the nature and extent of the risk, whether or not Kwantlen should accept the risk and whether there are measures that can be taken to minimize the risk. Unless the potential risk has previously been considered, in most instances, the senior administration will be well advised to
 - (i) seek advice from Kwantlen's risk management representative regarding any terms or conditions under which the risk should be accepted or managed, and
 - (ii) seek advice from either its risk management representative and/or legal counsel regarding whether any precautions should to be taken in relation to the research activity or whether modifications need to be made to the research methodology to minimize the risk of legal liability.

Part 5 of this Report makes several recommendations regarding protocols and strategies that could be adopted to promote the identification of potential conflicts between research activities and the law and potential issues of legal liability related to research activities.

When the senior administration finds it desirable to obtain a legal opinion regarding a potential conflict between research activities and the law or potential issues of legal liability related to research activities, Part 7 of this Report describes a process of communication and interaction between the senior administration and the principal investigator of a research project.

3.3 Recommendation regarding Part A of the Terms of Reference

On the assumption that the responsibility of the REB is limited to making determinations regarding whether or not research projects satisfy Kwantlen's ethical standards and that members of the REB are provided with training

about the responsibilities and functions of a research ethics board, I make the following recommendation:

RECOMMENDATION:

With regard to a decision of whether or not a research proposal or project satisfies Kwantlen's ethical standards and requirements, the senior administration of KUC should respect and abide by those decisions of the REB except in extraordinary circumstances.

Extraordinary circumstances include:

- (a) Evidence that the decision of the REB was based on a description of a research proposal where the description either:
 - (i) did not fully describe the research methodology or its application to human subjects, or
 - (ii) did not fully disclose all the relevant information regarding the proposed research activity; or
- (b) A palpable and overriding error in arriving at its decision to approve a research proposal that amounts to a failure of the REB to discharge its responsibilities including:
 - (i) a failure to apply Kwantlen's ethical standards;
 - (ii) a conflict of interest regarding the research proposal on the part of one or more members of the REB, who did not recuse himself or herself from consideration of the research proposal;
 - (iii) actual bias or a reasonable apprehension of bias on the part of one or more members of REB who favoured the approval of a research proposal; or
 - (iv) a mistaken assessment of the facts.

In describing these extraordinary circumstances, this Report does not purport to suggest that the REB is an adjudicative body that must comply with the principles of natural justice.

A decision of the REB that a research proposal satisfies Kwantlen's ethical standards and requirements does not necessarily mean that a research project may go ahead without any further review. Properly understood, the approval of the REB is limited to a determination that the research proposal satisfies Kwantlen's ethical standards and requirements. The REB's approval does not mean that any determination has made with regard to:

- (a) Whether or not there is a conflict between the proposed research activities and the law of British Columbia or Canada, or the law of the jurisdiction where the research will be undertaken. This is an issue that needs to be considered in relation to all research projects regardless of whether the research project involves human subjects; or
- (b) Whether or not the proposed research activities present an unacceptable

risk of legal liability for harm, loss or damage that may be caused by the research activity.

The determinations required by clauses (a) and (b) of the preceding paragraph are the responsibility of the senior administration. These responsibilities should be fulfilled in a manner that is transparent and gives the maximum scope to the exercise of academic freedom within the law (see Part 7 of this Report). The subject matter of research projects may be controversial; however, as long as a research activity is conducted in accordance with both the law and university policies, including the approval of the REB, when that is required, and the research activity does not expose Kwantlen to an unwarranted risk of legal liability, the research should be permitted to continue.

The relationship between the REB and the senior administration is the subject of further discussion in Part 8.1 of this Report.

4.0 REQUESTS FOR ALLOCATION OF RESOURCES TO PROVIDE LEGAL SUPPORT REGARDING EITHER A CONFLICT BETWEEN RESEARCH ACTIVITIES AND THE LAW OR A CLAIM FOR COMPENSATION FOR LOSS, HARM OR DAMAGE CAUSED BY A RESEARCH ACTIVITY

Part B of the Terms of Reference request me to provide Kwantlen University College with a report about the principles which should guide the senior administration's decision-making regarding two sets of circumstances. These circumstances are discussed in Part 1.0 of this Report.

4.1 Types of Potential Conflicts with the Law

The first circumstance described in Part B of the Terms of Reference is where activities associated with a research program conducted under the auspices of Kwantlen have resulted or may result in a conflict with the law of the jurisdiction in which the research is taking place or has taken place. There are many different types of potential conflicts between research activities and the law. Without purporting to describe all potential conflicts with the law, some broad categories of potential conflicts include:

- A contravention of a municipal bylaw or government regulation;
- A breach of a provincial statute;
- Conduct that constitutes an offence under the *Criminal Code of Canada*. The *Criminal Code* contains many offences. Many of these offences are part of common knowledge. Some offences that are less well known include:
 - Counselling an offence (section 22): Where a person counsels another person to be a party to an offence and that person is afterwards a party to that offence, the person who counseled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counseled. Section 22(3) provides that the term "counsel" includes "procure, solicit or incite".

- Aiding or Abetting an offence (section 21): Every one is a party to an offence who does or omits to do anything for the purpose of aiding any person to commit it or abets any person in committing it. The term “abetting” includes encouraging the principal with acts or words.
- Accessory after the fact (section 23): An “accessory after the fact” to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape.
- Conduct that constitutes an offence under other federal statutes such as the *Controlled Drugs and Substances Act*, R.S.C. 1996, c. C-19. This Act contains numerous offences related to the possession, importation, trafficking in the substances described in the Schedules to the Act including opium, cocaine, cannabis, its preparations, derivatives and similar synthetic preparations, including cannabis resin and cannabis (marihuana). However, the Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including the regulation of medical, scientific and industrial applications of substances described in the Schedules to the Act.
- An infringement of intellectual property rights of another person including a breach of copyright, infringement of patents, and the disclosure of trade secrets;
- An infringement of the privacy rights;
- An infringement of the Human Rights Code;

Notwithstanding that a significant portion of a research activity is conducted outside of British Columbia, if some elements of the research are conducted within British Columbia, British Columbia and Canadian law may apply to the research activity.

If some aspect of the research activity will be conducted outside British Columbia, it may be necessary to request a legal opinion on whether or not the research activity conflicts with the law of the jurisdiction where the research activity will be conducted.

Another complex issue that may arise in relation to research is where a researcher is served with a subpoena to testify as a witness in a legal proceeding regarding confidential communications made to the researcher or conduct observed by the researcher. This issue is discussed more fully in Part 4.4.5 of this Report.

Many of the types of the categories of potential conflicts listed above are more likely to arise where research involves human subjects; however, conflicts with

the law may arise in research activities that do not involve human subjects. Where a research activity involves human subjects, compliance with ethical standards does not provide an assurance that there is no conflict between some aspect of the research activity and the applicable law. For example, proposed questions on a questionnaire, which are to be addressed to research subjects in a face-to-face meeting may satisfy Kwantlen's ethical standards and requirements; however, if the face-to-face meetings are planned to occur on private property, there may be a conflict with the law of trespass to land if, for example, it is sought to administer a questionnaire to farm workers while they are working on a farm owner's fields without the consent of the farm owner.

Part 5 of this Report discusses several alternative strategies and protocols that are designed to identify potential conflicts between research activities and the law. This will enable the senior administration to obtain legal advice before proposed research activity is conducted and thereby determine whether the research activity, as described in the research proposal, will constitute a conflict with the applicable law and, if there is a conflict, whether there are modifications that can be made to the research proposal that will avoid a conflict with the law.

4.2 Risks of harm, loss or damage caused by research activities

The second circumstance described in Part B of the Terms of Reference requests a report about the principles that should guide the senior administration when a request is received for an allocation of resources to provide legal support regarding a research activity

... which involves or may involve activity creating a high risk of physical abuse, harassment, or some other form of serious mistreatment of the researcher by the research subject(s).

While the above quotation relates to the risk of harm or damage suffered by researchers that is caused "by" a research subject in the course of a research activity, there are several categories of persons who may also be at risk of harm caused by a research activity conducted under the auspices of Kwantlen. These include:

- (a) Persons who are research subjects;
- (b) Kwantlen students who conduct research as part of the academic requirements for a degree, certificate, diploma or course;
- (c) Volunteer members of a research team who may be members of the community or Kwantlen students; or
- (d) Members of the public who suffer harm, loss or damage caused by a research activity but who otherwise have no connection with the research activity.

Depending on the circumstances including the type of claim and the nature of the harm, loss or damage alleged to have been suffered, a claim of actual harm may be handled by the Self-Insured Comprehensive General Liability

Coverage under the University College and Institute Protection Program.

If a Kwantlen employee, whether the employee is a faculty member or a student who is employed by Kwantlen as a research assistant, suffers an injury in the course of and within the scope of the employee's employment, an employee's recourse is normally limited to a claim under the *Workers Compensation Act*.

4.2.1 Acknowledgement of Risk and Waivers of Potential Claims

In some cases, persons, who may be at risk of suffering harm to their person or damage to their property, may be requested, as a condition of their participation in an activity, to waive any legal claims they may have or that may accrue to them as a consequence of suffering harm to their person or damage to their property from participating in the activity. Waivers of liability give rise to several questions. First, in what circumstances, if any, is it appropriate for researchers in an academic institution to seek a waiver from participants in a research project. Another question relates to the effectiveness of waivers as a means of limiting exposure to liability for any harm that may be suffered from participating in the research activity.

When harm occurs and a claim for compensation is made in a legal action, the determination of liability depends on the type of legal action and the court's findings of the fact based on the evidence. If the type of legal action is a claim "in tort" seeking damages for harm caused to a person or damage caused to property, a prerequisite to a successful legal action is that the defendant owed a legal duty of care to the plaintiff claimant. A duty of care is usually found to exist where persons are so closely and directly affected by a defendant's conduct that the defendant ought reasonably to have had such persons within the defendant's contemplation when the defendant engaged in the conduct. If there is no legal duty of care, there is no liability. If there is a legal duty of care, the next question relates to the standard care imposed by that duty of care. The standard of care will vary depending on several factors including the nature of the activity, the training and experience of those who are supervising the activity, and the foreseeable risk of harm. If there is a legal duty of care, before legal liability for harm, loss or damage arises, there must be a breach of the legal duty of care, a failure to meet the standard of care, and there must be a causal connection between the breach of the legal duty and the harm, loss or damage that has been suffered. A person may suffer harm, loss or damage; however, unless there is a causal connection between the breach of a legal duty of care and that harm, loss or damage, there is no legal liability. Even if each of the elements of a tort, which are mentioned in this paragraph, are established, there are other factors that may need to be considered including whether or not the claimant waived his or her claims for compensation.

When a Kwantlen student undertakes research to fulfill the academic requirements for a degree, certificate, diploma or course, Kwantlen University

College will owe a legal duty of care to the student. This duty of care may include a duty not to approve or authorize research projects that may subject a student to a significant risk of foreseeable harm. When student research is a component of an academic requirement, the student may not have a real choice regarding whether or not to participate in a research project. In these circumstances, it may be inappropriate for Kwantlen to request a student to sign a waiver. Furthermore, in these circumstances, a court may disregard any waiver of liability signed by a student because the student had no real choice. If a research project is proposed by a student to fulfill an academic requirement, and it is foreseeable that the project may involve a significant risk of harm, the faculty member who is responsible for the course or program should either refuse to approve the research proposal or insist that research proposal be modified to minimize the risk of harm. Notwithstanding that it may be inappropriate to request a student to sign a waiver in the circumstances described in this paragraph, if there are some foreseeable but manageable risks associated with a research project, the participants should be expressly informed of the risks and requested to inform the supervising faculty member of any conditions that may accentuate the risks for a particular student participant. For example, if a student participant is particularly allergic to bee stings, and a botanical research field trip is planned to a location where there are known to be a number of beehives, students should be informed of the presence of beehives and special precautions may need to be taken with regard to any student participants who have a known allergy to bee stings. In some cases, it may be advisable to request participants to sign an acknowledgement that they have been informed of the known and foreseeable risks without requesting a waiver or any potential legal claims.

Faculty members may invite persons to participate as volunteer members of a research team. Persons who respond to such an invitation may include members of the community or Kwantlen students. In this context, Kwantlen students are not required to participate in the research activity as part of an academic requirement or as part of their employment as a research assistant. If there are some foreseeable risks of harm to the researchers, a legal duty of care will be owed to these volunteers by Kwantlen. As a matter of University policy, Kwantlen may decide that if research is being conducted under the auspices of Kwantlen, volunteer members of a research team should not be requested to sign any form of waiver of their legal rights if they suffer harm as a consequence of their participation in the research activity. Regardless of whether a waiver is sought from these volunteers, they should be fully informed about any foreseeable risks and it may be advisable to obtain a signed acknowledgement from each volunteer that he or she has been informed of the known and foreseeable risks. In circumstances where Kwantlen decides to seek a waiver of any legal claims that may accrue to the volunteer as a consequence of the volunteer's participation in a particular research activity, Kwantlen should retain a lawyer to prepare a suitable form of acknowledgement of the risks and waiver of legal claims for signature by each

volunteer participant.

With regard to research subjects, Kwantlen may, as a matter of University policy, decide that if research is being conducted under the auspices of Kwantlen, research subjects should not be requested to sign any form of waiver of their legal rights if they suffer harm as a consequence of their participation in the research activity. Regardless of whether a waiver is sought from research subjects, they should be fully informed about any known or foreseeable risks associated with the research and, in many cases, it will be advisable to obtain a signed acknowledgement that he or she has been informed of the known and foreseeable risks and that they consent to participate in the research project. If a research proposal, which is submitted to the REB for approval, does not propose to obtain a signed acknowledgement and consent from research subjects, the REB must, in fulfilling its responsibility to determine whether or not the research proposal meets Kwantlen's ethical standards, consider whether to impose a requirement that the researchers obtain a signed acknowledgement and consent from each research subject.

4.3 Obligations of Kwantlen University College under the Collective Agreement with the Kwantlen Faculty Association

Article 18.06 of the 2007 - 2010 Collective Agreement between Kwantlen University College and the Kwantlen Faculty Association (hereinafter referred to as the "KFA" provides:

18.06 INDEMNITY: LIABILITY INSURANCE

In accordance with provisions of the Self-Insured Comprehensive General Liability Coverage of the University College the [sic] Institute Protection Program, the Employer shall:

- (a) Exempt and save harmless each current and former faculty member from any legal action arising from the proper performance of their duties for the Employer; and
- (b) assume all costs, legal fees and other expenses arising from any such action, which resulted from actions of the faculty member when in the employ of the University College, and
- (c) provide advance notice at last known address to those current and former faculty members who are named in any such action as soon as the Employer becomes aware of same.

The Employer's obligations described in clauses (a), (b) and (c) of Article 18.06 are prefaced by a reference to the provisions of the Self-Insured Comprehensive General Liability Coverage of the University College and Institute Protection Program. I have not reviewed the content of the Self-Insured Comprehensive General Liability Coverage of the University College and Institute Protection Program because it is not the purpose of this Report to consider the extent of the Employer's obligations under Paragraph 18.06 of the Collective Agreement.

I have observed that clause (a) of Article 18.06 of the Collective Agreement refers to "the proper performance of their (faculty members') duties". With

regard to the scope of a faculty member's duties, a recent amendment to the Collective Agreement provides:

12.17 SCHOLARLY ACTIVITY

The parties recognize that research and scholarly activity have always been an integral component of faculty work at Kwantlen University College. Research and scholarship inform teaching, curriculum and teaching practices, enhance the knowledge of faculty and students, and enable faculty members to remain intellectually stimulated and current in their fields. Scholarly activity is a dynamic process consisting of the following interrelated components: discovery, application, integration, teaching and learning, and creative artistry.

Nothing in this provision shall be construed as increasing a faculty member's assigned work load.

The statement of "Principles of Academic Freedom", which has been approved by the Board of Governors and the Education Council, concludes with an acknowledgement of

... the requirement to operate within applicable provincial and national legislation.

Therefore, it may be argued that "proper performance" of a faculty member's duties on behalf of an employer does not include conduct that is contrary to the law, particularly if a faculty member knew or had been informed that a proposed course of conduct is or may be contrary to the law. In circumstances where a faculty member is aware that some aspect of a proposed research activity may be contrary to the law, a faculty member may be well advised to bring this aspect of the proposed research to the attention of the senior administration and seek a determination of whether or not the proposed research activity will be regarded as being within the proper performance of the faculty member's duties. Some of the ways in which this can be done are discussed in Part 5 of this Report.

Another aspect of Article 18.06 (a) of the Collective Agreement that may require interpretation is the meaning of the term "legal action". In some contexts, the term "action" is limited to particular types of proceedings.

Therefore:

The senior administration is obliged to fulfill the obligations of the Employer under Paragraph 18.06 of the Collective Agreement between Kwantlen University College and the KFA.

4.4 Principles and factors to guide the senior administration's decisions regarding the allocation of KUC resources when Legal Proceedings arise in relation to Kwantlen research activities

What principles and factors should guide the senior administration's decision making when a request is received for an allocation of resources to provide legal support in relation to a research activity conducted under the auspices of Kwantlen, when

- (a) the request is received from a faculty member but Kwantlen University College is not obligated under Paragraph 18.06 of the Collective Agreement between KUC and the KFA to assume the costs, legal fees and expenses, or
- (b) the request is received from a Kwantlen student?

No single principle will be determinative in all cases. In some cases, it may be desirable to consider several principles and factors. Each request for resources should be examined and evaluated on its individual merits.

4.4.1 Statement of Principles of Academic Freedom

The Board of Governors and the Education Council of Kwantlen University College have approved a statement of “Principles of Academic Freedom”. A submission that I received referred to the description of the “Principles of Academic Freedom” as being a “statement” rather than a “policy”. For the purposes of this Report and the recommendation made at the end of this Paragraph, it makes no difference whether it is a statement or a policy. The statement of Principles includes several references to research. After making an opening statement that Kwantlen University College upholds the right to freedom of expression in teaching, learning, research, scholarship and publishing, the statement provides, in part:

These rights and freedoms include but are not limited to the following:

- The right to carry out research and scholarship on human participants and animal subjects with public monies, trust, and support, and to disseminate the results without censorship, institutional or otherwise;”
- ...
- “The freedom to express ideas both in research and ...

The statement of “Principles of Academic Freedom”, also includes a statement that Kwantlen’s commitment to academic freedom recognizes and is based on:
Respect for the value of independent scholarship and research ...

The references in the statement of Principles of Academic Freedom to “the right to carry out research” and “the value of independent scholarship and research” are not absolute rights. Researchers, like everybody else, are subject to the law. This is recognized by the statement of “Principles of Academic Freedom” when it includes an acknowledgement of
... the requirement to operate within applicable provincial and national legislation.

For example, the false shouting of fire in a crowded theater is a criminal offence notwithstanding that it may be part of a research project to observe crowd reaction and how people act under great and sudden stress. The Canadian *Criminal Code*, R.S., 1985, c. C-46, s. 437 provides:

437. Every one who wilfully, without reasonable cause, by outcry, ringing bells, using a fire alarm, telephone or telegraph, or in any other manner, makes or circulates or causes to be

made or circulated an alarm of fire is guilty of
 (a) an indictable offence and is liable to imprisonment for a term not exceeding two years;
 or
 (b) an offence punishable on summary conviction.

Neither the fact that shouting of “fire” in a crowded theatre was part of a research project to make first-hand observations about how people react under sudden stress, nor the principles of academic freedom, will provide the researcher with a defence or from having to answer for the consequences of the ensuing panic caused by shouting “fire” in a crowded theatre.

In this context, the comments of Henry P. Edwards, in an article entitled “Regulation and accreditation in professional psychology: facilitators? Safeguards? Threats?”, 35 Canadian Psychology 66 (Jan. 1994), may be relevant. He wrote:

The question arises, however: within what limits must academic freedom be exercised, so that it is not confounded with licence or anarchy? In my personal view, although there can be no hard and fast answer to this question, a tentative answer must take into account at least the following elements:

1. Freedom of intellectual expression must be respected except when its exercise is precluded by higher order considerations, especially when the safety or well - being of others would be clearly threatened by uninhibited, unethical or irresponsible verbal or written expressions.
2. More specifically, academic freedom must not be used as a justification for unethical or criminal behaviours. Writings or oratory intended to promote violence, racism, discrimination against women, etc. do not fall within the scope of academic freedom.

In the course of the interviews which I conducted regarding the preparation of this Report, I asked most of the interviewees to identify the principles that they thought were important principles for the senior administration to consider when determining whether or not to allocate resources to support a legal proceeding arising out of a research activity. One of the common responses to this question was that an important principle was the protection of academic freedom. Most of the interviewees did not identify a particular aspect of academic freedom; however, some identified “independence of research” as being one aspect of academic freedom that needed to be protected. The value of “independent scholarship and research” is one of the aspects of academic freedom that is specifically mentioned in the statement of Principles of Academic Freedom.

Recommended Principle:

To the extent the statement of the “Principles of Academic Freedom” adopted by the Board of Governors and the Education Council may be relevant to a legal proceeding for which the senior administration has been requested to allocate resources, the senior administration must give due consideration to the statement of the “Principles of Academic Freedom”, including the statement that “Kwantlen also acknowledges the requirement to operate within applicable provincial and national legislation”, when determining whether or not to allocate the requested

resources.

4.4.2 Research Conducted in accordance with prior Legal Advice Obtained by Kwantlen

Part 5 of this Report, recommends the adoption of several protocols or strategies whose purpose is to identify and bring to the attention of the senior administration potential conflicts between research activities and the applicable law and potential legal liabilities associated with a research activity before an actual conflict or legal liability claim arises. Part 6 of this Report deals with seeking a legal opinion regarding potential conflicts with the law or issues of legal liability. Part 7 of this Report recommends a process whereby, if senior administration obtains a legal opinion about a potential conflict with the law or a potential issue of legal liability, a copy of the legal opinion should be provided to the Principal Investigator.

Recommended Principle:

The senior administration should allocate resources to retain and pay the fees of legal counsel and pay the costs and expenses of a legal proceeding regarding a research activity conducted under the auspices of Kwantlen if:

- (a) a principal investigator has done everything that he or she could be reasonably be expected to do in accordance with Part 5.3 to bring potential legal issues regarding a proposed research activity to the attention of the senior administration,**
- (b) a legal opinion has been obtained by the senior administration regarding the proposed research activity,**
- (c) the legal opinion is communicated to the principal investigator,**
- (d) the research is conducted in accordance with the legal opinion, and**
- (e) the legal proceeding, which subsequently arises, regarding the research activity, relates to a matter upon which the legal opinion was obtained.**

The rationale for this principle is that the principal investigator has done everything that he or she could be reasonably be expected to do to avoid any conflict with the law and minimize the risk of legal liability.

Some may suggest that each research activity in a research program is a unique and unpredictable experience that cannot be described with specificity in advance of the event. The response to this suggestion is that in the relatively rare circumstances where there is both a potential conflict with the law or potential issue of legal liability and also a relatively high degree of unpredictability with regard to how a research event may evolve, it is incumbent upon the principal investigator to anticipate and provide a description of as many alternative variables as are reasonably foreseeable. This will enable the senior administration, if it wishes, to obtain a legal opinion regarding all the

anticipated variables. If a legal opinion is obtained by the senior administration on the basis of the description of the proposed research including any alternative variables, the senior administration must consider the legal opinion when it decides whether to:

- (a) approve the research activity,
- (b) approve the research activity provided that it is conducted in accordance with the legal opinion obtained by the senior administration and communicated to the principal investigator,
- (c) approve the research activity subject to conditions specified by the senior administration including a condition that expressly reserves the right of the senior administration to decline to allocate resources to support any legal proceedings that may arise regarding research activity, or
- (d) decline to approve the research activity on the ground that the research activity does not constitute proper performance of a faculty member's duties for Kwantlen University College.

If, during the course of a research activity, some unanticipated variable arises, that was not described in the documentation upon which a legal opinion was based, the principal investigator must suspend this aspect of the research activity and terminate the researchers' involvement in the research activity until the new unanticipated variable is reviewed by the senior administration. This review may include obtaining a supplementary legal opinion regarding the previously unanticipated variable. If the principal investigator does not suspend the research activity and terminate the researchers' involvement the research activity pending such a review, and legal proceedings arise with regard to this aspect of the research, the senior administration may decline to allocate resources to provide legal counsel or to pay legal costs and expenses associated with any legal proceeding regarding this aspect of the research activity.

4.4.3 Prior Disclosure of Legal Issue by Faculty Member

Faculty members submit applications for a research grants, and prepare research proposals for several purposes including submission to the REB, and as step of the process that may lead to undertaking research under a research contract between Kwantlen and an government agency or private entity. In Part 5.3 of this Report, it is recommended when a faculty member prepares such an application or proposal, the faculty member identify any foreseeable potential conflict between the proposed research activity and the governing law and any foreseeable potential legal liability for harm, loss or damage that may arise from the research activities.

In some cases, where a potential conflict with the law or a potential legal liability is identified in the above mentioned documentation, the senior administration will obtain a legal opinion regarding the identified legal issue and approve the research provided that the research is conducted in accordance with the legal

opinion. In those cases, the Recommendation made in Part 4.4.2 of this Report will apply.

In cases where a faculty member has specifically identified a potential conflict with the law or a potential legal liability in accordance with Part 5.3 of this Report but the senior administration has not sought a legal opinion regarding the identified legal issue, the faculty member has done all that can be reasonably expected to alert the senior administration about potential legal issues. In these circumstances, the following principle should guide the senior administration:

Recommended Principle:

The senior administration should allocate resources to retain and pay the fees of legal counsel and pay the costs and expenses of a legal proceeding regarding a research activity conducted under the auspices of Kwantlen if:

- (a) the principal investigator has identified potential conflicts with the governing law and potential issues of legal liability in documentation submitted by the principal investigator as part of**
 - (i) an application for a research grant that has been filed with Office of Research and Scholarship**
 - (ii) a research proposal that has been submitted to and approved by the REB ,**
 - (iii) a research proposal that has been prepared and submitted to the Office of Research and Scholarship for the purpose of obtaining a research contract, or**
 - (iv) a document describing a research project that has been submitted to the Office of Research and Scholarship for consideration or approval;**
- (b) the application, proposal or other documentation fully described the research methodology and circumstances that gave rise to the conflict with the law or a claim of legal liability; and**
- (c) the request for an allocation of resources relates to a conflict with the law or a legal claim that was identified by the principal investigator in accordance with clause (a).**

The rationale for this recommended principle is that the principal investigator has done all that he or she can do to identify potential legal issues before undertaking the research activity.

4.4.4 Research Conducted in accordance with REB Approval and a Legal Proceeding relating to the application of Kwantlen's Ethical Standards and Requirements

If a Principal Investigator submits a research proposal to the REB, approval is granted by the REB, and the research activity is conducted in accordance with the research proposal approved by the REB, Kwantlen should allocate resources to retain legal counsel and pay legal costs and expenses of a legal proceeding if a legal proceeding subsequently arises regarding the application of Kwantlen's ethical standards.

Recommended Principle:

The senior administration should allocate resources to retain and pay the fees of legal counsel and pay the legal costs and expenses of a legal proceeding regarding a research activity conducted under the auspices of Kwantlen if:

- (a) a research proposal has been submitted to and approved by the REB as satisfying Kwantlen's ethical standards and requirements regarding research involving human subjects,**
- (b) the research has been conducted in accordance with the research proposal approved by the REB,**
- (c) the research has been conducted in accordance with any legal opinion obtained by KUC and communicated to the principal investigator regarding the research project, and**
- (d) the legal proceeding relates to the application of Kwantlen's ethical standards.**

There are two rationales for this recommended principle. One rationale is the importance of reinforcing the requirement that researchers submit research proposals involving human subjects to the REB for approval before any research is undertaken. Unless a research project involving human subjects has been approved by the REB, the presumption should be that the senior administration will not allocate resources to retain and pay the fees of legal counsel or pay legal costs and expenses of a legal proceeding arising out of the research project that relates to Kwantlen's ethical standards and requirements. This presumption may be overcome if there is some other principle, which favours the allocation of such resources, that outweighs the principal investigator's failure to submit a research proposal to the REB for approval. Another rationale for this recommended principle is that the principal investigator has done all that he or she can reasonably be expected to do as far as complying with Kwantlen's ethical standards and requirements.

4.4.5 Confidential Communications made to Researchers

There are several contexts in which confidential information may be received by researchers. Under this heading, the Report will consider confidential communications made to researchers that may include some form of admission of civil or criminal liability. Under a subsequent heading, this Report will consider information supplied to researchers on a

confidential basis where the information has some commercially sensitive attributes including financial information or market information.

In the course of research regarding such matters as youth gang activity, domestic violence, prostitution, non-prescription drug-use, or elder abuse, a researcher may receive a communication from a research subject that may be regarded as either an incriminating statement in a criminal proceeding or an admission of liability in a civil proceeding. If a researcher proposes to ask questions that may elicit this type of response, the questions and the proposed research methodology in relation to such questions should be vetted by the REB prior to the commencement of the research.

If a researcher who received communications from a research subject, which are described in the preceding paragraph, is subpoenaed to testify in a legal proceeding involving the research subject, a legal question arises regarding whether or not the researcher may decline to disclose the content of the communication on the ground that the communications are protected from disclosure by some form of legally recognized “privilege”. Whether or not such privilege will be recognized by the court in a specific case is a complex legal question. The circumstances surrounding a specific case must be examined on a case-by-case basis. Generally, a witness who is subpoenaed to testify in a legal proceeding, must answer any and all questions that are relevant to the issues before the court or tribunal. However, in a series of cases, beginning with *Slavutych v. Baker*, [1976] 1 S.C.R. 254, the Supreme Court of Canada recognized that, in limited circumstances, a witness will not be compelled to disclose confidential communications. The following passage from paragraph of the judgment of McLachlin J. (writing the judgment of the Supreme Court of Canada) in *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, provides a summary of relevant legal principles that a court will consider. At paragraph 20 of the judgment, she wrote:

The applicable principles are derived from those set forth in *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), § 2285. First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be “sedulously fostered” in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

The application of these principles will vary from case to case. Indeed, this qualified privilege against disclosure is often described as a “case-by-case” privilege. In every case, the specific facts must be considered in relation to the jurisprudence that has developed regarding each of the four principles identified in the preceding quotation. This can only be done with the assistance of legal counsel.

It should be observed that privilege only applies to “communications” and

the communications must originate in a confidence. When the courts have considered the “privilege” that may protect other communications from disclosure in court, the courts have held that a privilege, which exempts a witness from being compelled to disclose a communication, does not operate to excuse the witness from being compelled to answer questions about factual observations or conduct that the witness observed. For example, in relation to the privilege under which a lawyer may not be compelled to disclose confidential communications made by to the lawyer by a client, the court in *Ontario (Securities Commission) v. Greymac Credit Corp.* (1983), 41 O.R.(2d) 328 (Div. Ct.), held that a lawyer could be compelled to answer questions about a client’s conduct. At page 337, the court said:

The fact that a client has paid to, received from, or left with his solicitor a sum of money involved in a transaction is not a matter as to which the client himself could claim the privilege, because it is not a communication at all. It is an act.

Similarly, in relation to the spousal privilege under which one spouse cannot be compelled to disclose communications made by the other spouse, the court in *Gosselin v. R.* (1903), 33 S.C.R. 255, held that, notwithstanding the validity of the wife’s claim that communications made to her by her husband were privileged, the wife was compelled to testify about blood spots she observed on her husband’s clothes when he returned home on the day that the alleged crime was committed. The court held that her observation of the blood spots did not constitute a “communication”. It should be mentioned that when this case was decided, a spouse was a compellable witness when the other spouse was on trial for a criminal offence; however, the witness spouse could not be required to disclose a spousal communication made by the spouse who was on trial.

Furthermore, in the context of the lawyer-client privilege regarding disclosure of confidential communications, the privilege does not apply to statements made by a client in furtherance of future unlawful conduct. Sopinka, Lederman and Bryant in *The Law of Evidence in Canada*, expressed this qualification in the following words, at page 644:

If a client seeks out a lawyer for the purpose of assisting him or her to perpetrate a crime or fraud there can be no privilege, whether or not the solicitor is aware of the client’s motive in consulting with him or her. As stated by Dickson J. in *Solosky v. Canada* [(1980), 105 D.L.R (3d) 745 at 757]

... if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant.

The preceding discussion relates to a privilege against disclosure that may be claimed by a witness who is otherwise a compellable witness to testify upon receiving a subpoena. This is distinct from the relatively few situations where certain types of witnesses cannot be compelled to be a witness at all. For example, an accused who is charged with a criminal offence cannot be

compelled to be a witness against himself or herself. One spouse cannot be compelled to be a witness in a prosecution against the other spouse. Neither lawyers nor university researchers have any exemption from being compelled to testify as a witness. If they are compelled by means of a subpoena to testify as a witness and they are asked questions about certain types of communications, a question regarding the application of any privilege against disclosure of confidential communications will arise.

In some research endeavors, the solicitation of confidential information is essential. When it is necessary for researchers to solicit confidential information, it is important that researchers be able to uphold assurances of confidentiality to the extent that the law permits. If a researcher is served with a subpoena to testify in a matter regarding a research subject, most researchers do not have the legal knowledge that will be required to make a proper submission to the court or tribunal regarding the application of any privilege against disclosure of confidential communications that may be applicable. It is important for the entire community of researchers including those at Kwantlen that research subjects understand that when the issue of disclosure of confidential communications arises, universities will allocate resources to retain and pay the fees of legal counsel to give advice and make a proper legal submissions to the court or tribunal on this complex legal issue .

Recommended Principle:

If a Kwantlen researcher is subpoenaed to testify about confidential communications made to the researcher by a research subject during the course of a research project conducted under the auspices of Kwantlen, the senior administration should allocate resources to retain and pay the fees of legal counsel to provide legal advice regarding the applicability of any legally recognized privilege against disclosure of confidential communications and, if such a legal privilege may be applicable, to ensure that the court or tribunal receives the benefit of a full legal submission regarding the application of any privilege against disclosure of the confidential communications that may be applicable in the circumstances of the case where the subpoena has been issued.

4.4.6 Information subject to a Confidentiality Agreement

When the research involves a commercial or business enterprise, it may be desirable for the researcher to obtain confidential financial, market, or production information about the enterprise. Any release of such information could potentially benefit competitors or adversely affect financial dealings. When contract research is undertaken on behalf of government agencies, hospitals and similar organizations, the information to which researchers have access may include sensitive policy information

or patient data. In these circumstances, the business or government agency will normally agree to provide this type of information to the researchers only if a confidentiality agreement is signed by the researchers.

When a confidentiality agreement is signed, the researchers are contractually bound by the agreement and a breach of the confidentiality covenant could result in a civil action for damages.

Recommended Principle:

If research is being conducted under the auspices of Kwantlen, and information has been provided to the researchers under a confidentiality agreement, and a person, who is not a party to a confidentiality agreement, seeks to compel a Kwantlen researcher to release or otherwise divulge confidential information which is protected by the confidentiality agreement, the senior administration should allocate resources to retain and pay the fees of legal counsel to ensure that the court or tribunal receives the benefit of a full legal submission regarding the application of the confidentiality agreement.

Confidentiality agreements are the subject of Paragraph 1.17 of **UBC Research Policy 87 - Procedures**. It provides:

1.17. Confidential Data

1.17.1. If, under the terms of a formal contract, a sponsor agrees to provide data essential to the research which is clearly labeled "Confidential Data", the University will accept such a contract and observe such confidentiality provided that the results of the research may be published without identifiable reference to the confidential data and that no limitations are placed on the publication of results other than those outlined.

Confidentiality clauses or covenants must be distinguished from non-publication covenants. Some agreements may contain both types of clauses. A non-publication clause typically precludes the researcher and/or the university from publishing the results of research for a period of time specified by the agreement. The purpose of a non-publication clause is normally intended to provide a company with an opportunity to either obtain or perfect a patent or gain a competitive advantage in the market place.

Non-publication clauses are the subject of Paragraph 1.16 of **UBC Research Policy 87 - Procedures**. It provides:

1.16. Limitation of Publication

1.16.1. A sponsor may be given the right under the terms of the formal contractual agreement to publish research results or to approve such publication in advance. In any case, the University shall be completely free to publish after a maximum of 12 months from termination of the project or submission of the final report, whichever is later, unless an exception for a brief extension is granted by the Vice-President, Research.

1.16.2. No restriction shall prohibit or delay in any way the use of research results by

graduate students for theses or other academic purposes.

- 1.16.3. Delays in publication at the request of sponsor are permissible only if the public interest is best served by such a policy or if patent property protection is being sought.

4.4.7 Intellectual Property Issues

The 2007 - 2010 Collective Agreement between Kwantlen University College and the KFA provides:

18.02 COPYRIGHT AND INTELLECTUAL PROPERTY

a) Copyright Ownership

The copyright or patent for any work product, including creative work, instructional strategies or curriculum/instructional material, software or any other material or technology that may be copyrighted or patented:

1. belongs to the employee(s) where the work product has been prepared or created as part of assigned duties, other than the duties listed in 2. below, and the copyright to all copyrightable material shall be the sole property of the employee(s) and shall be retained throughout his or her lifetime and upon his/her death by his/her heirs or assigns; and
2. belongs to the institution where one or more employees:
 - i) have been hired or agrees to create and produce copyrightable work product for the institution, or
 - ii) are given release time from usual duties to create and produce copyrightable work product, or
 - iii) are paid, in addition to their regular rate of pay, for their time in an appointment to produce copyrightable work product.

b) Employer Rights to Materials Copyrighted by Employee(s)

Where the employee holds the copyright pursuant to 1. above the institution shall have a right to use his/her copyrighted material in perpetuity for institutional purposes. The institution may amend and update the copyrighted material with the approval of the employee(s) holding the copyright to the material. Such approval will not be unreasonably withheld.

c) Employee Rights to Materials Copyrighted by the Employer

Where the institution holds the copyright pursuant to 2. above the employee(s) shall have the right to use in perpetuity, free of charge, such copyrighted material. The employee may amend and update the copyrighted material with the approval of the institution holding the copyright to the material. Such approval will not be unreasonably withheld.

In some of the circumstances described in Paragraph 18.06, Kwantlen University College has no legal property interest in the intellectual property described in the Paragraph 18.06.

In some instances, commercial publishers or others may have taken full or partial assignment of intellectual property rights held by a faculty member under Paragraph 18.06.

If Kwantlen does not have any legal interest in intellectual property, the the presumption should be that senior administration will not allocate resources to pay legal fees or legal costs and expenses of a legal proceeding regarding such intellectual property. This presumption may be overcome if there is an agreement between Kwantlen and the owners and holders of all legal interests regarding the intellectual property, which is the subject of the legal proceeding, to share both burdens of protecting the intellectual property and the benefits of the intellectual property.

Recommended Principle:

The senior administration should not allocate resources to retain legal counsel or pay any portion of the legal costs and expenses regarding a legal proceeding involving intellectual property unless

- (a) KUC has a legal interest in the intellectual property, and**
- (b) where a legal interest in the intellectual property is held by person other than KUC, an agreement has been reached with holders of all the legal interests regarding the allocation of both**
 - (i) the legal fees and the costs and expenses associated with the legal proceedings,**
 - (ii) the benefits that may accrue from the legal proceedings.**

4.4.8 Breach of Government Regulations or Municipal Bylaws

There are many government regulations that are not part of common knowledge. A faculty member who undertakes research in a subject area that is subject to government regulation will often be knowledgeable about applicable government regulations and municipal bylaws. If not, he or she should familiarize himself or herself with regard to any applicable government regulations by addressing inquiries to the appropriate government ministries and agencies, and municipal offices. Nevertheless, circumstances may arise where, despite all reasonable efforts, there is an alleged breach, albeit an unknowing and unintended breach, of some obscure government regulation or municipal bylaw.

Many of these regulatory offences are known as “absolute” or “strict liability” offences where the prosecution is not required to prove that an alleged offender either intentionally, knowingly or recklessly breached the

regulation or bylaw. The only issue before a court is whether the conduct violated the regulation or bylaw. If there is no dispute about whether the conduct constitutes a breach of the regulation or bylaw, there may not be any defence to charge; however, it may still be important to retain and pay the fees of legal counsel for the purpose of making submissions to the court regarding the appropriate penalty.

When a researcher, in the circumstances described above, is charged with a violation of a government regulation or municipal bylaw, legal counsel should be retained to provide a legal opinion regarding whether or not the conduct constitutes a breach of the regulation or bylaw. If the legal opinion concludes that the conduct does not constitute a breach of the government regulation or municipal bylaw, the senior administration should allocate resources to retain and pay the fees of legal counsel to represent the researchers charged with the infraction. If the legal opinion concludes that the conduct does constitute a breach of the government regulation or bylaw, the senior administration should allocate resources to retain and pay the fees of legal counsel to present a submission regarding the appropriate penalty.

Recommended Principle:

Where research activity has been or is being conducted under the auspices of Kwantlen and, despite reasonable efforts to learn about and abide by all applicable government regulations and municipal bylaws, a Kwantlen faculty member or student is charged with the breach of a government regulation or municipal bylaw that was unknown to the researcher, the senior administration should allocate resources to retain and pay the fees of legal counsel of those who are charged with the alleged breach of the government regulation or municipal bylaw.

4.4.9 Factors contained in the statement of Guiding Principles established for the Office of Research and Scholarship

In addition to the above mentioned principles, there are factors, which may be considered by the senior administration when determining whether or not to allocate resources to provide legal support with regard to a legal issue that arises from a research project. These factors are not as important as the principles described above. These factors should not be used as a basis for declining a request to allocate resources to pay legal fees or legal costs and expenses in relation to a legal proceeding involving a research activity conducted under the auspices of Kwantlen. They are factors that should only be considered as supporting a decision in favour of the allocation of resources in circumstances where a decision on whether or not to allocate resources may otherwise be uncertain. These factors are drawn, in part, from the “Guiding Principles” that have been established for the

Office of Research and Scholarship and particularly item #2 of those Guiding Principles. It reads:

2. Every plan, decision or action relating to research and scholarship at Kwantlen shall have at least one and ideally a combination of the following objectives:
- Enhancement in the quality of the education of our students
 - Enrichment in the professional lives and reputation of the faculty
 - A valuable and valued contribution to the economic, social and cultural well-being of the communities we serve
 - Enhancement in the reputation of Kwantlen

An amplification of how these factors may support a decision to allocate resources is provided below.

(a) Enhancement of the reputation of Kwantlen

The reputation of Kwantlen may be affected by the outcome of a legal proceeding regarding a research activity conducted under the auspices of Kwantlen. An example of where the reputation of KUC may be affected is where it is alleged that a Kwantlen researcher did not conduct research in an ethical manner notwithstanding that the research proposal has been approved by the REB. In these circumstances, it may be important for the overall reputation of Kwantlen and its research community for the senior administration to allocate resources to retain and pay the fees of legal counsel and to pay legal costs and expenses in relation to such a legal proceeding.

Recommendation:

If the reputation of Kwantlen may be affected by the outcome of a legal proceeding involving a research activity conducted under the auspices of Kwantlen, this factor may be considered by the senior administration as a factor that supports the allocation of resources to retain and pay the fees of legal counsel and pay legal costs and expenses regarding such a legal proceeding.

(b) The research has or will likely provide a valuable or valued contribution to economic, social or cultural well-being of the communities served by Kwantlen

Some research projects are likely to provide a valuable or valued contribution to the economic, social or cultural well-being of a community served by Kwantlen. This factor may take on increased importance when a segment of the community has participated in the research or an expectation has already developed that the community will benefit from the research. For example, a specific community may have approached the university with a request to enter into a research partnership, or the community may have invested a significant amount of time and energy in a research project. If the completion of the research project is threatened by a legal proceeding, the abandonment of the research project in the face of a legal proceeding may adversely

affect the university's future relationship with that community. In these circumstances, it may be important for the overall reputation of Kwantlen and its research community for the senior administration to allocate resources to retain and pay the fees of legal counsel and to pay legal costs and expenses in relation to such a legal proceeding.

Recommendation:

If a research activity is being or was conducted under the auspices of Kwantlen and either

- (a) the outcome of research has provided or will likely provide a valuable or valued contribution to economic, social or cultural well-being of the communities served by Kwantlen, or**
- (b) a community that Kwantlen serves has had a significant involvement with either the development or implementation of the research project**

these factors may be considered by the senior administration as factors that support the allocation of resources to retain and pay the fees of legal counsel and pay legal costs and expenses of a legal proceeding arising out of the research activity.

(c) Enhancement of the quality of the education of Kwantlen's students

The outcome or likely outcome of a research project may be to improve the education of Kwantlen's students by either improving instructional materials or by providing Kwantlen's students with an educational experience including experience in research methodology.

Recommendation:

If the outcome or likely outcome of a research activity conducted under the auspices of Kwantlen will likely improve the education of Kwantlen's students, this factor may be considered by the senior administration as a factor that supports the allocation of resources to retain and pay the fees of legal counsel and pay legal costs and expenses regarding such a legal proceeding.

4.4.10 Cost-Benefit Analysis

A consideration of the principles discussed in this Part of the Report by the senior administration should also include a consideration of:

- (a) the amount of the requested allocation of resources to the legal proceeding, in relation to
- (b) the likely benefit that may be obtained by allocating resources to the legal proceeding, and

- (c) the availability of less costly alternative dispute resolution mechanisms if all the parties to the dispute agree to participate in and be bound by the outcome.

When considering the amount of the requested allocation of resources, the senior administration is bound by Board of Governors Policy 3-5 and the direction contained therein that the senior administration not cause or allow the development of fiscal jeopardy for Kwantlen University College.

Some examples may illustrate the need for a cost-benefit analysis.

- (1) Assume that a Kwantlen faculty member is at the page-proof stage of publishing a text based on the Kwantlen faculty member's research. The author of another text has learned that the Kwantlen faculty member's draft text includes a number of extensive quotations and the prior author objects to their inclusion on the ground that they are a breach of copyright despite the proper acknowledgement of the prior author's work. Legal counsel for the prior author has demanded that the quotations be removed from the Kwantlen faculty member's text or an application will be made for an injunction to prohibit publication of the Kwantlen faculty member's text on the ground that it constitutes a breach of copyright. In these circumstances, the senior administration should consider the financial cost of and the likelihood of successfully opposing the application for an injunction in relation to the benefits to be achieved by publishing the Kwantlen faculty member's text with or without the contentious quotations. The possibility of resolving the dispute by reducing the number and size of the quotations should be explored if counsel for the prior author will agree to participate in such a process.
- (2) Assume that the senior administration has allocated resources to support a legal proceeding but the decision made by the court or tribunal of first instance is unfavorable to the position taken by Kwantlen. Assume further that the faculty member or student who made the initial request for an allocation of resources, wants to appeal the decision of the court or tribunal of first instance and the senior administration receives a request for an allocation of additional resources to retain and pay the fees of legal counsel and pay the legal costs and expenses to file and present an appeal. In some cases, the principle at issue may be so important that the additional cost of an appeal may be warranted. On the other hand, if the likelihood of overturning the initial decision by way of an appeal is low and the issue in the legal proceeding does not involve a principle that is at the core of academic freedom, the cost of allocating resources to support an appeal in relation to the potential benefit may not warrant the allocation of additional resources.

Recommended Principle:

When considering the application of the principles discussed in Part 4.4

of this Report, the senior administration should also consider:

- (a) the amount of the requested allocation of resources, in relation to
- (b) the likely benefit that may be obtained by allocating resources to support the legal proceeding, and
- (c) the availability of less costly alternative dispute resolution mechanisms.

4.4.11 Step-by-Step Evaluation Process

In some cases, a legal proceeding may have several steps, including several levels of appeal. An allocation of resources should be only for the immediately forthcoming step in a legal proceeding. Any subsequent steps in the legal proceeding including any appeals, should be the subject of a separate request for an additional allocation of resources. The new request should be re-evaluated by the senior administration on the basis of the relevant principles and factors discussed in this Part of the Report. In other words, an allocation of resources to the initial step in a legal proceeding does not, for example, constitute a commitment by Kwantlen University College to allocate resources to take the case all the way to the Supreme Court of Canada.

Recommended Principle:

If there are several steps in a legal proceeding including one or more levels of appeal, each step including any appeal should be the subject of a separate request for an allocation of resources to retain and pay the fees of legal counsel and pay the legal costs and expenses associated with the immediately forthcoming step in the legal proceeding. Each request should be evaluated by the senior administration on the basis of the principles discussed in this Part of the Report in relation to

- (a) the financial resources already committed by the senior administration to the legal proceeding,**
- (b) the additional financial liability for legal fees and costs and expenses that will likely be incurred in the immediately forthcoming step in the legal proceeding, and**
- (c) the potential liability for the legal costs of other parties to the legal proceeding if the court or tribunal orders such costs to be paid by the unsuccessful litigant.**

4.4.12 Carriage of Legal Proceedings

When a company or an institution agrees to pay legal fees, costs and expenses of a legal proceeding on behalf of another person, it is common for the company or institution, which is paying the funds, to assume carriage of the legal proceeding including the selection of legal counsel and the right to give instructions to the legal counsel. This is common in the insurance industry where an insurance company agrees to defend an insured or prosecute a claim

on behalf of an insured. Similarly, Paragraph 78.2.3 of the Framework Agreement between University of Victoria Faculty Association and the University of Victoria provides:

78.2.3 Before any obligation by the University to indemnify a Member arises:

- (a) the Member must give notice of the claim to the University ...
- (b) the University must be given the opportunity to assume carriage of the defence of the claim; and
- (c) in the case of an out of court settlement of the claim, the University must approve the settlement.

Recommended Principle:

If the senior administration allocates resources to pay legal fees or legal costs and expenses of a Kwantlen faculty member or student regarding a legal proceeding arising from a research activity conducted under the auspices of Kwantlen, Kwantlen University College

- (a) must be given the opportunity to assume carriage of the legal proceeding, and**
- (b) must approve any out-of-court settlement of the legal proceeding.**

5.0 IDENTIFICATION OF POTENTIAL LEGAL ISSUES PRIOR TO LEGAL PROCEEDINGS ARISING

At Kwantlen, it is not part of the responsibility of a Chair of a Department to review or approve research proposals developed by members of the Department.

In my discussions with Deans, several Deans observed that they frequently learn about research proposals developed by members of their respective faculties when a faculty member requests either a letter in support of an application for a research grant or teaching-release time to conduct the research. With regard to applications for some types of research grants, a Dean may be required to “sign-off” on the application form. However, there is no standardized protocol whereby Deans are kept informed about the current and proposed research activities of all their faculty members.

In my review of various Kwantlen policies and in my discussions with various members of the Kwantlen community, it became apparent that there are few strategies currently in place whereby potential conflicts between research activities and the governing law or potential claims of legal liability may be identified and brought to the attention of the senior administration before an actual conflict with the law arises or an actual legal proceeding is commenced. Conflicts with the law or legal claims may be more likely to arise in relation to research projects involving human subjects; however, these legal issues are not confined to research involving human subjects. The advantage of identifying potential legal issues before they mature into actual legal problems is that it provides the senior administration with an opportunity to seek legal advice which may, in turn, permit steps to be taken that will avoid any conflict

with the law and minimize the risks of legal liability without jeopardizing the search for knowledge contained in the research proposal.

There are several strategies and protocols that may be utilized including:

- (a) An annual statement of a faculty member's current and proposed research activities that would be filed with each faculty member's Dean,
- (b) Co-ordinating all applications for research grants (both internal and external) and research contracts through the Office of Research and Scholarship,
- (c) Imposing a "soft" requirement on the REB to identify and bring to the attention of the senior administration any potential legal issues that come to the attention of the REB during its review of a research proposal.
- (d) Imposing a requirement on principal investigators to identify any potential legal issues when they are submitting:
 - (i) an application for a research grant,
 - (ii) a proposal for contract research, or
 - (iii) a research proposal for submission to the REB.

Each of these proposals is considered in the following paragraphs.

5.1 Annual Statement of Current and Proposed Research

In many universities, each faculty member is required to file some form of annual statement with his or her Dean, with a copy for the Vice President Academic, that includes a brief description of a faculty member's current research as well as any research proposals that are under development. In the subsequent year, this statement will be updated and may indicate that some research projects have been completed and that research is underway on proposals described in the previous report. In a university context, faculty members have an incentive to provide this information because, together with teaching evaluations and publications, it is used in making recommendations about promotion, tenure and merit-based salary adjustments. If, during a review of this annual report, a Dean identifies a research program that may involve some potential legal issues, the Dean can request the faculty member to provide further information or the Dean can refer the matter to the senior administration for legal advice. There is no equivalent process or protocol at KUC whereby Deans of Faculties receive an annual statement of the research activities of their faculty members.

It is my understanding that Kwantlen faculty members already provide their respective Deans with an annual statement of their professional and curriculum development activities. This statement could be expanded to include a statement that briefly describes any current research being conducted during the faculty member's reportable time as well as any proposed research that the faculty member expects to conduct during the forthcoming year of reportable time.

A requirement of filing such a statement does not imply that there is an obligation on faculty members to undertake research. The requirement will only apply if, in fact, a faculty member is engaged in research as part of his or her reportable time or is developing a research proposal that the faculty member expects to conduct during his or her reportable time in the forthcoming year.

If, during a Dean's review of these annual reports, a Dean identifies a potential conflict with the law or a potential issue of legal liability, the initial responsibility of the Dean would be to seek further information about the nature and scope of the research from the faculty member including a copy of the research proposal or research plan. Beyond the responsibility of obtaining this information, the only additional responsibility of the Dean would be to refer any potential legal issue to the senior administration for the purpose of ascertaining whether it is advisable to obtain a legal opinion with regard to a legal issue that has been identified.

Another benefit that may flow from such a protocol is that Deans will become more familiar with the research interest of their faculty members. This may enable Deans to facilitate more interdisciplinary contacts among Kwantlen faculty members as well as facilitate the development of more research opportunities with external agencies.

RECOMMENDATION:

Kwantlen adopt a protocol whereby Faculty Members are required to file an annual written statement with their Dean that provides a brief description of current research activities conducted during their reportable time and any research proposals that they expect to conduct in the forthcoming year as part of their reportable time. After review, the Dean should forward a copy of this statement to the Associate Vice President, Research and Scholarship.

5.2 Co-ordinating all applications for research grants (both internal and external) and research contracts through the Office of Research and Scholarship

In many universities, virtually all research activity done under the auspices of the university is funneled through the university's Office of Research or an office with a similar name. Most research conducted under the auspices of a university research falls into one of the following categories:

(1) Research undertaken with the assistance of a research grants provided by the university:

These grants are sometimes referred to as "Internal Research Grants". In most

cases, the applications for such internal grants are submitted to the Office of Research; however the evaluation applications and selection of the recipients is frequently made by a committee consisting of faculty members. At some stage of the process, there is usually some review by the staff of the Office of Research that includes a determination of:

- Whether the research proposal may need to be reviewed by the Research Ethics Board,
- Whether any proposed purchase of goods or services with research funds should be handled by the university's purchasing department, and
- Whether there is any potential conflict between the proposed research activities and the governing law and whether there are any potential legal liabilities that may arise from the proposed research activities.

After a grant has been awarded, the funds are normally administered by the Office of Research.

(2) Research undertaken with the assistance of External Research Grants

A common feature of the many applications for external grants is a requirement that the grant application be "signed off" by the Vice President, Research or other designated officer of the university, on behalf of the University. By "signing off" on these applications, the university may be requested to certify, among other things, that:

- The applicant has the appropriate status within the university to conduct research,
- The university has the necessary physical space and other resources to enable the proposed research to be conducted,
- The university is prepared to administer the research grant funds, if the application is successful,
- The university assumes responsibility for ensuring that the research will be conducted in accordance with the governing law and in accordance with certain standards including, when the research involves human subjects, specified ethical standards for such research.

UBC's Research Policy #87 is a typical example of a university policy governing external grants and contracts. Policy #87 provides, in part:

1. General

...

1.3. Support for research arises from grants or contracts. Every application for funds (new or renewal) from an external source must be signed, in the following order, by the applicant, the Department Head or Director, the Dean and the Director of Research Services. Only the University itself has the legal authority to enter into contracts which are binding on the University; such contracts must be executed by a delegated signing officer.

1.4. Grant and contract funds are held in trust by the University and are not the property of any individual.

The accompanying procedures of UBC's Research Policy #87 provide, in

part:

1. Application for External Funds – Grants & Contracts

1.2. This rule applies equally to:

- 1.2.1. funding requests for new projects;
- 1.2.2. requests for renewal or supplemental funding for existing projects;
- 1.2.3. requests made by letter or by written proposal as well as those prepared on pre-printed forms;
- 1.2.4. all faculty awards and fellowships, even when funds will not be administered by UBC;

(3) Contract Research

In most universities, when there is a proposed research contract with a government ministry or agency or private industry that involves university resources or facilities, the Vice President Research or another designated person is the only person who can sign the research contract on behalf of the university. Simon Fraser University's Policy on "External Research Grants and Contracts (Policy R.10:01) is a typical example of a university policy governing research contracts with industry and other public and private agencies. Paragraphs 5.3 - 6.3 of this Policy are reproduced in Appendix "C" to this Report.

The Procedures accompanying UBC Research Policy 87 provide another example. Paragraphs 2.1 and 2.2 of the Procedures are reproduced in Appendix "C" to this Report.

Prior to signing a research contract, a number of matters are normally reviewed including a due diligence check that includes an examination of whether the proposed research is in compliance with the law and that all required government permits, licenses, etc have been obtained. Furthermore, an examination of legal liability issues may be undertaken to ensure that the university is not assuming any unwarranted or undue financial risks.

(4) Unsolicited Donations

Occasionally, research funds may be offered by an external source in a casual manner without any requirement that the researcher submit any formal application and without any formal research contract. The procedures accompanying UBC Research Policy #87 contain the following provision regarding this source of funds:

1.12. Unsolicited Donations

- 1.12.1. Funds for research are often obtained in the form of unsolicited donations or as a result of informal conversations with potential donors, and thus formal applications may not exist. In such cases copies of letters or other related documents, a summary of the project, and the proposed budget, on an Office of Research Services Grant Information Form, should be sent to the Office of Research Services. Copies of this form are available from the Office of Research Services. Such requests must be endorsed by the Head and Dean in the usual way.

(5) Research conducted by faculty members without any internal or external

financial assistance in form of research grants, teaching release-time
 Research may be conducted by a faculty member without any internal or external financial assistance or teaching-release time. The research is conducted in his or her capacity as a Kwantlen faculty member and the research may utilize various university resources such as computers, secretarial services, and the library. The product of the research may be in the form of a publication that identifies the author and researcher as a Kwantlen faculty member. In these circumstances, unless a research proposal must be submitted to the REB because the research involves human subjects, it is unlikely that there would be any review of the research activity in terms of any potential conflicts with the law or legal liability issues. However, research in this category tends to be “library” research with a relatively low level of risk of either any conflict with the law or legal liability.

(6) Research not conducted under the auspices of Kwantlen

Some faculty members undertake private research on behalf of external agencies or private industry during their non-reportable time (evenings, week-ends or vacation time) without any use of Kwantlen’s facilities or resources. As long as such research does not involve the use of university facilities or resources and does not use the name of the university or university letterhead, and the faculty member does not sign any contracts or research reports as a Kwantlen faculty member, this type of research is outside the purview of the university. Some universities have developed specific policies regarding this type of research. For example, Paragraph 2.4 of the procedures accompanying UBC’s Research Policy #87 provides:

2.4. Personal Contracts

2.4.1. Personal contracts for research and other services negotiated between an individual and an external agency and signed by that individual will not be accepted for administration by the University, nor may University facilities be used for work carried out under such contracts.

However, if Kwantlen’s facilities or resources are used in performing contract research or a faculty member uses Kwantlen’s letterhead in correspondence relating to the performance of the contract or signs a research contract or report using his or her KUC title, it is likely that any third party, who suffers harm or damage as a consequence of the research performed under the contract, will add KUC as a party defendant to any claim for compensation. Therefore, whenever any research activity, which is conducted by a Kwantlen faculty member under a contract with a government ministry or agency, private industry or other external entity, involves the use of Kwantlen’s facilities or resources, the research contract should be submitted to the Office of Research and Scholarship for approval.

Conclusion

At many universities, research activities that fall within categories 1 - 4 come within the purview of the Office of Research. To use the term in the research policy of one university, the Office of Research maintains an “inventory” of all

current research activities. Copies of all research proposals, research grant applications, research grant and research contracts are kept on file in the Office of Research. Each research project is typically subjected to some level of scrutiny by the Office of Research. This scrutiny may include at least some examination with regard to whether there are any obvious potential conflicts with the law or legal liability issues.

At Kwantlen, it appears that most but not all applications for internal research projects are submitted to the Office of Research and Scholarship. Applications by Kwantlen faculty members for external research grants have not been common. With regard to most of the external grant applications that were mentioned to me during the interviews I conducted, the grant application was “signed-off” by a member of the senior administration; however, it was not necessarily submitted through the Office of Research and Scholarship.

RECOMMENDATIONS:

- (a) All applications for research grants (both internal and external) including any supporting documentation that describes the research proposal should be submitted through and kept on file by the Office of Research and Scholarship .**
- (b) All research contracts that use any Kwantlen resources or facilities including any supporting documentation that describes the research proposal should be submitted to and approved by the Associate Vice President Research or a person designated by the Associate Vice President Research.**
- (c) The Office of Research and Scholarship should peruse all the documentation described in paragraphs (a) and (b) for the purpose of identifying any potential conflict between the proposed research activity and the governing law and any potential legal liability issues.**

5.3 Requiring Principal Investigators to identify known legal issues when submitting research applications or proposals

Most, but not all research, is preceded by the preparation of one or more of the following:

- (a) an application for a research grant;
- (b) a preliminary research proposal that leads to contract research with a government ministry or agency, or private industry; or
- (c) a research proposal for submission to the REB if the proposed research involves human subjects.

At present, when a Kwantlen faculty member is preparing of any of these documents, there is no requirement that he or she identify any potential conflict between the proposed research activities and the governing law or any risks of legal liability for harm or damage that may be caused by the proposed research activities notwithstanding that the principal investigator is aware of potential

conflicts with the law or potential legal liabilities.

If a protocol is developed that requires principal investigators to identify any of these types of issues, which are known by the principal investigator, two purposes would be served. First, it would direct the principal investigator's mind to consider these issues. Second, if a potential issue is identified, it will enable the senior administration to seek a legal opinion regarding whether the proposed research presents an actual conflict with the law or whether the proposed research presents a significant risk of legal liability. If a legal opinion obtained by the senior administration advises that there are conflicts with the law or significant legal liability issues, it is possible to explore modifications of the proposed research activity in question that will avoid a conflict with the law and reduce the risk of legal liability. The process for obtaining a legal opinion and keeping the principal investigator and others informed about the legal issues is discussed in Parts 6.0 and 7.0 of this Report.

RECOMMENDATION:

If, with regard to a research activity conducted under the auspices of Kwantlen, a faculty member is aware an issue regarding a potential conflict between some aspect of a proposed research activity and the governing law or an issue regarding a potential risk of legal liability that may be caused by the proposed research, the faculty member be required to identify these issues in

- (a) an application for a research grant,**
- (b) a preliminary research proposal that leads to contract research with a government ministry or agency, or private industry, or**
- (c) a research proposal for submission to the REB if the proposed research involves human subjects.**

5.4 Requiring the REB to refer to the senior administration any potential legal issues identified during its review of a research proposal

Under the present Policy entitled "Research Involving Human Participation", it is not an express responsibility of the REB to refer to the senior administration any legal issues that the REB may identify during its review of a research proposal. In Part 3.1 of this Report, it is stated that it is not the role of the REB to examine a research proposal from the perspective of seeking to identify any potential conflicts with the law or legal liability issues except to the extent such an examination is necessary to determine whether the research proposal satisfies Kwantlen's ethical standards or requirements. Nevertheless, if, during the course of its review of a research proposal, a member of the REB identifies a potential conflict between the proposed research activity and the law or a potential legal liability issue, the REB should not remain silent with regard to the issue.

It may be observed that the commentary relating to Paragraph 1.3 of the

“Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans”, after suggesting that it may be advisable but not mandatory (except for biomedical research) to have one member who is knowledgeable in the relevant law, provides, in part:

The role of the member knowledgeable in the applicable law is to alert REBs to legal issue and their implications, not to provide formal legal opinions nor to serve as legal counsel for the REB.

This Report recommends that members of the REB be alert to potential legal issues and refer any potential legal issues to the senior administration. It is not the role of the REB to seek or provide legal opinions.

Finally, a faculty member, who submits a research proposal to the REB, cannot require, as a condition of submitting a research proposal to the REB or otherwise, the REB remain silent with regard to any legal issues that the researcher or the REB may identify or decline to refer any identified legal issues to the senior administration. When a potential legal issue is identified, the REB should be required to simply refer the identified legal issue to Associate Vice-President, Research who will be responsible for determining whether or not a legal opinion should be sought in accordance with sections 6.0 and 7.0 of this Report or whether any other action should be taken.

RECOMMENDATION:

If during its review of a research proposal, a member of the REB identifies a potential conflict between the proposed research activity and the governing law or a potential issue of legal liability, the REB be required to refer the identified legal issue to Associate Vice-President, Research

6.0 SEEKING A LEGAL OPINION

When a legal issue regarding a research activity conducted under the auspices of Kwantlen is identified by or brought to the attention of the senior administration, and the senior administration has not previously obtained a legal opinion regarding the issue, the senior administration should normally seek a legal opinion regarding the issue. The request for a legal opinion should normally include questions regarding:

- (a) Whether or not the proposed or current research activity:
 - (i) conflicts with the law applicable in British Columbia or the jurisdiction where the research activity is being or will be conducted, or
 - (ii) presents a significant risk of legal liability for harm, loss or damage caused by the research activity; and

- (b) Whether or not the research activity could be modified in some manner to avoid any conflict with the governing law and minimize the risk of legal liability for harm or damage caused by the research activity.

It should be observed that it is the responsibility of the senior administration to seek and obtain and pay for the legal opinion. If a faculty member seeks his or her own legal opinion, he or she is responsible for any legal fees associated with the provision of such an opinion.

7.0 PROCESS WHEN A LEGAL OPINION IS SOUGHT REGARDING RESEARCH

When the senior administration seeks a legal opinion or retains legal counsel with regard to research activities conducted under the auspices of Kwantlen, it is important that the principal investigator, and any Kwantlen faculty members who are members of the research team be kept fully informed about the process.

When a potential conflict between some aspect of a research activity and the applicable law or a potential legal liability associated with the research activity is identified by or brought to the attention of the senior administration, a member of the senior administration:

1. Should meet with the principal investigator and seek the principal investigator's agreement to either:
 - (a) Hold in abeyance any research activity that may related to the identified legal concerns until a legal opinion is obtained by the senior administration, or
 - (b) Modify the research proposal or planned research activities in a manner that will avoid the potential conflict between the research activity and the applicable law or the potential legal liability associated with the research activity.

If an agreement cannot be reached, the senior administration may, by a notice given to the principal investigator, place a temporary "Hold" on the commencement or continuation of those research activities that may be related to the identified legal concerns.

2. Where a temporarily hold is placed on a research activity pursuant to either an agreement or a Hold notice given to the principal investigator, the senior administration should immediately seek a legal opinion regarding the identified legal concerns.
3. Upon receipt of a legal opinion, the senior administration should provide a copy of the legal opinion to the principal investigator.
4. Within two weeks of receiving the legal opinion requested by the senior administration:
 - (a) If the legal opinion received by the senior administration states that the research activity does not conflict with any applicable law and does not present any significant risk of legal liability, the senior administration

should, as the case may be

- (i) rescind a “Hold” that had been previously placed on the research activity, or
- (ii) release the principal investigator from any agreement to hold a research activity in abeyance

In either of these events, if the research activity proceeds in accordance with the legal opinion, and legal action or proceeding subsequently arises in relation to an aspect of the research activity that is dealt with in the legal opinion, the senior administration should allocate the resources to retain and pay the fees of legal counsel and pay the legal costs and expenses associated with a legal action in accordance with Part 4.3 of this Report or a legal proceeding in accordance with Part 4.4.2 of this Report.

- (b) If the legal opinion received by the senior administration states that the research activity conflicts with any applicable law, or presents a significant risk of legal liability, the senior administration should meet with the principal investigator to determine whether an agreement can be reached between the senior administration and the principal investigator to modify the research proposal or planned research activity in a manner that will
 - (i) avoid any conflict with the applicable law,
 - (ii) reduce the risk of legal liability to an acceptable level, and
 - (iii) address any concerns raised in the legal opinion.

5. If, after meeting with the principal investigator in accordance with paragraph 4(b) above, an agreement cannot be reached to modify the research activity in a manner that addresses the matters contained in clauses (i) to (iii) inclusive of paragraph 4(b) above, the senior administration may issue a “Stop Order” regarding all or some aspects of the research activity in question and deliver it to the principal investigator. A Stop Order should not limit the research activities to any greater extent than is necessary to satisfactorily address the matters contained in clauses (i) to (iii) inclusive of paragraph 4(b) above.

Under Bylaw #2, adopted by the Board of Governors regarding the powers and duties of the President, and approved by Ministry /Advanced Education, Training & Technology, effective 16 November, 1982 and revised 28 June 1995, the President is given the power to “... supervise and direct the instructional, administrative and other staff of the University College ...”. The President may delegate this power to such of the officers and employees of Kwantlen University College as are appropriate.

A “Stop Order” should be signed by both the Vice President Academic and the Associate Vice President Research, or, in the absence of either of them,

another Vice President of the University. After it has been signed, the Stop Order, should be delivered to the principal investigator. A copy of a Stop Order should be communicated to:

- (a) the Dean of the Faculty in which the principal investigator holds an appointment,
- (b) if the research involves human subjects, the Chair of the REB, and
- (c) if the research is sponsored by one of the Institutes, the Director of the Institute,
- (d) if the research is research conducted under a research grant, a research grant, or in conjunction with another institution, agency, partner or foundation, the responsible contact person at that entity.

If the senior administration issues a “Stop Order” with regard to an aspect of a research activity because the senior administration has obtained a legal opinion that an aspect of the research activity does not comply with the applicable law or that it creates an unwarranted risk of legal liability for monetary compensation as a consequence of harm, loss or damage caused by a research activity, this is not “censorship” as that term is used in the “Principles of Academic Freedom” but rather, it is upholding the requirement in the “Principles of Academic Freedom” that Kwantlen “operate within applicable provincial and national legislation” and the obligation imposed by Board of Governor’s Policy 3.5 - Financial Condition and Activities that the President and the senior administration not cause or allow the development of circumstances that will place Kwantlen in fiscal jeopardy.

8.0 POLICY - RESEARCH INVOLVING HUMAN PARTICIPATION

The “Principles of Academic Freedom” expressly recognizes that research must be carried out with respect for the “protection of individual human rights and the principles of equity and justice”. In order to fulfill this objective, the Policy entitled “Research Involving Human Participation” has been approved by the President effective 01 October 2002 and revised in September 2004.

The terms of reference for my Report expressly request me to report on principles that should guide the senior administration when a conflict arises between the senior administration and the REB. These principles are discussed in Part 3 of this Report. This aspect of my terms of reference required me to examine the relationship between the Research Ethics Board and the senior administration. It is not necessary for me to review the entire “Research Involving Human Participation” Policy. I understand that another task force will be charged with this responsibility. Nevertheless, it may inform that task force if I include some observations that I have made about several aspects of the Policy. In some instances, these observations reflect comments made to me by members of the Kwantlen community that I interviewed.

8.1 Relationship between the Senior Administration and the REB

The respective roles and responsibilities of the REB and the senior administration are also discussed in Part 3 of this Report.

During the interviews I conducted in relation to the preparation of this Report, several members of the Kwantlen community expressed a concern that the REB was too closely connected with the senior administration and there needed to be a greater separation between the REB and the senior administration. These comments suggest to me that there may be a misconception about the relationship between the REB and the senior administration.

The REB is created by a Policy approved by the President. Under that Policy, the REB is designated as the entity charged with the responsibility of ensuring that Kwantlen's ethical standards are followed when research involves human subjects. When the REB performs this function and decides whether or not to approve a research proposal, it is doing so as the designated agent of the President and Kwantlen University College. An approval of a research proposal by the REB (with regard to compliance with Kwantlen's ethical standards and requirement) will be regarded as an approval of the research proposal by the President of Kwantlen University College. After such approval, a third party, who alleges that he or she has suffered, harm, loss or damage related to the application of the ethical standards approved by the REB, will likely seek to hold Kwantlen University College liable for the loss or damage.

Presumably, it was for these reasons that:

- (a) Under Paragraph 1 of the Policy under the heading of "Research Ethics Board Terms of Reference", the initial REB was appointed by the Vice President Academic; and
- (b) Under Paragraph 4 of the Policy under the heading of "Research Ethics Board Terms of Reference" the Chair of the REB reports to the Associate Vice President Research and Scholarship.

The manner in which the members of the REB are selected is a policy decision that must be made by the President and the senior administration. The President and Kwantlen University College will ultimately be held responsible for the decisions of the REB. Therefore, a strong argument may be made that the President and the senior administration should be responsible for selecting the members of the REB including the Chair of the REB. However, there are universities where the members of the REB are elected. The Tri-Council Policy Statement does not specify a method of selection; however, Article 1.3 does state that the membership should include both men and women and that membership of the REB should include:

- a. at least two members have broad expertise in the methods or in the areas of research that are covered by the REB;
- b. at least one member is knowledgeable in ethics;

- c. for biomedical research, at least one member is knowledgeable in the relevant law; this is advisable but not mandatory for other areas of research and
- d. at least one member has not affiliation with the institution, but is recruited from the community served by the institution.

If KUC decides to select some or all of the members of the REB by means of an election, the election process will need to be structured in a manner that will achieve the composition of the REB recommended by the Tri-Council. In addition to the criteria recommended by the Tri-Council, it is also important that there be diversity in the academic disciplines represented among the members who are selected to serve on the REB.

Regardless of how the members of the REB are selected, the REB has the responsibility to make its own decisions regarding whether or not to approve a research proposal. In Part 3 of this Report, I have recommended that the senior administration should respect and abide by decisions that are rendered by the REB regarding whether or not research satisfies Kwantlen's ethical standards. If the members of the REB are appointed by the senior administration, this does not compromise the value of independent scholarship and research that is recognized in the Principles of Academic Freedom. Any concern that the senior administration may seek to influence the consideration of individual research proposals by the REB may be overcome if members are appointed to the REB for a specified term, and during the term of their appointment, members will not be removed as long as they fulfill their responsibilities as members of the REB including the responsibility of attending regularly scheduled meetings of the REB.

The statement in Paragraph 4 of the Policy, whereby the "Chair of the REB reports to the Associate Vice President Research and Scholarship" does not accurately describe the relationship between the Chair of the REB and the senior administration. It would be more appropriate to say that the Associate Vice President Research and Scholarship serves as the primary liaison between the Chair of the REB and the senior administration. As stated elsewhere in this Report, the REB does not operate in a vacuum. Part 5.4 of the Report recommends that the Chair of the REB refer to the senior administration any potential conflict between a proposed research activity and the applicable law or any potential issue of legal liability that may be identified by a member of the REB. In Part 8.3 of this Report, it is recommended that copies of all decisions and approvals of the REB (together with a copy of the research proposal and any conditions imposed by the REB) be sent to the office of the Associate Vice President Research and Scholarship.

8.2 Definition of Kwantlen's Ethical Standards and Requirements

Kwantlen's Policy entitled "Research Involving Human Participation", contains the following references:

In paragraph 1, under the heading "General", the Policy states that the

purpose of the REB is to ensure that “**appropriate standards**” are followed.

In paragraph 3, under the heading “Research Ethics Board Terms of Reference”, the Policy states, in part, that the REB is responsible for:

“c. approving proposals meeting Kwantlen’s **ethical requirements**”

[emphasis added by bolding]

...

f. rejecting proposals and terminating any ongoing research that cease to meet **ethical standards.**” [emphasis added by bolding]

However, the Policy itself does not contain any definition of these terms. The drafters of the Policy may have intended that all these terms mean the same thing; however, in the field of interpretation of documents, when different terms are used within a document, the courts are inclined to conclude that the drafter intended to attribute a different meaning to each term. Several members of the Kwantlen community, whom I interviewed, expressed a concern that some members of the REB appear to have used their own personal values when determining whether or not to approve a research proposal. The absence in the Policy of a definition of above mentioned terms and lack of adequate training of REB members may account for this phenomena.

If the REB rejects an application to approve a research proposal or terminates an ongoing research activity, it is incumbent on the REB to give reasons for its decision including the particular ethical standard that the research proposal did not satisfy. If the principal investigator wishes to appeal a rejection of a research proposal, it is essential that the principal investigator know the reasons for the REB’s decision including the particular ethical standard upon which the REB’s decision was based. In the absence of any definition of Kwantlen’s ethical standards, a decision of the REB to reject a research proposal or terminate a research activity is more susceptible to a challenge.

The previous chair of the REB developed some supplementary materials and guidelines to assist both applicants and REB members with the application of the Kwantlen Policy. These materials include references to the “Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans”; however, the Kwantlen Policy itself does not contain any reference to the Tri-Council Policy Statement. As a matter of strict interpretation, the Tri-Council Policy Statement does not have any formal status or connection with the Kwantlen Policy. Similarly the supplementary materials and guidelines developed by the REB do not have any formal status.

The Tri-Council Policy Statement contains a statement of “Guiding Ethical Principles”. These principles together with the Tri-Council’s statement of “A Moral Imperative: Respect for Human Dignity” are reproduced in Appendix “D” of this Report. One approach that Kwantlen may wish to consider when it addresses the absence of any definition of “ethical standards” in the current

Policy would be to adopt and incorporate the Tri-Council Policy Statement of “Guiding Ethical Principles”. This could be accomplished by amending the current Policy in the following manner. Under the heading “DEFINITION OF TERMS”, a new subheading #3 could be added with the following content:

3. Meaning of Kwantlen’s ethical standards and requirements

In this Policy, the terms , “ethical standards”, “ethical requirements” and “appropriate standards” mean the “Guiding Ethical Principles” contained in the “Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans” as amended from time to time (hereinafter referred to as the “Tri-Council Policy Statement”) adopted by the Medical Research Council of Canada, the Social Science Research Council of Canada and the Natural Sciences and Engineering Research Council of Canada.

Another approach would be to adopt and incorporate by reference the entire Tri-Council Policy Statement, as amended from time to time, either as a statement of policy that informs the Kwantlen Policy or as a Policy Statement that will apply in default of a comparable provision of the Kwantlen Policy. An example of this approach can be found in Paragraph 1.1 of the University of Victoria Policy 1250 entitled “University Regulations for Research Involving Humans”. It provides:

- 1.1 The University will regulate the conduct of all research involving humans in accordance with the most current version of the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans (hereinafter referred to as the Tri-Council Policy Statement) as the minimal standard.

Research grants made by any member of the Tri-Council normally require adherence to the Tri-Council Policy Statement. An advantage of adopting the approach suggested in the preceding paragraph will be that the Tri-Council Policy Statement will already be in place with regard to any future research grants that Kwantlen may receive from members of the Tri-Council.

8.3 Decisions of the REB

It is important that the senior administration be made aware of decisions made by the REB. Each decision of the REB to approve or reject a research proposal or to terminate ongoing research (including a copy of the research proposal and any conditions imposed by the REB) should be filed with the Office of Research and Scholarship. There are several reasons why this practice should be followed. These include:

- If an inquiry or complaint is received by the senior administration about the use of a particular research methodology in research being conducted under the auspices of Kwantlen, it is important that the senior administration be in a position to immediately determine whether or not the REB approved the research proposal regarding the research in question.
- If the REB has approved a research proposal subject to specified terms or

conditions, it is important that these terms or conditions be communicated to the Office of Research and Scholarship for several reasons. If the proposed research is contract research being performed for an external agency, or research that will be conducted under an external research grant where the grant contains certain expectations, it may be necessary to communicate the REB's terms or conditions to the external partner or agency. Even when no external agency or partner is affiliated with the research, it is important that the Office of Research and Scholarship be informed of any terms or conditions attached to an approval by the REB. While it cannot be expected that the Office of Research and Scholarship will monitor all research projects to ensure that any terms and conditions imposed by the REB's conditions are followed, it is important that the Office of Research and Scholarship be aware of such terms and conditions. If matters come to the attention of the Office of Research and Scholarship, which may indicate that terms and conditions imposed by the REB are not being followed, the Office of Research and Scholarship can refer the matters to the REB. After conducting review, the REB has the power to terminate ongoing research that ceases to meet Kwantlen's ethical standards.

- If a research proposal is rejected by the REB, it is important that the Office of Research and Scholarship be made aware of that rejection. While it cannot be expected that the Office of Research and Scholarship will monitor research by faculty members whose research proposals have been rejected by the REB to ensure no research involving human subjects is undertaken without REB approval, if an inquiry or complaint is received by the senior administration about research involving human subjects, it is important that the Office of Research and Scholarship be in a position to immediately determine whether or not the REB has approved the research proposal.
- If an appeal from a decision of the REB is filed, the Office of Research and Scholarship will need a copy of the REB's decision to send to the appellate body.
- If a research activity is terminated by the REB, it is important that the senior administration be aware the REB's decision. In the case of a termination, the senior administration does have a responsibility to ensure that the REB's decision is respected.

8.4 Appeals

The current policy only provides an appeal from a decision of the REB to reject a research proposal. The termination of an ongoing research project by the REB will likely have more serious consequences for a principal investigator. A decision by the REB to terminate ongoing research should also be subject to

appeal.

8.5 Composition and Training of the REB

During the interviews I conducted, several members of the Kwantlen academic community made comments to me about the size, composition and training of the REB. Some of these comments are reflected in the following observations

Paragraph 1.3 of the Tri-Council Policy Statement recommends that a REB consist of at least five members. In larger universities, which have a wide variety of academic disciplines, it has been necessary to establish REBs with specialized responsibilities. The scope of research activity at Kwantlen and the number of research proposals which will likely be submitted to the REB for approval suggest that a REB consisting of no more than 5 or 6 members is probably adequate. An REB of this size will be more economical for Kwantlen to support in terms of providing appropriate teaching-release for its members, and providing suitable training and education regarding the role and responsibilities of an REB. Furthermore, an REB of this size will be able to develop some expertise in the consideration of research proposals. With regard to training and education, new members of the REB should, at the very least, complete the on-line tutorial that will acquaint members with Tri-Council Policy Statement. This on-line tutorial takes about 135 minutes and is available at:

<http://www.pre.ethics.gc.ca/english/tutorial/>

Several members of the Kwantlen research community expressed criticisms to me about how the REB functioned with regard to some individual applications for approval of a research proposal. One criticism was that on some occasions the REB appeared to be comparing the research methodology described in a research proposal with the standard of a REB's member's academic discipline rather than determining whether or not the research proposal satisfied Kwantlen's ethical standards and requirements. In some instances, it will be difficult, if not impossible, to separate the consideration of ethical standards from the proposed research methodology. However, accepted research methodologies differ from one academic discipline to another. Such differences should not be a factor in the REB's decision-making process. The REB is not a general research committee charged with the responsibility of approving research methodologies. The responsibility of the REB is limited to determining whether a research proposal involving human subjects satisfies Kwantlen's ethical standards.

Nevertheless, if a research proposal is submitted to the REB by a faculty member who has a limited research background in the proposed area of research and the REB has concerns about the soundness of some aspect of the proposed research methodology, albeit that the proposed methodology will not offend Kwantlen's ethical standards or requirements, it will be appropriate

for the REB to draw its concerns to the attention of the principal investigator and recommend resources that the principal investigator may wish to consult before proceeding with the research; however, if the research proposal satisfies Kwantlen's ethical standards and requirements, the REB should not deny approval of the research proposal.

8.6 Other Issues relating to the REB

During the course of my interviews of members of the Kwantlen academic community, a number of topics, which relate to the REB and the current Policy were also brought to my attention. I will be pleased to pass these observations to the new task force that will be examining Kwantlen's research policies.

CONCLUSION

The recommendations contained in this Report together with the accompanying text will hopefully facilitate the development of research initiatives at Kwantlen University College within a framework where potential legal issues will be identified in the course of the development of a research proposal. When legal issues are identified, legal advice can be sought with the objective of avoiding conflicts with the applicable law and minimizing the risk of legal liability without jeopardizing the search for knowledge contained in a research proposal.

I wish to express my appreciation to all of the members of the Kwantlen's academic community who took the time to meet with me and respond to my questions.

All of which is respectfully submitted

Dated at Victoria, this 29th day of August, 2007

Lyman R. Robinson, Q.C.

APPENDICES

APPENDIX “A”

Terms of Reference

Thank you for agreeing to provide Kwantlen University College (“KUC”) with a report about the principles which should guide the senior administration’s decision making in the following circumstances:

A – when a conflict arises between the senior administration and KUC’s Research Ethics Board (“REB”) about potential legal issues associated with a pending or approved research program; or

B – when the senior administration is asked to allocate KUC’s financial and other resources on an extraordinary basis to provide support, particularly legal support, to a KUC faculty member or student in connection with an approved research program which has resulted or may result in a conflict between the activities associated with the approved research program and the law of the jurisdiction in which the research is taking place or which involves or may involve activity creating a high risk of physical abuse, harassment, or some other form of serious mistreatment of the researcher by the research subject(s).

This letter will provide you with detailed instructions about the scope of your mandate and your associated authority in providing the above report.

FACTUAL BACKGROUND

KUC is a post-secondary education institution established under the provisions of the *College and Institute Act*. KUC has campuses at various locations in the Lower Mainland and offers a variety of academic programs leading to both degrees at the baccalaureate level and various associate degrees, diplomas, and certificates.

Faculty members at KUC do not have tenure but are employed under the terms of a collective agreement which imports a just cause standard for termination. KUC guarantees academic freedom to faculty members within the terms of a policy, *Principles of Academic Freedom*, issued by authority of the Board of Governors (see attachment “A”).

A KUC faculty member proposing to undertake a research program involving human subjects must submit an application for ethical approval of the proposed research program and methodology to KUC’s Research Ethics Board (REB). The REB operates within a framework that includes a policy, *Research Involving Human Participation*, issued under the authority of KUC’s President (see attachment “B”). In addition, all research conducted under KUC’s auspices must comply with the requirements of the agency funding the research and with general principles reflected in a policy, *Ethical Conduct for Research Involving Humans*, issued by the Tri-Council.

A research program which is not otherwise exempted from the requirement for ethical review and approval by the REB must be submitted to the REB in conformity with the above policies. The REB operates independently of KUC's senior administration and is required to do so under the above policies. KUC's senior administration is informed of research program approvals by receipt of the REB's minutes but plays no other role in the process. (Please note that in the past the Associate Vice President, Research signed off on approved research programs to confirm compliance with the relevant policies and the REB's process but that requirement has now been eliminated.)

SCOPE OF MANDATE

In its decision making, KUC's senior administration wishes to strike a balance reflecting its strong commitment to academic freedom, the autonomy of the REB, and KUC's willingness to provide discretionary levels of support to faculty members pursuing controversial or challenging research with equally principled convictions that academic freedom does not trump the rule of law, that research must be conducted within the legal framework which is common to all British Columbians (and, as appropriate, to inhabitants of other jurisdictions in which approved research is being carried out), and that KUC's available resources must be allocated appropriately and productively.

In the senior administration's view, this balance must be struck in both of the circumstances identified above. The key question for the senior administration is what principles should inform their decision making in these areas in order to strike the desired balance. Your report will be an important element in the senior administration's identification and assessment of these principles.

AUTHORITY

To assist you in undertaking your mandate, the senior administration confirms that you may:

- (a) request copies of any policies and procedures that are relevant to your mandate;
- (b) request copies of any documents, records, correspondence or e-mail communications that may be relevant to your mandate;
- (c) request copies of the REB's minutes and other records;
- (d) review any research applications, which have been submitted to the REB, that may relate to the scope of your mandate;
- (e) interview those persons whom you determine may be able provide information that is relevant to your mandate including:
 - (1) members of KUC's administration;
 - (2) current and past members of the REB;
 - (3) faculty members; and
 - (4) other persons who may have information that is relevant to your mandate.

The above description of your authority is not intended to be exhaustive. If you encounter problems when undertaking your mandate, please notify me at your earliest reasonable

convenience. I will then advise the senior administration about your requirements and what steps might be taken to address them.

Please direct your report jointly to the attention of:

Ms. Judith McGillivray
Provost and Vice President, Academic

and

Dr. Grant Allan
Associate Vice President, Research and Scholarship

Kwantlen University College
12666 72nd Avenue
Surrey
BC V3W 2M8

Please provide me with a copy of your report at the same time.

As well, please note that while you are providing your report to the senior administration of KUC, the institution will make your report public.

I understand that you will be available to begin your work during the fourth week of March, 2007. Please contact Dr. Allan at 604 599 3179 to make the practical arrangements required to begin your work.

Please let me know if you have any questions or comments about anything in this letter.

Yours truly,

Patrick Gilligan-Hackett

APPENDIX “B”**Schedule of Recommendations****RECOMMENDATION Re: Part A of Terms of Reference):**

(Part 3 of Report)

With regard to a decision of whether or not a research proposal or project satisfies Kwantlen’s ethical standards and requirements, the senior administration of KUC should respect and abide by those decisions of the REB except in extraordinary circumstances.

RECOMMENDED PRINCIPLES Re: Part B of the Terms of Reference:

(Part 4 of Report)

1. To the extent the statement of the “Principles of Academic Freedom” adopted by the Board of Governors and the Education Council may be relevant to a legal proceeding for which the senior administration has been requested to allocate resources, the senior administration must give due consideration to the statement of the “Principles of Academic Freedom”, including the statement that “Kwantlen also acknowledges the requirement to operate within applicable provincial and national legislation”, when determining whether or not to allocate the requested resources.
2. The senior administration should allocate resources to retain and pay the fees of legal counsel and pay the costs and expenses of a legal proceeding regarding a research activity conducted under the auspices of Kwantlen if:
 - (a) a principal investigator has done everything that he or she could be reasonably be expected to do in accordance with Part 5.3 to bring potential legal issues regarding a proposed research activity to the attention of the senior administration,
 - (b) a legal opinion has been obtained by the senior administration regarding the proposed research activity,
 - (c) the legal opinion is communicated to the principal investigator,
 - (d) the research is conducted in accordance with the legal opinion, and
 - (e) the legal proceeding, which subsequently arises, regarding the research activity, relates to a matter upon which the legal opinion was obtained.
3. The senior administration should allocate resources to retain and pay the fees of legal counsel and pay the costs and expenses of a legal proceeding regarding a research activity conducted under the auspices of Kwantlen if:
 - (a) the principal investigator has identified potential conflicts with the governing law and potential issues of legal liability in documentation submitted by the principal investigator as part of

- (i) an application for a research grant that has been filed with Office of Research and Scholarship
 - (ii) a research proposal that has been submitted to and approved by the REB ,
 - (iii) a research proposal that has been prepared and submitted to the Office of Research and Scholarship for the purpose of obtaining a research contract, or
 - (iv) a document describing a research project that has been submitted to the Office of Research and Scholarship for consideration or approval;
 - (b) the application, proposal or other documentation fully described the research methodology and circumstances that gave rise to the conflict with the law or a claim of legal liability; and
 - (c) the request for an allocation of resources relates to a conflict with the law or a legal claim that was identified by the principal investigator in accordance with clause (a).
4. The senior administration should allocate resources to retain and pay the fees of legal counsel and pay the legal costs and expenses of a legal proceeding regarding a research activity conducted under the auspices of Kwantlen if:
- (a) a research proposal has been submitted to and approved by the REB as satisfying Kwantlen's ethical standards and requirements regarding research involving human subjects,
 - (b) the research has been conducted in accordance with the research proposal approved by the REB,
 - (c) the research has been conducted in accordance with any legal opinion obtained by KUC and communicated to the principal investigator regarding the research project, and
 - (d) the legal proceeding relates to the application of Kwantlen's ethical standards.
5. If a Kwantlen researcher is subpoenaed to testify about confidential communications made to the researcher by a research subject during the course of a research project conducted under the auspices of Kwantlen, the senior administration should allocate resources to retain and pay the fees of legal counsel to provide legal advice regarding the applicability of any legally recognized privilege against disclosure of confidential communications and, if such a legal privilege may be applicable, to ensure that the court or tribunal receives the benefit of a full legal submission regarding the application of any privilege against disclosure of the confidential communications that may be applicable in the circumstances of the case where the subpoena has been issued.

- 6. If research is being conducted under the auspices of Kwantlen, and information has been provided to the researchers under a confidentiality agreement, and a person, who is not a party to a confidentiality agreement, seeks to compel a Kwantlen researcher to release or otherwise divulge confidential information which is protected by the confidentiality agreement, the senior administration should allocate resources to retain and pay the fees of legal counsel to ensure that the court or tribunal receives the benefit of a full legal submission regarding the application of the confidentiality agreement.**
- 7. The senior administration should not allocate resources to retain legal counsel or pay any portion of the legal costs and expenses regarding a legal proceeding involving intellectual property unless**
 - (a) KUC has a legal interest in the intellectual property, and**
 - (b) where a legal interest in the intellectual property is held by person other than KUC, an agreement has been reached with holders of all the legal interests regarding the allocation of both**
 - (i) the legal fees and the costs and expenses associated with the legal proceedings,**
 - (ii) the benefits that may accrue from the legal proceedings.**
- 8. Where research activity has been or is being conducted under the auspices of Kwantlen and, despite reasonable efforts to learn about and abide by all applicable government regulations and municipal bylaws, a Kwantlen faculty member or student is charged with the breach of a government regulation or municipal bylaw that was unknown to the researcher, the senior administration should allocate resources to retain and pay the fees of legal counsel of those who are charged with the alleged breach of the government regulation or municipal bylaw.**
- 9. Recommendations regarding factors that may be considered:**
 - (a) If the reputation of Kwantlen may be affected by the outcome of a legal proceeding involving a research activity conducted under the auspices of Kwantlen, this factor may be considered by the senior administration as a factor that supports the allocation of resources to retain and pay the fees of legal counsel and pay legal costs and expenses regarding such a legal proceeding.**
 - (b) If a research activity is being or was conducted under the auspices of Kwantlen and either**
 - (i) the outcome of research has provided or will likely provide a valuable or valued contribution to economic, social or cultural well-being of the communities served by Kwantlen, or**
 - (ii) a community that Kwantlen serves has had a significant involvement with either the development or implementation of the research project**

- these factors may be considered by the senior administration as factors that support the allocation of resources to retain and pay the fees of legal counsel and pay legal costs and expenses of a legal proceeding arising out of the research activity.
- (c) If the outcome or likely outcome of a research activity conducted under the auspices of Kwantlen will likely improve the education of Kwantlen's students, this factor may be considered by the senior administration as a factor that supports the allocation of resources to retain and pay the fees of legal counsel and pay legal costs and expenses regarding such a legal proceeding.
10. When considering the application of the principles discussed in Part 4.4 of this Report, the senior administration should also consider:
- (a) the amount of the requested allocation of resources, in relation to
 - (b) the likely benefit that may be obtained by allocating resources to support the legal proceeding, and
 - (c) the availability of less costly alternative dispute resolution mechanisms.
11. If there are several steps in a legal proceeding including one or more levels of appeal, each step including any appeal should be the subject of a separate request for an allocation of resources to retain and pay the fees of legal counsel and pay the legal costs and expenses associated with the immediately forthcoming step in the legal proceeding. Each request should be evaluated by the senior administration on the basis of the principles discussed in this Part of the Report in relation to
- (a) the financial resources already committed by the senior administration to the legal proceeding,
 - (b) the additional financial liability for legal fees and costs and expenses that will likely be incurred in the immediately forthcoming step in the legal proceeding, and
 - (c) the potential liability for the legal costs of other parties to the legal proceeding if the court or tribunal orders such costs to be paid by the unsuccessful litigant.
12. If the senior administration allocates resources to pay legal fees or legal costs and expenses of a Kwantlen faculty member or student regarding a legal proceeding arising from a research activity conducted under the auspices of Kwantlen, Kwantlen University College
- (a) must be given the opportunity to assume carriage of the legal proceeding, and
 - (b) must approve any out-of-court settlement of the legal proceeding.

**RECOMMENDATIONS RE; IDENTIFICATION OF POTENTIAL LEGAL ISSUES
PRIOR TO LEGAL PROCEEDINGS ARISING**

(Part 5 of Report)

1. **Kwantlen adopt a protocol whereby Faculty Members are required to file an annual written statement with their Dean that provides a brief description of current research activities conducted during their reportable time and any research proposals that they expect to conduct in the forthcoming year as part of their reportable time. After review, the Dean should forward a copy of this statement to the Associate Vice President, Research and Scholarship.**
2.
 - (a) **All applications for research grants (both internal and external) including any supporting documentation that describes the research proposal should be submitted through and kept on file by the Office of Research and Scholarship .**
 - (b) **All research contracts that use any Kwantlen resources or facilities including any supporting documentation that describes the research proposal should be submitted to and approved by the Associate Vice President Research or a person designated by the Associate Vice President Research.**
 - (c) **The Office of Research and Scholarship should peruse all the documentation described in paragraphs (a) and (b) for the purpose of identifying any potential conflict between the proposed research activity and the governing law and any potential legal liability issues.**
3. **If, with regard to a research activity conducted under the auspices of Kwantlen, a faculty member is aware an issue regarding a potential conflict between some aspect of a proposed research activity and the governing law or an issue regarding a potential risk of legal liability that may be caused by the proposed research, the faculty member be required to identify these issues in**
 - (a) **an application for a research grant,**
 - (b) **a preliminary research proposal that leads to contract research with a government ministry or agency, or private industry, or**
 - (c) **a research proposal for submission to the REB if the proposed research involves human subjects.**
4. **If during its review of a research proposal, a member of the REB identifies a potential conflict between the proposed research activity and the governing law or a potential issue of legal liability, the REB be required to refer the identified legal issue to Associate Vice-President, Research**

APPENDIX “C”

Selected Provisions from University Research Policies

Simon Fraser University’s Policy on “External Research Grants and Contracts” (Policy R.10:01) provides, in part:

5.3 For all contracts from public and private sources and for grants from industry sources, approval of the Vice-President, Financial Services is required in order for the funds to be administered by the University. The Office of Research Services will provide Financial Services with a copy of the proposed agreement for Financial Services review prior to obtaining signature of the Vice-President, Research.

Note: Information on all the above policies referred to in 5.1 and 5.2 can be obtained from the Office of the Vice-President, Research.

5.4 The applicant for grants and contracts is responsible for providing the Office of the Vice-President, Research with a copy of his/her application and any subsequent award notification and accompanying materials.

5.5 The Office of the Vice-President, Research maintains an inventory of funded research projects in the University and provides regular reports on sources and amounts of research funding to the Board of Governors.

Approval Process

6.1 Every application for research funds from an external source must be signed (in the following order) by (i) the applicant(s), (ii) the Department Chair, (iii) the Dean of the Faculty, and (iv) the Vice-President, Research. Where the proposed research uses facilities which are part of a Research Centre or Institute, the Director of the Institute must also sign the application. Note that not all application forms provide places for all these signatures. In such cases, a brief memorandum attached to the application or proposal showing approval of those concerned will suffice.

6.2 The Vice-President, Research is responsible for negotiation of contracts between the University and sponsoring agencies. Once the work statement and budget have been established by the principal investigator, further negotiation should be carried on directly between the agency and the Vice-President, Research who will inform the principal investigator, seeking his/her advice where appropriate.

6.3 The Vice-President, Research is authorized to sign research contracts on behalf of the University. Research contracts must be between Simon Fraser University and the contracting agency and may not be written in the name of an individual, a Department, Institute, School or Faculty. The Vice-President, Research will not sign a research contract or industry source grant that is unacceptable on financial grounds to Financial Services.

6.4 In general, the signature of the Vice-President, Research indicates that the University will encourage the prosecution of the research to the extent that available facilities and resources permit, and that the University is prepared to administer funds received on behalf of the grantee.

6.5 The principal investigator is required to sign a grant or contract request or a

final contract in order to indicate his/her acceptance and willingness to carry out the work within the established budget. Once an award is made, the principal investigator generally becomes the employer of personnel funded from the grant or contract in his/her capacity as the grant holder (see GP 12). Should the overall budget on a grant or contract be exceeded, it is the responsibility of the principal investigator to make arrangements for payment for the over-expenditure.

UBC Policy #87

Procedures relating to Contract Research:

2.1. Contract Research

- 2.1.1. Contract research is carried out under the terms of a written agreement which, generally:
- 2.1.1.1. defines in specific terms the work to be carried out for the contracting agency;
 - 2.1.1.2. includes a budget which restricts, by category, the payment for actual expenditures, except that some portion of the allocated funds may be withheld until the contracted work is complete and a final report submitted; and
 - 2.1.1.3. requires a detailed financial audit of all expenditures charged to the contract.
- 2.1.2. The above restrictions are typical of those found in contracts issued by Public Works and Government Services Canada, the department responsible for most federal contracting. While not all contracts contain all these conditions, staff members should be aware that contracts are inherently more restrictive than grants and that great care must be taken in the management of contract funds.

2.2. Authority to Contract

- 2.2.1. In accordance with the University Act, only the University itself has the legal authority to enter into contracts which are binding on the University. Contracts for research and other projects must be between The University of British Columbia and the contracting agency and may not be written in the name of an individual Department, Institute, School, Faculty, or staff member.

2.3. Execution of Documents

- 2.3.1. All written documents to which the University is a party must be executed by the Board of Governors or its delegate. The Directors of Research Services and the University-Industry Liaison Office are responsible for obtaining appropriate University signatures on all contracts for research and related projects.

2.5. Contract Negotiation

- 2.5.1. The Managing Director of the University-Industry Liaison Office is responsible for negotiation of research contracts between the University and public sector contracting agencies or industry and for licences and other intellectual property agreements. Once the work statement and budget have been established, negotiations should be carried on directly between the agency and the University-Industry Liaison Office.

APPENDIX “D”

Tri-Council Policy Statement

(excerpt from)

B. A Moral Imperative: Respect for Human Dignity

An ethic of research involving human subjects should include two essential components: (1) the selection and achievement of morally acceptable ends, and (2) the morally acceptable means to those ends.

The first component is directed at defining acceptable ends in terms of the benefits of research for subjects, for associated groups, and for the advancement of knowledge. The second component is directed at ethically appropriate means of conducting research. For example, even in the most promising of research initiatives, the Tri-Council Policy Statement objects to tricking a person into participating by promising false benefits. Part of our core moral objection would concern using another human solely as a means toward even legitimate ends.

The objection provides moral insight that proves pertinent to human research in several ways: First, it translates into the familiar moral imperative of respect for human dignity. It is unacceptable to treat persons solely as means (mere objects or things), because doing so fails to respect their intrinsic human dignity and thus impoverishes all of humanity. Second, it translates into the requirement that the welfare and integrity of the individual remain paramount in human research.¹

Thus, the moral imperative of respect for human dignity translates into a number of important correlative ethical principles in research ethics. These are elaborated in C. below.

C. Guiding Ethical Principles

The approach taken in this framework is to guide and evoke thoughtful actions based on principles. The principles that follow are based on the guidelines of the Councils over the last decades,² on more recent statements by other Canadian agencies,³ and on statements from the international community.⁴ The principles have been widely adopted by diverse research disciplines. As such, they express common standards, values and aspirations of the research community.

Respect for Human Dignity: The cardinal principle of modern research ethics, as discussed above, is respect for human dignity. This principle aspires to protecting the multiple and interdependent interests of the person -- from bodily to psychological to cultural integrity. This principle forms the basis of the ethical obligations in research that are listed below.

In certain situations, conflicts may arise from application of these principles in isolation from one other. Researchers and REBs must carefully weigh all the principles and circumstances involved to reach a reasoned and defensible conclusion.

Respect for Free and Informed Consent: Individuals are generally presumed to have the capacity and right to make free and informed decisions. Respect for persons thus means respecting the exercise of individual consent. In practical terms within the ethics review process, the principle of respect for persons translates into the dialogue, process, rights, duties and requirements for free and informed consent by the research subject.

Respect for Vulnerable Persons: Respect for human dignity entails high ethical obligations towards vulnerable persons -- to those whose diminished competence and/or decision-making capacity make them vulnerable. Children, institutionalized persons or others who are vulnerable are entitled, on grounds of human dignity, caring, solidarity and fairness, to special protection against abuse, exploitation or discrimination. Ethical obligations to vulnerable individuals in the research enterprise will often translate into special procedures to protect their interests.

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

Respect for Justice and Inclusiveness: Justice connotes fairness and equity. Procedural justice requires that the ethics review process have fair methods, standards and procedures for reviewing research protocols, and that the process be effectively independent. Justice also concerns the distribution of benefits and burdens of research. On the one hand, distributive justice means that no segment of the population should be unfairly burdened with the harms of research. It thus imposes particular obligations toward individuals who are vulnerable and unable to protect their own interests in order to ensure that they are not exploited for the advancement of knowledge. History has many chapters of such exploitation. On the other hand, distributive justice also imposes duties neither to neglect nor discriminate against individuals and groups who may benefit from advances in research.

Balancing Harms and Benefits: The analysis, balance and distribution of harms and benefits are critical to the ethics of human research. Modern research ethics, for instance, require a favourable harms-benefit balance -- that is, that the foreseeable harms should not outweigh anticipated benefits. Harms-benefits analysis thus affects the welfare and rights of research subjects, the informed assumption of harms and benefits, and the ethical justifications for competing research paths. Because research involves advancing the frontiers of knowledge, its undertaking often involves uncertainty about the precise magnitude and kind of benefits or harms that attend proposed research. These realities and the principle

of respect for human dignity impose ethical obligations on the prerequisites, scientific validity, design and conduct of research. These concerns are particularly evident in biomedical and health research; in research they need to be tempered in areas such as political science, economics or modern history (including biographies), areas in which research may ethically result in the harming of the reputations of organizations or individuals in public life.

Minimizing Harm: A principle directly related to harms-benefits analysis is non-maleficence, or the duty to avoid, prevent or minimize harms to others. Research subjects must not be subjected to unnecessary risks of harm, and their participation in research must be essential to achieving scientifically and societally important aims that cannot be realized without the participation of human subjects. In addition, it should be kept in mind that the principle of minimizing harm requires that the research involve the smallest number of human subjects and the smallest number of tests on these subjects that will ensure scientifically valid data.

Maximizing Benefit: Another principle related to the harms and benefits of research is beneficence. The principle of beneficence imposes a duty to benefit others and, in research ethics, a duty to maximize net benefits. The principle has particular relevance for researchers in professions such as social work, education, health care and applied psychology. As noted earlier, human research is intended to produce benefits for subjects themselves, for other individuals or society as a whole, or for the advancement of knowledge. In most research, the primary benefits produced are for society and for the advancement of knowledge.