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WAR CRIMINALS: THE DESCHÊNES COMMISSION

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ISSUE DEFINITION

In recent years, the presence in Canada of individuals who may, as Nazis or Nazi collaborators, have committed war crimes in Europe 50 to 55 years ago has raised a number of issues, including: how many such individuals currently reside in Canada; how they came to be here; whether they should be the object of investigation and prosecution and, if so, what means might be used to bring them to justice. Since no authoritative study of these issues existed, the Deschênes Commission was appointed in 1985 to investigate and report on the subject.

BACKGROUND AND ANALYSIS

A. The War Crimes Trials

The post-World War II Nuremberg trials concentrated on bringing to justice the "major" war criminals, that is, those Nazis most responsible for establishing and implementing the policies which led to the war, to the abuse of civilian populations in occupied Europe and of prisoners of war, and to the attempted systematic extermination or genocide of whole categories of people. These categories included the Jews, Gypsies and the Slavs (some of whom were to be spared to form a pool of slave labour) as well as homosexuals, the mentally infirm, etc. Many "major" war criminals, such as Adolf Eichmann and Joseph Mengele, managed to escape from Germany and to elude capture for long periods of time.

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* The original version of this Current Issue Review was published in January 1987; the paper has been regularly updated since that time.

Not as much attention was paid to the "lesser" war criminals. Those suspected were subjected to a process of "denazification," but relatively few of the thousands implicated were brought to trial and convicted before 1948. These persons, who had functioned in relative obscurity as prison and concentration camp guards, as other ranks and non-commissioned officers in death squads, and as informers and collaborators, were frequently non-Germans recruited from among the subject peoples of Europe. The lower echelon Nazis and collaborators had acted as the instruments of the genocide programs initiated by the Nazi hierarchy.

B. The Onset of the Cold War and the Decision to Halt War Crimes Trials

In early 1948, relations between the western powers and their erstwhile ally, the Soviet Union, deteriorated rapidly. In February, Soviet-supported Communists successfully overthrew the government of Czechoslovakia and transformed the country into a People's Republic. In July, disagreements over the administration and future of occupied Germany led to the Soviet blockade of Berlin and almost to war.

It was against this background of intensifying East-West hostility, the so-called "Cold War," and the drive to create the Federal Republic of Germany out of the rubble of the Nazi regime, that the governments of the Commonwealth, including Canada, received a telegram dated 13 July 1948 from the British Commonwealth Relations Office. This proposed an end to Nazi war crimes trials in the British zone of Germany. "Punishment of war crimes is more a matter of discouraging future generations than of meting out retribution to every guilty individual ... it is now necessary to dispose of the past as soon as possible." Faced with the reality of a new and dangerous enemy, the western powers became reluctant to pursue the remnants of the old. Their limited security resources were re-deployed to uncover suspected Soviet agents and Communists, rather than to identify and track down Nazi war criminals. In Canadian immigration policy, which was rapidly liberalized after the war, the restrictions against the entry of ex-enemy aliens were systematically relaxed.

C. Exclusions under Canadian Immigration Policy

Until 1949, Canada had no criteria for rejecting as immigrants either Nazis or the German military. The prohibition then introduced included past members of the Nazi party, the SS

(Schutz Staffel, an élite Nazi police force), Waffen SS (an equally heinous military version of the SS), the German Wehrmacht or regular armed forces, and collaborators. The Nazi prohibition was dropped in 1950. Non-Germans conscripted into the Waffen SS after 1942 were exempted in 1951 as were, in 1953, Waffen SS German nationals under the age of 18 at the time of conscription and ethnic Germans (the Volksdeutsche) conscripted under duress. The more general ban on veterans of all German military and SS units was relaxed in 1956 in cases of exceptional merit or where these veterans had close relatives in Canada. Specific exclusions were removed altogether in 1962. There remained only the loose catch-all exclusion of those "implicated in the taking of life or engaged in activities connected with forced labour and concentration camps."

No serious attempt ever seems to have been made to define "collaborator" in the relatively brief period of time these exclusions were in effect and may have been enforced. For example, membership in the various Nazi-organized police auxiliaries which had been raised among local populations and used to keep order, to round up and sometimes to execute those suspected of being Jews, partisans, etc., was not a specific reason for exclusion.

D. Establishment of the Deschênes Commission

The immediate cause of the establishment of the Deschênes Commission in 1985 was the accusation that Joseph Mengele, an infamous Nazi war criminal, had applied to immigrate to Canada in 1962 and that Canadian government officials had been informed at the time of his identity. Moreover, it was suggested that he might still be in Canada. The issue was raised in the House of Commons on 23 January 1985 by Robert Kaplan. The Prime Minister responded that he had instructed the Minister of Justice and the Solicitor General to initiate, on an urgent basis, a full inquiry to ascertain whether there was any truth in the accusations.

On 7 February 1985, the Minister of Justice announced that Mr. Jules Deschênes, a Justice of the Court of Appeal of Quebec, would head an independent Commission of Inquiry to investigate the charge that a considerable number of Nazi war criminals had gained admittance to Canada through a variety of illegal or fraudulent means. The terms of reference of the Commission were:

> To conduct such investigations regarding alleged war criminals in Canada, including whether any such persons are now resident in Canada and when and how they obtained entry to Canada, as in the opinion of

> the Commissioner are necessary in order to enable him to report to the Governor in Council his recommendations and advice relating to what further action might be taken in Canada to bring to justice such alleged war criminals who might be residing within Canada, including recommendations as to what legal means are now available to bring to justice any such persons in Canada, or whether and what legislation might be adopted by the Parliament of Canada to ensure that war criminals are brought to justice and made to answer for their crimes.

The Commission was given wide powers to conduct its investigation, including the power to travel outside Canada, and was instructed to report its findings and recommendations by 31 December 1985.

The public hearings of the Commission had many highlights, but the most emotional aspect of the hearings and public debate outside the hearings seemed to pit the Canadian Jewish community against the Canadian East European and Baltic communities. The latter were afraid that the inquiry would become a witch hunt against their members who had revolted against Soviet tyranny during the war to the point of allying themselves with the Nazis.

The question of whether or not the Commission should travel to the Soviet Union and other Iron Curtain countries to take evidence caused a bitter controversy throughout the late summer and early fall of 1985. Baltic and Ukrainian groups were completely opposed because, they argued, Soviet-supplied evidence could not be trusted and would be used to attack any individual or ethnic group opposed to the Soviet state. Representatives of Jewish groups argued that there was important evidence in the Soviet Union, both eyewitness and documentary, and that there was no known instance in Europe or North America of the Soviets having provided a false document or a witness who committed perjury.

In a formal written decision of 14 November 1985, Justice Deschênes decided that, while he himself should not take part in the hearing of evidence abroad, there was no reason why evidence should not be sought and heard, even in Eastern Bloc countries. But he set strict conditions that would have to be met by host countries:

i) protection of reputations through confidentiality;

ii) independent interpreters;

iii) access to original documents;

iv) access to witnesses' previous statements;

v) freedom of examination of witnesses in agreement with Canadian rules of evidence; and

vi) videotaping of such examinations.

However, a satisfactory response was not received from the Soviet Union until June 1986 and Justice Deschênes decided there was insufficient time left for the Commission to travel.

E. The Report of the Deschênes Commission

1. General

The report of the Commission was submitted to the government at the end of 1986, a year later than originally anticipated. The Government tabled the public portion of the *Report [Commission of Inquiry on War Criminals, Part 1: Public]* on 12 March 1987 together with its response to the recommendations.

The Report found that public estimates of the number of war criminals allegedly living in Canada had become grossly exaggerated, expanding from a "handful" or "several hundred" in the mid-1970s to "thousands" by the mid-1980s. Some exaggeration may have resulted from the casual lumping together of "war criminals" and "war-time collaborators," some from blanket accusations against all members of certain military units such as the "Galicia" or "Halychyna" Division (which the Commission formally cleared of collective war crimes), and still more from duplication. Nevertheless, the master list of possible suspects compiled by the Commission contained the names of just 774 individuals; an addendum listed 38 names, and there was a further list of 71 German scientists and technicians. Of the 774 suspects on the master list, 341 were found never to have landed or resided in Canada, 21 had landed in Canada but had left for another country, 86 had died in Canada, and 4 could not be located in this country. The Commission could find no *prima facie* evidence of war crimes in the files of 154 further suspects. Therefore, it recommended that 606 files be closed.

In a further 97 cases, the Commission could not find *prima facie* evidence of war crimes, but believed that such evidence might exist in East European countries. The decision of whether or not to circulate these files abroad was left up to the government. Some 34 cases on the master list were outstanding because answers had not been received from foreign agencies. Time constraints had also prevented the Commission from fully investigating the 38 cases referred to it after October 1986 and the list of German scientists and technicians.

The Commission found *prima facie* of war crimes in just 20 cases, and, in a confidential Part II to the Report, made detailed recommendations to the government about how to proceed in each case.

To deal with the problem of bringing war criminals to justice, the Report recommended amendments to the *Criminal Code* to make prosecution possible in Canada, amendments to the *Extradition Act* and treaties of extradition to facilitate removal of individuals sought by foreign countries for war crimes, and amendments to laws and procedures governing denaturalization (removal of citizenship) and deportation.

2. The Criminal Law

The Commission concluded that the *Criminal Code* should be used as the vehicle for the prosecution of war criminals in Canada. This would avoid the image of military courts and wartime procedure; avoid the appearance of short-circuiting the Canadian legal process or of downplaying the *Charter of Rights and Freedoms*; and assert the primacy of the rule of law. It therefore recommended that section 6 of the Code be amended to make war crimes and crimes against humanity a Canadian criminal offence even if committed outside Canada and before adoption of the amendment:

> (1.10) Notwithstanding anything in this Act or any other Act,
>
> a)where a person has committed outside Canada, at any time before or after the coming into force of this subsection, an act or omission constituting a war crime or a crime against humanity, and
>
> b)where the act or omission if committed in Canada would have constituted an offence under Canadian law,
>
> that person shall be deemed to have committed that act or omission in Canada if
>
> c) the person who has committed the act or omission or a victim of the act or omission was, at the time of the act or omission,
> (i) a Canadian citizen, or
>
> (ii) a person employed by Canada in a military or civilian capacity; or
> later became a Canadian citizen; or
>
> d) the person who has committed the act or omission is, after the

act or omission has been committed, present in Canada.

Under the amendment, only the Attorney General of Canada would be able to institute proceedings.

3. Extradition and Treaties of Extradition

To overcome the difficulty created by the absence of a treaty of extradition with certain countries that might have an interest in trying war criminals now living in Canada, the Commission recommended that section 36 of the *Extradition Act* be amended to apply to war crimes committed before, and not only after, extradition treaties came into force.

The 1967 Extradition Agreement between Canada and Israel contains two obstacles to the extradition of Nazi war criminals to Israel: the offence leading to extradition must have been committed within the territory of Israel, and must have been committed after the signing of the agreement (1967). The Commission recommended that the restriction as to the date of the offence be abrogated and that executive discretion be permitted when extraterritorial jurisdiction is asserted.

4. Denaturalization and Deportation

Under Canadian law, Canadian citizens cannot either be deported or have their citizenship revoked. Naturalized citizens, however, can lose their citizenship, and hence become liable for deportation, if it can be shown that citizenship was obtained as a result of "false representation or fraud or concealment of material circumstances." Thus the process of denaturalization and deportation could be used in appropriate cases as a means of ridding Canada of war criminals. In cases of suspected Nazi war criminals, the Commission recommended that the deportation hearing be elevated to the level of the judicial process, as is the case in denaturalization proceedings. Since these processes could take years to accomplish if carried out consecutively, the Commission recommended that the two hearings be held before the same authority, provided that the denaturalization phase proceeded and was decided first, and that the "findings of facts" in the denaturalization phase be held as "conclusive" with respect to the deportation phase. Furthermore, judicial appeals should be denied or, at most, a single appeal provided for against the denaturalization/deportation proceedings.

To prevent the granting of citizenship to war criminals and/or to make its revocation easier in the case of war criminals, the Commission recommended amendments to the *Citizenship Act* and the *Immigration Act*. To the same end it also recommended that immigrant applicants be

asked specific questions about their past military, para-military, political and civilian activities, and that a written, signed record of the applicant's answers be kept during her or his lifetime.

5. The Response of the Government

In its initial response, the Government pledged itself, wherever possible, to deal with the problem of war criminals in Canada. The *Criminal Code* would be amended to give Canadian courts jurisdiction. But the Government rejected action with retroactive effect to amend procedures of extradition, denaturalization and deportation. Within a week, the Government appointed an Assistant Deputy Minister to head the Justice Department's investigation of the 20 suspects and promised to introduce amendments to the *Criminal Code* as soon as possible.

F. War Crimes Prosecutions

1. Criminal Prosecutions

In early November 1987 some participants at an international conference marking the 40th anniversary of the Nuremberg trials expressed concern that, ten months after Mr. Justice Deschênes had submitted his report, no charges had been laid. Within six weeks, the first war crimes charges had been laid: Mr. Imre Finta was charged with involvement in kidnapping and manslaughter while a mounted police captain during World War II. His trial before a jury of the Ontario Supreme Court ended in acquittal, a verdict which was upheld by the Ontario Court of Appeal in late April 1992 and by the Supreme Court in March 1994.

Michael Pawlowski was charged on 18 December 1989 with eight counts of murder -- four under the *Criminal Code* provisions dealing with war crimes and four under provisions dealing with crimes against humanity. He was accused of killing about 410 Jews and 80 non-Jewish Poles in the Soviet Republic of Byelorussia in the summer of 1942. Two separate judges refused to allow the prosecution to send a judicial commission to the Soviet Union to collect evidence, finding that the introduction of such evidence would prejudice Mr. Pawlowski's right to a fair trial. The ruling of Justice Chadwick was appealed to the Supreme Court, which, without stating the reasons, refused to entertain the appeal in early February 1992. Unable to convince essential witnesses to change their minds about coming to Canada to testify, the Crown was forced to drop the charges and to contribute to Pawlowski's legal costs.

In January 1990, Stephen Reistetter became the third person to be charged under the

War Crimes provisions of the *Criminal Code*. It was charged that in 1942, while serving as an official of the Hlinka party in war-time Slovakia, he had kidnapped 3,000 Jews in order to send them to Nazi death camps. In February 1990, an Ontario Supreme Court Judge ordered that a commission travel to Czechoslovakia to take testimony from elderly witnesses. On the eve of pre-trial arguments the federal government abruptly dropped charges against him on the grounds that they no longer had sufficient evidence to proceed.

By mid-May 1992, the Crown's special war crimes unit had failed to secure convictions in any of the three prosecutions that had proceeded under the 1987 amendments to the *Criminal Code* adopted to allow the trial of war criminals in Canada. The failure to convict those charged and the very slow progress being made in investigating and laying charges in other cases led to renewed accusations that the government lacked commitment in its pursuit of Nazi war criminals. This impression was strengthened when the Minister of Justice said that the department wanted to conclude these investigations by March 1994.

In late November 1992, the Institute for International Affairs of B'nai Brith released a detailed study of the prosecution of Nazi war criminals in Canada. The report was harshly critical of the government for its failure to convince public opinion of the need for war crimes legislation and the aggressive prosecution of war criminals, of the prosecutors of the Justice Department's war crimes unit for being overly cautious and waiting for the perfect case before laying charges, and of the judges who had presided over the trials and appeals for the quality of their decisions and for delays in rendering decisions. Since criminal prosecutions had failed to result in convictions and time was running out, the report recommended giving priority to denaturalization and deportation proceedings. The government had already succeeded in using denaturalization and deportation proceedings to deal with the case of Jacob Luitjens, who, the courts found, had probably given immigration authorities false information about his wartime activities as a member of the Dutch Nazi party and about his conviction *in absentia* by a Dutch court in 1948.

Senior prosecutors with the war crimes unit defended their work by noting that it was difficult to appreciate the effort and time required to assemble a case in a decades-old crime. Key witnesses died, as did suspects. Documents were lost or hard to locate and some officials in eastern Europe would prefer to pursue former communist officials rather than old Nazis. The difficulty of securing criminal convictions was underscored in July 1993 when the Israeli Supreme Court unanimously ruled that it had not been proved beyond reasonable doubt that John Demjanjuk was the sadistic Nazi death-camp guard Ivan the Terrible, and consequently overturned his

conviction.

In December 1992, Radislav Grujicic, a former Yugoslav police officer stationed in Belgrade during World War II, was charged with 10 counts of murder, with conspiracy to murder and with conspiracy to kidnap. The charges related to his alleged participation in the classification of persons suspected of communist activities, ideology or sympathy, and who, as a result of this classification, were executed. His trial began in April 1994, but the Crown stayed proceedings in September due to Mr. Grujicic's ill health.

In late December 1992, the war crimes unit also let it be known that it was selecting 20 cases for priority investigation over the next 15 months. As many as possible would be charged with war crimes and crimes against humanity; action would be taken to deprive others of their Canadian citizenship, so that they could be deported. The results of the most promising investigations were forwarded to the new Justice Minister who completed his review of the dossiers in July 1994, recommending that some cases be held for further investigation and possible prosecution, and that others be forwarded to the Immigration Minister. By the time the Justice Minister made his announcement, the possibility of securing criminal convictions for war crimes and crimes against humanity in the World War II era, already remote because of the passage of time and the high standard of proof required, had been further reduced by a Supreme Court decision.

On 24 March 1994, the Supreme Court of Canada upheld the acquittal of Imre Finta in a narrow 4-3 decision. The Court ruled on a wide range of issues raised both at the trial and at the Ontario Court of Appeal. Some of these rulings will have an important influence on future prosecutions.

The Supreme Court dismissed a number of challenges to the sections of the *Criminal Code* that establish Canadian jurisdiction over crimes against humanity and war crimes committed outside Canada by deeming such crimes to have taken place in Canada. Critical to the prosecution of World War II era offences was the finding that the long delay - some 45 years before charges were laid - did not violate the Charter principles of fundamental justice, the right to trial without unreasonable delay, and the right to be presumed innocent. The Court found that the delay was much more likely to be prejudicial to the Crown's case than to that of the defence. The Court also held that the provision of the law that denies the accused the defence of obedience to *de facto* law (a defence available in regular domestic prosecutions) did not contravene the Charter.

Although the judgment validated the legislation dealing with war crimes and crimes against humanity, it appears to have made conviction very difficult. The Supreme Court accepted the "peace officer and the military orders defences" put to the jury. The rationale for these defences is that a realistic assessment of police or military organizations requires an element of simple obedience and some degree of accommodation to those who are members of such bodies. Essentially, obedience to a superior order provides a valid defence unless the act is so outrageous as to be manifestly unlawful. Further, an accused will not be convicted of an act committed as a result of an order that he or she had no moral choice but to obey.

The Court found that the accused could not be denied the peace officer defence under section 25 of the *Criminal Code*; however, this defence could be invoked only in cases where the law was not manifestly illegal by international standards. The peace officer defence would not be available if a reasonable person in the accused's position must have known that his or her actions had the factual quality of a crime against humanity or a war crime. If, however, the accused acted honestly, and had, on reasonable grounds, believed his or her actions to be justified, the defence would be available.

The Supreme Court of Canada decision dismayed those seeking the prosecution of war crimes and crimes against humanity, particularly groups seeking prosecution of crimes from the World War II era. In late April the Canadian Holocaust Remembrance Association and the League for Human Rights of B'nai Brith Canada both submitted arguments requesting that the Supreme Court re-hear the appeal. They wanted the Court to re-consider its reliance on untested evidence to give "an air of reality" to the defences of obedience to superior orders and mistake of fact. Introduction of this evidence could also leave the impression that the existence of public expressions of racial prejudice at the time of the alleged crime could help determine the issue of the *mens rea* of the accused. Finally, it was argued that the Court's acceptance of obedience to superior orders and mistake of fact in the circumstances of *Finta*, as well as the Court's interpretation of the requisite elements that the Crown must prove, would make successful prosecution of war crimes and crimes against humanity very unlikely.

In a rare step, on 10 May 1994 the Attorney General of Canada supported the request for a re-hearing of the *Finta* appeal; however, the Supreme Court turned down the request. In late January 1995, the Department of Justice announced that the size of its War Crimes Unit would be reduced from 24 to 11. The Unit would also lose its long-time Director and in future would de-emphasize new investigations and concentrate on completing investigations of priority files.

2. Civil Proceedings

The failure to secure any criminal convictions in the cases brought to court, the defence opened up by the Supreme Court decision, and the reduction in the size and status of the War Crimes Unit have virtually ruled out any further criminal proceedings for crimes from the World War II era. Attention has therefore become focused on the only remaining way of "punishing" suspected war criminals: initiating civil proceedings to strip them of their Canadian citizenship as a prelude to seeking their deportation. In some 12 cases referred to the Immigration Minister, it had to be decided whether there was sufficient evidence that the accused war criminals or collaborationists had obtained entry to Canada by concealing information from and lying to security and immigration officials.

The government began proceedings against the twelfth of this group in July 1997 and by early October 1998 had initiated proceedings in a further three cases. Death due to old age, however, has been almost as successful as federal prosecutors in dealing with the accused: three have died while their cases were underway; two have decided not to oppose proceedings and have left the country; one has been found guilty of concealing material circumstances, and one has been found not guilty. The current status of the 15 cases is as follows:

a. Accused Who Have Died

Antanas Kenstavicus died in January 1997, just before his case was to go to trial. In April 1995 Joseph Nemsila, a landed immigrant who had never applied for citizenship, was accused of commanding a unit that had deported Jews to Auschwitz and killed Slovak civilians. His deportation proceedings were delayed in July 1995 when an immigration adjudicator ruled that Nemsila had acquired Canadian domicile and was protected under section 123 of the *Immigration Act* from being deported for any pre-1978 activities for which he could not have been deported at that time. On appeal this ruling was overturned by Justice James Jerome. The latter's ruling was also appealed, but the Federal Court of Appeal decided not to release its decision following Nemsila's death in April 1997. Erich Tobias, accused of having concealed his participation in the execution of Jews in Latvia, died after the Supreme Court ruled in September 1997 that his case could proceed (see below).

b. Accused Who Have Voluntarily Left the Country

Ladislaus Csizsik-Csatary was accused of involvement, while a member of the Royal Hungarian Police in 1944, in the confinement of thousands of Jews and their subsequent deportation to death camps. In July 1997, just before his trial was to begin, he decided not to oppose the loss of his citizenship. He has since left the country. Mamertas Maciukas, accused of concealing membership in a Lithuanian police battalion which had committed crimes against civilians, also decided not to contest the proceedings and voluntarily left the country.

c. Accused Found to Have Concealed Material Circumstances

In February 1998, Judge McKeown, of the Trial Division of the Federal Court, found that Wasily Bogutin had concealed his participation, while a volunteer policeman in German-occupied Ukraine, in the execution of civilians and in the arrest of civilians for deportation to forced labour camps. The Cabinet has issued the formal order withdrawing Bogutin's citizenship and has ordered him to leave the country; however, deportation proceedings could drag on for years, as they did in the cases of Jacob Luitjens and Joseph Nemsila.

d. No Probable Concealment of Material Circumstances Established

In September 1998, Judge McKeown found that Peteris Vitols had not concealed his membership in the Latvian Army or Waffen SS and that on entry to Canada he may not have been asked about his membership in volunteer police organisations or about his wartime activities. Judge McKeown found no evidence that Vitols had personally committed war crimes; furthermore, the definition of "collaborator" was poorly drafted at the time Vitols was processed and security officials were using their discretion as to whether or not to "clear" low level collaborators who could otherwise be considered desirable immigrants.

e. Ongoing Proceedings

Proceedings against three of the accused were held up by long delays in rendering verdict and by the improper conduct of a senior Justice Department official. The cases against Erich Tobias, accused of having concealed his participation in the execution of

Jews in Latvia, Helmut Oberlander, accused of participation in the execution of civilians as a member of the German *Einsatzcommando,* and Johann Dueck, accused of concealing similar activities as a policeman in German-occupied Ukraine, were tried before Associate Chief Justice James Jerome of the Federal Court. In early March 1996, an Assistant Deputy Attorney General complained personally and in writing to Chief Justice Julius Isaac about the length of time it was taking Justice Jerome to render verdict. The official also stated that the government would transfer the cases to the Supreme Court if they were not expedited. The Chief Justice replied that Justice Jerome had agreed to speed up work on his decisions. When news of the private meeting and letter became public, Justice Jerome resigned from the cases. His successor, Justice Cullen, ruled that judicial independence had been infringed and ordered a halt to the proceedings. The Federal Court of Appeal overturned the stay of proceedings, a ruling that was upheld by the Supreme Court in a ruling of September 1997. Since then, Tobias has died. Judge Noel, of the Federal Court, has ruled that, since the proceedings are civil, not criminal, the two remaining accused can be formally questioned in advance of their trials and the defence must disclose the position they will take at the revocation hearings.

At the beginning of his hearings in October 1998, the government abruptly withdrew allegations that Dueck had been personally involved in the arrest and execution of civilians. The Oberlander hearings are expected to conclude early in 1999.

- **Vladimir Katriuk, accused of concealing his participation in actions against partisans and atrocities against civilians while a policeman in Byelorussia, is awaiting the judge's decision following completion of the hearings;**
- **Serge Kisluk, accused of concealing membership in a police unit that committed atrocities in German-occupied Ukraine, is also awaiting a decision;**
- **Eduards Podins, accused of concealing his past as a concentration camp guard in Latvia, is scheduled for hearings in November 1998;**
- **Wasyl Odynsky, accused of failing to divulge his role as a guard in forced labour and concentration camps in Poland during 1943 and 1944, is scheduled for hearings in November 1998;**

- **Michael Baumgartner, accused of concealing his membership in the Waffen SS and work as a guard at concentration camps in Poland and Germany, is scheduled for hearings in November 1998; and**
- **Ludwig Nebel faces deportation proceedings for concealing his illegal Nazi activities in his native Austria in the early 1930s and his command of a "resettlement action" while a police lieutenant in Galicia during the war. The latter action led to the arrest and detention of more than 200 Jewish civilians, and their later surrender to the Gestapo.**

The Federal Court has been severely criticized for its handling of the proceedings against accused war criminals of the Second World War era. Until March 1997, undue delay in rendering decisions was the most common complaint. Since then, however, the reputation of the Federal Court has been severely shaken by the appearance of collusion between government officials and the members of the Court in the incident referred to above, and by a series of related reports. These included the reported withdrawal of another Federal Court judge from the three cases because he spoke privately with a federal lawyer over scheduling and the suggestion that yet another judge would not be assigned to the cases because she had written to the Justice Minister defending Judge Cullen and expressing shock that she might be liable to "vitriolic attacks" if she made a decision unfavourable to the government. The original judge, Judge Jerome, has been formerly reprimanded by the Canadian Judicial Council for his tardiness. Moreover, documents have been released claiming that the contacts between the Chief Justice and the government official were more extensive than reported. A previous head of the War Crimes Unit has alleged that the Chief Justice had put himself in a conflict-of-interest situation by involving himself in the three cases because, as Assistant Deputy-Attorney General in the Department of Justice from 1987-1989, he had prior knowledge of the proceedings against the three. Together, all the above reports raised the question of whether the Federal Court was capable of trying these and the other cases in a just and expeditious manner.

These doubts have been only partially dispelled by the rulings of Judge McKeown in the Bogutin and Vitols cases. Initially, the success of the Bogutin prosecution was welcomed as a sign that decisions would be expedited. The decision in the Vitols case, however, proved how very reluctant judges might be to find against those not accused of personal involvement in war crimes, but rather of collaboration with the Nazis against the

Soviet forces who had overrun their countries or of membership in an organisation that had collaborated with the Nazis against the occupying Soviets. In the latter case, Judge McKeown established that the offence of collaboration was poorly defined and not really applicable in the Baltic countries. He said that immigration officials had exercised a wide discretion over whether or not to admit those who had collaborated into Canada; they had been more concerned about denying entry to Communists and Communist sympathisers than to Baltic nationalists who had collaborated with the Nazis. Thus in some circumstances, collaborators would not have had to lie about, misrepresent or conceal their wartime service and activities in order to gain admission to Canada.

PARLIAMENTARY ACTION

On 6 March 1979, Mr. Robert Kaplan, MP (York Centre) began debate in the House of Commons on Private Member's Bill C-215, an Act respecting war criminals in Canada, a proposed amendment to the *Citizenship Act* that would have deprived convicted war criminals of Canadian citizenship. The bill had received first reading on 30 October 1978 and proposed:

> 1. The *Citizenship Act* is amended by inserting, immediately after section 9 thereof, the following new section:
>
> 9.1 Notwithstanding any other Act, every person convicted of an offence pursuant to section 3 of the *Geneva Conventions Act* thereby ceases to be a Canadian citizen.

The explanatory note accompanying Bill C-215 read as follows:

> The purpose of this Bill is to provide for the loss of Canadian citizenship by any person convicted as a war criminal, that is, of a "grave breach" of the Geneva Conventions of 1949.
>
> These conventions were implemented in Canada in 1965 by the *Geneva Conventions Act*. "Grave breaches" meant, among other things, wilful killing, torture or inhuman treatment, including biological experiments, and wilfully causing great suffering or serious injury to body or health.

The proposed amendment was not adopted and the bill was withdrawn.

As originally introduced by the government in 1980, the proposed *Charter of Rights and Freedoms* (sections 11(e) and (f)) contained provisions against retroactive criminalization and double jeopardy that, it was felt, might operate to prevent prosecutions of war criminals living in Canada. Amendments were introduced to eliminate this potential constitutional impediment to such prosecutions under existing, amended or new legislation.

In March 1985, during study by the Standing Committee on Justice and Legal Affairs of Bill C-18: An Act to amend the Criminal Code, etc., an attempt was made to introduce amendments to the *Criminal Code* dealing with war crimes and crimes against humanity. Three of the five motions were ruled out-of-order as going beyond the scope of the bill, one was defeated and one withdrawn. The same pattern of rejection was repeated during third reading of the bill on 14 April.

The government tabled Bill C-71, An Act to amend the Criminal Code, the Immigration Act, 1976 and the Citizenship Act, on 23 June 1987 some six months after it received the report of the Deschênes Commission. Royal Assent was received on 16 September 1987. The amendments to the *Criminal Code* make it clear that Canada can exercise jurisdiction over crimes against humanity and war crimes committed outside Canada by deeming that such crimes took place in Canada.

Clause 1 states that the crime must be committed by a Canadian citizen or an employee of Canada in a civilian or military capacity; by a citizen of, or an employee in a civilian or military capacity of a country with which Canada is at war; or must affect a victim who is either a Canadian citizen or a citizen of an allied state while Canada is at war. Clause 1 also contains a more general provision that reads:

> (b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada, and subsequent to the time of the act or omission the person is present in Canada.

The meaning of this sub-section is opaque. Its most likely intention would seem to be to provide that a person present in Canada might be prosecuted if by international law Canada could have exerted jurisdiction over that person at the time of the act or omission.

The amendments to the *Criminal Code* further stipulate that prosecution requires the personal consent of the Attorney General of Canada, or his or her Deputy, and can be conducted only by the Attorney General or his or her Counsel; that the defence of previous trial and conviction for the offence does not apply where the trial was held outside Canada *in absentia* and the accused was not punished in accordance with the sentence imposed by the court; and that the defence that the action was legal when and where committed does not apply where that action at the time constituted a contravention of customary or conventional international law.

The amendments to the *Immigration Act* make a person inadmissible to Canada if there are reasonable grounds to believe the person committed a war crime or a crime against humanity; make a permanent resident removable if he or she is a war criminal and was granted landing after the Act came into force; and allow the Minister to select the country to which the person is removed.

The amendments to the *Citizenship Act* add to existing circumstances that bar Canadian citizenship; namely, being under investigation for war crimes or crimes against humanity, or having been charged with, on trial for, or convicted of such crimes.

In the House of Commons, the bill was debated very briefly during second reading on 20 August 1987, and immediately referred to a legislative committee. Debate in committee focused on clause 1(b) quoted above and on whether or not the committee should adopt the wording of the similar provision in the Deschênes Report. The bill was reported on 26 August without amendment and was adopted by the House two days later. The bill moved quickly through the Senate, being given first reading on 28 August and third reading on 15 September before receiving Royal Assent on 16 September 1987.

Negotiations were completed to enable Canada to collect evidence abroad under the guidelines established by Mr. Justice Deschênes. Arrangements were made with Israel, the Soviet Union, Czechoslovakia, Hungary, the Netherlands, Poland, Yugoslavia and West Germany. The Department of Justice sought permission from these countries to gather evidence against 32 of the 45 suspected war criminals living in Canada.

CHRONOLOGY

1948 - The Cold War between East and West began. The British advised an end to trials of war criminals.

1949 -	Canada restricted the immigration to Canada of ex-members of the Nazi party, the German armed forces and collaborators. These restrictions were relaxed in subsequent years and withdrawn in 1962.
1979 -	Bill C-215, to provide for the loss of Canadian citizenship by those convicted of war crimes, was introduced, debated and withdrawn.
1980 -	An interdepartmental committee concluded that existing law was inadequate to bring war criminals to justice.
1980 -	The proposed *Charter of Rights and Freedoms* was amended to eliminate potential constitutional impediment to prosecutions.
February 1985 -	Commission of Inquiry on War Criminals was established under Mr. Justice Jules Deschênes.
November 1985 -	The Commission established conditions for gathering evidence abroad, particularly in the Soviet Union.
December 1986 -	The Commission submitted its report to the government.
March 1987 -	The report of the Commission was tabled, together with the initial response of the Government.
16 September 1987 -	Bill C-71, an Act to amend the Criminal Code, the Immigration Act, 1976 and the Citizenship Act, received Royal Assent.
December 1987 -	The first war crimes charges were laid against Imre Finta.
December 1989 -	Michael Pawlowski was charged with war crimes and crimes against humanity.
January 1990 -	Stephen Reinstetter was charged with kidnapping Jews in 1942.
May 1990 -	Imre Finta was acquitted by a jury. The verdict was appealed by the Crown.
March 1991 -	The charges against Stephen Reistetter were dropped.
22 October 1991 -	Judge Collier of the Federal Court upheld the government's decision to revoke the citizenship of Jacob Luitjens. Shortly thereafter, the government announced it would begin deportation proceedings.

February 1992 - The Supreme Court of Canada refused to hear the Crown appeal from Judge Chadwick's ruling in the Pawlowski case. Charges had to be dropped.

April 1992 - The Ontario Court of Appeal rejected the Crown's appeal against the acquittal of Finta. The Supreme Court heard the Crown's appeal in June 1993. **It upheld the acquittal in March 1997**.

December 1992 - Radislav Grujicic was charged. His trial began in April 1994.

July 1995 - An immigration adjudicator ruled that Josef Nemsila could not be deported because he had acquired "domicile" and was protected under section 123 of the *Immigration Act*. The ruling was overturned by the Federal Court before Mr. Nemsila died.

July 1996 - A Judge halted the proceedings against three accused, on the grounds that a meeting between a senior official and the Chief Justice of the Federal Court had infringed on the independence of the judiciary. **The ruling was overturned on appeal, a reversal that was upheld by the Supreme Court.**

February 1998 - A judge ruled that Vasily Bogutin had gained admission to Canada by false representation or fraud or by concealing material circumstances.

September 1998 - A judge ruled that the Crown had not established that Peteris Vitols had gained admission by false representation, fraud or concealment of material circumstances.

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