

**BILL S-13: AN ACT TO AMEND
THE STATISTICS ACT (CENSUS RECORDS)**

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LEGISLATIVE HISTORY OF BILL S-13

HOUSE OF COMMONS

Bill Stage	Date
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First Reading: 28 May 2003

Second Reading:

Committee Report:

Report Stage:

Third Reading:

SENATE

Bill Stage	Date
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First Reading: 5 February 2003

Second Reading: 11 February 2003

Committee Report: 29 April 2003

Report Stage:

Third Reading: 27 May 2003

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print**.

Legislative history by Peter Niemczak

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BILL S-13: AN ACT TO AMEND
THE STATISTICS ACT (CENSUS RECORDS)*

BACKGROUND

Bill S-13 was introduced by the Hon. Senator Sharon Carstairs, Leader of the Government in the Senate, on 5 February 2003. After a short debate, it received second reading on 11 February 2003, and was referred to the Standing Senate Committee on Social Affairs, Science and Technology.

The purpose of Bill S-13 is to make census records available for research and to the public after a certain period of time. As such, the bill is designed to remove a legal ambiguity that currently exists with respect to post-1901 census records. The bill would allow access by historical and genealogical researchers to census records between 1910 and 2003 under certain conditions, beginning 92 years after the census took place. The census records would then be available for examination without restriction after 112 years. The bill also contains a provision to avert potential problems in releasing future census data.

For a number of years, there has been considerable debate and controversy over the public release of post-1901 census records. On 7 February 2001, in the 1st session of the 37th Parliament, the Hon. Senator Lorna Milne introduced Bill S-12 in the Senate to amend the *Statistics Act* and the *National Archives of Canada Act* by mandating the transfer of census records from Statistics Canada to the National Archives, where the records would eventually be made available to the public. Senator Milne had introduced this bill in the previous Parliament, and similar legislation was also introduced in the House of Commons as Bill C-312 and Bill C-380 in the 1st session of the 37th Parliament.

* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

Census records up to and including the 1901 census have already been made available for public use. The data from the 1891 and 1901 censuses were released by the National Archives 92 years after their collection. In 1998, however, the 1906 census records were not released despite the passage of 92 years. A legal opinion from the federal Department of Justice concluded that the later censuses – specifically, 1911 onward – were conducted under changes to the law that legally guaranteed that the information would not be shown to any other person. As such, the potential existed to prevent the release of any further census records.

An Expert Panel on Access to Historical Census Records was established by the Minister of Industry in 1999 to examine the issue of disclosure. The members of the panel were Dr. Richard Van Loon (Chair), President of Carleton University; the Honourable Lorna Marsden, President and Vice-Chancellor of York University; Professor Chad Gaffield of the University of Ottawa; Professor John McCamus of Osgoode Hall Law School; and retired Supreme Court of Canada Judge the Honourable Gérard La Forest.⁽¹⁾

The Panel concluded that no perpetual guarantee of confidentiality was ever intended to attach to census records. In the Panel's view, the passage of time diminished concerns about individual privacy; and the value of public access, after a sufficient period of time, took precedence. It was agreed that 92 years was a sufficient lapse of time. The Panel's recommendations were tempered by its belief that the public might perceive the release of old census records as removing a guarantee made by the Government. It felt that this could create problems for Statistics Canada census compilation in the future. Accordingly, careful consideration of the issue by Government was urged, and it was recommended that all Canadians be informed that the guarantee of confidentiality with respect to future censuses endures for only 92 years. The Panel did not recommend that individual consent be sought for the future release of records.

It should be noted that the Panel made a distinction with respect to those records created before the 1918 *Statistics Act*. It indicated that, in its opinion, legislation was not required with respect to the census records that had not been made public (i.e., 1906, 1911 and 1916), particularly given the precedent of the release of the 1891 and 1901 records. With respect to the censuses from 1921 onwards, however, the Panel noted that the enactment of confidentiality guarantees into legislation in 1918 could be interpreted as making it more

(1) The Panel's report and related materials are available on-line at:
<http://www.statcan.ca/english/census96/finalrep.htm>.

difficult to release these census records, and suggested that “for greater certainty” an amendment be made to the *Statistics Act* for post-1918 census returns.

In its summary, the Panel stated:

The Panel is firmly convinced of the benefits of the release of historical census records. The Panel is of the view that with the passage of time, the privacy implications of the release of the information diminishes and that the passage of 92 years is sufficient to deal with such concerns. We are persuaded that a guarantee of perpetual confidentiality was not intended to apply to the census. We believe that the indication of transfer to the National Archives also implied an intention that the census records would eventually become public and we would not view any legislation deemed necessary to do so as a breaking of a promise to respondents. We view the historical and international precedents as fully supportive of this position. The Panel is equally convinced of the value of the census and other work of Statistics Canada and is unwilling to make any recommendation which it believes will jeopardize this work. It is for that reason that we recommend release of the pre-1918 Census records and post-2001 records on a 92-year cycle, while advising some caution regarding any legislative steps that might be thought necessary to effect the release of those census records for the period 1921 to 2001.

One of those opposed to the release of census records was the Privacy Commissioner of Canada, who made detailed submissions to the Expert Panel.⁽²⁾ The then Commissioner (Bruce Phillips) argued that when information is to be released for purposes other than those for which it was collected, individual consent is required. He pointed out the increasingly intrusive nature of census questionnaires and referred to privacy as a public right with significant societal value.

Senator Milne’s Bill S-12 was referred to the Standing Senate Committee on Social Affairs, Science and Technology after second reading. On 14 December 2001, in its Twelfth Report, the bill was reported back to the Senate without amendments, but with observations. The Committee noted that it had heard a range of opinions with respect to the bill. While many witnesses and Committee members favoured the disclosure of historical census records after 92 years, there was disagreement as to whether Bill S-12 provided adequate privacy protection. The bill would provide a right to object to the release of one’s own census information, but the process contemplated by it would require that the individual objecting make an application to the National Archivist 91 years after the data were collected. Assuming the

(2) The Commissioner’s submission, *The Census Returns, Privacy, and Questions of Governance*, 9 February 2000, is available on-line at: <http://www.statcan.ca/english/census96/return.htm>.

individual was still alive, the objection to disclosure would be considered valid only if the Archivist was satisfied that disclosure would be unwarranted.

The Committee was provided with a compromise proposal by Statistics Canada, which would provide more limited access than anticipated by Bill S-12. Access to historical census records would be provided only for genealogical research about one's own family and for historical research. Only family members (or their authorized agents) or those conducting historical research (peer-reviewed by the Social Sciences and Humanities Research Council) would be given access. While access would be unrestricted, researchers would be permitted to make public only the following basic information: name, age, address, marital status and birthplace. Furthermore, those accessing information would have to sign a legally enforceable undertaking confirming that they agreed to be bound by these terms.

The Committee noted that, notwithstanding the compulsory provisions of the *Statistics Act*, Statistics Canada relies on public cooperation and is thus concerned to preserve the integrity of Canada's statistical system. The integrity of Statistics Canada itself is based on its ability and effectiveness in keeping what its officials referred to as an "unconditional promise of confidentiality." The Committee referred to a poll by Environics, in which Canadians expressed concern that if legislation such as Bill S-12 were passed, it would affect their cooperation in future censuses. Some members of the Committee favoured the provisions of the compromise proposal over the process delineated by Bill S-12. The bill was agreed to on division by the Committee.

Bill S-12 was debated at third reading in the Senate, and on 25 March 2002 was referred back to the Standing Senate Committee on Social Affairs, Science and Technology for further study. It was felt that more time was required in order to reach a conclusion on the merits of the compromise proposal, and to allow the Chief Statistician to respond before the Committee. No report was presented by the Committee before the prorogation of the session.

Some of the arguments for and against the release of historical census records may be summarized as follows. Arguments in favour of releasing such records include the following:

- Without the release of these records, historians will lose important information about our nation's heritage, and those interested in genealogy will lose important information about their ancestors.
- Privacy interests are minimal after 92 years and are outweighed by the public interest in having access to historical records.
- No perpetual guarantee of confidentiality was ever made.

- Most of the information collected by the census is not of a highly sensitive nature, and the information that may be sensitive, such as income data, is likely to lose its sensitivity over time.
- While census respondents were told that their responses would be confidential, there was also evidence of an intent to preserve the information for the use of future generations; e.g., it is stored at the National Archives, which has always had the mandate to store information for future use.
- Many of the concerns relating to the privacy of census records relate to short-term issues that are irrelevant 92 years after the fact; e.g., people were worried that the information could be used for taxation purposes.
- Other countries routinely release census records without arousing contention; e.g., in Britain and the United States, records are released after 100 years and 72 years respectively.

Arguments against the release of historical census records include the following:

- Canadians are obligated under the law to answer the census, and do so with an assurance that the information will remain protected. A desire to study history should not take precedence over this guarantee of confidentiality.
- The use of information for purposes other than those for which it was collected should be subject to consent.
- Census information can be extremely personal (e.g., religion, marital status, health problems), and a decision should not be made for other people as to what constitutes acceptable disclosure of such information.
- Privacy rights should not end with an individual's death.
- The public may perceive the release of census information as retroactively revising a government guarantee.
- Collection of future census data could be adversely affected if respondents are concerned about the privacy of the information provided.

On 24 January 2003, the Government released the entire 1906 census on-line and without restriction. Notwithstanding the legal questions, it was decided to make this information available. It should be noted that this census was an agricultural one of three provinces, and contained little intrusive or personal information; moreover, it constituted the first census of Saskatchewan and Alberta, and was, therefore, historically important.

DESCRIPTION AND ANALYSIS

Clause 1 of Bill S-13 amends section 17 of the *Statistics Act*. The proposed section 17(4) allows census returns taken between 1910 and 2003 to be examined after 92 years by a person conducting genealogical research on his or her own behalf or on behalf of another person where duly authorized, or by a person conducting approved historical research. Persons wishing such to examine such records must sign and comply with an undertaking in prescribed form. In deciding whether to approve historical research, the public and scientific value of the project must be assessed.

Proposed section 17(7) provides that after 112 years census records may be examined by the general public. Information that is examined by the public may be publicly disclosed without any problem.

Proposed section 17(8) is designed to prevent difficulties from arising with respect to future censuses. It provides that if the person to whom the information relates has consented, census returns may be examined by anyone after 92 years. Essentially, this is intended to ensure that, in future, Canadians will be asked to give their prior consent to having their census returns stored in the National Archives and made available after 92 years. If such consent is withheld, the information will never be made public. No two-step procedure will be required for these census returns, because each person will have given his or her consent on the issue. Concern had been expressed with respect to the previous bill in the Senate by some who felt that it amounted to a form of “negative option billing,” in that a person had to do something before the information was withheld. The provision in Bill S-13 is clearer, and will presumably be based on models such as that used in Australia.⁽³⁾ It is, of course, unknown how many respondents will “opt out,” or decline to give their consent. In the case of the check-off on tax returns for transmittal of information to Elections Canada in respect of the Register of Electors (or permanent voters’ list), the non-participation rate is apparently very low. Similarly, when Statistics Canada conducted the Canadian Communities Health Survey, less than 5% of respondents declined to allow their health information to be released to local authorities. Another question that could arise with respect to this provision is whether the head of the household, who is completing the census return, can (or should be able to) consent on behalf of all members of his or her household.

(3) The Australian census consent clause, Question 50, provides: “Does each person in this household agree to his/her name and address and other information on this form being kept by the National Archives of Australia and then made publicly available after 99 years?”

Proposed section 17(10) provides that census records are to be transferred to the National Archives of Canada after 92 years.

Clause 2 of the bill adds a new section 17.1 to the *Statistics Act*, which would authorize the Governor in Council, on the recommendation of the responsible Minister and the Minister of Canadian Heritage, to make regulations prescribing the forms of undertaking and the categories of persons who can approve historical research projects. The form of undertaking may include conditions relating to the use and disclosure of the information examined. According to the sponsor of the bill in the Senate, the forms to be signed will be short, simple and easy to understand.

Clause 3 will enact a new offence of unauthorized disclosure as section 35 of the *Statistics Act*. Unauthorized disclosure of information contrary to the undertaking (i.e., between 92 and 112 years) could be punished by a fine of up to \$1,000. No jail time is prescribed.

Clause 4 provides that the bill will come into force on proclamation.

COMMENTARY

Bill S-13 introduces a new regime for the release of post-1901 census records. It allows limited disclosure after 92 years, and public disclosure after 112 years. It seeks to clarify the position with respect to future census records by asking respondents to consent to the eventual release of the data.

By way of comparison, Bill S-12, introduced by Senator Milne in the previous session, and other private Members' bills, adopted different approaches. Bill S-12 would have amended the *Statistics Act* to require the preservation of census records and their transfer within 30 years to the National Archives. It also proposed to amend the *National Archives of Canada Act* to provide for the following:

- The transferred records would be deemed to be of “permanent historic and archival importance.”
- When 92 calendar years had elapsed since the taking of a census, the Archivist would provide public access for historical, genealogical or scientific research purposes, or for other purposes the Archivist may establish.

- Individuals could object to the disclosure of their census information provided the objection was in writing and: (a) was received by the Archivist during the 92nd calendar year following the year in which the census was taken; (b) contained sufficient particulars to permit the Archivist to identify the personal information to which the objection related; and (c) in the opinion of the Archivist, the disclosure of the information would constitute an unwarranted invasion of the privacy of the individual.
- If no valid written objection was received, irrevocable consent would be deemed to have been given when 92 years had expired.

The debate over Bill S-12, and the fact that it was referred back to the Committee for further study, illustrate the difficulty in accommodating conflicting interests in this area. Several Senators felt that more effort should be made to achieve a compromise along the lines proposed by Statistics Canada.

This issue has been the subject of discussion and debate within certain sectors of society. Genealogists and historians have been actively pressing for the release of the post-1901 census records as fundamental to their work. Privacy advocates, on the other hand, have expressed concerns over the release of such records. In addition, concerns have been voiced over the impact that public release would have on future efforts to conduct censuses. These differing views are not easy to reconcile.

Bill S-12 is designed to avert the risk that historical census records from 1906 onwards may not be released or made available, unlike earlier ones. While there are valid reasons for contemporary confidentiality, it has been argued that information loses its sensitivity over time, and that census records are integral to historical and genealogical research. Where does the right to privacy end, and the need for historical knowledge begin? Should current laws and attitudes towards privacy and confidentiality apply to information gathered almost a century ago? Central to the issue are society's evolving attitudes towards privacy, and the nature of the guarantees or expectations that were made or implied at the time of the original censuses. The decision-making is made more difficult because so much time has passed. It is far easier to develop a prospective regime for future censuses. At the same time, concerns have been expressed that decisions taken regarding the release of census returns should not affect the present or future operations of Statistics Canada and its collection of sensitive information.

While the Privacy Commissioner was apparently consulted in the preparation of Bill S-13, it is unclear whether he supports it, or whether all of his concerns have been

adequately addressed. Also not known is what form the regulations will take, what the undertakings will look like, and what sort of conditions will be imposed. Who will be able to authorize historical research? A background document indicates that this could be done by the Chief Statistician, the National Archivist, Members of Parliament and Senators, a mayor, the chief of a First Nations community or band council, the dean of a university, senior clergy, etc. Is this list broad enough, or too broad? Why was the period of 112 years chosen for full disclosure? A question has also been raised as to why the restriction on the disclosure of personal data is to be lifted after 112 years: is it because of the passage of time, convenience or ease, or because the information is considered less worthy of protection? Why was the 1906 census released separately rather than under the provisions set out under Bill S-12, especially given the earlier legal advice? What is the effect of the 1983 *Privacy Act* on census records?

The compromise solution proposed in 2001 was criticized as overly bureaucratic and unworkable. Whether the regime proposed in Bill S-13 achieves the appropriate balance remains to be seen.