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Docket: T-421-04

Citation: 2006 FC 132

BETWEEN:

THE INFORMATION COMMISSIONER OF CANADA

Applicant

and

THE MINISTER OF INDUSTRY

Respondent

REASONS FOR ORDER

KELEN J.:

[1] The Information Commissioner seeks review under section 42 of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the "*Access Act*") of the refusal of the Chief Statistician of Canada to disclose certain census records for the years 1911, 1921, 1931 and 1941. Subsection 17(1) of the *Statistics Act*, R.S.C. 1985, c. S-19 prohibits disclosure of individual census returns. The Information Commissioner submits, *inter alia*, that the Crown has a constitutional obligation under section 35 of the *Constitution Act, 1982* to disclose this information to an Aboriginal government for the purpose of validating a land claim.

Facts

[2] The following three Algonquin First Nation Bands (the Algonquin Bands) are located in North Western Québec and Eastern Ontario:

1. the Barriere LakeBand;
2. the Wolf Lake Band; and
3. the Timiskaming Band.

On November 1, 2001 the Alongonquin Bands made an access to information request to Statistics Canada, a part of the Department of Industry, for the census returns of 1911, 1921, 1931, and 1941 for the districts of Nipissing, North Renfrew, Renfrew and Timiskaming in the Province of Ontario, and the districts of Pontiac, Témiskamingue, Wright and Yamaska in the Province of Québec.

[3] The access request was made by Mr. Peter D.I. Gangi, Director of the Algonquin Nation Secretariat, which represents the rights of the three Algonquin Bands.

[4] The Algonquin Bands are researching and validating an Aboriginal land claim which requires evidence of community continuity through time in terms of membership, land use and occupancy. Because of

an absence of band lists before 1951, and other departmental files relating to their history, the census records are allegedly a critically important source of proof.

[5] On November 23, 2001 Statistics Canada denied the access request. The Algonquin Bands communities complained to the Information Commissioner who investigated, and on December 3, 2003, reported to the respondent that the complaint was well-founded and recommended that the respondent comply by disclosing the census records.

[6] On December 11, 2003, the Chief Statistician advised the applicant that the recommendation would not be followed. On February 26, 2004 the applicant, with the consent of the Algonquin Bands, commenced this review of the respondent's decision refusing to disclose the census records.

[7] Since this access request, the *Statistics Act* has been amended to release the 1911 census records to the public. The amendment, which is set out in Appendix A, provides that census records will be released to the public after 92 years. Accordingly, for example, the 1921 census records will be released to the public in 2013.

[8] The census enumerators during the material times went from household to household, with a translator, throughout the territory presently occupied by the three Algonquin Bands. The enumerators gathered information including the name, address or geographic location, the racial or tribal origin, the language, and other personal information from each person and family residing in that territory.

[9] The Algonquin Bands making this claim for Aboriginal land title claim must satisfy the following three criteria, as succinctly set out by the Supreme Court of Canada:

- i. the land must have been occupied prior to sovereignty;
- ii. if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation by their ancestors; and
- iii. at sovereignty, that occupation must have been exclusive.

See *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 per Lamer C.J.C. (as he then was) at paragraph 143.

[10] In this case, the Algonquin Bands have obtained the necessary evidence for the 19th century, but are missing proof of continuity of occupation for the 20th century until 1951, when the Department of Indian and Northern Affairs first maintained band lists. The Algonquin Bands state that the census records constitute accurate proof of who was living in the territories in question, as the enumerators travelled to each Aboriginal settlement in the course of their census record duties.

[11] The Algonquin Bands have received funding from 1997 to 2004 from the Federal Government for the purpose of researching and preparing this land claim. This funding provided for research including:

- i. that the Algonquin Bands have traditionally used and occupied the territory in question and that this use and occupation continues; and
- ii. a description of the extent and location of the land use and occupancy.

The Decision under Review

[12] The decision under review is of the Chief Statistician of Canada, Mr. Ivan P. Fellegi, dated

December 11, 2003 advising the Information Commissioner:

... I am unable to follow your recommendation in this matter to make the records at issue available to the requestor. For the reasons set out in my letter to you of December 5, 2002 (one year earlier), I strongly believe that such a disclosure is contrary not only to the provisions of the Statistics Act but to the Privacy Act as well.

[13] The "reasons" in the letter dated December 5, 2002 include:

1. that paragraph 8(2)(k) of the *Privacy Act* is subject to subsection 17(1) of the Statistics Act so that it does not apply; and
2. that there is no obligation owed to the Algonquin Bands because:
 - a. it is difficult to identify the Aboriginal rights in this context;
 - b. the Aboriginal claimants must prove in a Court of law that they have an Aboriginal right;
 - c. there is no fiduciary duty owed by Statistics Canada to the Algonquin Bands;
 - d. the Algonquin Bands should make use of the 1940 National Registration records which are an alternative source of evidence to validate the land claims.

Confidentiality Undertaking

[14] Dr. James Morrison, a respected and qualified ethnohistorian researching this land claim for the Algonquin Bands, deposed that if the census records are disclosed to him on behalf of the Algonquin Bands, he will undertake to maintain the confidentiality of the census records not related to the ancestors of the Algonquin Bands so that the personal information of non-Algonquin persons would continue to be kept confidential.

Notice of Constitutional Question

[15] The Information Commissioner served a Notice of Constitutional Question on the provincial Attorney Generals and the Attorney General of Canada with respect to the constitutional effect of section 35 of the *Constitution Act, 1982* in the context of the facts in this case. None of the provincial Attorney Generals have intervened or made any representations.

Relevant Legislation

[16] The relevant legislation is as follows:

1. the *Access Act*;
2. the *Privacy Act*;
3. the *Statistics Act*;
4. the *Constitution Act, 1982*;

The relevant excerpts of these statutes are set out in Appendix "A".

Standard of Review

[17] In the case at bar, the Court is called upon to review a decision of the Chief Statistician on a question of information disclosure under the *Access Act*. The parties submit, and the Court agrees, that the appropriate standard against which to review the decision is correctness. The Supreme Court of Canada in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 held at paragraph 26 that the Court deciding the appropriate standard of review must apply a pragmatic and functional approach.

[18] The first factor the Court must consider is the presence or absence of a privative clause or statutory right of appeal. This factor was assessed by the Supreme Court of Canada in *Canada(Information Commissioner) v. Canada(Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66. At paragraph 15, Justice Gonthier held that the *Access Act* does not contain a privative clause insulating decisions of heads of government institutions on questions of access to information, and sections 41 and 42 of that Act provide a statutory right of judicial review of these decisions before the Federal Court. Accordingly, this factor warrants no deference.

[19] The second factor to consider is the expertise of the decision-maker relative to the Court. The finding under review is the statutory interpretation of the Chief Statistician of the interplay of provisions under the *Access Act*, *Privacy Act*, *Statistics Act*, and *Constitution Act, 1982*. Relative to the reviewing judge, this decision-maker has no expertise in statutory interpretation. The Court is in better able to decide questions of law than the Chief Statistician. Accordingly, this factor militates no deference to the decision under review.

[20] The third factor to consider is the purpose of the applicable legislation, namely that of the *Access Act*, *Privacy Act*, *Statistics Act*, and *Constitution Act, 1982*. In *Canada (Information Commissioner) v. Canada(Commissioner of the Royal Canadian Mounted Police)*, *supra*, the Supreme Court per Gonthier J. at paragraph 17 determined that the purpose of the *Access Act* is advanced by adopting a less deferential standard of review.

[21] In my view, the purpose of the secrecy and disclosure provisions of section 17 of the *Statistics Act* are similarly advanced by adopting a less deferential standard of review. The purpose of maintaining the authorized secrecy of records held by Statistics Canada is not advanced by affording greater curial deference to a decision-maker who may be inclined to favour his or her own department.

[22] The purpose of section 35 of the *Constitution Act, 1982*, which includes respecting and recognizing Aboriginal land claims, was not considered at all by the Chief Statistician, even though the Information Commissioner requested the Chief Statistician consider this law in authorizing the disclosure of the census records. Similarly, the Chief Statistician did not consider the purpose of paragraph 8(2)(k) of the *Privacy Act*, which is to disclose personal information to an Indian band for the purpose of researching a land claim. Therefore, the Court will not accord deference to the Chief Statistician in his decision with respect to the purposes of these four statutes.

[23] The fourth factor to be addressed is the nature of the question, whether it is one of law, fact, or mixed law and fact. The Court will accord greater deference to the head of government's factual findings, and less deference on questions of legal principle or interpretation. The question in the review at bar involves a statutory interpretation of the interplay of provisions under the *Access Act*, *Privacy Act*, *Statistics Act*, and *Constitution Act, 1982* with respect to the census records sought for an Aboriginal land claim. This is a question of law, which warrants no deference.

[24] Having regard to the four factors, the Court agrees that the decision of the Chief Statistician to refuse disclosure should be assessed on the correctness standard.

Burden of Proof

[25] On judicial review, section 48 of the *Access Act* provides that the head of the government institution bears the burden of establishing that an access request was denied in accordance with law:

Burden of proof

Charge de la preuve

48. In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

48. Dans les procédures découlant des recours prévus aux articles 41 ou 42, la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document incombe à l'institution fédérale concernée.

Therefore, in the review at bar the Minister must satisfy the Court, on the balance of probabilities, that the decision of the Chief Statistician to refuse access to the census records was correct.

Issues

[26] The issues are as follows:

1. Are the census records necessary for the land claim of the Algonquin Bands?;
2. Are the census records in this case subject to production under that *Access Act*?;
3. Is section 35 of the *Constitution Act, 1982* "statutory or other law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*?;
4. Is paragraph 8(2)(k) of the *Privacy Act* "statutory or other law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*?;
5. What is "information available to the public" within the meaning of paragraph 17(2)(d) of the *Statistics Act*?; and
6. In the alternative that the respondent was prohibited from disclosing census records pursuant to section 17 of the *Statistics Act*, what would be the effect of section 52 of the *Constitution Act, 1982*?

Analysis

Issue No. 1: Are the census records necessary for the land claim of the Algonquin Bands?

[27] The Government of Canada funding to the Algonquin Bands from 1997 to 2004 for the research of this land claim demonstrates that the Government of Canada has accepted that the Algonquin Bands may have a legitimate land claim.

[28] The Court is satisfied, upon reviewing the evidence, that the census information sought is necessary and important for the Algonquin Bands to properly document their land claim. This census information is probably the best evidence of the proof required to complete the evidence of their continued occupation of the territory in question.

[29] The respondent submits that this evidence is not critically important because there was a National

Register is 1940 prepared for conscription purposes and that this National Register listed all persons over the age of sixteen years. The Court is satisfied that this National Register is not adequate evidence for several reasons:

1. it does not deal with the time period between 1900 and 1940;
2. it was completed for purpose of identifying young men of conscription age. Many such persons sought to avoid conscription and took steps to avoid being registered;
3. this National Register did not record the names of persons under the age of sixteen years which would be part of the proof required for this land claim;
4. the National Register was not compiled in the comprehensive manner as census enumeration;
and
5. part of the National Register is missing.

Issue No. 2: Are the census records in this case subject to production under the *Access Act*?

[30] This issue, and the subsequent four issues, involve the interpretation and interplay of four statutes. Counsel for the applicant described this legal exercise as "intense legal gymnastics". The Court agrees that this case requires a multi-step exercise in statutory interpretation.

[31] Section 4 of the *Access Act* provides that every citizen has a right of access to any record under the control of a government institution, subject only to the *Access Act* and notwithstanding any other Act of Parliament:

Right to access to records

Droit d'accès

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

4. (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande:

(a) a Canadian citizen, or

les faire communiquer sur demande:

(b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act,

a) les citoyens canadiens;

b) les résidents permanents au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés.

has a right to and shall, on request, be given access to any record under the control of a government institution.

[32] This general right of access to information is attenuated by operation of section 24 of the *Access Act*, which mandate the head of government institutions refuse disclosure of information that is restricted pursuant to any provision enumerated in schedule II to the *Access Act*, which includes section 17 of the *Statistics Act*.

[33] Subsection 24(1) of the *Access Act* incorporates by reference to Schedule II the restriction on the disclosure of census records mandated by section 17 of the *Statistics Act*.

Statutory prohibitions against disclosure

Interdictions fondées sur d'autres lois

24. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

24. (1) Le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements dont la communication est restreinte en vertu d'une disposition figurant à l'annexe II.

[...]

[...]

SCHEDULE II

ANNEXE II

(Section 24)

(article 24)

[...] Statistics Act, Section 17

[...] Loi sur la statistique, article 17

[34] Absent any exemption, paragraph 17(1)(b) of the *Statistics Act* would require the respondent refuse to disclose the census records.

SECRECY

SECRET

Prohibition against divulging information

Protection des renseignements

17. (1) Except for the purpose of communicating information in accordance with any conditions of an agreement made under section 11 or 12 and except for the purposes of a prosecution under this Act but subject to this section,

17. (1) Sous réserve des autres dispositions du présent article et sauf pour communiquer des renseignements conformément aux modalités des accords conclus en application des articles 11 ou 12 ou en cas de poursuites engagées en vertu de la présente loi :

[...]

[...]

(b) no person who has been sworn under section 6 shall disclose or knowingly cause to be disclosed, by any means, any information obtained under this Act in such a manner that it is possible from the disclosure to relate the particulars obtained from any individual return to any identifiable individual person, business or organization.

b) aucune personne qui a été assermentée en vertu de l'article 6 ne peut révéler ni sciemment faire révéler, par quelque moyen que ce soit, des renseignements obtenus en vertu de la présente loi de telle manière qu'il soit possible, grâce à ces révélations, de rattacher à un particulier, à une entreprise ou à une organisation identifiables les détails obtenus dans un relevé qui les concerne exclusivement.

[Emphasis added]

[Je souligne]

[35] However, the mandatory prohibition against disclosure mandated by subsection 17(1) of the *Statistics Act* is subject to the discretionary exemptions under subsection 17(2). In the review at bar, the applicant submits that paragraph 17(2)(d) is engaged to exempt the bar against disclosure because the census records are "information available to the public under any statutory or other law":

17. [...]

17. [...]

Exception to prohibition

Exception à l'interdiction

(2) The Chief Statistician may, by order,

(2) Le statisticien en chef peut, par arrêté,

authorize the following information to be disclosed:

[...]

(d) information available to the public under any statutory or other law;

[Emphasis added]

autoriser la révélation des renseignements suivants:

[...]

d) les renseignements mis à la disposition du public en vertu d'une loi ou de toute autre règle de droit;

[Je souligne]

[36] The applicant submits that both paragraph 8(2)(k) of the *Privacy Act* and section 35 of the *Constitution Act, 1982* operate to satisfy the exemption requirement that the census records are "information available to the public under any statutory or other law".

[37] The respondent submits that section 24 of the *Access Act* is a mandatory prohibition since the disclosure of the census records are "restricted by or pursuant to any provision set out in Schedule II", which includes section 17 of the *Statistics Act*. The Court does not agree. The restriction in subsection 17(1) of the *Statistics Act* must be read subject to the discretionary exceptions set out in subsection 17(2) of the *Statistics Act*.

[38] The meaning of paragraph 17(2)(d) of the *Statistics Act* in this case involves a three step analysis, which logically should be undertaken in the following sequence.

Issue No. 3:

STEP 1

Is section 35 of the *Constitution Act, 1982* "statutory or other law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*?

[39] Section 35 of the *Constitution Act, 1982* protects Aboriginal rights and treaty rights that exist already by established land claim agreements or those rights which may be acquired pursuant to such claims to Aboriginal title:

Part II

Rights of the Aboriginal Peoples of Canada

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

PARTIE II

Droits des peuples autochtones du Canada

Confirmation des droits existants

des peuples autochtones

35. (1) Les droits existants -- ancestraux ou issus de traités -- des peuples autochtones du Canada sont reconnus et confirmés.

Définition de "peuples autochtones du Canada"

(2) Dans la présente loi, "peuples autochtones du Canada" s'entend notamment des Indiens, des Inuit et des Métis du Canada.

(3) For greater certainty, in subsection (1) "treaty Accords sur des revendications territoriales rights" includes rights that now exist by way of land claims agreements or may be so acquired.

[Emphasis added]

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

[je souligne]

[40] In 1997, the Supreme Court of Canada in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 held per Lamer C.J.C. at paragraph 2 that Aboriginal title was a distinct species of Aboriginal right recognized and affirmed under section 35 of the *Constitution Act, 1982*:

¶ 2 In *Adams*, and in the companion decision in *Côté*, I considered and rejected the proposition that claims to aboriginal rights must also be grounded in an underlying claim to aboriginal title. But I held, nevertheless, that aboriginal title was a distinct species of aboriginal right that was recognized and affirmed by s. 35(1). Since aboriginal title was not being claimed in those earlier appeals, it was unnecessary to say more. This appeal demands, however, that the Court now explore and elucidate the implications of the constitutionalization of aboriginal title. The first is the specific content of aboriginal title, a question which this Court has not yet definitively addressed, either at common law or under s. 35(1) [...]

[Emphasis added]

[41] Then Chief Justice Lamer held at paragraph 133 that subsection 35(1) does not create Aboriginal rights, rather it accorded constitutional status to those rights which existed in 1982. In paragraph 143, the Chief Justice held that a claim to Aboriginal title must show continuity between present and pre-sovereignty occupation of the territory over which Aboriginal title is claimed. (The census records sought in the case at bar are for that purpose.) The Chief Justice held in paragraph 186 that the Crown is under a moral, if not a legal, duty to enter into and conduct Aboriginal land title negotiations in good faith. It is through such negotiated settlements that the basic purpose of subsection 35(1) will be achieved. The Chief Justice stated that the basic purpose of the negotiations is the:

... reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. Let us face it, we are all here to stay.

In *Delgamuukw, supra*, the Chief Justice was speaking for himself and two other Judges.

[42] In 2004 Chief Justice McLachlin delivered the unanimous Judgment of the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 which set out the legal obligations of the Crown in its dealings with Aboriginal peoples from the assertion of sovereignty to the resolution of their land claims. The Chief Justice held, and I paraphrase except where shown in quotation marks:

1. the "honour of the Crown" means that the Crown must act honourably in its dealings with Aboriginal peoples to achieve "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown". See paragraph 17 of *Haida*;

2. the honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty. The duty's fulfillment requires that the Crown act with reference to the Aboriginal group's best interests. See paragraph 18 of *Haida*;

3. where treaties (and I take this to include land claims which may lead to treaties) are involved, "the honour of the Crown" requires negotiations leading to a just settlement of Aboriginal claims. See paragraph 20 of *Haida*;

4. ... It is a corollary of section 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. See paragraph 20 of *Haida*;

5. "Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by section 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult, and where indicated, accommodate Aboriginal interests." See paragraph 25 of *Haida*; and

6. The honour of the Crown requires that the Crown act with good faith. See paragraph 41 of *Haida*.

[43] Based upon *Haida*, I conclude that the Crown's duty to act honourably with respect to the Algonquin Bands' land claim in this case means that the Crown disclose the census records in the possession of the Crown which may prove continuity of occupation between present and pre-sovereignty occupation, one of the proofs required for Aboriginal land title.

[44] The Court is also of the view that the honour of the Crown gives rise to a fiduciary duty with respect to these census records being kept by the Crown. This duty requires that the Crown act with reference to the Aboriginal bands' best interest and disclose these census records which relate to the Aboriginal rights in the territories at stake.

[45] It is also the Court's view that the honour of the Crown requires good faith negotiations leading to a just settlement of the Aboriginal claims. This duty to negotiate in good faith, which is an implied part of section 35, means that the Crown disclose census records in the possession of the Crown which are relevant to the proof of Aboriginal title.

[46] It would be absurd and wrong if the Crown had the evidence the Aboriginal people required to prove their land claim, but the Government was entitled to suppress it. This would be inconsistent with section 35 of the *Constitution Act, 1982*.

[47] The duty to act honourably, in good faith and as a fiduciary are common law duties that have now been constitutionalized to the extent that they relate to the Crown's legal obligations under section 35 of the *Constitution Act, 1982* with respect to Aboriginal land claims. Accordingly, section 35 and the aforementioned common law duties are "statutory or other law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*.

Issues No. 4:

STEP 2

Is paragraph 8(2)(k) of the *Privacy Act* "statutory or other law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*?

[48] Paragraph 8(2)(k) of the *Privacy Act* exempts census records from the prohibition against disclosure of personal information under subsection 19(1) of the *Access Act*. It is "statutory law".

Privacy Act, R.S.C. 1985, c. P-21**8. [...]**

Where personal information may be disclosed

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

[...]

(k) to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada;

[Emphasis added]

8. [...]

Cas d'autorisation

(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants:

[...]

k) communication à tout gouvernement autochtone, association d'autochtones, bande d'Indiens, institution fédérale ou subdivision de celle-ci, ou à leur représentant, en vue de l'établissement des droits des peuples autochtones ou du règlement de leurs griefs;

[Je souligne]

[49] The respondent submits that the reference to "statutory law" in paragraph 17(2)(d) cannot mean subsection 19(2) of the *Access Act* since this is a circular argument, i.e. section 24 of the *Access Act* refers to section 17 of the *Statistics Act* which refers to section 19(2) of the *Access Act*. (Subsection 19(2) of the *Access Act* refers to section 8 of the *Privacy Act*. See Appendix A.) While the Court agrees that this is circular, the exemption at paragraph 8(2)(k) of the *Privacy Act* is obviously "statutory law", and the intent of Parliament in enacting this law is obvious, namely personal information under the control of a government institution may be disclosed to an Indian Band for the purpose of researching or validating a land claim. Accordingly, paragraph 8(2)(k) of the *Privacy Act* is "statutory law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*.

Issue No. 5:**STEP 3**What is "information available to the public" within the meaning of paragraph 17(2)(d) of the *Statistics Act*?

[50] The meaning of the phrase "information available to the public" in paragraph 17(2)(d) of the *Statistics Act* is a question of law to be determined by the Court with the aid of dictionaries. See *Pfizer Co. v. Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.)*, [1973] F.C. 3 (C.A.) per Jackett C.J. at paragraph 19:

¶ 19 In legal theory, as I understand the law, the general rule is that a word in a document such as a statute or order in council having the effect of law is to be given its ordinary or popular meaning according to the context [See Note 1 below] and that meaning is a question of law to be determined by the Court with the aid of dictionaries and other legitimate aids of construction. ...

[51] The respondent submits that the word "available" means accessible as a matter of right or legal certainty. *The Oxford English Dictionary*, 2d ed. (Oxford, U.K.: Clarendon Press, 1989) defines "available" as "capable of being employed with advantage or turned to account; hence, capable of being made use of, at one's disposal, within one's reach".

[52] The respondent submits that the word "public" must be interpreted to denote the public at large, and not some element or subset of the public. *The Oxford English Dictionary*, *supra*, defines the adjective "public" as, *inter alia*: "1. of or pertaining to the community as a whole; belonging to, affecting, or concerning the community or nation [...] Open or available to, used or shared by all members of a community; not restricted to private use".

[53] With respect, the Court does not agree with the respondent. The definition cited by the respondent relates to the word "public" as an adjective, not as a noun. In the words "available to the public" in the review at bar, the word "public" is a noun. In determining the grammatical and ordinary sense of words used by Canadians, the Court prefers definitions provided in *The Canadian Oxford Dictionary*, 2d ed., (Toronto, Ontario: Oxford University Press, 2004). *The Canadian Oxford Dictionary* defines the noun "public" as:

1. the community in general, or members of the community. 2. a section of the community having a particular interest or some special connection ...

The noun "public" thus has three meanings, referring to either the entirety of the community, to members of the community, or to a section of the community sharing a common status or interest. Each of these meanings is sufficient to meet the definition of "public" in paragraph 17(2)(d) of the *Statistics Act*.

[54] *The Canadian Oxford Dictionary* defines the adjective "available" as:

1. capable of being used; at one's disposal; obtainable.

Accordingly, the words "information available to the public" denote records capable of being obtained by the entire general public, or by members or sections thereof. To be capable of obtaining a given record, the member of public must have a right of access.

[55] In the alternative that the meaning of "available to the public" was equivocal, ambiguous or unclear, in *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, the Supreme Court of Canada per Binnie J. held at paragraph 80 that the appropriate approach to statutory interpretation is to read the words of a statute in their entire context, liberally construed, and in their ordinary sense in accordance with the intention of Parliament:

¶ 80 ... [T]he "presumption" suggested by Lord Hatherley 135 years ago is out of step with modern principles of statutory interpretation accepted in Canada, as set out in Driedger's Construction of Statutes (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [p. 87]

This approach was recently affirmed in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, and *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, and is reinforced by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". Such interpretative principles apply with special force in the application of human rights laws.

[56] The information in the census records requested by the Algonquin Bands is exactly the type of information which Parliament intended under the *Privacy Act* may be disclosed to an Aboriginal people or Indian band. Similarly, it is exactly the type of information which the Crown is obliged to provide an Aboriginal people or Indian band under section 35 of the *Constitution Act, 1982*. Applying the modern

approach to statutory interpretation, the words "available to the public" should be liberally construed and interpreted to mean a member of the public, and not only the public as a whole.

[57] Further in the alternative that the meaning of "available to the public" was unclear, the respondent would not have met his burden of proof under section 48 of the *Access Act* in that I am not satisfied on the balance of probabilities that the respondent's interpretation of "available to the public" was correct. On this basis, I would allow this application.

Conclusion with Respect to Issues 3, 4, and 5

[58] In conclusion, the correct statutory interpretation in the review at bar is that paragraph 17(2)(d) of the *Statistics Act* is engaged because a member of the public, i.e. the Algonquin Bands, have a right of access to the information by statute or other law, namely section 35 of the *Constitution Act, 1982*, the common law duties referred to in paragraph 46, and subsection 8(2)(k) of the *Privacy Act*. I note that only one statute or common duty is sufficient to satisfy the requirement of paragraph 17(2)(d) of the *Statistics Act*.

Issue No. 6:

In the alternative that the respondent was prohibited from disclosing census records pursuant to section 17 of the *Statistics Act*, what would be the effect of section 52 of the *Constitution Act, 1982*?

[59] Subsection 52(1) of the *Constitution Act, 1982* provides that any law that is inconsistent with the Constitution of Canada is, to the extent of the inconsistency, of no force or effect:

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Primauté de la Constitution du Canada

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de

[60] The Crown has an obligation independent of the *Access Act* to provide the Algonquin Bands with those parts of the census records required to prove their land title claim. This obligation has been constitutionalized in section 35 of the *Constitution Act, 1982*. In accordance with section 52 of the *Constitution Act*, and to the extent that section 17 of the *Statistics Act* is inconsistent, section 17 is of no force or effect unless it can be justified.

[61] In *R v. Sparrow*, [1990] 1 S.C.R. 1075 at paragraphs 59 to 62 the Supreme Court of Canada held that legislation can restrict Aboriginal constitutional rights, but the Courts demand justification for such government regulation. Therefore, if section 17 of the *Statistics Act* prohibits the disclosure of the census records in this case, it is not automatically of no force or effect by the operation of section 52 of the *Constitution Act, 1982*. This legislation is valid if it meets the test for justifying an interference with the Aboriginal right under subsection 35(1).

[62] In the case at bar, the Court concludes that section 17 does not meet the test for justifying an interference with the right of the Aboriginal peoples to obtain their own census records necessary to prove their land title claims. It would be absurd if the Crown, which has the obligation to assist Aboriginal peoples with respect to their land claims, could suppress the evidence necessary for the proof of these land claims. The respondent has not offered any justification for overriding this constitutional right. While the confidentiality of census records are necessary to ensure full and frank responses to enumerators, the census records sought are more than 60 years old, and can be disclosed subject to a confidentiality undertaking

referred to herein. Recent census records are not being sought or disclosed, nor are they necessary, because the Band Lists which began in 1950 provide the evidence necessary for a land claim. Accordingly, the disclosure of the census records for 1941 and earlier will not deter full and frank census records in the future.

Remedy

[63] In the review at bar, the Chief Statistician erred in law with respect to:

- i. section 35 of the *Constitution Act, 1982*,
- ii. the common law obligations of the Crown to disclose the information to the Algonquin bands with respect to their land claim; and
- iii. paragraph 8(2)(k) of the *Privacy Act*.

Since the decision under review was based on errors of law, it should be set aside and referred back to the Chief Statistician with directions to consider the access request under paragraph 17(2)(d) of the *Statistics Act* in accordance with these Reasons for Order, and with a direction that the census records for 1921, 1931 and 1941 can be disclosed to Dr. James Morrison on behalf of the Algonquin Bands upon his undertaking that he will keep confidential the personal information in the census records with respect to non-Aboriginal persons. The 1911 census records have been made public so the right to access their disclosure is moot.

[64] Both parties advised the Court that they are not seeking costs in this case. Accordingly, the Court will make no order as to costs.

"Michael A. Kelen"

Judge

Ottawa, Ontario

February 13, 2006

APPENDIX "A"

1. Access to Information Act, R.S.C. 1985, c. A-1

Right to access to records

Droit d'accès

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

4. (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande:

(a) a Canadian citizen, or

a) les citoyens canadiens;

(b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act,

b) les résidents permanents au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés.

has a right to and shall, on request, be given access to any record under the control of a government institution.

[...]

[...]

Renseignements personnels

Personal information

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act.

19. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la Loi sur la protection des renseignements personnels.

Where disclosure authorized

Cas où la divulgation est autorisée

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

(2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :

(a) the individual to whom it relates consents to the disclosure;

a) l'individu qu'ils concernent y consent;

(b) the information is publicly available; or

b) le public y a accès;

(c) the disclosure is in accordance with section 8 of the Privacy Act.

c) la communication est conforme à l'article 8 de la Loi sur la protection des renseignements personnels.

[Je souligne]

[Emphasis added]

[...]

[...]

Statutory prohibitions against disclosure

Interdictions fondées sur d'autres lois

24. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

24. (1) Le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements dont la communication est restreinte en vertu d'une disposition figurant à l'annexe II.

[...]

[...]

SCHEDULE II

ANNEXE II

(Section 24)

(article 24)

[...] Statistics Act, Section 17

[...] Loi sur la statistique, article 17

[...]

[...]

Review by Federal Court

Révision par la Cour fédérale

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans

matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

Information Commissioner may apply or appear

42. (1) The Information Commissioner may

(a) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof in respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record;

(b) appear before the Court on behalf of any person who has applied for a review under section 41; or

(c) with leave of the Court, appear as a party to any review applied for under section 41 or 44.

[...]

Burden of proof

48. In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

Order of Court where no authorization to refuse disclosure found

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems

Exercice du recours par le Commissaire, etc.

42. (1) Le Commissaire à l'information a qualité pour :

a) exercer lui-même, à l'issue de son enquête et dans les délais prévus à l'article 41, le recours en révision pour refus de communication totale ou partielle d'un document, avec le consentement de la personne qui avait demandé le document;

b) comparaître devant la Cour au nom de la personne qui a exercé un recours devant la Cour en vertu de l'article 41;

c) comparaître, avec l'autorisation de la Cour, comme partie à une instance engagée en vertu des articles 41 ou 44.

[...]

Charge de la preuve

48. Dans les procédures découlant des recours prévus aux articles 41 ou 42, la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document incombe à l'institution fédérale concernée.

Ordonnance de la Cour dans les cas où le refus n'est pas autorisé

49. La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

2. Privacy Act, R.S.C. 1985, c. P-21 (assented to July 1, 1983)

8. [...]

Where personal information may be disclosed

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

[...]

(k) to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada;

[Emphasis added]

8. [...]

Cas d'autorisation

(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants:

[...]

k) communication à tout gouvernement autochtone, association d'autochtones, bande d'Indiens, institution fédérale ou subdivision de celle-ci, ou à leur représentant, en vue de l'établissement des droits des peuples autochtones ou du règlement de leurs griefs;

[Je souligne]

3. Statistics Act, R.S.C. 1985, c. S-19

SECRECY

Prohibition against divulging information

17. (1) Except for the purpose of communicating information in accordance with any conditions of an agreement made under section 11 or 12 and except for the purposes of a prosecution under this Act but subject to this section,

(a) no person, other than a person employed or deemed to be employed under this Act, and sworn under section 6, shall be permitted to examine any identifiable individual return made for the purposes of this Act; and

(b) no person who has been sworn under section 6 shall disclose or knowingly cause to be disclosed, by any means, any information obtained under this Act in such a manner that it is possible from the disclosure to relate the particulars obtained from any individual return to any identifiable individual person, business or

SECRET

Protection des renseignements

17. (1) Sous réserve des autres dispositions du présent article et sauf pour communiquer des renseignements conformément aux modalités des accords conclus en application des articles 11 ou 12 ou en cas de poursuites engagées en vertu de la présente loi :

a) nul, si ce n'est une personne employée ou réputée être employée en vertu de la présente loi et qui a été assermentée en vertu de l'article 6, ne peut être autorisé à prendre connaissance d'un relevé fait pour l'application de la présente loi;

b) aucune personne qui a été assermentée en vertu de l'article 6 ne peut révéler ni sciemment faire révéler, par quelque moyen que ce soit, des renseignements obtenus en vertu de la présente loi de telle manière qu'il soit possible, grâce à ces révélations, de rattacher à un particulier, à une

organization.

Exception to prohibition

(2) The Chief Statistician may, by order, authorize the following information to be disclosed:

(a) information collected by persons, organizations or departments for their own purposes and communicated to Statistics Canada before or after May 1, 1971, but that information when communicated to Statistics Canada shall be subject to the same secrecy requirements to which it was subject when collected and may only be disclosed by Statistics Canada in the manner and to the extent agreed on by the collector thereof and the Chief Statistician;

(b) information relating to a person or organization in respect of which disclosure is consented to in writing by the person or organization concerned;

(c) information relating to a business in respect of which disclosure is consented to in writing by the owner for the time being of the business;

(d) information available to the public under any statutory or other law;

(e) information relating to any hospital, mental institution, library, educational institution, welfare institution or other similar non-commercial institution except particulars arranged in such a manner that it is possible to relate the particulars to any individual patient, inmate or other person in the care of any such institution;

(f) information in the form of an index or list of individual establishments, firms or businesses, showing any, some or all of the following in relation to them:

(i) their names and addresses,

(ii) the telephone numbers at which they may be reached in relation to statistical matters,

(iii) the official language in which they prefer to be addressed in relation to statistical matters,

entreprise ou à une organisation identifiables les détails obtenus dans un relevé qui les concerne exclusivement.

Exception à l'interdiction

(2) Le statisticien en chef peut, par arrêté, autoriser la révélation des renseignements suivants:

a) les renseignements recueillis par des personnes, des organisations ou des ministères, pour leur propre usage, et communiqués à Statistique Canada avant ou après le 1er mai 1971; toutefois, ces renseignements sont assujettis, lorsqu'ils ont été communiqués à Statistique Canada, aux prescriptions concernant le secret auxquelles ils étaient assujettis lorsqu'ils ont été recueillis et ils ne peuvent être révélés par Statistique Canada que de la manière et dans la mesure où en sont convenus ceux qui les ont recueillis et le statisticien en chef;

b) les renseignements ayant trait à une personne ou à une organisation, lorsque cette personne ou organisation donne, par écrit, son consentement à leur révélation;

c) les renseignements ayant trait à une entreprise, lorsque celui qui à ce moment-là en est le propriétaire donne, par écrit, son consentement à leur révélation;

d) les renseignements mis à la disposition du public en vertu d'une loi ou de toute autre règle de droit;

e) les renseignements ayant trait à un hôpital, un établissement pour malades mentaux, une bibliothèque, un établissement d'enseignement, un établissement d'assistance sociale ou autre établissement non commercial du même genre, à l'exception des détails présentés de telle façon qu'elle permettrait à n'importe qui de les rattacher à un malade, un pensionnaire ou une autre personne dont s'occupe un tel établissement;

f) les renseignements revêtant la forme d'un index ou d'une liste, relativement à des établissements particuliers, ou des firmes ou entreprises particulières, indiquant l'un ou plusieurs des éléments suivants:

(iv) the products they produce, manufacture, process, transport, store, purchase or sell, or the services they provide, in the course of their business, or

(v) whether they are within specific ranges of numbers of employees or persons engaged by them or constituting their work force; and

(g) information relating to any carrier or public utility.

[Emphasis added]

(i) leurs noms et adresses,

(ii) les numéros de téléphone où les joindre relativement à des données statistiques,

(iii) la langue officielle qu'ils préfèrent utiliser relativement à des données statistiques,

(iv) les produits obtenus, manufacturés, fabriqués, préparés, transportés, entreposés, achetés ou vendus par eux, ou les services qu'ils fournissent au cours de leurs activités,

(v) s'ils se rangent dans des catégories déterminées quant au nombre des employés ou des personnes qu'ils engagent ou qui constituent leur main-d'oeuvre;

g) les renseignements ayant trait à un transporteur ou à une entreprise d'utilité publique.

[Je souligne]

4. An Act to amend the Statistics Act, S.C. 2005, c. 31 (assented to June 29, 2005)

1. The Statistics Act is amended by adding the following after section 18:

18.1 (1) The information contained in the returns of each census of population taken between 1910 and 2005 is no longer subject to sections 17 and 18 ninety-two years after the census is taken.

(2) The information contained in the returns of each census of population taken in 2006 or later is no longer subject to sections 17 and 18 ninety-two years after the census is taken, but only if the person to whom the information relates consents, at the time of the census, to the release of the information ninety-two years later.

(3) When sections 17 and 18 cease to apply to information referred to in subsection (1) or (2), the information shall be placed under the care and control of the Library and Archives of Canada.

1. La Loi sur la statistique est modifiée par adjonction, après l'article 18, de ce qui suit :

18.1 (1) Les articles 17 et 18 cessent de s'appliquer aux renseignements contenus dans les relevés de tout recensement de la population fait entre 1910 et 2005 quatre-vingt-douze ans après la tenue du recensement.

(2) La même règle s'applique à l'égard de tout recensement de la population fait en 2006 ou par la suite, mais seulement si la personne visée par les renseignements consent, lors du recensement, à ce que ceux-ci cessent d'être protégés quatre-vingt-douze ans plus tard.

(3) Lorsque les articles 17 et 18 cessent de s'appliquer aux renseignements visés aux paragraphes (1) et (2), ceux-ci sont placés sous la garde et la responsabilité de Bibliothèque et Archives du Canada.

5. Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Part II

PARTIE II

Rights of the Aboriginal Peoples of Canada

Droits des peuples autochtones du Canada

Recognition of existing aboriginal and treaty rights

Confirmation des droits existants des peuples autochtones

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

35. (1) Les droits existants -- ancestraux ou issus de traités -- des peuples autochtones du Canada sont reconnus et confirmés.

Definition of "aboriginal peoples of Canada"

Définition de "peuples autochtones du Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(2) Dans la présente loi, "peuples autochtones du Canada" s'entend notamment des Indiens, des Inuit et des Métis du Canada.

Land claims agreements

Accords sur des revendications territoriales

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

[Emphasis added]

[Je souligne]

Primacy of Constitution of Canada

[...]

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Primauté de la Constitution du Canada

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

FEDERAL COURT**NAME OF COUNSEL AND SOLICITORS OF RECORD****DOCKET:**

T-421-04

STYLE OF CAUSE:

The Information Commissioner of Canada v. The Minister of Industry

PLACE OF HEARING:

Ottawa, Ontario

DATE OF HEARING:

January 25 and 26, 2006

REASONS FOR ORDER:

KELEN J.

DATED: February 13, 2006

APPEARANCES:

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Ms. Jennifer Francis

Mr. Patrick Bendin FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Deputy Attorney General of Canada