SEEKING ACCESS TO THE 1911 NATIONAL CENSUS OF CANADA. Events leading up to a legal action by the Canada Census Committee and the current status of that action

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Since early 1998 concerned individuals from across Canada and elsewhere have campaigned to regain public access to Canada's Historic Census records after 1901. 235 years of Census records up to 1901 had been, and currently are, publicly available for genealogical or historical research. Clauses in the *Access to Information* and *Privacy* Acts, and Privacy *Regulations* make specific provision for public access of information collected through Census or Survey to "any person or body" for purposes of research. The *only* restriction to that access is that 92 years must have passed since the information was collected.

Public access to Historic Census records after 1901 had been prevented because of one highly placed federal bureaucrat – Dr. Ivan P. Fellegi – appointed as Chief Statistician of Canada in 1985. He accomplished this by simply refusing to return control of the records to the National Archivist who, in accordance with clauses in Instructions to Officers and Enumerators of Census (having the 'force of law') should have had that control to begin with.

On 24 January 2003, after nearly five years of lobbying led by the Canada Census Committee, records of the 1906 Census of the North-Western Provinces of Alberta, Saskatchewan and Manitoba were released to public access. Within minutes of that release scanned images of the original Schedules of Census were placed online by the National Archives for access by anyone with an Internet connection. (Schedules of the 1901 National Census of Canada had already been online for some time.) At the same time microfilm copies of the records were sent to major public libraries across Canada. We now had public access, with no restrictions or conditions, to 240 years of records from the first Census of New France taken by Intendant Jean Talon in 1666, up to the newly released 1906 Census of the North-Western Provinces.

Coincidentally the release of the 1906 Census took place on the same day that Information Commissioner John M. Reid filed a legal action in the Federal Court. That action was the result of complaints made by several individuals who had previously been refused access to the 1906 Census by Statistics Canada. Release of the 1906 records effectively terminated the action of the Information Commissioner, as well as an earlier action initiated by members of the Canada Census Committee. The Court subsequently awarded costs to Lois Sparling, lawyer for the Canada Census Committee.

It had been reasonably thought that the release of the 1906 Census would set the stage, and a precedent, for the subsequent release in 2003 of the 1911 National Census of Canada. After all, both Censuses had been conducted under the *same legislation*, and similar Instructions to Officers and Enumerators of Census that had the 'force of law'. In releasing the 1906 records the government had conceded that existing legislation allowed them to do so. Unfortunately the expected time for release of the 1911 Census (after June 2003) came and went with no records being made available.

Numerous Access to Information requests for access to the 1911 Census records were made to Statistics Canada. Those requests were refused and subsequent complaints were made to the Information Commissioner. At the time of this writing the Information Commissioner has yet to bring down his findings regarding these complaints. It is felt, however, that his response should be similar to that for earlier complaints regarding the failure of Statistics Canada to allow the release the 1906 records.

In anticipation of the rejection of ATI requests for access to the 1911 Census, Canada Census Committee lawyer Lois Sparling filed a second legal action on behalf of a single applicant, Mertie Anne Beatty, who had also been an applicant on the original action for the 1906 Census. Essentially this action, filed in June 2003, was a near duplication of the first one and sought an order directing that the Chief Statistician and the National Archivist make the nominal returns and schedules of the 1911 Census of Canada available to the public. It sought declarations that the National Archivist, and not the Chief Statistician has control of the 1911 Census records and/or that the Chief Statistician is under a legal obligation to transfer control of the records to the National Archivist, and further that the National Archivist has the power to disclose these records to the public, on request, for research purposes.

Legal counsel for the respondents, i.e. the Attorney General of Canada, the Chief Statistician and the National Archivist, submitted a Motion to the Court seeking to have the action submitted by Lois Sparling struck on the basis, so they claimed, that it was "bereft of any chance of success and therefore clearly improper".

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A hearing on this Motion was held in Calgary, Alberta on 7 August 2003 – the Honourable Madam Justice Layden-Stevenson presiding. The Order of Justice Layden-Stevenson was brought down on 5 September 2003. The respondents were partially successful in that the judge allowed the Motion "to the extent that the request in the notice of application for an order directing that the Chief Statistician and the National Archivist make the nominal returns and schedules of the 1911 Census of Canada available for research purposes [was] struck".

In effect, the Madam Justice felt that until it was legally established that the National Archivist did have control of the records in question, and that he had been requested and subsequently refused to make the records available to the public, that any Order directing him to do so was premature. She did not, however, believe that the remainder of the action was "bereft of any chance of success" and so in all other respects the Motion of the respondents was dismissed.

The hearing on the main action took place in Calgary on 8 June 2004 – the Honourable Mr. Justice Gibson presiding. His Order regarding the action was brought down 25 June 2004. It was not, however, favourable to our Applicant. The short version of his Order simply states, "This application for judicial review is dismissed. There is no Order as to costs".

In his "Reasons for Order" it appears to this writer that Justice Gibson was somewhat one-sided in the testimony and submissions he chose to consider. In his order he appears mainly to rely upon, and extensively quotes from, the Affidavit of Pamela White (Access to Information and Privacy Co-ordinator for Statistics Canada). By contrast, he makes virtually no mention of the arguments put forth by Lois Sparling. He apparently accepts without question a statement in the Affidavit of Pamela White that ".... the 1911 census records have remained in the care and control of Statistics Canada, and its predecessors since 1911." He does not question when, or by what authority Statistics Canada obtained such "care and control" to begin with, and no proof of any such authority was forthcoming from the Respondents. His sole reference to arguments put forth by Lois Sparling on behalf of the Applicant is a single sentence, i.e. "This is hotly disputed on behalf of the Applicant."

Further on Justice Gibson states, "In 1964, an archival microfilmed copy of the 1911 census records was stored in the federal records centre controlled by the National Archives of Canada. The 1911 census records, o*nce again in the submission on behalf of the Respondents*, nevertheless *remained under the care and control of Statistics Canada* or a predecessor."

Justice Gibson makes reference to the fact that on 16 November 1999 the National Archivist had formally requested records of the 1906 and 1911 censuses be transferred from the care and control of Statistics Canada to the care and control of the National Archives of Canada, and that on 22 December 1999 the Chief Statistician denied that request. He accepts argument from Counsel for the Respondents that the fact a formal request was made to *transfer* care and control of the records to the National Archivist is proof that the National Archivist and the Chief Statistician are not at odds on the question of care and control of the records. He states "They agree that the Chief Statistician has always had, since the creation of that office, and currently retains, care and control of those records."

Still, there had been no submission that suggested on what authority the Chief Statistician would have attained such control to begin with.

As indicated above, in his "Reasons for Order" Justice Gibson makes almost no mention of the arguments and Affidavits submitted by Lois Sparling for the Applicant. With some very minor exceptions, the most reference made to the Applicant's submission consists of three paragraphs quoted from the earlier Order of Madam Justice Layden-Stevenson.

Bill S-13 was a government Bill first presented in the Senate of Canada on 5 February 2003. While the stated purpose of Bill S-13 was to provide the public access of Historic Census records sought by the people it was, in the opinion of this writer, more concerned with placing conditions and restrictions upon that access than it was in permitting it. It was not what those lobbying for access sought.

S-13 proceeded through the Senate without sought-after amendments and was referred to the House of Commons where it received First Reading and two sessions of Debate in Second Reading. Contrary to a statement by Justice Gibson, Bill S-13 did not receive Second Reading or referral to Committee. Before a called for recorded vote on this could be taken, the Second Session of the 37th Parliament of Canada was prorogued and the Bill died on the Order Paper. It was not brought forward to the next Session of Parliament, which ended when the election scheduled for 28 June 2004 was announced.

Bill S-13 had died on the Order Paper and for all intents and purposes it had never, or no longer, existed. However, in the mind of Justice Gibson it apparently still played a major part in his decision. Simply the fact that a legislative solution had been proposed, even though not successfully brought to fruition, seems to have confirmed his belief that there was general agreement between government officials that care and control of the records in question did, and does, rest with the Chief Statistician. It amazes this writer that something that does not exist can play such a major part in an action brought before the Courts.

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In his "Reasons for Order" Justice Gibson expresses his own amazement regarding this action. He states:

> "[26] Strangely, or at least strangely within the view of this judge, while a legislated solution to the impasse was sought without success, it would appear that no resort to a solution by regulation prescribed by the Governor in Council, as contemplated in subsection 6(2) of the *National Archives of Canada Act*, was ever turned to, notwithstanding the inference that might be drawn from the proposed legislative solution that there was general agreement within government that care and control of the relevant census information should now vest in the National Archives of Canada or the National Archivist."

It does not appear 'strange' to this writer that no attempt for a solution by regulation of the National Archives of Canada Act as suggested by Justice Gibson was contemplated. To begin with, the failure of Bill S-13 had taken place only a short time before the dissolution of Parliament when the Federal Election was called for 28 June 2004. In addition it was felt that regulations already prescribed by the Governor in Council in the form of Section 6(d) of *Privacy Regulations* adequately stated the intention of Parliament. Section 6(d) of *Privacy Regulations* was included in the submissions to the Court and states as follows:

> "6. Personal information that has been transferred to the control of the National Archives of Canada by a government institution for archival or historical purposes may be disclosed to any person or body for research or statistical purposes where:
> (d) in cases where the information was obtained through the taking of a census or survey, 92 years have elapsed following the census or survey containing the information."

Clearly then, the intent of parliamentarians debating and passing the Bill that brought into being the *Access to Information* and *Privacy* Acts, and *Privacy Regulations*, was that 92-year-old Census records would be available to public access. Why else would they have included such clauses in the *Regulations* were that not the case? They did not envision that such access might be prevented simply by the refusal of one bureaucrat to return control of those records to another bureaucrat to which the *National Archives of Canada Act* has delegated the authority to determine what records of government were of archival or historical value.

If, as inferred above by Justice Gibson there actually is "general agreement within government that care and control of the relevant census information should now vest in the National Archives of Canada or the National Archivist" there should be no need for any legislation change, further regulation prescribed by the Governor in Council or for any Court challenges to accomplish this. All that is required is for the Chief Statistician to withdraw his refusal to return control of the affected records to the National Archivist.

Summing up, Justice Gibson's Order states "care and control of the 1911 census records rests with the Chief Statistician and will remain there following this proceeding." This even though no evidence was produced to show when and how such authority was bestowed upon the Chief Statistician to begin with. He states that "no legal obligation exists that would compel the Chief Statistician to transfer care and control of the 1911 census records to the National Archives of Canada" and further that "he is under no legal obligation to reach an agreement to transfer such care and control to the National Archive of Canada". He concludes "none of the reliefs by way of mandamus and declaration that are sought by the Applicant are appropriate".

Where does this leave us now? Needless to say, we are disappointed with the Order of the Honourable Justice Gibson. We disagree with his conclusions and the means by which he reached them. On 4 August 2004, after due consideration and consultation our lawyer Lois Sparling announced her intention to appeal the Order of Justice Gibson to the Federal Court of Appeal. Steps to launch that appeal are currently under way.

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