

**Written Brief
and Speaking Notes**

for presentation to

**Committee on Social Affairs, Science, and Technology
The Senate of Canada**

respecting

**Bill S-13
An Act to amend the Statistic Act**

presented by:

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for the
Canadian Historical Association
and the
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******* *Le français suivre* *******

Introduction

The Canadian Historical Association (CHA) and the Association of Canadian Archivists (ACA)

are delighted to be invited before your Committee. We wish to applaud the dedicated leadership of Senator Lorna Milne, and the non-partisan support of her colleagues, including Senator Murray, in promoting the release of Historical Census Records to the Canadian people. As representatives of professional archivists and historians in Canada, we are dedicated to the preservation of authentic and accurate records relating to Canada and to their use to discover who we are as a nation, as a people, as groups, families, and individuals.

Both of our associations have long supported before Parliament and elsewhere the need to balance access to records with the protection of personal information and privacy, a balance achieved after much public and Parliamentary debate during the early 19890's in the *Access to Information Act* and *Privacy Act*, and their related regulations. That balance has been upset by withholding Historical Census Records through non-compliance with those regulations.

While our two associations want to indicate today support for the general intent of Bill S-13, we are also here to help you improve the bill. In that regard, we are proposing three central amendments (with a fourth as a fall-back position) relating to three broad issues.

1. Censuses of 1911 and 1916

First, we assert that the censuses of 1911 and 1916 should be treated in exactly the same way as those for 1871, 1881, 1891, 1901, and 1906. There is no “legal ambiguity” whatsoever for any census records taken before the *Statistics Act* of 1918. Exactly as in the release of all earlier censuses, these two censuses are subject only to the *Privacy Act* regulations that authorizes full release without restriction 92 years after the census was taken.

There is also no moral ambiguity against such release: the Expert Panel on the Historical Census, including noted jurists and privacy advocates, found after much study no evidence of any alleged promise of confidentiality made by the Laurier Government about census data. Formal requests under the *Access to Information Act* for copies of any record documenting such a promise have produced nothing from those asserting that such a promise existed. Conversely, there is explicit documentary evidence that the Laurier and successor governments intended census records to be transferred to the nation’s archives. Finally, millions of Canadians have used the Historical Census Records for several decades, without a single complaint being filed with the Privacy Commissioner – including the released and much more recent Newfoundland censuses of 1940 and 1945.

Our first amendment, therefore, reads as follows:

that the 1911 and 1916 censuses be removed from the proposed regime set forth in Bill S-13 for the later censuses of 1921 to 2001 and that these two censuses be released without restriction after 92 years, according to the suggested formal wording in Appendix “A” to our brief.

2. Censuses from 1921 to 2001

Secondly, in terms of those censuses from 1921 to 2001 inclusive, we recognize (as did the Expert Panel) that a “legal ambiguity” exists between the wording of the *Statistic Act* of 1918

and that of the *National Archives of Canada Act*, as well as the *Privacy Act* already mentioned. We applaud the intent of Bill S-13 to remove that legal ambiguity. That removal, however, should result in placing the 1921 to 2001 censuses on exactly the same legal footing as the censuses from 1871 to 1916: release without restriction after 92 years. This will restore the balance between privacy and access achieved by Parliamentarians in the 1980's.

We see, therefore, no reason for the extension of the period of unrestricted release by 20 years from 92 years after the census is taken to 112 years, nor for any “undertaking” to be made by researchers using the census, with limitations, during that 20-year period.

This new 20-year regime is about not removing legal ambiguity, which is the declared intent of Bill S-13, but about imposing new restrictions to the carefully balanced access and privacy provisions that mandates release of census records unconditionally after 92 years. The CHA and ACA supports the arguments and amendment being tabled in this regard by Mr. Gordon A. Watts of the Canada Census Committee and, in the interests of space, we will not repeat his fuller points here.

Our second proposed amendment therefore reads as follows:

that Bill S-13 should drop all references to a 20-year period of limited and restricted release and to any researcher undertakings and their monitoring.

3. “Consent” required for transfer of post-2001 censuses to the National Archives

Thirdly, and most seriously, the CHA and ACA very strongly object to “consent” being required for transfer of post-2001 censuses to the National Archives (clause 8). This sets an extremely dangerous precedent that potentially would decimate the archives of Canada and destroy the nation’s history – and thus its collective memory and identity. This linkage of consent and archival transfer is explicitly denied in the European Union’s very tough privacy legislation and it contradicts Canadian federal practice and precedent.

Basic privacy principle holds that sensitive personal information collected from citizens for an identified administrative purpose “A” shall not be used for another, separate, administrative purpose, say purpose “B,” without the citizen’s informed consent. We agree.

We strongly disagree that the transfer of a portion of government records created for purpose “A” to the nation’s archives to document, historically, purpose “A” is such a separate purpose “B.” Rather, parallel jurisdictions, including the European Union, view the archival retention of some or all of the records of purpose “A” as a perfectly consistent and integral part of purpose “A.” In the same way, use of the records of purpose “A” by an auditor, investigating the financial probity of purpose “A,” is a consistent use of purpose “A,” and not a new-use purpose “B.”

Canadian precedent under the *Privacy Act* has been to inform citizens that a portion of their personal information collected on a government form under purpose “A” may be transferred to the National Archives of Canada, but their consent to this transfer has never before been required. Neither Great Britain nor the United States has such a consent clause, upon which nations Canadian census-taking has been historically patterned. The only known exception is

Australia in its special “centennial” census of 2001, which is, within Western census practice, a complete and one-time anomaly because of that country’s unique convict-settled past.

We urge you to consider the (no doubt unintended) consequences of this unprecedented consent clause. Records in archives are not just about underpinning history and heritage, but also about protecting the rights of citizens and ensuring long-term accountability of government activity. Once established, this “consent” precedent in Bill S-13 will surely be insisted on by privacy advocates for other case-level records that contain far more sensitive personal information than does the census – records that form the backbone of the nation’s historical records: the Aboriginal status registry system, Aboriginal residential schools enrolments, immigrant applications, Canadian naturalization and citizenship forms, taxation and pensions, RCMP and CSIS case files, grants to farmers and scholars and scientists, and many more.

Now imagine parents of Inuit or Aboriginal children being asked to consent to the transfer of forms (loaded with personal information) to the National Archives of Canada that were at the time being used to remove their children and place them in southern or urban residential schools? Imagine Japanese Canadians being asked to consent to the archival transfer of forms used to confiscate their belongings and relocate them forcefully from British Columbia to the interior during the Second World War. Imagine CIA-funded brainwashing victims in a Montreal hospital consenting to transfer their forms to augment the nation’s archives.

Angry at intrusive and, they would argue, unjust government actions, the consent level would have been about zero in these (and many similar) cases: why help the same government now oppressing us to have a nice historical archive? Yet those very same records – containing far more sensitive personal information than does the census – are indeed now in the National Archives and, very significantly, are precisely the recorded evidence used by these same people, and their descendants, not just to understand their past, but to pursue successfully legal and financial recourse from the government. Even if some few did consent for the transfer of their records when under such duress, the incomplete and thus inaccurate surviving archival record would allow future administrators to dismiss claims filed decades later as mere exceptions.

Canada’s proud international reputation as a fair and just nation, with the will to settle such past grievances, rests on it having an accurate and reliable archive – one chosen by an arms-length professional archivist, not one riddled with gaps from records caused by the citizens’ refusal, in the heat of the moment of their creation, to consent to the transfer of their record to the National Archives, thus erasing a future where that citizen’s descendants may require access to that very record so that justice could be served. No one can predict the future – nor tell what seemingly mundane government form today might be a very significant document historically tomorrow: for the citizen, for his or her descendants, for their community, for the entire nation and its identity.

So that this very dangerous “consent” precedent does not enter Canadian jurisprudence, we urge, therefore, as our third amendment:

that clause 8 end with the words “be examined by anyone” and that the rest of the clause be removed entirely from Bill S-13.

If the Senate declines this recommendation just requested, we urge the Senate, as a fall-back

position, at least to amend clause 8 from an opt-in and negative default, to an opt-out with a positive default. The citizen must explicitly opt-out and refuse the transfer only *those portions of his or her own post-2001 census record that contain personal identifiers* to the National Archives, **and** be informed on the census form that this will result in its non-availability to their descendants. Again, we defer to, and support, the fuller arguments advanced by Mr. Watts of the Canada Census Committee, and request as our fourth “fall-back” amendment replacing the third above, **only** if necessary:

that Bill S-13 be amended, according to the suggested formal wording in Appendix “B” to our brief, to make the “consent” clause 8 a conscious “opt-out” formula.

As archivists and historians, we thank you sincerely for considering our concerns, and hope that you will see merit in accepting our first three amendments, and, if need be, the fourth.

“A”

FOR USE IN COMMITTEE

MOTION

Bill S-13
(37th – 2nd)

Clause 1
Pages 1 and 2

Moved by _____,

THAT Bill S-13 be amended, in clause 1,

(a) on page 1,

(i) by adding after line 6 the following:

"(4) The information contained in the returns of any census of population taken between 1910 and 1917 may, starting ninety-two years after the census is taken, be examined by anyone.",

(ii) by replacing in line 9 “1910” with “1918”, and

(iii) by replacing in line 33 “1910” with “1918”; and

(b) on page 2,

(i) by replacing in line 9 with the following:

“under subsection (4), (8) or (9) may disclose that”,

(ii) by replacing line 12 with the following:

“in subsection (4), (5) or (9) shall, ninety-two years”, and

(iii) by replacing lines 15 and 16 with the following:

“permit their examination under subsection (4), (5), (8) or (9).”; and

(c) on pages 1 and 2, by renumbering subsections 17(4) to 17(10) as subsections 17(5) to 17(11) and any cross-references thereto accordingly. ”

“B”

FOR USE IN COMMITTEE

MOTION

Bill S-13
(37th – 2nd)

Clause 1
Page 2

Moved by

THAT Bill S-13 be amended in clause 1, on page 2,

(a) by replacing in 4 the word “if” with the word “unless”; and

(b) by replacing in line 6 the word “given” with the word “denied” .”