Date: 20070601

Docket: A-107-06

Citation: 2007 FCA 212

CORAM: **RICHARD C.J.**
DÉCARY J.A.
EVANS J.A.

BETWEEN:

MINISTER OF INDUSTRY

Appellant

and

INFORMATION COMMISSIONER OF CANADA

Respondent

Heard at Ottawa, Ontario, on March 27, 2007.

Judgment delivered at Ottawa, Ontario, on June 1, 2007.

REASONS FOR JUDGMENT BY: RICHARD C.J.

CONCURRING REASONS BY: DÉCARY J.A.
DISSENTING REASONS BY: EVANS J.A.

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REASONS FOR JUDGMENT

[1] This is an appeal from an Order of the Federal Court ([2006] 4 F.C.R. 241, 2006 FC 132) which provides that the Chief Statistician shall disclose specific census records of 1921, 1931 and 1941 with respect to individual returns in eight specific districts and requested under the *Access to Information Act* in November 2001 on behalf of three Aboriginal bands for the exclusive purpose of researching or validating their Aboriginal claims as provided under paragraph 8(2)(k) of the *Privacy Act*.

[2] I need not repeat the factual and legislative background to this proceeding which is found in Justice Evans' reasons. I also agree with the standard of review that he proposes.

[3] I would dismiss the appeal for the following reasons.

[4] The broadly stated purpose of the *Access to Information Act* is to provide a right of access to information in records under the control of a government institution in accordance with the principle that necessary exceptions to the right of access should be limited and specific: *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66 at 78, 2003 SCC 8, Gonthier J.

[5] Section 4 of the *Access to Information 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 to Information Act* and notwithstanding any other Act of Parliament. This general right of access to information is limited by subsection 24(1) of the *Access to Information Act*, which requires the head of a government institution to refuse to disclose any record requested under the *Access to Information Act* that contains information the disclosure of which is restricted pursuant to any provision set out in Schedule II of the *Access to Information Act*. Schedule II lists section 17 of the *Statistics Act*.

[6] The Appellant submits that the mere inclusion of section 17 of the *Statistics Act* in Schedule II prohibits disclosure of the census information. I cannot agree. In my opinion, section 17 must be read as a whole to determine whether or not disclosure is "restricted".

[7] This reasoning is consistent with the decision of *Siemens Canada Ltd. v. Canada (Minister of Public Works & Government Services)*, 2001 FCT 1202 at paragraphs 12, 13 and 20 (T.D.), aff'd 2002 FCA 414, where the Federal Court considered the interplay between section 24 of the *Access to Information Act* and section 30 of the *Defence Production Act*, a provision listed in Schedule II of the *Statistics Act*. The Federal Court stated that section 24 has the effect of incorporating section 30 of the *Defence Production Act* into the *Access to Information Act*. It then considered whether the requirements and exceptions provided under section 30 of the *Defence Production Act* were met. Thus, when a provision is listed in Schedule II, the head of the government institution is required to determine whether disclosure can take place under that provision.

[8] In this particular case, Schedule II lists section 17 of the *Statistics Act*. Although subsection 17(1) is a general prohibition against the disclosure of information, subsection 17(2) provides a list of exceptions to this general prohibition. Specifically, paragraph 17(2)(d) grants the Chief Statistician the discretionary power to authorize the disclosure of information "available to the public under any statutory or other law." Accordingly, consideration must be given to the exception at paragraph 17(2)(d) to determine whether or not disclosure is "restricted".

[9] Paragraph 17(2)(d) of the *Statistics Act* states: "The Chief Statistician may, by order, authorize the following information to be disclosed: …(d) information available to the public under any statutory or other law; …." In this case, the exception at paragraph 17(2)(d) of the *Statistics Act* brings into play paragraph 8(2)(k) of the *Privacy Act*.

[10] Section 8 of the *Privacy Act* outlines the circumstances under which personal information under the control of a government institution may be disclosed. Paragraph 8(2)(k) states: "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…for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada;…."

[11] The Appellant points to the opening words of subsection 8(2) of the *Privacy Act*, which subjects permissible disclosures of information to "…any other Act of Parliament" and argues that the information sought is subject to section 17 of the *Statistics Act*. However, as the applications judge noted, this argument leads to an endless circle of provisions. While disclosure under subsection 8(2) of the *Privacy Act* is subject to any other Act of Parliament, the *Statistics Act* allows for disclosure of information available under "any statutory or other law."

[12] The applications judge concluded at paragraph 49 that:

> …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.

I agree. If subsection 8(2) of the *Privacy Act* was subject to section 17 of that *Statistics Act*, as opposed to the other way around, then the exception at paragraph 8(2)(k) could never be invoked to allow disclosure of personal information to aboriginal people for the purpose of research or claims

because section 17 would always prohibit disclosure. Obviously, Parliament would not have intended such an absurd result.

[13] This is a case where the information requested clearly falls into a specific category of materials containing personal information the release of which is permitted. Parliament turned its mind to this very situation and determined that, in the case of information relating to the research of land claims by aboriginal people, access takes priority over personal information. This is the very reason for inclusion of paragraph 8(2)(k) in the *Privacy Act*.

[14] Paragraph 17(2)(d) of the *Statistics Act* provides that the Chief Statistician may authorize the disclosure of information "available to the public" under any statutory or other law. Paragraph 8(2)(k) of the *Privacy Act* allows the disclosure of personal information 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…" Does this limited segment of the population amount to "public" within the meaning of paragraph 17(2)(d) of the *Statistics Act*? The applications judge concluded that it does and I agree.

[15] The applications judge held that the word "public" in the phrase "available to the public" is a noun, which, according to The Canadian Oxford Dictionary, 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. The applications judge concluded that "[e]ach of these meanings is sufficient to meet the definition of "public" in paragraph 17(2)(d) of the *Statistics Act*" (paragraph 53). With respect to the words "information available to the public", the

applications judge stated that these words denote "records capable of being obtained by the entire general public, or by members or sections thereof" (paragraph 54). Based on this interpretation, the applications judge concluded that the census information requested by the Algonquin Bands "is exactly the type of information which Parliament intended under [paragraph 17(2)(d) of] the Privacy Act may be disclosed to an Aboriginal people or Indian band" (paragraph 56).

[16] The Appellant submits that the term "available to the public" refers "to the community at large". In making this submission, the Appellant argues that "…disclosure in according with paragraph 8(2)(k) – which only contemplates discretionary disclosure to certain people for a specific purpose – cannot be the same as "public availability" within the meaning of paragraph 19(2)(b) [of the *Access to Information Act*]" adding that "[t]here is no reason why the concept of "available to the public" should be interpreted differently in paragraph 17(2)(d) of the *Statistics Act* than in subsection 19(2) of the [*Access to Information Act*]."

[17] The Respondent submits that there are compelling reasons why the concept of the public may vary in scope in these two legislative provisions. The Respondent points out that the statutory language is not identical in both provisions: while paragraph 19(2)(b) of the *Access to Information Act* contemplates disclosure "if the information is publicly available / *dans les cas où: le public y a accès*", paragraph 17(2)(d) of the *Statistics Act*, in turn, authorizes disclosure of "information available to the public under any statutory or other law / *les renseignements mis à la disposition du public en vertu d'une loi ou de toute autre règle de droit*". The Respondent further submits that the meaning of "the public" under paragraph 17(2)(d) of the *Statistics Act* can be contrasted with

subsection 2(2) of the *Access to Information Act* where the wording is "…available to the *general* public" ("… à la disposition du grand public"). This demonstrates that when Parliament intended to limit the scope of the noun "the public" to mean only the public in its entirety rather than particular segments of it, it used legislative language that clearly demonstrates this intent.

[18] In my view, even if paragraph 19(2)(b) of the *Access to Information Act* and paragraph 17(2)(d) of the *Statistics Act* were interpreted to mean the same thing, as the Appellant suggests, not much turns on the argument. What still needs to be determined is the scope intended by the use of the word "public". In that respect, I agree with the applications judge that, to give effect to paragraph 8(2)(k) of the *Privacy Act*, the words "available to the public" under paragraph 17(2)(d) of the *Statistics Act* must be interpreted to mean a segment of the population, such as aboriginal groups, as opposed to the entire population.

[19] The Appellant further submits that the discretion under paragraph 17(2)(b) of the *Statistics Act* can only be exercised to disclose information to which the public already has a right of access from another source. In support of this submission, the Appellant compares the English and French versions of paragraph 17(2)(d): the English version refers to any "information available to the public under any statutory or other law" whereas the French versions refers to "*les renseignements mis à la disposition du public en vertu d'une loi ou de toute autre règle de droit*." In the Appellants view, the exception, especially when considering the words "mis à la disposition du public en vertu d'une loi" in the French version, requires the information to be already accessible or obtainable.

[20] In reading the English and French versions of paragraph 17(2)(d), I can see the subtle distinction the Appellant is trying to make but, from a practical point of view, the argument cannot stand. The Appellant is reading the statutory provision as requiring the information to be "already" accessible, as opposed to simply being accessible. In my opinion, if a statutory provision allows for the disclosure of information to the public, as does paragraph 8(2)(k) of the *Privacy Act*, then the information is "available" to the public or "mis à la disposition du public". There is no requirement that the information be "already" in the public domain.

[21] In light of the foregoing, it is my view that the statutory requirements imposed under paragraph 8(2)(k) of the *Privacy Act* have been met: the census information is requested by aboriginal groups for the purposes of research and claims. It therefore follows that the statutory requirements of paragraph 17(2)(b) have also been met: the information requested, i.e. the census information, is available to the public in another statute by application of paragraph 8(2)(k) of the *Privacy Act*.

[22] The Appellant submits that, even if the requirements of paragraph 8(2)(k) of the *Privacy Act* have been met, the Chief Statistician nonetheless retains discretion in deciding whether or not to disclose the requested information.

[23] In response, the Respondent argues that, once the statutory exception provided for under paragraph 8(2)(k) of the *Privacy Act* has been met, the Appellant retains no discretion not to disclose the information requested. I would agree with the Respondent that, though the word "may"

is to be construed as permissive, as provided for in section 11 of the *Interpretation Act*, there are situations in which the permission granted must be exercised. As explained by Professor Sullivan, "…the use of 'may' implies discretion, but it does not preclude obligation" since oftentimes a duty arises to exercise the power once the conditions of exercise have been met. This is because "[o]therwise the purpose of the legislation would the thwarted." *Sullivan and Driedger on the Construction of Statutes*, 4th ed. 2002, Butterworths, p. 58-59.

[24] In *Information Commissioner v. Minister of Employment and Immigration*, [1986] 3 F.C. 63 at paragraph 4 (T.D.), Jerome A.C.J. considered the discretion granted pursuant to subsection 19(2) of the *Access to Information Act*, which provides that the head of a government institution may disclose records requested that contain personal information if a certain condition is met, one of these conditions being when the individual to whom it relates consents to its disclosure. Jerome, A.C.J. rejected the argument that subsection 19(2) established a discretion not to disclose information even though the conditions of the subsection have been met. He did so on the grounds that it was both contrary to the principles of statutory interpretation and that it ran "directly against the very purpose for which this legislation was enacted" (paragraph 3). He further explained that once the conditions necessary to release personal information had been fulfilled, "…it becomes tantamount to an obligation upon the head of the government institution to do so, especially where the purpose for which the statute was enacted is, as here, to create a right of access in the public" (paragraph 4).

[25] The applications judge concluded that the Crown's duty to act honourably, in good faith and as a fiduciary are common law duties that have been constitutionalized under section 35 of the *Constitution Act, 1982* with respect to Aboriginal land claims and are "statutory and other law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*. In arriving to this conclusion, the applications judge explained that:

- the Crown has a duty to act honourably with respect to the Algonquin Bands' land claim, which means that the Crown must disclose the census records in the possession of the Crown as it may prove continuity of occupation between present and pre-sovereignty occupation – information required to prove Aboriginal land title (paragraph 43).

- the honour of the Crown gives rise to a fiduciary duty with respect to the census records being kept by the Crown. This duty, he explained, "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" (paragraph 44).
- "the honour of the Crown requires good faith negotiations leading to a judge settlement of the Aboriginal claims" and this duty, "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" (paragraph 45).

Both parties have made submissions in respect of this portion of the applications judge's decision. I would agree that section 35 of the *Constitution Act, 1982* is instructive in assessing the importance of aboriginal land claims in Canada, but I do not think such an analysis is necessary in light of the applicability of paragraph 8(2)(k) of the *Privacy Act*.

[26] Accordingly, I would dismiss the appeal with costs.

"J. Richard"

Chief Justice

DÉCARY J.A. (Concurring)

[27] I had the benefit of reading in draft the reasons of my two colleagues. I find both of them quite compelling in their own way. In the end, I adopt the solution proposed by the Chief Justice.

[28] I agree with Evans J.A. with respect to what he identifies as issues 1 to 4.

[29] I agree, however, with the Chief Justice that the words "available to the public" in paragraph 17(2)(*d*) of the *Statistics Act* may be read as meaning available to a segment of the population. I wish only to add a few observations.

[30] Kelen J. made an important finding of fact, which is unassailable at our level: access to the requested information is necessary for the Indian Bands to establish continuity of membership as well as use and occupancy of the claimed lands.

[31] The impugned order does not allow census records to be examined for any purpose or by anybody. Nor does it allow the records to be disclosed to the general public. The Chief Statistician would only allow the information to be examined for the limited purpose set out in paragraph 8(2)(*k*) of the *Privacy Act* and solely by a researcher engaged by the Indian Bands. Furthermore, that researcher would undertake to keep confidential, personal information relating to non-Aboriginal persons. For all practical purposes the Chief Statistician retains a considerable margin of discretion over the disclosure of the personal information at issue.

[32] We are dealing here, as so clearly appears from the reasons of my two colleagues, with conflicting provisions of different statutes whose interpretation could easily result, to use the words of the Chief Justice at paragraph [11], in “an endless circle”.

[33] Provisions of three statutes are at issue: the *Access to Information Act*, the *Privacy Act* and the *Statistics Act*. They all seek legitimate and important objectives. In addition, paragraph 8(2)(*k*) of the *Privacy Act* introduces a fourth objective, recognized by the Constitution of Canada, i.e. the protection of aboriginal rights.

[34] Of the provisions at issue, paragraph 8(2)(*k*) of the *Privacy Act* is the only one which addresses the specific concerns of an identified group of persons. It is significant that this paragraph allows Indian bands access to personal information which was provided by present or past members of the Bands. Parliament intended to ensure that privacy of information about individual members of Indian bands could be set aside for the purpose of enhancing the rights of the present and future members. It is a form of *quid pro quo* between the protection of the privacy of individual members and the enhancement of their collective rights. To the extent that privacy could stand in the way of the recognition of collective rights, it was expressly allowed to be lifted. This is hardly a case of invasion of privacy. Nor is it a serious case of a threat posed to the sanctity of the confidentiality of census records.

[35] I dare say that in this modern world where hundreds and hundreds of statutes are enacted the “wisdom” imputed to Parliament of knowing the consequences of everything it does is a naive

anachronism. The use, for example, of the “notwithstanding any other Act of Parliament” clause is perhaps not as necessarily determinative as it used to be, where provisions in different statutes are so clearly inconsistent that the obvious intent of Parliament in one statute would be clearly defeated if the notwithstanding clause in another statute was strictly adhered to. Legislative provisions should be allowed to survive despite words used by drafters in other statutes which, if constructed without regard to the global statutory context, would render these provisions meaningless.

[36] I would dismiss the appeal with costs.

"Robert Décary"

J.A.

EVANS J.A. (Dissenting)

A. INTRODUCTION

[37] This is an appeal by the Minister of Industry from a decision of Justice Kelen of the Federal Court granting an application by the Information Commissioner of Canada to review a refusal by the Chief Statistician to disclose census records for certain years. The decision is reported as *Canada (Information Commissioner) v. Canada (Minister of Industry)*, 2006 FC 132, [2006] 4 F.C.R. 241.

[38] A request for these records was made under the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*") by Peter Di Gangi, Director, Algonquin Nation Secretariat ("ANS"), a Tribal Council representing three Algonquin Bands. He had been mandated by the ANS to research the continuity of membership of the Bands, and their use and occupation of the lands which they claim.

[39] An important object of this research, which has been funded by the Department of Indian Affairs and Northern Development ("DIAND"), is to support aboriginal land claims made pursuant to two DIAND policies: the comprehensive claims policy, which may ultimately lead to the conclusion of a lands claim treaty, and the specific claims policy for the investigation of allegations of particular breaches of aboriginal rights.

[40] These reasons address the following three questions. First, does the *Access Act* apply to the disclosure of census returns, or do the specific disclosure provisions of the *Statistics Act*, R.S.C. 1985, c. S-19, constitute a complete code? Second, does the provision in paragraph 17(2)(*d*)

of the *Statistics Act* permitting the Chief Statistician to disclose personal information from census returns which is "available to the public under any statutory or other law" apply to subsection 8(2) of the *Privacy Act*, R.S.C. 1985, c. P-21? Third, if it does, is it "information available to the public under any statutory law" for the purpose of paragraph 17(2)(*d*) of the *Statistics Act* if a statute provides that it may be disclosed to a section of the public? Whether the appellants have a right to the records by virtue of section 35 of the *Constitution Act, 1982* is a question which I would decline to answer on the ground that it is premature.

B. FACTUAL BACKGROUND

[41] On November 2, 2001, Mr. Di Gangi submitted a request to the Chief Statistician under the *Access Act* for the disclosure of census records for 1911, 1921, 1931, and 1941, for the districts and sub-districts of eastern Ontario and northwestern Québec relevant to the Bands' land claims. Mr. Di Gangi explained in his request the importance of these records as a source of the information needed to support the claims.

[42] In a letter dated November 23, 2001, Mary Ledoux, Chief, Access to Information and Privacy, Data Access and Control Services Division, Statistics Canada, notified Mr. Di Gangi that his request was refused. She gave three reasons.

[43] First, section 24(1) of the *Access Act* requires the head of a government institution to refuse to disclose any record requested under the *Access Act* which contains information, the disclosure of which is restricted by any statute listed in Schedule II of the Act. Second, section 17 of the *Statistics*

Act is listed in Schedule II and restricts the disclosure of individual census returns. Third, the exceptions in subsection 8(2) of the *Privacy Act* to the general duty not to disclose personal information are "subject to any other Act of Parliament"; since the *Statistics Act* and its predecessors forbid the disclosure of census returns, subsection 8(2) is no assistance.

[44] On December 11, 2001, Mr. Di Gangi, wrote to the Information Commissioner inviting him to investigate the Chief Statistician's refusal to release the requested census returns. He added that the refusal to disclose information relevant to land claims was particularly troubling in light of the Crown's fiduciary duties towards aboriginal peoples.

[45] The Information Commissioner undertook an investigation of the complaint, and asked for representations from the Chief Statistician. In a letter dated September 18, 2002, Pamela White, Access to Information and Privacy Coordinator, Statistics Canada, responded. She stated that, since paragraph 8(2)(*k*) of the *Privacy Act* only applies "Subject to any other Act of Parliament", including the prohibition of disclosure in subsection 17(1) of the *Statistics Act*, it did not confer any discretion on the Chief Statistician to disclose the census returns requested by Mr. Di Gangi. There followed further correspondence and meetings between officials of the Information Commissioner and of Statistics Canada. However, they could not reach a consensus on the issues.

[46] On November 12, 2002, the Information Commissioner wrote to Ivan Fellegi, the Chief Statistician, expressing his provisional view that the requested census returns could be disclosed under paragraph 17(2)(*d*) of the *Access Act* by virtue of paragraph 8(2)(*k*) of the *Privacy Act*. He

added that the fiduciary duty owed by the Crown to aboriginal peoples required the Chief Statistician to avoid taking a narrow view of the discretion to disclose census records, to the prejudice of the ability of the Algonquin Bands to establish their land claim.

[47] In a letter dated December 5, 2002, Dr. Fellegi acknowledged the importance of the purposes for which Mr. Di Gangi wanted the census returns in question. However, he said, the use to which a requester under the *Access Act* intends to put the returns is immaterial. For the reasons already canvassed, he denied that paragraph 8(2)(*k*) of the *Privacy Act* gave him a discretion to disclose and that Statistics Canada owed any fiduciary duty to aboriginal peoples to provide the information requested.

[48] On December 3, 2003, the Information Commissioner wrote to Dr. Fellegi to report to his Minister, the Minister of Industry, the results of the investigation. For the reasons indicated in his letter of November 12, 2002, the Information Commissioner recommended disclosure. In particular, the information requested is "available to the public" because it could be disclosed to aboriginal bands for the purpose of researching or validating claimed aboriginal rights.

[49] On December 11, 2003, Dr. Fellegi replied that he did not accept the recommendations. For. the reasons given in his letter of December 5, 2002, he was of the opinion that disclosure would be contrary to both the *Statistics Act* and the *Privacy Act*. He noted also that, as an alternative, the 1940 National Registration records could be disclosed, because, although under the custody of Statistics Canada, they are not subject to the *Statistics Act*.

[50] Mr. Di Gangi consented to an application to the Federal Court by the Information Commissioner under paragraph 42(1)(*a*) of the *Access Act* to review the Chief Statistician's refusal to disclose the census returns.

[51] Disclosure of the census records for 1911 is no longer in issue. They became available to the ANS on June 30, 2005, as result of *An Act to Amend the Statistics Act*, S.C. 2005, c. 31, section 1. This amends the *Statistics Act* by adding subsection 18.1, which provides for the disclosure to the public of individual census returns after 92 years have elapsed since the information was collected and it has been transferred to care and control of the Library and Archives of Canada.

C. LEGISLATIVE FRAMEWORK

[52] The application for review from which this appeal arises was brought under section 42 of the *Access Act*.

42(1) The Information Commissioner may	42(1) Le Commissaire à l'information a qualité pour :
(*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;	*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;
…	[…]

[53] The object of the *Access Act* is set out in subsection 2(1), and the right to access created to achieve it is contained in subsection 4(1).

2(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government	2(1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.
….	[…]
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.	
Subsection 24(1) limits the broad scope of the right created by section 4. It appears under the heading "Statutory Prohibitions". 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.

[54] Schedule II lists sections of nearly sixty statutes, including section 17 of the *Statistics Act.* The prohibition of the disclosure of census returns in subsection 17(1) of the *Statistics Act is* modified by subsection 17(2). Paragraph 17(2)(*d*) is relevant to this appeal.

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 :
(*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	*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*) 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.
(2) The Chief Statistician may, by order, authorize the following information to be disclosed:	(2) Le statisticien en chef peut, par arrêté, autoriser la révélation des renseignements suivants :
…	[…]
(*d*) information available to the public under any statutory or other law;	*d*) les renseignements mis à la disposition du public en vertu d'une loi ou de toute autre règle de droit;
…	[…]

[55] Paragraph 8(2)(*k*) of the *Privacy Act* is said by the Information Commissioner to be a law which makes ”information available to the public” within the meaning of paragraph 17(2)(*d*) of the *Statistics Act*, and enables the Chief Statistician to disclose the census returns requested by Mr. Di Gangi. It provides

8(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	8(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*) 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;	*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;
…	[…]

D. FEDERAL COURT DECISION

[56] Justice Kelen allowed the Information Commissioner’s application, set aside the Chief Statistician’s refusal to disclose the census records for 1921, 1931 and 1941, and remitted the matter with a direction that they be disclosed to Dr. Morrison, a researcher engaged by the ANS, subject to his undertaking to keep confidential personal information in those records relating to non-Aboriginal persons. Justice Kelen based his decision on the following analysis.

[57] First, after conducting a pragmatic and functional analysis, he concluded that the Chief Statistician's refusal to disclose the requested census returns was reviewable on a standard of correctness.

[58] Second, he found as a fact that the census records were necessary for enabling the ANS "to properly document their land claims", and "probably provided the best evidence of the proof required to completer the evidence of their continued occupation of the territory in question": para. 28. He described (at para. 8) the meticulous, "on-the-ground" manner in which the census enumerators had gathered information in the years in question, going from household to household with an interpreter.

> 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.

[59] In contrast, the national register, prepared in 1940 for conscription purposes and listing all persons over the age of 16, was inadequate for the purposes of the ANS. For example, the national register did not cover the entire time period of interest to the ANS; many young men likely avoided registration in order not to be conscripted; it did not include persons under the age of 16; and the information collection methodology was not as comprehensive or thorough as the census.

[60] Third, Justice Kelen rejected the argument that subsection 24(1) of the *Access Act* imposes an absolute duty on the Chief Statistician not to disclose information in census returns which reveal the identity of individuals. He held that this provision, in effect, incorporates section 17 of the

Statistics Act into the *Access Act*, including the provisions of subsection 17(2) permitting the Chief Statistician to disclose census information in the circumstances that it describes.

[61] Fourth, section 35 of the *Constitution Act*, 1982, which entrenches the existing treaty and aboriginal rights of the aboriginal peoples of Canada, is an "other law" for the purpose of paragraph 17(2)(*d*) of the *Statistics Act*. The honour of the Crown, and its associated fiduciary duties, requires the disclosure to the ANS of information in the possession of the government that is necessary for the validation of their land claims.

[62] Fifth, the *Privacy Act* is "statutory law" for the purpose of paragraph 17(2)(*d*) of the *Statistics Act*. The power in paragraph 8(2)(*k*) of the *Privacy Act* to disclose to individuals acting on behalf of aboriginal associations information relevant to an aboriginal land claim renders the information "available to the public" within the meaning of paragraph 17(2)(*d*) of the *Statistics Act*.

[63] In order to reach this conclusion, the Judge made three further findings. (1) The fact that all the permissive provisions in subsection 8(2) of the *Privacy Act* are stated to be "Subject to any other Act of Parliament" does not remove subsection 8(2) from the category of "statutory law" which makes personal information "available to the public" under paragraph 17(2)(*d*) of the *Statistics Act*. In effect, he eliminated the potentially perpetual *renvoi* between the paragraphs 17(2)(*d*) and 8(2)(*k*) by interpreting the words, "Subject to any other Act of Parliament" as not including paragraph 17(2)(*d*). (2) Information is "available" when it is capable of being obtained. (3) In the present

context “the public” should be interpreted broadly to include a section of the public or even an individual member of the public, and not limited the public as a whole.

[64] Sixth, Justice Kelen concluded (at para. 62) that if, contrary to his view, section 17 of the *Statistics Act* prohibits the Chief Commissioner from disclosing the census returns requested in this case, it is invalid because it denies rights protected by section 35 of the *Constitution Act, 1982*. Such a statutory restriction on aboriginal peoples’ right to obtain “their own census records necessary to prove their land title claims” would be unwarranted.

E. ISSUES AND ANALYSIS

Issue 1: Standard of review

[65] Questions relating to the interpretation of the *Access Act* by an institution head in refusing to disclose records in response to an access request are reviewable on a standard of correctness, while the exercise of any statutory discretion under the *Access Act* is reviewable for unreasonableness *simpliciter*: see, for example, *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at paras. 14-19; *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421 at paras. 28-47.

Issue 2: Does the *Access Act* apply to section 17 of the *Statistics Act*?

[66] The answer to this question turns on the interpretation of subsection 24(1) of the *Access Act.* The Information Commissioner argues that subsection 24(1) only prevents the Chief Statistician

from disclosing census returns when not permitted by section 17, but that, in other respects, the *Access Act* applies to information about individuals in census returns.

[67] Thus, a refusal by the Chief Statistician to disclose census records which may be disclosed under subsection 17(2) would be reviewable within the framework of the *Access Act* and, in particular, its objects and the general duty to disclose records in the control of a government institution. A refusal could be investigated by the Information Commissioner and, if the resulting recommendations were not accepted, he could make an application to the Federal Court under section 42.

[68] In other words, the disclosure of information covered by provisions listed in Schedule II of the *Access Act*, including section 17 of the *Statistics Act*, is the subject of two regimes: the particular provisions in the statutes listed in Schedule II and the general scheme of the *Access Act*.

[69] In my opinion, this is not a correct interpretation of subsection 24(1) of the *Access Act*. This provision imposes an unqualified duty on the head of a government institution to "refuse to disclose any record requested under this Act" which contains information, the disclosure of which is "restricted" by a provision listed in Schedule II. When subsections (1) and (2) of section 17 of the *Statistics Act* are read together, they *restrict,* without prohibiting entirely, the disclosure of information contained in census returns.

[70] Hence, the plain language of section 24(1) prohibits the Chief Statistician from disclosing information within the scope of section 17 when it is requested under the *Access Act*. The legislative record supports the conclusion that the intention of Parliament was that information may not be disclosed under the *Access Act* if its disclosure is restricted under a provision listed in Schedule II.

[71] First, during the Parliamentary consideration of clause 25 of *Bill C-43*, which became section 24 of the *Access Act*, the Minister responsible for introducing the legislation, the Hon. Francis Fox, Secretary of State and Minister of Communications, moved an amendment to append Schedule II.

[72] Concern was expressed by Members and, in particular, by Mr. Svend Robinson, that the clause might go too far, because it could be interpreted as *prohibiting* the disclosure of information under the *Access Act* which the relevant listed statutory provision did not prohibit, but merely *restricted*: Canada, House of Commons, Minutes of Proceedings and Evidence of the Committee on Justice and Legal Affairs, 32nd Parliament, 1st Session, No. 52 (November 4, 1981) at 17. This observation would apply to section 17 of the *Statistics Act*.

[73] Mr Robinson's understanding of clause 25 was endorsed by an official from the Privy Council Office, Mr Robert Auger, who was in attendance with the Minister. After Mr Robinson read the words of clause 25, "the head of a government institution shall refuse to disclose any record ….", Mr Auger interjected, "When it is requested under access to information. That is part of the

scheme": *ibid.* at 18. That is to say, the disclosure of information included in section 17 of the *Statistics Act* shall not be disclosed if requested under the *Access Act*.

[74] Second, in a subsequent review of the *Access Act*, the Hon. John Crosbie, Minister of Justice and Attorney General of Canada, explained the function of section 24 and the exemptions from the *Access Act* which it created:

> The importance of those exemptions, of course, is twofold. First, by their very nature they are somewhat general, since they deal with the whole body of government information, and the specific provisions contained in individual pieces of legislation are crafted to deal with the particular problems associated with that legislation and therefore they are more precise. Secondly, such legislative schemes in any event require a particular type of protection of information they deal with which operates outside the *Access to Information Act*. It seems to me important from a practical point of view and from the point of view of consistency that one set of rules should apply rather than two. We would welcome your views on that.
>
> (Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Solicitor General, 33rd Parliament, 1st Session, No. 10 (May 8, 1986) at 7.)

[75] In short, these extracts support the conclusion that section 24 prohibits the disclosure under the *Access Act* of records governed by the statutory provisions listed in Schedule II, even if their disclosure is only *restricted*, but not *prohibited*, by a statute listed in Schedule II. If Parliament had intended only to prohibit the disclosure of information, the disclosure of which is prohibited by a Schedule II statutory provision it could easily have said so. Moreover, since Parliament subjected the Schedule II exclusions to five-year reviews by a Parliamentary committee (*Access Act*, subsection 24(2)), it can readily make an exception for Indian bands if it so chooses.

[76] Nonetheless, it remains open for an individual to request the Chief Statistician, outside the *Access Act*, to disclose census information in accordance with subsection 17(2) of the *Statistics Act*.

Issue 3: Even though the Information Commissioner's application under section 42 was misconceived, should the Court nonetheless decide the other issues of statutory interpretation in dispute?

[77] Since the census returns requested by Mr. Di Gangi fall within section 17, the Chief Commissioner was bound by subsection 24(1) to refuse to disclose them because they were requested under the *Access Act*. As counsel for the Minister put it at the hearing in this Court, the request for disclosure came through the "wrong door". He submitted that the Court should simply allow the appeal, leaving Mr Di Gangi at liberty to approach the Chief Statistician through the "right door" by making a direct request to the Chief Statistician to disclose the census records for the years in question pursuant to paragraph 17(2)(*d*) of the *Statistics Act*. If this request were refused, Mr. Di Gangi could make an application for judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[78] In the circumstances of this case, I do not agree that this would be an appropriate way to deal with the issue of whether the records requested are "information available to the public" under paragraph 17(2)(*d*) by virtue of the provision in paragraph 8(2)(*k*) of the *Privacy Act*, which authorizes the disclosure of personal information requested by aboriginal bands in connection with their claims. It would be unduly formalistic, unfair to those represented by the ANS, and wasteful of time and resources, to allow the appeal on the narrow jurisdictional ground urged by the Minister.

[79] Whether the Chief Statistician is authorized by statute to disclose the records sought on behalf of the ANS depends on the answers to the following two questions. First, is paragraph 8(2)(*k*) of the *Privacy Act* a "statutory law" for the purpose of paragraph 17(2)(*d*) of the *Statistics Act*? Second, if it is, do the words "available to the public" in paragraph 17(2)(*d*) include information available to a section of the public?

Issue 4: Do the words "statutory law" in paragraph 17(2)(*d*) of the *Statistics Act* include paragraph 8(2)(*k*) of the *Privacy Act*?

[80] The Minister argues that it is futile to consider paragraph 8(2)(*k*) of the *Privacy Act* in order to determine whether the disclosure of personal information that it permits makes individual census returns "available to the public" and thus capable of disclosure under paragraph 17(2)(*d*) of the *Statistics Act*. This is because subsection 17(1) of the *Statistics Act* specifically prohibits the disclosure of census returns.

[81] The problem with this argument is that it disregards subsection 17(2) of the *Statistics Act*, which permits the Chief Statistician to disclose them in certain circumstances, including, of course, when they are available to the public by virtue of a statute. However, the Minister argues, a reference back to paragraph 8(2)(*k*) of the *Privacy Act* pursuant to paragraph 17(2)(*d*) does not advance the requester's case, but merely commences another trip around the circle.

[82] I disagree. Certainly, the two paragraphs of these statutes do not fit easily together. However, it would be unrealistic to assume that, when drafting one, the drafter had the other in

mind. In my view, the Applications Judge was correct to end the circularity by, in effect, concluding that the introductory words of subsection 8(2), "Subject to any other Act of Parliament", do not apply to section 17, since this provision expressly permits the disclosure of information which another statute makes "available to the public". Paragraph 17(2)(*d*) negates the idea that disclosure under the *Statistics Act* is governed by a self-contained code and permits of no reference to other legislation.

[83] I can see no rationale for the Minister's interpretation. What justification could there be for prohibiting the Chief Statistician from disclosing personal information which the *Privacy Act* makes available to the public?

Issue 5: Is information "available to the public" for the purpose of paragraph 17(2)(*d*) of the *Statistics Act* when it is not available to everyone?

[84] Paragraph 17(2)(*d*) permits the disclosure of information which is "available to the public" under any statute. As an exception to the general prohibition on the disclosure of personal information under the control of a government institution in subsection 8(1) of the *Privacy Act*, paragraph 8(2)(*k*) permits its disclosure to, among others, Indian bands who require it for the purpose of researching aboriginal claims. It is conceded that the census returns at issue in the present appeal constitute personal information.

[85] Paragraph 17(2)(*d*) of the *Statistics Act* provides that the Chief Statistician may disclose information "available to the public under any statutory or other law". Since paragraph 8(2)(*k*) of the *Privacy Act* is "statutory law" for this purpose, the question is whether information which may

be disclosed under this paragraph is thereby "available to the public" within the meaning of paragraph 17(2)(*d*) of the *Statistics Act*. In my opinion, it is not.

[86] As evidence of the ordinary meaning of this phrase, dictionaries define the words "the public" to include "the body politic", "people collectively", and "the members of the public" (*The New Shorter Oxford English Dictionary, s.v.* "public") and "the community in general, or members of the community" (*The Canadian Oxford Dictionary, s.v.* "public"). Similarly, *Le Nouveau Petit Robert* (*s.v.* « *public* ») provides as the first two definitions of « *public*» when used as a noun, « *L'État, la collectivité* » and « *Les gens, la masse de la population* ».

[87] Hence, information is "available to the public" when anyone may readily access or obtain it by virtue of being a member of the Canadian population. The fact that members of aboriginal bands, or persons acting on their behalf, may obtain it for the purpose of researching an aboriginal claim would not seem to make it "available to the public", since it is not available to the population as a whole; indeed, it is available to only a relatively small percentage of the population. In order to access information through paragraph 8(2)(*k*), a person must establish a connection with particular groups within the Canadian population: being a member of the community at large is not enough.

[88] However, the noun "public", can also mean "a section of the community having a particular interest in or special connection with the person or thing specified (freq. w. possess. adj.)": *The New Shorter Oxford English Dictionary*. *The Canadian Oxford Dictionary (s.v.* "public") illustrates this latter meaning: "the reading public" and "my public demands my loyalty". Similarly, *Le Nouveau*

Petit Robert indicates that «*public*» may also refer to a group within the broader population, such as « *L'ensemble des gens qui lisent, voient, entendent les œvres (litteraires, artistiques, musicales), les spectacles* », and those whom someone wishes to reach: « *il a son public* ».

[89] In my opinion, these latter meanings do not much help the ANS, since membership of the sections of the public included in these definitions is limited only by a common interest in an activity (listening to music or looking at art, for example). It is not limited to members of particular ethnic groups, for example, or to those who possess some analogous personal attribute or qualification.

[90] As for the use of "public" in the law, *Black's Law Dictionary* defines "public", when used as a noun, to mean, "The people of a nation or community as a whole". However, Daphne Dukelow and Betsy Nuse, *The Dictionary of Canadian Law*, 2nd edn. (Toronto: Carswell, 1994) include the following salutary words of Lord Wright, M.R. in *Jennings v. Stephens*, [1936] 1 Ch. 469 (Eng. C.A.) at 476, describing "public" as "a term of uncertain import it must be limited in every case by the context in which it is used …".

[91] The *phrase* "available to the public" occurs in a number of federal statutes, including, for example, the *Canada Labour Code*, R.S.C. 1985, c. L-2, section 59 (duty to make a copy of an arbitration decision award "available to the public"); *Canada Pension Plan Investment Board Act*, S.C. 1997, c. 40, subsection 50(2) (duty to make financial statements "available to the public"); *Copyright Act*, R.S.C. 1985, c. C-42, paragraph 2.2(1)(*b*) ("publication" of sound recordings means

making copies “available to the public”); *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, subsection 69(3) (guidelines issued under the Act shall be made “available to the public”).

[92] The function of the phrase “available to the public” in paragraph 17(2)(*d*) of the *Statistics Act* is to connote the range of those to whom personal information in census returns must be legally available before it may be disclosed as an exception to the prohibition on disclosure in subsection 17(1). Subsection 2(2) of the *Access Act* uses the phrase “… normally available to the general public”. This could be taken to indicate that, in the context of legislation dealing with access to and restrictions on information, the availability of information to “the public” is not the same as its availability to “the general public”. However, since the *Access Act* does not apply to requests for information covered by the *Statistics Act*, I would not attach much weight to an argument based on any presumption of consistency in the use of legislative language.

[93] The legislative record provides some indication of the purpose underlying paragraph 17(2)(*d*), which first appeared as paragraph 16(3)(*d*) of the *Statistics Act*, S.C. 1970-71-72, c. 15. Its purpose was said to be to ensure that information did not acquire a greater degree of secrecy when it came into the possession of Statistics Canada than it had with its source: Canada, Debates of the Senate, 3rd Sess., 28th Parl. (October 21, 1971) at 38 (Hon. Hédard Robichaud).

[94] However, this rationale does not fit well when, as in the present case, the information in question was supplied to Statistics Canada by the individuals to whom it relates, and when it only becomes available (to some but not all members of the public) after it has been collected. These are

probably not situations contemplated by the drafter of the *Statistics Act*. To be consistent with the legislative purpose described above, paragraph 17(2)(*d*) should have said that the Chief Statistician may disclose information to persons to whom it is available under any statutory or other law. But this is not what it says.

[95] Moreover, if information is "available to the public" under paragraph 17(2)(*d*) whenever it is available to a section of the public, the question would arise as to whether Chief Statistician could disclose census information to any member of the public who requested it, or only to those who are members of the section of the public to which the information is available under another statute. Paragraph 17(2)(*d*) would only correspond to its stated purpose if disclosure was limited to members of the relevant section of the public. However, this would require additional words to be implied into paragraph 17(2)(*d*).

[96] The phrase "available to the public" in paragraph 17(2)(*d*) should also be interpreted in the broader context of the *Statistics Act*, particularly as it relates to the census. The data collected through the census are of the greatest importance in the planning of social and economic policies for the people of Canada, and in business planning. The reliability of this information depends on two aspects of the Act: the legal obligation, on pain of penalty, of those questioned to supply the information requested, and the government's obligation not to disclose information about particular individuals without their consent.

[97] The importance of complete and accurate census information supports the view that paragraph 17(2)(*d*) should not be interpreted in a way that requires words to be implied. In my opinion, the plain and ordinary meaning of the words are consistent with Parliament's primary concern, namely to protect the integrity of the census, and there is no reason to read broadly the exceptions to the general prohibition of disclosure. If Parliament had meant that the Chief Statistician may disclose to a person who is a member of a section of the public to which the information is statutorily available, it could have said so.

[98] Finally, I would note that my interpretation of paragraph 17(2)(*d*) does not undermine the utility of paragraph 8(2)(*k*) of the *Privacy Act*, because it is still available to enable an Indian band or association of aboriginal people to obtain for research purposes personal information, other than census records, held by a government institution. Indeed, as the Chief Statistician pointed out, the National Registration records could be made available in this way.

Issue 6: Should the Court decide whether there is a right to the disclosure of the census returns by virtue of section 35 of the *Constitution Act, 1982*?

[99] For the reasons given above, the Chief Statistician was correct to deny Mr. Di Gangi's request on the basis of the relevant statutes. In my opinion, it would be premature to decide whether the honour of the Crown in its dealings with aboriginal peoples, or any other fiduciary duty of the Crown, obliges the Chief Statistician, as the head of an institution of the Government of Canada, to disclose the requested records by virtue of section 35 of the *Constitution Act, 1982*.

[100] In essence, the constitutional argument is that, in the present context, the honour of the Crown puts the Crown under an obligation to avoid sharp practices when settling an aboriginal claim, and that it would be a breach of this duty for the Crown to refuse to disclose material information in its possession.

[101] However, the parties are presently a long way from reaching the negotiating table. Nor do we know at this stage whether, in the light of other evidence, the Crown would insist on the production of proof by the claimants of genealogical and geographic continuity with respect to the disputed lands from 1912 to 1951.

[102] A request to the Chief Statistician may not be the most appropriate way for the ANS to raise the constitutional questions involved in this case, if, as is my view, the legislation does not permit the disclosure of the information requested.

F. CONCLUSIONS

[103] For these reasons, I would allow the appeal with costs, set aside the judgment of the Federal Court and dismiss the Information Commissioner's application.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-107-06
(APPEAL FROM AN ORDER OF THE HONOURABLE MICHAEL A. KELEN DATED FEBRUARY 13, 2006, DOCKET NUMBER T-421-04.)	
STYLE OF CAUSE:	MINISTER OF INDUSTRY v. INFORMATION COMMISSIONER OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 27, 2007
REASONS FOR JUDGMENT BY:	RICHARD C.J.
CONCURRING REASONS BY:	DÉCARY J.A.
DISSENTING REASONS BY:	EVANS J.A.
DATED:	June 1, 2007

APPEARANCES:

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